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RESEARCH ARTICLE

COMPETING IDEAS OF REGULATIONISM – WHAT CAN BE LEARNT FROM THE GERMAN MOVE TO A MORE COMPREHENSIVE REGULATION OF PROSTITUTION.

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Abstract

In 2002, Germany legalised prostitution through the enactment of the Prostitution Act, thereby following one of the most liberal regulationist approaches to date. The following year, New Zealand enacted the Prostitution Reform Act 2003, which has become an often-referenced example of decriminalisation. Despite both jurisdictions following a regulationist approach, New Zealand's model has attracted much positive international attention, whereas the German approach is used as an example of the shortcomings within regulationism. Drawing on the findings of the governmental evaluations of both New Zealand's and Germany's prostitution legislation, this article argues that the significant differences between the New Zealand and German models of regulating prostitution are not to be found within the legislation, but rather in the evaluation thereof. This finding calls into question the evidence presented within the evaluation of approaches to prostitution, and suggests that there may be other societal factors which decide how the success of legislation is determined. In Germany, the evaluation of the 2002 Prostitution Act (Prostitutionsgesetz) resulted in a move towards stricter regulation of prostitution. This article examines the changes to the law that will enter into force in July 2017, which are aimed at ensuring that the rights of sex workers in Germany will not just be protected in theory, but also in practice.

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Introduction:-

As a subject matter that divides people in their opinions regarding morality, best practice, society and laws, prostitution and the way it should be regulated in individual jurisdictions is a contemporary topic that regularly finds its way into governmental debates regarding the best way to regulate the issue. As will be demonstrated in the following article, there are a number of different approaches to regulating prostitution, and much debate regarding whether these approaches are appropriate to effectively deal with prostitution in relation to the desired objectives sought to be achieved by a particular government. In contemporary law reform discussions, a general practice can be found in examining other jurisdictions and the approaches taken in order to evaluate whether a particular approach would be similarly suitable in one's own jurisdiction. As will be demonstrated in the following, a country often referred to in relation to decriminalisation, is New Zealand, with their regulationist approach to prostitution. However, Germany, as one of the countries with the most liberal regulationist approach to prostitution, is rarely used as a similar role model in this sense. In order to examine why this may be the case, the following will examine the German model of regulationism in light of the upcoming changes to their legislation on prostitution, which will be

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entering into force in July 2017. In particular, the focus will be on the German experience of regulationism in legal practice, what has been learnt, and how this has affected the upcoming German law reforms. In light of the German legal terminology, the words prostitutes and sex workers will be used interchangeably.

The Theoretical Approaches to Prostitution:-

There are a number of terms used in relation to the regulation of prostitution in law and policy. Many are commonly used interchangeably to describe different legal approaches, such as “criminalisation” and “prohibitionism,” in some cases “legalisation” and “decriminalisation” as well as in other cases “decriminalisation” and “abolitionism.” However, when investigating the terms, it becomes clear, that what is often used to describe a particular regulatory system in the media or certain policy documents, or even in certain journal articles, is not actually in line with the theoretical meaning of the terms, which leads to confusion. In this sense, it has to be explained that these terms fall into two fundamentally separate categories. In this sense, the Council of Europe Resolution 1579 (2007) is correct when explaining that the three predominant approaches adopted in the 47 member states of the Council of Europe are prohibitionist, regulationist and abolitionist.¹ This is because these three terms actually address and describe regulatory approaches. However, it is often found that decriminalisation is mentioned as a fourth option, often with reference made to the system in New Zealand.² However, “decriminalisation” is not an approach in itself. Instead, it is a function, or a tool used within the development of approaches, which merely describes the absence of criminalisation. In this sense, the terms “criminalisation” and “legalisation” fall into the same category of legal terminology. Accordingly, “criminalisation” describes the process of making an activity prohibited under criminal law provisions³ and “legalisation” describes the process of reform in which something, which was considered illicit, ceases to be viewed as such under the law, and instead becomes legitimate.⁴ In this sense, although these latter three terms may constitute key attributes within the regulatory approaches to prostitution, they are not the same and cannot be used interchangeably.

In terms of the different theoretical regulatory approaches to prostitution, prohibitionist approaches generally target both the sale and the purchase of these services by utilising criminalisation. Prohibitionism can also involve a categorical prohibition of certain behaviours, which are closely related to selling or purchasing sexual services, including activities like street solicitation, or running agencies or sex businesses.⁵

Abolitionist approaches involve policies, which do not unconditionally criminalize acts of prostitution or activities closely related. The defining attribute of an abolitionist approach is that it will target only one side of an interaction in an attempt to make the entire interaction obsolete. Usually the side targeted is the procurement side, which is then categorically criminalized, as it is thought that the elimination of demand will eliminate the entire transaction.⁶

¹Council of Europe, Parliamentary Assembly, 'Resolution 1579 (2007) Prostitution – Which Stance to Take?' Assembly debate on 4 October 2007 (35th Sitting) s.4 et seq.

² See for example: Jane Scoular, *The Subject Of Prostitution. Sex/Work, Law And Social Theory* (1st edn, Taylor & Francis Ltd 2016) 116; Victor Minichiello, *Male sex work and society* (Harrington Park Press, 2014) 191; Joanna Phoenix, *Regulating sex for sale: prostitution policy reform and the UK* (Policy Press, 2009) 19; For an example of the issues of decriminalisation as a term to classify the model taken in New Zealand, see: Kelly, Liz, Maddy Coy, and Rebecca Davenport. 'Shifting sands: a comparison of prostitution regimes across nine countries.' (2009) London: London Metropolitan University.

³ See for example: M J Allen, *Textbook on criminal law* (Oxford University Press, 2015) 12 et seq.; Nina Peršak, *Criminalising harmful conduct: the harm principle, its limits and continental counterparts* (Springer, 2007) 5; Caron Beaton-Wells; Ariel Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) Chapter 13.

⁴ See for example: Philip Bean, *Legalising drugs: debates and dilemmas* (Bristol : Policy Press, 2010) iv; Janina Dill, *Legitimate targets?: social construction, international law and US bombing* (Cambridge University Press, 2015) 145.

⁵Peter De Marneffe, *Liberalism And Prostitution* (Oxford University Press 2010) 16; Phil Hubbard, Roger Matthews and Jane Scoular, 'Regulating Sex Work In The EU: Prostitute Women And The New Spaces Of Exclusion' (2008) 15 Gender, Place & Culture.

⁶Peter De Marneffe, *Liberalism And Prostitution* (Oxford University Press 2010) 12, 29; Joyce Outshoorn, *The Politics Of Prostitution* (Cambridge University Press 2004) 8, see also: GeetanjaliGangoli and Nicole Westmarland, *International Approaches To Prostitution* (Policy Press 2006) 175; K. Thorlby, 'May-Len Skilbrei And CharlottaHolmstrom, Prostitution Policy In The Nordic Region: Ambiguous Sympathies.' (2015) 18 Sexualities.

Regulationism refers to a set of policies that neither criminalise the sale or purchase of prostitution services nor any other activities that are closely related. Accordingly, regulationist approaches will legalise the activity itself, however, while imposing certain restrictions, which differentiate prostitution from other transactions or businesses. Restrictions in this sense can involve, for instance, imposing age restrictions or introducing targeted health regulations.⁷ This attribute of regulationism differentiates it from full decriminalisation. Full decriminalisation may be what is meant by “decriminalisation” when used to describe a regulatory approach to prostitution. Full decriminalisation refers to a set of policies that incorporate normalisation or laissez-faire.⁸

Calls for the Decriminalisation of Prostitution:-

Over the past decades, there have been numerous calls for decriminalisation of prostitution. These calls become particularly public, when governments open discussions for potential law reforms in the area of prostitution.⁹ The ideas that are put forward in this situation usually relate to the general feminist ideas of decriminalization, which involve the objective of decriminalizing “prostitution in those places where it is still a crime to be or to visit a whore.”¹⁰ However, as the term “decriminalization” refers to the complete abolition of any laws, which seek to criminalize prostitution as well as any offences that are related to prostitution,¹¹ it is implied that prostitution activities are legitimised as a form of work.¹² Thus, decriminalisation would involve removing any penal sanctions, while avoiding to introduce any legal measures to regulate prostitution.

When looking through a number of bills and reports from governments reviewing potential changes to the laws on prostitution, New Zealand is often referred to and discussed as an example of decriminalisation in the false use of the term.¹³ New Zealand sought to decriminalise prostitution in 2003 with the implementation of the Prostitution Reform Act (PRA).¹⁴ The objectives of this piece of legislation were claimed to be to decriminalise prostitution,¹⁵ construct a legal framework to protect sex workers’ human rights and prevent them from being exploited, as well as to promote sex workers’ welfare and occupational health and safety and to “contribute to public health; and prohibit the use of prostitution of persons under 18 years of age.”¹⁶ These objectives already indicate that what is being referred to as “decriminalisation” is not what the theoretical concept of decriminalisation dictates. Instead, it appears that New Zealand’s decriminalisation approach is a form of regulationist approach. This becomes even more apparent when looking more closely at the various provisions that were implemented through the PRA, such as, for instance the provisions listed in part 2 of the Act which regulate prostitution as commercial sexual services,

⁷Peter De Marneffe, *Liberalism And Prostitution* (Oxford University Press 2010) 29; Brigit C. A Toebes, *The Right To Health. A Multi-Country Study Of Law, Policy And Practice*; Melissa Hope Ditmore, *Encyclopedia Of Prostitution And Sex Work* (Greenwood Press 2006) 372.

