

Human Rights Language as an Instrument. An Analysis of the Sex Work Discourse in South Africa with a Focus on Human Rights

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Abstract

This paper addresses and investigates the ways sex work is being discussed in South Africa. The main focus is on the human rights discourse as applied by the South African parliament and the non-governmental organisation SWEAT (Sex Worker Education and Advocacy Task-force). The research proceeds by analysing which human rights the two actors refer to and which discursive strategies they apply in order to pursue their varying agendas. This also includes a discussion of which actors are seen as violating sex workers' human rights and preliminary conclusions on the agendas and objectives that might be underlying the respective discourses. The paper's analysis indicates that human rights, here, are not an end in themselves, but rather a means to an end. Both actors utilise the very same human rights language with quite different effects and outcomes, which leads to conclusions about the instrumentality of human rights.

Keywords

Human rights – sex work – discourse – South Africa – parliament – NGO

Introduction

Throughout history the topic of prostitution and sex work has caused moral outrage and heated discussions. Being originally perceived as an inherently immoral business, the emergence of feminist and women's rights movements led to a new argument linking prostitution with the discourse on women's sexual rights. One of the core feminist arguments regarding the sex industry was that sex work is in and by itself a form of abuse as it is involuntary and degrading.

People working in the sex industry have found themselves in a position where their business was not respected and they were (and frequently are) exposed to social marginalisation and a wide number of human rights abuses. In reaction to the victimisation of sex workers and their real-life situation, the International Committee for Prostitutes' Rights was founded and passed the World Charter for Prostitutes' Rights in 1985. This laid out the human rights sex workers claim for themselves as for any other member of society. This Charter thus also forms the beginning of the struggle for sex workers' human rights.

The human rights framework has subsequently become the standard language in the struggle to improve sex workers' rights situation and their position within society. Nonetheless, people working in the sex industry, still face abusive, hateful, disrespectful and after all harmful behaviour all over the world.

One of the countries in which the situation seems devastating is South Africa. With its skyrocketing rape rate and high incidents of crime coinciding with the criminalised status of prostitution, sex workers find themselves in an especially vulnerable position.

Although the South African government has since the end of Apartheid, continuously worked to improve the human right situation in the country and – considering the history of racial segregation – especially a liberalisation of sexual rights, sex work is still a crime. This criminalisation is justified with human rights arguments. So is the struggle for decriminalisation.

This paper aims to analyse the purpose of the human rights discourse in this realm.

It is to be established how human rights are being used in the governmental and non-governmental discourse related to sex work. Which human rights do the different actors refer to, which discursive strategies do they use to make their arguments effectively heard, and what might be the purpose of leading the discourse a specific way? In other words – what picture is being painted by using certain human rights in a certain way?

The first chapter will shortly explain the methodology applied in the research and then an overview of the actors that are to be looked at, will be given. Following that, the author will proceed to analyse the human rights discourse on sex work as constructed by the South African parliament. The different stages of that discourse will make up the following six chapters. Part of that is also the analysis of the discourse the non-governmental organisation (NGO) Sex Worker Education and Advocacy Taskforce (SWEAT) pursues as a reaction to the parliamentary and public discourse on sex workers' human rights. Finally, a few thoughts on the possible purposes of these different discourses will be shared. The conclusions will then give the reader an overview of the research findings.

Methodology: Discourse Analysis

Discourse, here, is to be understood as a practice of knowledge in a social field that is specific to its social and historical context. It is the manner in which thinking about and the expression of this knowledge take shape rather than the knowledge by itself (Diaz- Bone 2006, 251, referring to Foucault). Being a means to express views, understandings and the knowledge linked to that, discourse can serve to set the framework and boundaries within which ideas, critiques and world-views more generally may or may not be expressed. Discourse thus reaches beyond the individual level to the extent of affecting a whole society in a temporarily stable manner (Diaz- Bone 2003, 64).

Although discourse can include more than spoken and written language, for example institutional practices, monuments, pictures and the like, the focus of this paper is to analyse the spoken and written language used by the South African Parliament and the NGO SWEAT on the issue of sex work. Thus 'the author' – as suggested by Foucault – has been chosen as the leading principle in organising and analysing the material (Foucault 2010, 20).