⁸ Ibid.

⁹Nadia Khomami, 'Decriminalisation Of Sex Workers In England And Wales Backed By Mps' *The guardian* (2017) <<https://www.theguardian.com/society/2016/jul/01/decriminalisation-of-sex-workers-in-england-and-wales-backed-by-mps>> accessed 28 March 2017; Al Jazeera, 'French Parliament Passes Prostitution Bill' (2017) <<http://www.aljazeera.com/news/europe/2013/12/french-parliament-passes-prostitution-bill-2013124182412605944.html>> accessed 28 March 2017; Joyce Outshoorn, *The Politics Of Prostitution* (1st edn, Cambridge University Press 2004).

¹⁰ L O Ericsson 'Charges Against Prostitution: An Attempt at a Philosophical Assessment' in D Kelly Weisberg (ed) *Application of Feminist Legal Theories to Women's Lives: Sex, Violence, Work and Reproduction* (Temple University Press, 1996) 208-216.

¹¹Judith Kilvington, Sophie Day and Helen Ward, 'Prostitution Policy In Europe: A Time Of Change?' (2001) 67 *Feminist Review*.

¹² South African Law Commission (SALC) Issue Paper 19 (Project 107) 'Sexual Offences: Adult Prostitution' (2002).

¹³UK Parliament, 'Prostitution - Point 5: Other Legislative Models' <https://www.publicationsparliamentuk/pa/cm201617/cmselect/cmhaff/26/2608htm> 2016 accessed 31 March 2017.

¹⁴ Prostitution Reform Act 2003 (New Zealand), Public Act, 2003 No 28, 27 June 2003.

¹⁵ Ibid. Part 1, s. 3; while remaining neutral and avoiding any endorsement or comment in relation to morally sanctioning prostitution or the use thereof.

¹⁶ New Zealand Government, Ministry of Justice, 'Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003' (New Zealand Ministry of Justice 2008) <<https://maggiemcneill.files.wordpress.com/2012/04/report-of-the-nz-prostitution-law-committee-2008.pdf>> accessed 31 March 2017.

including regulating an age restriction of 18 years of age or a certification regime for owners or managers of brothels.¹⁷

A point which will be interesting when looking at the German regulatory approach is that the first purpose named listed in the PRA 2003 is to “[safeguard] the human rights of sex workers and protects them from exploitation¹⁸ and that the first regulatory provision of commercial sex in part 2 is that “No contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds.”¹⁹ As it is already clear from the theoretical concept of the term “decriminalisation” that the approach taken in New Zealand is regulationist rather than fully decriminalised, the question arises what makes this approach unique in relation to other regulatory approaches to prostitution.

The main reason for this can be the reported success of the approach, as promoted by the New Zealand Government. In this sense, the PRA underwent governmental evaluation in 2008 by a governmentally arranged Law Review Committee.²⁰ The main findings of this report were that the PRA had not had any significant impact on the amount of sex workers working in the sex industry; that the PRA protected the rights of children, in the sense of people under the age of 18 years; that the PRA succeeded in protecting adults’ right to refuse engagement in sex work, which included being able to refuse particular clients or sexual services, and that the PRA offered sufficient protection from exploitative and degrading employment practices.²¹ The report suggests that this protection of the sex workers’ rights was only achieved through decriminalisation, in the sense of having removed the illegality of this kind of work. This is not disputed here. The use here of decriminalisation is clearly in line with the meaning of the term as explained above. In this sense, it can be argued that New Zealand decriminalised prostitution. However, it should be emphasised that this was only one part of the overall regulatory approach taken.²²

Although the report noted that the Act had not managed to eliminate all exploitative practices in practice, there was clear evidence from their qualitative study that more sex workers felt they were likely to report any incidents of violence they had experienced to the police. Street work was still claimed to be dangerous for sex workers, who were urged to either leave the industry entirely or move their work to safer, indoor settings.²³ Tim Barnett, a New Zealand Member of Parliament, who had sponsored the Prostitution Reform Bill while it was passing through Parliament, stated that the decriminalisation of prostitution had resulted in a “massive improvement in police-sex worker cooperation” that had facilitated the solving of murders of sex workers, the exposure and conviction of corrupt and law breaking brothel owners and police, as well as the detection of traffickers of sex workers.²⁴ According to the New Zealand Prostitutes Collective, the approach to prostitution in New Zealand ensures the protection of prostitutes’ rights, health and welfare.²⁵ Furthermore, they emphasise that this not only protects sex

¹⁷ Prostitution Reform Act 2003 (New Zealand) – Part 2, ss. 20-23.

¹⁸ Prostitution Reform Act 2003 (New Zealand) – Part 1, s. 3 Purpose.

¹⁹ Prostitution Reform Act 2003 (New Zealand) –Part 2, s. 1, Commercial sexual services, Contracts for commercial sexual services not void, (7): “No contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds.”

²⁰ New Zealand Government, Ministry of Justice (n 16).

²¹ Ibid.

²² See: Prostitution Reform Act 2003 (New Zealand).

²³ New Zealand Government, Ministry of Justice, (n 16).

²⁴ Tim Barnett (PRO0127) cited in House of Commons Home Affairs Committee (UK), ‘Prostitution, Third Report of Session 2016–17’, 15 June 2016, Committee reports are published on the Committee’s website at <www.parliament.uk/homeaffairscom> accessed 28 March, 2017; see also New Zealand Parliament Hansard, ‘Prostitution Reform Bill’ — Procedure, Third Reading, 25 June 2003, Volume: 609, Page: 6585, <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20030625_00001319/prostitution-reform-bill-procedure-third-reading>accessed 28 March, 2017.

²⁵ UK Parliament, Home Affairs Committee, Committee Evidence, ‘Written evidence submitted by the New Zealand Prostitutes’ Collective’ 2016, <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/prostitution/written/29308.pdf>>accessed 28 March 2017.

workers from exploitation, but also provides them with the legal opportunity to report any violence they encounter to the relevant authorities without having to fear any action being taken against them or their clients by the police.²⁶

The New Zealand model has been emphasised as an example in various governmental reports looking at the issue of the regulation of prostitution. In this sense, the UK House of Commons, for instance, examined the New Zealand model in their Third Report of Session 2016–17.²⁷

The German Approach to Regulating Prostitution:-

The German approach to prostitution is openly regulationist by nature, with many counting it not only as the most liberal approach to prostitution in Europe, but also as one of the most liberal approaches in the world.²⁸ Nevertheless, the discussions about prostitution reform tend to focus on the New Zealand model, or even the Dutch model, rather than the German approach.²⁹ One of the reasons for this could be the stark criticism Germany has received in light of the size of its sex industry.³⁰ In this sense, Germany is often referred to as the “bordello of Europe.”³¹ However, the following will look at the German model in closer detail, in order to demonstrate that this system may not be as different as the New Zealand model, which is often referred to as “decriminalisation.” In particular, the following will also address how the German criticalness of their own system may be one of the root causes of its international disrepute, rather than the disadvantages within the system itself. In order to understand the German viewpoint in the laws, a brief overview will also be provided on the legal system prior to the introduction of the Prostitutionsgesetz (Prostitution Act) (ProstG) in 2002.³²

One of the initial critiques of the former prostitution laws in Germany, as explained by Philipp S. Fischinger,³³ is that prostitution as the “world’s oldest profession” was essentially, a millennia-old set of double standards which involved a form of legal discrimination. On the one hand, there were the clients, who lived a respectable life as first

²⁶House of Commons Home Affairs Committee (UK), Prostitution, Third Report of Session 2016–17, 15 June 2016, Committee reports are published on the Committee’s website at <www.parliament.uk/homeaffairscom> accessed 28 March, 2017.

²⁷Ibid.

²⁸See: Germany 2002 Prostitution Act (ProstG), Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten, Prostitutionsgesetz of 20th December 2001 (BGBl. I S. 3983); Danna, Daniela. “Trafficking and prostitution of foreigners in the context of the EU countries’ policy about prostitution.” In *NEWR Workshop on Trafficking, Amsterdam*, vol. 26. 2003; Milivojević, Sanja, and Sharon Pickering. “Football and sex: the 2006 FIFA World Cup and sex trafficking.” *Temida* 11, no. 2 (2008): 21-47; Louise Osborne, ‘Why Germany Is Now ‘Europe’s Biggest Brothel’ (the Guardian, 2013) <<https://www.theguardian.com/world/shortcuts/2013/jun/12/germany-now-europes-biggest-brothel>> accessed 28 March 2017.