Since Foucauldian discourse theory and analysis perceives discursive meanings as emerging from systems of texts and discursive practices, a range of texts from both actors (the parliament and SWEAT) will be analysed. For SWEAT the available material covers scientific research reports and journal publications as well as information material such as flyers and pamphlets for sex workers themselves. The choice to include this variety of text forms was made, as this represents the spectrum of SWEAT's work: they work with sex workers themselves, offer them counselling and support, but also address their issues towards the government and its different branches. In addition to that, SWEAT has been engaged in research on the topic of sex work for several years. The information and advocacy material has been made available to the researcher by SWEAT employees, whilst the research reports and journal articles have been found and accessed from a number of online sources.

For the parliamentary discourse on sex work it seemed most useful to focus on the discussion the parliament conducted on the topic. This ensures that not only statements of single government members are included, but rather a variety of views, which nonetheless can be assumed to represent the parliamentary or legislative discourse on sex work.

The parliamentary library granted the researcher access to the Hansards, the printed proceedings of the sessions of the National Assembly and the National Council of Provinces. The Hansards have then been searched for entries including the terms "sex work", "prostitution", "commercial sex" or "the Sexual Offences Act". Entries on related issues such as "trafficking" also had to be included as sex work was barely ever discussed as an independent topic and rather turned out to be perceived as being inevitably linked to trafficking. The latest session

proceedings have been made available by the parliamentary library service in electronic form, since no printed versions were accessible yet.

As for a time frame the research has been limited to publications, materials and discussion protocols published between 2002 and 2011. This year marks an expansion in the political and NGO activities around the topic of sex work: the case *Jordan and Others v State* challenged the constitutionality of the Sexual Offences Act, but was dismissed by the Constitutional Court whilst at the same time the South African Law Reform Commission released its first, very comprehensive report on adult prostitution. It therewith opened the public discussion on the topic and called for papers and comments in order to contribute to the law reform process. Before that the topic has been on the agenda around 1998 when legalisation was suggested, but has nonetheless not found a lot of public and political attention as the post-Apartheid government set different priorities in its agenda. This period shall thus be neglected.

The analysis of these texts is supposed to give insight into the terms in which the topic is discussed and the thematic choices the actors made in their discussions. Mainly, it is to be elaborated in which way the Parliament and SWEAT apply a human rights language.

Frameworks of the respective discourses

Founded in 1996, the Sex Worker Education and Advocacy Taskforce initially focussed its work on the issue of HIV/AIDS within the realm of sex work. Due to the complexity of the topic and the lack of adequate counselling and advocacy for sex workers more generally, the organisation soon expanded its task to include the fight for sex workers' human rights, counselling and the strengthening of self-representation of the people engaged in the business as well as health, legal and life skills counselling. SWEAT strives to bond closely with sex workers themselves in order to ensure that their needs assessment and their advocacy work are informed by the needs and desires of people affected by it. The organisation also emphasises the importance of a holistic view on the topic, and thus the solutions and support services it offers (for all of the above information see www.sweat.org.za).

The organisation's publications are twofold in nature. Firstly, there is material being published for sex workers themselves. It includes practical advice for every-day challenges and clarifications about the dangers of the business and the rights of people engaged in it. Secondly, there are research papers and reports as well as journal articles published by SWEAT. They are concerned with many of the facets of the sex work industry such as state intervention and violence, stigmatisation, health issues, decriminalisation, human and sexual rights and the like, and address a more scientifically interested audience.

Since English is the lingua franca in South Africa and – as opposed to any of the other ten official languages in the country – understood by most people at least to a certain degree, the majority of SWEAT's publications are in English. Only one pamphlet has been found that was published in both English and Afrikaans (“*Drugs and Sex Workers*”) and none in any other language.

As with other, the South African parliament is the representative of the population and thus the link between the citizens and the government. Not only does it represent the population's interest towards the government, but Members of Parliament (MPs) also work directly with the people in their respective constituencies. The parliament is a bicameral one, formed by the National Assembly and the National Council of Provinces. It can thus be assumed that the proceedings and decisions taken by parliament have an impact on public opinion. In order to better understand the mindset that prevails in the post-1994 government as well as in parliament, it is important to grasp the relationship of civil society and government in South Africa. As Ran Greenstein puts it in his comprehensive analysis of the South African government and its links to civil society, “[the] ANC and its alliance partners share an emphasis on the state as the guiding force of economy and society” (Greenstein 2003, 15). He furthermore indicates that “Popular participation is invariably seen, however, as a way of bolstering

the role of the state under the ANC leadership, rather than as potentially contradicting, challenging or forcing it to re-think its policies and practices. Invoking participation does not reflect genuine recognition that civil society forces may play a role independently of, let alone in opposition to, the ruling party” (Greenstein 2003, 15).