²⁹Mossman, Elaine. “International approaches to decriminalising or legalising prostitution.” *New Zealand: Ministry of Justice* (2007); Brown, Emma, Imy McCaw, and Raquel Bosó Pérez. “Prostitution Law Reform (Scotland) Evidence.”; Unit, Abuse Studies. “A critical examination of responses to prostitution in four countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” (2003); Geist, Darren. “Amnesty International’s Empty Promises: Decriminalization, Prostituted Women, and Sex Trafficking.” *Dignity: A Journal on Sexual Exploitation and Violence* 1, no. 1 (2016): 6.

³⁰See for example: Agustín, Laura María. “New research directions: the cultural study of commercial sex.” *Sexualities* 8, no. 5 (2005): 618-631; Jacoby, Wade. “Managing globalization by managing Central and Eastern Europe: the EU’s backyard as threat and opportunity.” *Journal of European Public Policy* 17, no. 3 (2010): 416-432; Macrae, Heather. “The EU as a gender equal polity: Myths and realities.” *JCMS: Journal of Common Market Studies* 48, no. 1 (2010): 155-174; Schneider, Friedrich, and A. T. Kearney. “The shadow economy in Europe, 2013.” *Johannes Kepler Universität, Linz* (2013); Isgro, Kirsten L., Maria Stehle, and Beverly M. Weber. “From sex shacks to mega-brothels: the politics of anti-trafficking and the 2006 soccer World Cup.” *European Journal of Cultural Studies* 16, no. 2 (2013): 171-193.

³¹Kulick, Don. “Sex in the new Europe: The criminalization of clients and Swedish fear of penetration.” *Anthropological theory* 3, no. 2 (2003): 199-218; Hirsh-Ratzkovsky, Roni. “City, Alter City: German Intellectuals writing on Paris, 1900–1933.” *Unpublished PhD thesis. Tel Aviv: Tel-Aviv University* (2011); Katona, Noémi. “Sex work” and “prostitution.” *Solidarity in Struggle* (2016): 89.

³²Germany 2002 Prostitution Act (ProstG).

³³Philipp S Fischinger and Norbert Habermann, §§ 134-138; Anh. Zu § 138: ProstG (1st edn, Sellier - de Gruyter 2011), §1 ProstG.

class citizens, whereas on the other hand, there was the sexual services providing prostitute, who was mostly regarded as a second class citizen and was exposed to social contempt. In Germany, prior to the introduction of the ProstG, this societal double standard was also implemented through the laws of the state: On the one hand, prostitutes were required to pay income and sales tax.³⁴ On the other hand, they were denied access to social security and were categorized as acting in violation of moral standards (*Sittenwidrigkeit*).³⁵

This was also found to be reflected in the German jurisprudence over several decades, starting with the equation of prostitution with ("Ausübung von Gewerbsunzucht") professional criminals in the Bundesverwaltungsgericht (BVerwG - The German Federal Administrative Court).³⁶ This had the effect that prostitution could not fall under the protection of Article 12 of the German Constitution (das Grundgesetz (GG)).³⁷ The Bundesverwaltungsgericht maintained this conception for several decades due to the perception of prostitution being a violation of moral standards and as such *contra bonos mores* and in many aspects socially repugnant.³⁸ This position was also put forward in 1981, when it was held that prostitutes could not be granted free movement rights in accordance with European Economic Community (EEC) law.³⁹ In the area of civil law, the jurisprudence of the Bundesgerichtshof (BGH – The German Federal Court) not only considered prostitution contracts as *contra bonos mores*, but also contracts such as for telephone sex⁴⁰ or for loan agreements for the purpose of financing brothels.⁴¹ In 1973, in the area of criminal law, the BGH even differentiated between whether the victim was an "unblemished woman" or a prostitute, in the determination of the culpability of a rapist.⁴² Around the turn of the millennium, a significant change became apparent in the courts' jurisprudence to a softer attitude towards prostitution. The BVerwG changed its decision regarding the free movement status by revoking its previous decision, which stated that prostitutes were not part of economic life.⁴³ Moreover, the Bundesfinanzhof (BFH – The German Federal Fiscal Court) started to think it possible to reconsider its previous decisions on the taxation of prostitution based on changes in public opinion,⁴⁴ and the BGH distanced itself from its previous decision on telephone sex.⁴⁵ In particular, a decision from the Verwaltungsgericht Berlin (Berlin administrative court) marked a significant change in the attitudes towards prostitution, as it clearly rejected the *contra bonos mores* of sex services as well as the idea of them being a violation of human dignity.⁴⁶

³⁴Ibid.

³⁵See: Wesel, Uwe: Frauen schaffen an, das Patriarchat kassiert ab, NJW (Neue juristische Wochenschrift) 1998, 120-121; Wesel, Uwe: Prostitution als Beruf; in: NJW (Neue juristische Wochenschrift) 1999, S. 2865–2866; Rautenberg, Erardo Cristoforo: Prostitution. Das Ende der Heuchelei ist gekommen! NJW (Neue juristische Wochenschrift) 2002, S. 650 et seq.

³⁶BVerwGE 22, 286 (Decisions of the Federal Administrative Court, vol 22), pp. 286, 289; Monatsschrift für Deutsches Recht (*M.D.R.*) 1996, p. 260; BGH, 30.06.1987 - 4 StR 267/87, NJW (Neue juristische Wochenschrift) 1987, 3209, MDR 1987, 948; BGH (Bundesgerichtshof – German Federal Supreme Court), 20.05.1981 - 2 StR 784/80, NJW (Neue juristische Wochenschrift) 1981, 2071, MDR 1981, 863, NSStZ 1981, 395; BVerwG (Bundesverwaltungsgericht - Federal Administrative Court), 28.06.1995 - 4 B 137.95, NVwZ-RR 1996, 84, BauR 1996, 78, ZfBR 1995, 331 only exception: BVerwG (Bundesverwaltungsgericht - Federal Administrative Court) GewArch (GewerbeArchiv) 1973, 192, 193].

³⁷German Grundgesetz (Basic Law) art 12, Grundgesetz für die Bundesrepublik Deutschland, 23.05.1949 (BGBl. p. 1) last amended 23.12.2014 (BGBl. I S. 2438) m.W.v. 01.01.2015.

³⁸Bénédict Winiger, Essential cases on damage, Digest of European tort law, v. 2 (Berlin: De Gruyter, 2011) 381; Silke Ruth Laskowski, 'New German Prostitution Act-An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law' (2002) *Int'l J. Comp. Lab. L. & Indus. Rel.* 18, 479; Anja Schmidt, 'Die Reform Des Rechts Der Freiwilligen Prostitution' (2015) 48 *Kritische Justiz*.

³⁹BVerwG (Bundesverwaltungsgericht - Federal Administrative Court) 15.07.1980, Az. 1 C 45/77 (Lueneburg) NJW (Neue juristische Wochenschrift) 1981, 1169;

⁴⁰BGH NJW (Neue juristische Wochenschrift) 1998, 2895, 2896.

⁴¹BGHZ (German Supreme Court Reporter for Civil Matters) 67, 119; NJW (Neue juristische Wochenschrift)-RR 1990, 750.

⁴²BGH at Dallinger, MDR 1973, 555.

⁴³BVerwG (German Federal Administrative Court) 18.9.2001, Az. 1 C 17/00 (Mannheim), NVwZ 2002, 339, 340.

⁴⁴BFH (German Federal Fiscal Court) 23.2.2000, Az. X R 142/95 (Schleswig-Holstein), NJW 2000, 2919, 2920.

⁴⁵BGH NJW (Neue juristische Wochenschrift) 2000, 361.

⁴⁶VG Berlin, Urteil v. 01. 12.2000, NJW 2001, 983 (986) - „Widerruf der Gaststätten erlaubnis"

A significant indicator for the change of public opinion in Germany was the result of a representative study used in the rationale of this case. This study looked into the public opinion in Germany as to whether prostitution should be recognised as employment. The study revealed that almost two thirds of the questioned participants thought that prostitution was to be considered to be legal employment.⁴⁷

The significance of this decision was that prior to the ProstG entering into force, the central legal issue surrounding prostitution was the characterisation of prostitution contracts as being *contra bonos mores*.⁴⁸ This meant that even after a prostitute had fulfilled the service, he or she did not have any legally enforceable demands.⁴⁹

The Creation of the Law for the Improvement of the Legal and Social Status of Prostitutes:-

The creation of the law for the improvement of the legal and social status of prostitutes is only comprehensible on the basis of the previously described legal situation. Following calls for reform for many years,⁵⁰ the German legislature started drafting a prostitution code.⁵¹ Despite diverse ideas on how this was to be conducted, all parties of the Bundestag (the German House of Representatives) agreed that the legal status of prostitutes had to be improved.⁵² Apart from the purely legal changes, a primary goal was to send a clear signal that the social double standards were to be removed.⁵³

The German prostitution code is essentially based on three pillars: Under civil law, the prostitute should have an entitlement to the agreed remuneration after the service has been performed.⁵⁴ Secondly, the access of prostitutes to social security should be enabled or facilitated. Finally, the expungement of § 180a Abs. 1 No. 2 StGB (Strafgesetzbuch – The German criminal code) was to give prostitutes the possibility to be legally safeguarded and to voluntarily act as persons in dependent employment in brothels. The objective was to achieve an improvement of working conditions in these types of establishments.⁵⁵

The most significant part of the ProstG (Prostitution Code) is the first of three paragraphs, which states:

⁴⁷Urteil des VG Berlin (Verwaltungsgericht Berlin) (Judgement of the Berlin Administrative Court) NJW (Neue juristische Wochenschrift) 2001, 893, 988; this is in contrast to: Deutscher Bundestag, BT-Drucksache 16/4146, Deutscher Bundestag Drucksache 16/4146 16. Wahlperiode, Bericht der Bundesregierung zu den Auswirkungen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG) (Report of the Federal Government on the effects of the law regulating the legal situation of prostitutes) (2007) English translation available online at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf accessed: 31st March 2017.

⁴⁸See: BGH NJW (Neue juristische Wochenschrift) 1976, 1883, 1884; Hefermehl, in Hans Theodor Soergel, Wolfgang Siebert and Jürgen F Baur, Bürgerliches Gesetzbuch (2nd edn, Kohlhammer 1997).

⁴⁹See: J. von Staudinger and others (n 70) § 138 Rn 453 mwNw; For most current version see: J. von Staudinger and Volker Emmerich, J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Mit Einführungsgesetz Und Nebengesetzen (1st edn, Sellier-de Gruyter 2016).

⁵⁰Deutscher Bundestag, BT-Drucks 14/4456 (German Parliament Print No. 14/4456) – Entwurf eines Gesetzes zur beruflichen Gleichstellung von Prostituierten und anderer sexuell Dienstleistender (Draft law on the professional equality of prostitutes and other sexually employed persons).

⁵¹Deutscher Bundestag, BT-Drucks 14/5958 (German Parliament Print No. 5958) – Entwurf eines Gesetzes zur Verbesserung der rechtlichen und sozialen Situation der Prostituierten (Draft law to improve the legal and social situation of prostitutes).

⁵²See in particular: the critique from the CDU/CSU-fraction: Deutscher Bundestag, BT-Drucks 14/6781, – Entschließungsantrag, Urheber: Fraktion der CDU/CSU (Motion for a resolution, author: Group of the CDU / CSU) 1 et seq; Maria Eichhorn [CDU], Stenographischer Bericht der 196. Sitzung des Deutschen Bundestages (Stenographic report of the 196th meeting of the German Bundestag) 14/196, 19195 et seq.

⁵³See: Remarks of the fraction Bündnis 90/Die Grünen BT-Drucks 14/19171 German Bundestag, 14th election period, 196th meeting, Berlin, Friday, den 19. Oktober 2001, at 8.

⁵⁴Germany 2002 Prostitution Act (ProstG) §§ 1 & 2.

⁵⁵Deutscher Bundestag, (n 51) 6.

§1 When sexual acts have been undertaken for a previously agreed fee, the agreement shall constitute a legally valid claim. The same applies if a person, especially in the context of an employment relationship, keeps the provision of such acts ready against an agreed fee for a certain period of time.⁵⁶

The *ratio legis* of the 2002 code, as evidenced by the draft justification, is solely the legal improvement of the prostitutes' status as opposed to brothel managers.⁵⁷ The two key priorities in the introduction of this provision, were to remove any barriers prostitutes may have accessing social security⁵⁸ and to create a civil claim for prostitutes against clients or brothel and club managers, when sexual acts have been performed, or have been kept ready.⁵⁹ The intention was to help prostitutes in two respects: Legally, by granting prostitutes an enforceable claim due to the repeal of the contractual finding of *contra bonos mores*, as well as factually, by reducing the dependence of prostitutes on procurers or pimps, as prostitutes no longer required the help of so-called "fist law."⁶⁰ This point is crucial in looking back at the provisions in New Zealand, as it becomes apparent that both models base their legalisation on the contractual notion of eliminating contracts for sexual services becoming void on the basis of *contra bonos mores* provisions.⁶¹

Another interesting point to be made is one of the key motivations for the German legislators to argue for the legalisation of sex services. Due to the history of human rights violations during the Third Reich period in relation to the holocaust and other atrocities which took place during the time of the Second World War, the highest legal provision on the basis of which all other laws need to be measured can be found in the first article of the German Basic Law, which essentially is the German constitution, states that human dignity shall be inviolable.⁶² The strong sense that human dignity needs to be ensured and protected at all costs is typical of a German legal philosophy. Accordingly, it is interpreted widely. As a basic human right, the protection of human dignity is a defensive tool to protect citizens from the state. In this sense, the wide understanding of the inviolability of human dignity includes preventing the state from dictating what an individual's dignity entails. Accordingly, part of the protection of dignity entails being able to decide for oneself what is and what is not in accordance with one's own dignity.⁶³ However, although the state understands that it is not able to decide whether providing sexual services is in accordance with one's own understanding of one's dignity, the German government accepts the responsibility to protect its citizens regardless of the way they perceive their own human dignity, and the life choices they make on the basis of this.⁶⁴ Thus, the German model is based mostly on ensuring the human rights' protection of prostitutes, including providing them legal protection from harm, by ensuring they are able to press charges under criminal law, as well as to make civil action claims,⁶⁵ as well as ensuring access to social security provisions. In this sense, prostitutes in Germany are entitled to the same rights as any other worker, including pension rights, holidays, sick leave, maternity

⁵⁶Translated from German: § 1 ProstG: "Sind sexuelle Handlungen gegen ein vorher vereinbartes Entgelt vorgenommen worden, begründet diese Vereinbarungen eine rechtswirksame Forderung. Das Gleiche gilt, wenn sich eine Person, insbesondere im Rahmen eines Beschäftigungsverhältnisses, für die Erbringung derartiger Handlungen gegen ein vorher vereinbartes Entgelt für eine bestimmte Zeitdauer bereithält."

⁵⁷Deutscher Bundestag, (n 51) 4, 6.

⁵⁸Bruckert, Chris, and Stacey Hannem, 'Rethinking the prostitution debates: Transcending structural stigma in systemic responses to sex work.' (2013) Canadian Journal of Law and Society 28, no. 1, 43-63.

⁵⁹Germany 2002 Prostitution Act (ProstG) § 1; Bernhard Pichler, *Sex als Arbeit: Prostitution als Tätigkeit im Sinne des Arbeitsrechts* (Hamburg :Disserta Verlag, 2013) 104.

⁶⁰Philipp S Fischinger and Norbert Habermann (n 33) §1 ProstG.

⁶¹See: Germany 2002 Prostitution Act (ProstG) § 12; Part 2. (7), Prostitution Reform Act 2003 (New Zealand).

⁶²German Grundgesetz (Basic Law) Article 1, para. 1: Die Würde des Menschen ist unantastbar (English translation: The human dignity is inviolable).

⁶³BVerfGE (Decision of the German Federal Constitutional Court) 45, 187, 227f. – Lebenslange Freiheitsstrafe ; Robert Esser ; Hans-Heiner Kühne , *Festschrift für Hans -Heiner Kühne* (Müller, 2013) 97; Barbara Sandfuchs, *Privatheit wider Willen? Verhinderung informationeller Preisgabe im Internet nach deutschem und US-amerikanischem Verfassungsrecht* (Mohr Siebeck, 2015) 126 – 129.

⁶⁴Rahel Gugel, *Das Spannungsverhältnis zwischen Prostitutionsgesetz und Art 3 II Grundgesetz in einer rechtspolitischen Untersuchung* (Münster Lit 2010) 115 et seq.

⁶⁵Raymond, Janice G. 'Prostitution on demand: Legalizing the buyers as sexual consumers.' *Violence against women* 10, no. 10 (2004): 1156-1186; Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG.

or parental leave and healthcare.⁶⁶ Again, this human rights emphasis mirrors the same objectives found in the New Zealand model.

The Scope of the German Prostitution Act:-

Due to the fact that the ProstG only consists of three paragraphs, in which the working has deliberately been kept as general as possible, the scope of the code and its effects in practice are far reaching. The way this works in practice will be addressed in the following, in particular, by laying out the scope of application.

In personal terms, the ProstG applies to all genders of prostitutes, including male, female, transsexual and hermaphrodites.⁶⁷ This has been the case since the date the code came into force, in other words since the 1st January 2002.⁶⁸ Due to the short and general nature of the ProstG, it is not surprising that the material scope was not clearly defined within the wording of the act, and, thus, needed to be established by legal interpretation.

According to von Galen, the material scope of the ProstG is to be interpreted narrowly. Hence, “sexual acts” in the sense of the first sentence of the first paragraph are to be understood the same way as the term would be understood in society, meaning the performance of sexual acts with or in front of a client with direct contact.⁶⁹ This interpretation would exclude practices such as telephone sex, the performance of sexual intercourse on stage in front of a public audience, peep-shows, striptease performances or webcam transmissions of a sexual nature.