With regards to its legislative task the parliament does not usually make use of its right to initiate legislation. This is rather done by the executive force, which implies that parliament as the entity representing the population's interests does not initiate legislation when needs are expressed by civil society forces but rather adopts a top-down approach (De Vos 2010, 98). Nonetheless, when legislation is discussed, the public and civil society play a pivotal role in the process (De Vos 2010, 98).

In its discourse about sex work in South Africa, parliament based its discussions on two main arguments: Firstly there are human rights that are violated by the nature of sex work itself and its very contradiction to societal, moral and constitutional values. Secondly, most human rights abuses that affect sex workers are committed by pimps, traffickers and other criminal, violent forces that are situated at the periphery of society. Those two main arguments are to be elaborated in the next two chapters.

Human rights and the nature of sex work

The South African Constitution grants the right to equality and non-discrimination to all its citizens and specifies that

“[...] the state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth [...]”

and that measures are to be taken to promote people and groups of people who are unfairly discriminated against (Constitution of South Africa, Art. 9). Parliamentary considerations on sex work and issues of discrimination and inequality are based on the victim-perpetrator binary. On the one hand, with regards to the victim role of sex workers, it is established that “the preponderance of women among prostituted people is a reflection of the reality of continued oppression on the basis of sex and gender. [...] Prostitution is the cornerstone institution of the system of inequality between the sexes” (RSA 2010a, 6). This indicates the awareness that many problems sex workers face are linked to societal attitudes towards women more generally. On the other hand it is detected that both parties involved in the crime of prostitution have to be punished in order to ensure equal treatment: “In a constitutional democracy it is an affront to treat prostitutes as criminals, but not their clients as well” (RSA 2006c, 8882). The extension of law that followed these considerations and criminalised the clients of sex workers was linked to the Jordan case from 2002. In that instance a sex worker took her case to the Constitutional Court and sued for the unconstitutionality of the Sexual Offences Act – among others – on the basis of the right to be free from discrimination. The Constitutional Court in its majority decision decided that the legal practice of only arresting and suing sex workers and not their clients might constitute discrimination, but in a justified manner and degree (*S v Jordan and Others* 2002b). In order to ensure the legal basis for suing clients of sex workers as well, the Sexual Offences Amendment Act of 2007 criminalised the purchase of sex. This in turn is argued to increase gender equality in this realm, but is the opposite of what the sex worker Ellen Jordan hoped to achieve when she made her case in court. In the latter argument, parliament basically uses the right to equality as pre-text for expanding the target of the legislation and in some way also the societal prejudice.

A second human right, that the parliament sees as being violated by the nature of the work itself is the right to human dignity. The members of parliament, who did comment on the topic of sex work, reveal a view of sex work as being a per se humiliating and demeaning conduct. As part of that portrayal, sex work is always talked about as being inevitably linked to human trafficking and forced prostitution: “Human trafficking is feeding into the existing

culture of degradation of women and children through prostitution and the debates around legalising it. South Africa has a long history of legalising and condoning inhumane behaviour" (RSA 2006, 2908). With statements like these the business of prostitution is also put into a framework of social and economic injustice in its most blatant form as represented and symbolised by the Apartheid regime. Interestingly, the speaker here talks about "inhumane behaviour", not inhumane acts or deeds. This conveys the impression that something is wrong with sex workers. They are exposed to degrading treatment, but also engage in inhumane behaviour. In a similar way, Jacob Zuma in 2002 in parliament discussed oral sex as unnatural conduct only certain kinds of people engage in:

"I can't answer about wrong things that people do that are unnatural. I can't talk about that. [...] I don't know really whether I should have an opinion on some of the things [...] because I don't understand what do they mean [sic]. We are talking about education about sex, not other things that are not sex. I wouldn't be able to have an opinion on that one" (Ratele 2008, 124, citing Mail & Guardian and MacLennan).

Both statements awaken a feeling of something being wrong with certain forms of sexual conduct and feed into a notion of wrong-being of those who engage in 'deviant' forms of sexual behaviour.

Also crucial to the parliamentary discussions on issues of human dignity within the context of sex work seems to be the notion of coercion. First and foremost economic constraints are seen as forcing women into the sex industry and leaving them no options for exit. As one member of parliament states,

"[in] addressing the issue of the alleged choice of women, most people say women choose to be prostituted and can leave if they want to. However, studies conducted show that 89% of women who are being prostituted say they want to leave prostitution, but have no other option for economic survival, suggesting that social and other factors are coercing women into prostitution rather than that they choose to be prostituted" (RSA 2010a, 7).

This quote clearly shows the lack of agency ascribed to sex workers. Nowhere is it mentioned that women actively take the decision to work as a sex worker. Instead they are always being "prostituted". Seeing sex workers as passive victims of either circumstances or trafficking delineates a severe objectification and secondary victimisation. This in itself contributes to the degradation of sex workers as they are denied any notion of agency.

The above quotes make it clear, that the speakers refer to sex workers as victims and mere objects, who do neither have nor exercise any agency or self-determination. It is by means of objectification and moral condescension that the right to human dignity is used to portray sex workers as immoral, but at the same time victimised elements at the periphery of society and its acceptable moral boundaries.

Human rights and sex work- specific actors

In its second major line of argument, parliament refers to actors in the sex work business that violate human rights through their criminal conduct. Amongst these are pimps, traffickers and clients. There are four human rights that parliament mainly, although not exclusively, refers to in order to make its point.

The first right, used to show the many ways in which sex workers' human rights are violated by actors specific to the sex work industry, is the right to the freedom of the person and bodily integrity, which in summary grants that "[e]veryone has the right to life, liberty and security of the person" (UN Declaration of Human Rights 1948, Art. 3).

The parliament as part of the government structure itself does not acknowledge that the state and its agents play a rather active role in violating sex workers' human rights. Instead it

portrays sex work as an inherent violation of the right to bodily integrity since the business is seen as the inevitable outcome of human trafficking. The statement of one MP clearly proves that view:

“Equal rights and equal opportunities for all start with the physical freedom to enjoy and practice them, which, for an increasing number of women in South Africa, is being snatched from them. South African women and girls are being increasingly lured or kidnapped and trafficked into strip joints and brothels, from which it is very difficult to escape” (RSA 2010a, 38).

It is furthermore elaborated that the legalisation of sex work would increase those inhuman practices inevitably (RSA 2006a, 2908). Clearly, the various speakers share a view that there are pimps and traffickers who kidnap and force women into prostitution. These actors are thus portrayed as unavoidably being perpetrators of crimes, whilst sex workers themselves are assigned the role of helpless victims in need of protection by the government.

On another line of discourse, parliament rhetorically creates a link and basically an equation between rape, murder, human trafficking and prostitution (RSA 2010b, 8). Thereby the sex work industry and the people who are employed in it are made offenders, perpetrators of serious crimes, which actually contradicts the point parliament made before, namely that sex workers are helpless victims.

In relation to the right to bodily integrity, the parliament emphasises the right to freedom of movement, which encompasses the right to leave South Africa and freely move within its borders. For South African citizens it furthermore provides the right to enter, remain or reside in the Republic and have the right to a passport (Bill of Rights, Art. 21).

Members of Parliament in their discussion regularly refer to the limitations of the freedom of sex workers by referring to its inherent link with forced prostitution. The only way in which prostitution as such – not human trafficking – is characterised as a violation of this right is by telling “stories about being locked in their rooms, beaten and, in some instances, having had their identity documents taken from them” (RSA 2010f, 19).

A third human right referred to in this discourse is the right to favourable conditions of work and thus fair labour relations. In the case of parliament the argument made is rather obvious, because (forced) prostitution is necessarily linked to human trafficking, the working conditions and labour relations the victims are subjected to are exploitative and inhumane: “The UN Office on Drugs and Crime report highlights the inevitable consequences of legalising the sex trade, which opens the door for further abuse through trade in human flesh” (RSA 2006a, 2908). In addition to that sex work as such is being portrayed as exploitation of the female body. Also addressed is the alleged fact of the exploitation of sex workers' labour: “There are reports that as soon as the women arrive at the strip clubs, their passports are taken away from them, and they are told they will have to work off debt, in what amounts to debt bondage” (RSA 2010a, 38).

Another question addressed by parliament is whether “serious attempts [will] be made to stop women and child trafficking, which turns into prostitution and slavery” (RSA 2010a 49). This again puts sex work into one line with trafficking and slavery and thus refers to a fourth human right, the right to “not be subjected to slavery, servitude or forced labour” (SA Bill of Rights, Art. 13). It is made clear here, that sex work is seen as a form of slavery or at least forced labour. The possibility of working in the sex industry as a consequence of an educated decision to earn a living does not seem to occur to the speakers.