However, the prevailing opinion appears to distance itself from this narrow interpretation by concentrating on the term “sexual act” in the sense of § 1 S 1 ProstG instead of “prostitution.”⁷⁰ The only counterargument to this is title of the act referring to the “legal relationship of prostitutes” as well as the fact that the legal materials and § 3 of the act consistently refer to the term “prostitution.” However, it is apparent that the drafters did not understand the term prostitution in the same narrow sense as stated above. Instead, in accordance with the draft act, prostitution is understood to mean “the commercial performance of sexual acts.”⁷¹ Furthermore, in accordance with the intentions of the drafters, the reference to “sexual act” will not only apply to sexual acts in the traditional sense between two people, commonly of different genders. It is also argued that the initial objective to protect the status of prostitutes justifies a wide interpretation. Moreover, the fluctuations⁷² in practices, pose difficulties in determining what is included within the definition or not. This difficulty in setting boundaries within the definitions is seen as a further supporting argument for a wide interpretation.⁷³

It appears that the entire scope of the ProstG relies on the term “sexual act.” This commonly refers to “every human act or acquiescence, which is directed at sexually arousing and satisfying another.”⁷⁴ This may include all forms of sexual acts, regardless whether a form of penetration has taken place. The key indicator is intention. Hypothetically, this could even include neutral acts such as gynaecological examinations or gymnastic exercises as long as the sexual intent can be subjectively established. This widens the scope of the definition of “sexual act” in the ProstG beyond the definition of the same term used in German criminal law.⁷⁵ In this sense, even acts such as telephone sex or cyber transmission could be included.⁷⁶ It is assumed, that a wide interpretation is accepted here, due to the fact

⁶⁶ Ibid.

⁶⁷ Götz Schulze, *Die Naturalobligation :Rechtsfigur und Instrument des Rechtsverkehrs einst und heute - zugleich Grundlegung einer zivilrechtlichen Forderungslehre* (Mohr Siebeck, 2008) 548, 549.

⁶⁸ Germany 2002 Prostitution Act (ProstG) § 2.

⁶⁹ Margarete von Galen, *Rechtsfragen Der Prostitution* (1st edn, Beck 2004) n.43.

⁷⁰ J. von Staudinger and others, *J. Von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch, Mit Einführungsgesetz Und Nebengesetzen* (1st edn, Sellier-de Gruyter 2003) § 138 Rn 452; Franz Jürgen Sacker, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch* (1st edn, CH Beck 2015) Rn 3 et seq.

⁷¹ Deutscher Bundestag, (n 51) 1.

⁷² For example: Someone may book a private striptease which could include physical touching, ranging from light to actual sexual intercourse.

⁷³ Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG, Rn 5.

⁷⁴ Ibid.

⁷⁵ See: Perron and Eisele in Adolf Schönke and others, *Strafgesetzbuch* (1st edn, Beck 2010) § 184 Rn 6.

⁷⁶ Christian Armbrüster, Kurt Rebmann and Franz Jürgen Sacker, *Allgemeiner Teil (Auszug)* (1st edn, Beck 2003) Rn 4 in Franz Jürgen Sacker, Christian Armbrüster and Kurt Rebmann, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch* (1st edn, Beck 2003).

that this is a matter of civil law, and is, thus, not connected to punitive evidence.⁷⁷ This also explains the fact that the mere acquiescence is sufficient without any requirement to have actively performed something.⁷⁸ Thus, the passive participation in sexual acts is also included.

Despite these differences between the civil and criminal legal realms, it is debated whether the definition of a "sexual act" in civil law requires an element of significance, as is the case in § 184g of the German Criminal Code (hereinafter referred to as StGB).⁷⁹

It is the German view, that transferring criminal law concepts and principles in such a manner would mix two things that are unrelated.⁸⁰ On the one hand, § 184g no. 1 StGB deals with the question whether actions against a protected interest, good or right are insignificant.⁸¹ On the other hand, it is merely relevant for the scope of the ProstG to establish whether the sexual activity in question was of "some weight."⁸² Furthermore, the fact that § 184 no 1 StGB is limited to, in the words of the paragraph, "this law," strengthens this argument. The limitation of culpability can be explained by the fact that the criminal law is only *ultima ratio*, whereas the objective of the ProstG is to establish the greatest possible protection for the sexual services providers, regardless of the nature of the service provided.⁸³ Finally, as the intention of the action is to satisfy the clients' sexual desire or arousal is a highly personal and subjective matter, it is argued that this cannot be determined on the basis of objective criteria, which ultimately means that the application of the ProstG is not dependent on establishing significance of the performed service.⁸⁴

Prostitutes as Employees:-

A point that is quite different between the German and the New Zealand models of regulating prostitution relate to the employee status of prostitutes. In this sense, although New Zealand's provisions may refer to prostitutes as being employed, this refers merely to the situations in which prostitutes work within brothels, or out of brothels, in the sense, that the brothels distribute work to them. However, as in accordance to Section 16 of the PRA, brothel operators are unable to sanction workers for lateness, unprofessional conduct or other misdemeanours,⁸⁵ as well as the fact that prostitutes are required to pay a "shift fee" to the brothels, regardless of how much business comes in,⁸⁶ and apart from this are able to keep their proceeds, the working relationship would be classified as self-employed according to EU standards.⁸⁷ These practices are often criticised in the New Zealand model, as it often means that prostitutes will potentially lose money on slow nights.⁸⁸ In contrast, in Germany it is possible for prostitutes to work as employees in brothels, which means that they receive a fixed salary. In these circumstances, there is no

⁷⁷ Ibid.

⁷⁸ Dirk Looschelders, Dirk Olzen and Gottfried Schiemann, J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch (1st edn, 2015) Anhang zu § 138 Rn 6.

⁷⁹ Christian Armbrüster, Kurt Rebmann and Franz Jürgen Sacker (n 76); A contrasting approach can be found in: Margarete von Galen, (n 69) 40 et seq.

⁸⁰ Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG.

⁸¹ See: Perron and Eisele in Adolf Schönke and others (n 75) § 184, 16.

⁸² Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG.

⁸³ Dirk Looschelders, Dirk Olzen and Gottfried Schiemann, (n 78) Rn 5.

⁸⁴ Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG, Rn. 6.

⁸⁵ See Section 16 Prostitution Reform Act 2003 (New Zealand).

⁸⁶ Jan Jordan, *The Sex Industry in New Zealand: A Literature Review* (Ministry of Justice (New Zealand), 2005) 29; Mossman, Elaine (n 29); Barrington, Jane. 'Shapeshifting: prostitution and the problem of harm: a discourse analysis of media reportage of prostitution law reform in New Zealand in 2003.' (2008) PhD diss., Auckland University of Technology; Cheryl Brunton; Lisa Fitzgerald; Catherine Healy; Gillian Abel, *Taking the crime out of sex work : New Zealand sex workers' fight for decriminalisation* (Policy Press, 2010) 119 et seq.

⁸⁷ Werner, Arndt, Johanna Gast, and Sascha Kraus. "The effect of working time preferences and fair wage perceptions on entrepreneurial intentions among employees." (2014) *Small Business Economics* 43, no. 1, 137-160; Cruz, Katie, Kate Hardy, and Teela Sanders. 'False Self- Employment, Autonomy and Regulating for Decent Work: Improving Working Conditions in the UK Stripping Industry.' (2016) *British Journal of Industrial Relations*; Nyombi, Chrispas. 'A Response to the Challenges Posed by the Binary Divide between Employee and Self-employed.' *International Journal of Law and Management* 57, no. 1 (2015): 3-16; Nigel G Foster, Foster on EU law (Oxford University Press, 2015) 315 et seq.

⁸⁸ Charles B Fields and Richter H Moore, *Comparative And International Criminal Justice* (1st edn, Waveland Press 2005) 73.

contractual relationship between the prostitute and the clients, but rather between the clients and the brothel owners.⁸⁹

The contract between the prostitute and the brothel will herein be referred to as a brothel contract. In accordance with § 1 S2 of the ProstG, the prostitute is considered to be keeping his or her services ready to provide these to clients for a particular amount of time. In return the prostitute will receive his or her “previously agreed salary.” However, it is clear from § 3 ProstG that the legislator aimed at only granting brothel owners a limited right of direction.⁹⁰ This, however, only applies to the place and time of the acts to be undertaken and not to the selection of clients and the nature of the services provided. In this sense, the prostitutes are not employed for the specific services, but rather for keeping his or her services ready for a particular time and at a particular place.⁹¹ This allows for employed prostitutes to also have the right to reject any clients without losing any claim towards the brothel owner in relation to salary.⁹² Similarly to the classification of the prostitution contract, the brothel contract will also be classified as a services contract. The only difference is that this contract is not unilateral and falls within the scope of a regular services contract. This is based on the fact that the prostitute is only contracted to keep the services ready for provision, and thus does not directly apply to the actual provision of the sexual act provisions per se.⁹³

However, the brothel owners’ right of direction, even if it is only limited, can only be explained constructively if the contractual partners have certain obligations. These obligations are seen in the keeping ready of the services. This obligation would not fall under the human dignity protection of the German constitution, as it cannot be equated to actually providing the sexual act itself.⁹⁴ This legal obligation can, however, not be enforced by the brothel owner, as a prostitute is able to terminate the contract at any point without notice.⁹⁵ Nevertheless, in order for the contractual relationship to be categorised as an employment contract, which brings with it the entitlement to social security in accordance with § 7 Abs. 1 S 1 SGB IV (Sozialgesetzbuch IV – the German Social Code: book IV), obligations need to be assumed, despite the fact that a brothel owner cannot enforce these.⁹⁶

If a brothel contract constitutes a contract for employment, the normal individual and collective employment laws apply. This includes that the contract can only be limited by § 14 TzBfG,⁹⁷ that the prostitute has holiday entitlements, an entitlement to continued payment in case of illness (sick leave), a protection against dismissal as well as the right to form a union.⁹⁸

In principle, although the brothel contract is not specifically referred to in the ProstG, it is widely accepted that it will not be considered *contra bonos mores*, similarly to prostitution contracts. However, this will only be applicable within reason, meaning that brothel contracts may, nevertheless, be considered *contra bonos mores* in exceptional circumstances, for instance, if the contract were to result in the exploitation of the prostitute.⁹⁹

A significant advantage in contrast to the New Zealand model is that under a brothel contract, prostitutes are merely contractually obliged to keep themselves ready to provide sexual acts.¹⁰⁰ This means that there is no due

⁸⁹ Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG, Rn. 48-53.

⁹⁰ Deutscher Bundestag, (n 51) 6.

⁹¹ Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG, rn. 52; Margarete von Galen(n 69) Rn. 132 et seq.

⁹² Ibid § 2 ProstG, Rn. 15.

⁹³ Margarete von Galen (n 69) Rn. 132 et seq.

⁹⁴ Ibid.

⁹⁵ Deutscher Bundestag, (n 51).

⁹⁶ J. von Staudinger, George Anub and Dieter Reuter, J. Von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch Mit Einfuhrungsgesetz Und Nebengesetzen (1st edn, Sellier 2011) §§ 138, 586, 50.

⁹⁷ Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Teilzeit- und Befristungsgesetz -TzBfG) (Act on part-time work and temporary contracts) 21st December 2000 (BGBl. I S. 1966)

⁹⁸ Christian Armbrüster, Kurt Rebmann and Franz Jürgen Sacker, (n 76).

⁹⁹ Ibid.

¹⁰⁰ Margarete von Galen, (n 69) Rn 147 et seq.

performance of the actual provision of sexual acts and prostitutes will be owed remuneration, even when sexual acts have not been performed.¹⁰¹

The question that naturally follows is how brothel owners' interests can be protected from prostitutes declining to perform sexual acts persistently or at least in an unreasonably large number of cases. The answer to this question can be found in the understanding of the term "keeping ready." It is understood that to keep something ready involves an internal willingness to serve suitable clients who are willing to pay for the service.¹⁰² According to von Galen,¹⁰³ this requirement of willingness extends to the prostitutes' appearance as well, meaning that it requires prostitutes to present themselves in an externally sufficiently attractive manner. The employment nature of the work relationship between prostitutes and brothel owners also assumes instruction rights of owners or managers in relation to prostitutes' appearances and clothing.¹⁰⁴ However, this does not mean that a prostitute can be forced against her will to follow these requirements. Instead, it merely means that non-compliance will be understood as an absence of internal willingness,¹⁰⁵ which in the worst case will result in a termination of the employment contract.¹⁰⁶

Despite being regulated under German employment law, the termination of brothel contracts involves a number of exceptions due to the nature of the work. In this sense, brothel contracts may be terminated mutually by agreement, or in the event of the death of the prostitute.¹⁰⁷ Furthermore, it has been emphasised that prostitutes, as they cannot be forced into providing sexual services against their will, have the right to terminate brothel contracts at any time without giving previous notice.¹⁰⁸ However, there is no corresponding termination right for brothel owners. Thus, without a qualifying reason for an extraordinary termination,¹⁰⁹ it can be assumed that the ordinary termination provisions apply in accordance with § 620 BGB. Accordingly, a brothel owner would have to give a prostitute between 2 weeks and 7 months' notice, depending on the length of the brothel contract.¹¹⁰

Finally, a point worth mentioning in relation to the current effects of the ProstG in Germany involve the way damages are regulated. Accordingly, claims for damages in prostitution usually follow the same *culpa in contrahendo* rules as in any other contractual relationship.¹¹¹ However, an area which deserves particular attention in the issue of damages related to parties to the contract being infected with a disease by the other party. The resulting claim in such a scenario would be derived from § 280 s. 1 in conjunction with § 241 s. 2 BGB, due to a breach of the duty of care towards the other party. In the event that the prostitute infected the client, this protected interest is the client's integrity interest. As there are no specific provisions within the ProstG, the majority opinion is that prostitutes do not fall under any general limitation of liability. The reason for this is that the non-use of barrier protection, such as condoms, is regarded as negligence, unless the surrounding circumstances of the risk of infection was known to the client and he or she nevertheless requested the omission of said protective measures.¹¹²

Understanding the German move to stricter Regulationism:-

In recent years, the German government has worked towards drafting new legislation targeted as implementing further regulation of prostitution, which will enter into force on 1st July, 2017.¹¹³

¹⁰¹ Dirk Looschelders, Dirk Olzen and Gottfried Schiemann, (n 78) Rn 9.

¹⁰² Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG, rn. 52.

¹⁰³ Margarete von Galen (n 69) Rn 148.

¹⁰⁴ Ibid.

¹⁰⁵ Philipp S Fischinger and Norbert Habermann, (n 33) §2 ProstG, Rn 56.

¹⁰⁶ Ibid.

¹⁰⁷ However, not in the event of the death of the brothel owner, in accordance with § 672 BGB.

¹⁰⁸ Deutscher Bundestag, (n 51) 4 et seq.

¹⁰⁹ § 626 BGB.

¹¹⁰ See: § 622 BGB - Kündigungsfristen bei Arbeitsverhältnissen (Section 622 Notice periods in the case of employment relationships).

¹¹¹ Philipp S Fischinger and Norbert Habermann, (n 33) §1 ProstG, Rn. 45; Bergmann 2003 JR, 2003, 270, 275.

¹¹² Ibid. Rn 47.

¹¹³ Committee on the Elimination of Discrimination against Women (CEDAW) Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, List of issues and questions in relation to the combined seventh and eighth periodic reports of Germany, Sixty-sixth session, 13 February-3 March 2017, CEDAW/C/DEU/Q/7-8/Add.1, available online at: <http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-

In order to understand the planned changes to the current laws, it is important to understand the issues and gaps revealed from the initial Prostitution Code (ProstG).

When the ProstG was drafted, a key philosophical stance towards prostitution was that it was a given, which realistically had to be dealt with regardless of moral attitudes.¹¹⁴ Accordingly, the Act sought neither to end prostitution, nor to augment its status.¹¹⁵ Instead, a particular focus was directed towards the improvement of prostitutes' working conditions, in order to support people voluntarily earning their living through the provision of sex services.¹¹⁶

Thus, the Act sought to enhance prostitutes' legal as well as social situations, by removing the negative effects of prostitution having been classified as immoral, and as such invalid, legal transactions,¹¹⁷ as well as by facilitating access to social insurance.¹¹⁸ The idea was for the ProstG to assist in reducing prostitution-related crimes as well as making it easier for people working in prostitution to exit the industry.¹¹⁹ A crucial point, however, was that prostitution was not "job like any other," in particular, due to strict legal protection provisions related to the rights of prostitutes to sexual self-determination.¹²⁰

A key rationale here is the notion that the state is not responsible for the protection of people from their own life-choices, especially when these have been a product of free self-determination. In this context, freedom as part of the right to sexual self-determination proscribes that people should be allowed to freely choose whether, how and when to engage in sexual acts.¹²¹

The basis for this is found, in particular in the fact that, today, prostitution, as an occupation aimed at sustaining one's livelihood, is protected by Article 12 s. 1 GG.¹²² As an occupation, people working in the area need to be protected from harm in the same way as anyone else. The German government recognises the vulnerability of people working in prostitution. Thus, it has been emphasised that the state needs to combat any prostitution-related

Dateien/Pakte_Konventionen/CEDAW/cedaw_state_report_germany_7_8_2015_loi_reply_en.pdf> accessed 31 March, 2017.

¹¹⁴Deutscher Bundestag, (n 7) 9, English translation available online at: <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf> accessed: 31 March 2017.

¹¹⁵ Ibid.

¹¹⁶Pajnik, Mojca. 'Reconciling paradigms of prostitution through narration.' (2013) *Društvena istraživanja* 22, no. 2, 257-276; Bruckert, Chris, and Stacey Hannem (n 58) 43-63.

¹¹⁷Venla Roth, Defining human trafficking and identifying its victims : a study on the impact and future challenges of international, European and Finnish legal responses to prostitution-related trafficking in human beings (MartinusNijhoff Publishers, 2012) 36, 37; Kavemann, Barbara, and Heike Rabe. 'The Act Regulating the Legal Situation of Prostitutes—Implementation, Impact, Current Developments: Findings of a Study on the Impact of the German Prostitution Act.' (2007) *Berlin: Sozialwissenschaftliches FrauenForschungsInstitut eV*, <www.cahrv.uni-osnabrueck.de/reddot/BroschuereProstGenglisch.pdf> accessed: 31 March, 2017.

¹¹⁸Laskowski, Silke Ruth. 'The New German Prostitution Act-An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law' (2002) *Int'l J. Comp. Lab. L. & Indus. Rel.* 18, 479; Dodillet, Susanne. 'Cultural clash on prostitution: Debates on prostitution in Germany and Sweden in the 1990s.' (2004) In *First Global Conference: Critical Issues in Sexuality, Salzburg, Austria, October*.

¹¹⁹Elfriede Steffan, Prof.Dr. Barbara Kavemann, Tzvetina Arsova Netzelmann & Prof.Dr. Cornelia Helfferich, 'Abschlussbericht der wissenschaftlichen Begleitung zum Bundesmodellprojekt Unterstützung des Ausstiegs aus der Prostitution' (translation into English: Final report of the scientific accompaniment to the federal model project Supporting the withdrawal from prostitution) (2015) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany] <<https://www.bmfsfj.de/blob/95446/b1f0b6af91ed2ddff0545d1cf0e68bd5e/unterstuetzung-des-ausstiegs-aus-der-prostitution-langfassung-data.pdf>> accessed: 31st March, 2017.

¹²⁰Greggor Mattson, *The cultural politics of European prostitution reform: governing loose women* (Palgrave Macmillan, 2016) 101.

¹²¹Sick, Brigitte, and Joachim Renzikowski. 'Lücken beim Schutz der sexuellen Selbstbestimmung aus menschenrechtlicher Sicht.' (2015) In *Über allem: Menschlichkeit* 928-942. Nomos Verlagsgesellschaft mbH & Co. KG.

¹²²Deutscher Bundestag (n 114).

crimes, in particular socially damaging human rights violations, such as forced prostitution, trafficking in human beings, child prostitution and other human rights violations by all available means provided by law.¹²³ These means include criminal prosecution, monitoring, preventive and repressive measures, and victim protection, including the provision of assistance to victims.¹²⁴

In line with the German gender equality framework, the Federal Government has recognised a need to take countermeasures against the gender equality issues found within prostitution.¹²⁵ This includes the high proportion of women working in the industry in contrast to men, as well as considerations of the nature of the industry, which can be “physically and psychologically demanding, risky and dangerous.”¹²⁶ Thus, while accepting the free choice of adults to work in this industry, it is understood that any threats, including poor hygiene conditions, as well as any other threats to prostitutes’ health, safety and overall wellbeing need to be addressed. In particular, it is important to ensure the voluntariness of the decision to work in prostitution. Accordingly, it needs to be ensured that the social reality of many prostitutes finding themselves in social and psychological situations, in which the ability to freely and autonomously choose to practice this occupation can be called into question, are counteracted. The social responsibility taken up by the Federal Government in this respect include providing possibilities for prostitutes to “earn their living by other means and to prevent them drifting into dependencies which make prostitution appear to be the lesser evil or an acceptable way out.”¹²⁷ These objectives are sought to be achieved through state-funded assistance programmes as well as labour market and education policy in order to offer viable alternatives.¹²⁸

Although the legal measures taken by Germany in 2002 strongly resemble the legislation introduced in New Zealand, the German Federal Government appears to have been more critical in their 5-year review of their prostitution laws. The New Zealand government undertook a four-stage research study, which, despite conducting a quantitative element by means of a survey, which was evaluated on the basis of statistical estimations, sought to avoid significant evaluation based on these statistics within their report, and instead focussed on the predominantly qualitative stages of the study. This consisted of interviews conducted with 58 voluntary participants who worked in prostitution.¹²⁹ This evaluation can be criticised on the basis, that any dark figures would not have been revealed, as it can be assumed that vulnerable prostitutes who had not been positively affected by the PRA, would not necessarily be able to take part in such studies. Moreover, New Zealand’s evaluation of the PRA, focussed more on the black letter law achievements. This means that the success of the PRA was predominantly based on the human rights protection the law provided in theory rather than in practice. In this sense, the report concludes that

“[t]he PRA has been in force for five years. During that time, the sex industry has not increased in size, and many of the social evils predicted by some who opposed the decriminalisation of the sex industry have not been experienced. On the whole, the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously. However, progress in some areas has been slower than may have been hoped. Many sex workers are still vulnerable to exploitative employment conditions, and there are still reports of sex workers being forced to take clients against their will.”¹³⁰

Despite the negative findings that the PRA’s success had been slower than intended and that there still were many exploitative practices, it is significant that New Zealand found the PRA to be a success. In this sense, they justified this finding by stating that “[i]t is a truism that traditions and attitudes developed over many years cannot be

¹²³ Ibid.

¹²⁴ European Parliament, Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs, 'Sexual Exploitation And Prostitution And Its Impact On Gender Equality' (2014) 40-43, <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET\(2014\)493040_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf)> accessed 31 March 2017.

¹²⁵ Deutscher Bundestag (n 114).

¹²⁶ Ibid.

¹²⁷ Ibid 12.

¹²⁸ Ibid.

¹²⁹ New Zealand Government, Ministry of Justice, (n 16).

¹³⁰ Ibid at 168

changed overnight”¹³¹ and concluded that the committee did not consider it to be necessary to undertake further reviews of the operation of the PRA at that stage.”¹³²

The optimism in the theoretical, legal application of the legislation in contrast to some of the more negative findings in practice may explain why the evaluation of the ProstG by the German government was less optimistic in its findings. In this sense, the German Federal government took a more pragmatic stance in its evaluation. It explained that despite the unreliability of statistical data, the legislators had to assume that the ProstG had only achieved its objectives to a limited extent. As previously explained, the objectives of the ProstG included to eliminate the legal immorality of prostitution, to enable prostitutes to take legal action, not only under criminal law, but also to ensure they could take civil measures, such as to enforce payment, to ensure access to social insurance, to combat prostitution-related crime, to facilitate prostitutes to exit prostitution, and to better working conditions.¹³³

Accordingly, the German government stressed that the legislation itself ensured that all the objectives were met legally, the situation in practice revealed that not all people working in prostitution were making use of these legal provisions. In particular, it was noted that there were no indications of the legislation having worsened the situation in prostitution, nor of human trafficking for the purpose of sexual exploitation as well as other prostitution related crimes having been enhanced or made more difficult to prosecute through the legalisation of prostitution, as initially feared by critics of the ProstG. However, the improvements through the legislation were still tentative, and despite some indications of improvements, these suggested that the ProstG proved rather a long-term rather than a short-term solution to the situation of prostitution in practice.¹³⁴ These final points essentially demonstrate the same kinds of findings as the report from the New Zealand Government. It appears that the most significant difference is that the New Zealand Government interpreted these findings as a success, whereas the German government interpreted their findings as an indication to take further action.

It was recognised by the Government, that the particularly liberal approach taken, which based on the mere three paragraphs, was in fact less regulated than the New Zealand model, only represented a limited approach, and as such could only be taken as a first step towards achieving the government’s objectives regarding the regulation of prostitution.¹³⁵

The Introduction of the Act on the Protection of Persons engaged in Prostitution:-

Following the evaluation of the ProstG in 2007, the Act on the Protection of Persons engaged in Prostitution (short: Prostituiertenschutzgesetz - ProstSchG) was issued as the first Article of the Law on the regulation of Prostitution and the Protection of Persons engaged in Prostitution (Gesetz zur Regulierung des Prostitutions sowie zum Schutz von in der Prostitution tätigen Personen - ProstSchGEG) on the 21st October 2016 and will enter into force on 1st July 2017.¹³⁶

The aim of the ProstSchG is to improve the situation for prostitutes by strengthening their right to self-determination as well as ensuring the protection from exploitation, coercion, violence and trafficking in human beings.¹³⁷ The legal basis also serves to improve the legal instruments relating to the monitoring of the prostitution industry in order to tackle any threats therein.¹³⁸

¹³¹ Ibid.

¹³² Ibid.

¹³³ Deutscher Bundestag (n 114).

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Article 7, Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹³⁷ Deutscher Bundestag, 'Drucksache 18/8556, Entwurf eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen (Draft Law On The Regulation Of Prostitution And The Protection Of Persons Engaged In Prostitution)' (Bundesanzeiger Verlag GmbH 2016).

¹³⁸ Ibid.

The act is based on two key pillars, namely, the regulation of the prostitution industry, as well as the protection of persons engaged in prostitution.¹³⁹

The first pillar primarily involves introducing an authorization requirement within the prostitution industry for brothels and brothel-like establishments, as well as all other forms of commercial prostitution.¹⁴⁰ Accordingly, operators will need to undergo a personal reliability test. This will also apply to any persons acting as a legal agent or has been entrusted with any managerial or security related duties.¹⁴¹ In order to obtain authorisation, operators will be required to draw up an operating concept and comply with the minimum requirements for the equipment within the business premises.¹⁴² A significant milestone, according to the German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth, is the newly created obligations to ensure acceptable working conditions.¹⁴³

The obligatory checks introduced by the new regulation will ensure, for instance, that people who have previously been convicted of human trafficking offences will no longer be permitted to operate brothels.¹⁴⁴ It will also ensure that there is an evaluation of reasonableness of operating concepts and business models prior to the start-up of prostitution businesses. This can be interpreted as a direct response to the consequences of capitalist market forces in Germany following the particularly liberal legalisation of prostitution, which resulted in new business models, such as “flat rate brothels” being introduced, as well as an increasing demand for harmful or dangerous sex acts, such as group sex” or “gangbangs.”¹⁴⁵ Any breaches would result in the operators being subject to sanctions, such as the loss of authorisation as well as penalties.¹⁴⁶

The second pillar, covering the protection of persons engaged in prostitution, includes the implementation of a personal notification obligation as well as health advice provisions for prostitutes, which are to be repeated at regular intervals.¹⁴⁷ The idea is to provide prostitutes with additional support and to ensure that prostitutes are actually able to exercise their rights and to work freely in a self-determined manner.¹⁴⁸

¹³⁹ Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Rahmenbedingungen für die legale Prostitution Schaffen (Framework For Legal Prostitution)' (2016) <<https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/rahmenbedingungen-fuer-die-legale-prostitution-schaffen/83928>> accessed 31 March 2017.

¹⁴⁰ Ibid.

¹⁴¹ § 15 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹⁴² § 12 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹⁴³ Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Rahmenbedingungen für die legale Prostitution Schaffen (Framework For Legal Prostitution)' (2016) <<https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/rahmenbedingungen-fuer-die-legale-prostitution-schaffen/83928>> accessed 31 March 2017, commenting on § 18 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹⁴⁴ Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Rahmenbedingungen für die legale Prostitution Schaffen (Framework For Legal Prostitution)' (2016) <<https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/rahmenbedingungen-fuer-die-legale-prostitution-schaffen/83928>> accessed 31 March 2017.

¹⁴⁵ Mathieson, Ane, Easton Braman, and Anya Noble. "Prostitution Policy: Legalization, Decriminalization and the Nordic Model." (2016) *Seattle Journal for Social Justice* 14, no. 2, 10, 395; Stephens, Monica. "Gender and the GeoWeb: divisions in the production of user-generated cartographic information." (2013) *GeoJournal* 78, no. 6, 981-996.

¹⁴⁶ Section 6, § 33 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹⁴⁷ Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Rahmenbedingungen für die legale Prostitution Schaffen (Framework For Legal Prostitution)' (2016) <<https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/rahmenbedingungen-fuer-die-legale-prostitution-schaffen/83928>> accessed 31 March 2017.

¹⁴⁸ Deutscher Bundestag, 'Drucksache 18/8556, Entwurf eines Gesetzes zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution

Thus, from July 2017, prostitutes will receive a personal information and consultation session at registration, during which they will be informed about their rights and receive important information on available support,¹⁴⁹ such as the Germany-wide "Violence against women support Hotline."¹⁵⁰ The provided services and information are available in currently 17 languages,¹⁵¹ however, § 7 (3) ProstSchG indicates that the provided information should be provided in a language understood by the prostitute, which may require further languages to be made available. Moreover, prostitutes are to be given the opportunity to discuss any health-related aspects of their work in confidentially in one-to-ones.¹⁵²

It has been argued that the new stricter regulation is a step backward from the ideal decriminalised regulation of prostitution, with merely few regulatory measures, such as age-restrictions, in particular from a number of advocacy groups for prostitution, such as Hydra,¹⁵³ BesD,¹⁵⁴ BSD¹⁵⁵ and the Doña Carmen eV.¹⁵⁶ The main criticism is based on the argument that any restrictions, such as imposed by the obligatory registration and authorisation for businesses, will unreasonably interfere with and potentially limit prostitutes' right to self-determination and other basic rights protected in the German constitution. However, the German Federal government has argued that these provisions are necessary in order to ensure the self-determination of vulnerable prostitutes and the protection of victims. Accordingly, it can be argued that a balancing of these competing interests, namely the limitation of the general right to self-determination and the rights of vulnerable prostitutes and exploitation victims to be protected from harm, justifies the implementation of such measures.¹⁵⁷

Conclusion:-

It has been revealed that the supposed decriminalisation approach in New Zealand is in fact a regulationist approach much like the German one. In fact, in terms of the amount of provisions, it became apparent that the German approach was less regulated than the New Zealand model. Both approaches targeted the elimination of invalidity of contracts due to prostitution being *contra bonos mores*, as their primary provision. Moreover, both systems appear to

TätigenPersonen (Draft Law On The Regulation Of Prostitution And The Protection Of Persons Engaged In Prostitution)' (Bundesanzeiger Verlag GmbH 2016) 1.

¹⁴⁹ §§7-9, Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹⁵⁰ 'The Violence Against Women Support Hotline – Support And Counselling For Women' (Hilfetelefon.de, 2017) <<https://www.hilfetelefon.de/en.html>> accessed 31 March 2017.

¹⁵¹ 'Beratung In 17 Sprachen: Hilfetelefon' (Hilfetelefon.de, 2017) <<https://www.hilfetelefon.de/das-hilfetelefon/beratung/beratung-in-17-sprachen.html>> accessed 31 March 2017.

¹⁵² §8 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

¹⁵³ HYDRA e.V., 'Information About The 'Prostitution Protection Law', That Will Go Into Effect Nationwide Starting 01.07.2017' (2017) <http://www.hydra-berlin.de/sexarbeit_von_a_bis_z/infos_zum_neuen_gesetz/information_about_the_new_law/> accessed 31 March 2017.

¹⁵⁴ Berufsverband erotische und sexuelle Dienstleistungen e.V. (BesDe.V.) - (English Translation: Professional association erotic And sexual services e.V.), 'BesD Unterstützt Verfassungsbeschwerde Gegen Das Prostschg (English Translation: BesD Supports Constitutional Complaints Against The Prostschg)' (2017) <<http://berufsverband-sexarbeit.de/besd-unterstuetzt-verfassungsbeschwerde-gegen-das-prostschg/>> accessed 31 March 2017.

¹⁵⁵ Bundesverband Sexuelle Dienstleistungen e.V. (English Translation: Federal Association for Sexual Services e.V.), 'Stellungnahme Zum Referentenentwurf Des Bundesministeriums Für Familie, Senioren, Frauen Und Jugend: „Entwurf Eines Gesetzes Zur Regulierung Des Prostitutionsgewerbes Sowie Zum Schutz Von In Der Prostitution Tätigen Personen,“ (Statement To The Draft Paper By The Federal Ministry For Family Affairs, Senior Citizens, Women And Youth: "Draft Law For The Regulation Of The Prostitution Industry As Well As For The Protection Of Prostitution Persons")' (2015) <<http://www.bsd-ev.info/publikationen/index.php>> accessed 31 March 2017.

¹⁵⁶ Doña Carmen e.V., '25 Gute Gründe Für Ein Klares NEIN Zur Geplanten „Erlaubnispflicht Für Prostitutionsgewerbe“ (English Translation: For A Clear NO To The Planned , Permission For Prostitutes')' (2016) <<http://www.donacarmen.de/wp-content/uploads/25-gute-Gr%C3%BCnde-gegen-Erlaubnispflicht.pdf>> accessed 31 March 2017.

¹⁵⁷ Dunn, Michael C., Isabel CH Clare, and Anthony J. Holland. "To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy." *Legal studies* 28, no. 2 (2008): 234-253; Klein, Alana. "Criminal Law and the Counter-Hegemonic Potential of Harm Reduction." (2015) *Dalhousie LJ* 38 447.

have prioritised the right to sexual self-determination as well as the protection of other human rights affected in the commercial sale of sex services in their choices to decriminalise the sale and procurement of sex services. Interestingly, the governmental evaluations of each model, which were conducted five years after the implementation of each approach revealed similar findings as well. However, these findings appear to have resulted in opposite conclusions. The evaluation of the New Zealand model was seen as a success, in particular due to the theoretical legal application and the way this was able to protect the rights of sex workers. It was understood that in the long-term, when society adapted, the approach would achieve the initially set objectives. The German evaluation, however, has focused on the short term application of the model, and sees a slow adaptation as something that needs addressing in order to ensure the rights of vulnerable prostitutes are protected. Thus, the German government has sought to create new legislation, which will tighten the regulation of prostitution. In particular, this move to stricter regulation will involve regulating and monitoring the industry as well as enhancing the protection of the individual sex workers by implementing mandatory registration and consultancy, as well as extending the provision of support and education, in order to ensure all voluntary sex workers are adequately protected, and any victims of exploitation or forced prostitution are helped. Consequently, what can be learnt from the German regulationism is that although decriminalisation, from a philosophical human rights perspective is desirable, in practice it appears that there are a number of other factors apart from the laws, which currently interfere with the realisation of the theoretical objectives of such a regulatory approach. Thus, in the short-term, negative practices cannot be ignored and require addressing to ensure the wellbeing of all sex workers. Only time will show whether the new German regulationist approach will be able to close any current deficiencies in the decriminalisation of prostitution.