Summarising this line of discourse, parliament refers to different human rights violations in which either pimps and traffickers or clients are the perpetrators. Although parliament does not usually directly mention these actors as perpetrators, the way the arguments are made, makes it clear who is seen as the criminal. This in turn makes sex workers victims and objects. It ascribes them the passive role of enduring what is being done to them rather than having made a choice and using different survival strategies to handle those kinds of dangers and human rights violations.

By ascribing the perpetrator role to traffickers, pimps and sex workers' clients, parliament creates an out-group that is to be blamed for the critical human rights situation. These actors are apparently not seen as members of society, but rather some deviant out-groups. The outside positioning is emphasised when parliament stresses that traffickers are often foreigners to South Africa: "The business is also fuelled by the influx of foreign women for sexual exploitation, trafficked to South Africa by South Africans working through foreign agents. The women come from Eastern Europe, Thailand and other countries [...]" (RSA 2010a, 38). The point is made that after all it is foreigners who either exploit sex workers as pimps, traffickers or even foreign women who engage in a business as immoral and degrading as sex work. The responsibility as well as the blame is thus put on people who are not seen as members of South African society.

From these basic arguments, the parliamentary discourse uses different discursive strategies to further strengthen its point. This is where SWEAT as an opposition to this hegemonic discourse comes into play. In the next chapters the discursive strategies used by parliament will be explained together with the ways in which SWEAT uses human rights to oppose these arguments.

Sex workers as victims

The above analysis has outlined parliament's argument on why sex work is discriminating, humiliating and consequently a violation of sex worker's human rights and moreover an affront to women's rights. The basic line of thought assumes that sex workers are victims of violent and criminal pimps, traffickers and clients and maybe of the economic hardship which drove them to take up this kind of work. The inevitable conclusion seems to be that they are in need of protection by the law. Since criminalisation does only provide limited protection for sex workers, the argument has to go further and justify how victims become criminals. This discursive move is to be explained in the next chapters. The author argues that the discourse about victims has been overlaid with a moralised argument that makes sex workers criminals. This is also where the NGO SWEAT positions its arguments: It challenges the discursive victimisation, the subsequent criminalisation as well as the lack of the rule of law that is so systematically ignored in parliamentary discussions.

It is through objectification, condescension and the denial of rationality that the South African parliament and the various speakers that have commented on the topic of sex work in the Republic deny sex workers any sense of autonomy or self-determination. Instead of being agents in their own sake, sex workers are being portrayed as victims of society, economic hardship or those actors involved in the sex work industry, that inevitably exploit, abuse and mistreat the mainly female workers. In a way, sex work here becomes what Melissa Hope Ditmore calls a brainwash issue: sex work therein is so perverted and deviant that who engages in it has either been forced to do so or is in a mentally irresponsible, irrational state of mind (Ditmore 2008, 59). Determined by this is also what cannot be expressed in the discourse: That sex workers might take educated decisions according to their needs and desires.

It is here, at the point of explicit victimisation that SWEAT uses a human rights discourse to challenge that very victimisation. For that purpose, the authors refer mainly to the right to human dignity and the right to equality and non-discrimination.

In the considerations of the aspect of human dignity in the sex work industry, SWEAT does not take on a notion of sex work as being degrading by itself, but rather as being provided with a notion of degradation and an assault on sex workers' dignity by the conduct of the police and partly also other actors.

To a certain degree the organisation does acknowledge that the conduct of sex work can challenge the workers' sense of self-respect and dignity: "[one] participant spoke of her feelings of guilt after having been with a client and how it makes one question one's worth as a person" (Fick 2005, 20).

SWEAT there points at the common denunciation of sex workers as either deviant elements of society that are to be blamed for various social problems such as crime or drug consumption or as victims who are being used and abused by criminal elements of society. On the personal and individual level the internalisation of stigma and the permanent treatment as a criminal, in the long run lead to a perception of oneself as unworthy of protection: "sex workers do not believe they have any rights [...]" (Fick 2007, 18). This implies that they start thinking of themselves as not equal to other humans who do have a right to human rights.

As opposed to the state-induced infringement of sex workers' dignity, sex work itself is at times portrayed as a viable means to restore or maintain somebody's sense of dignity. By making an informed decision to work in the industry they enable themselves to earn an income and provide for their dependants. Even though this might not always be the easiest decision, it is crucial because it shows the "[...] extend to which women in the industry have agency: they make decisions (perhaps based on their need for survival) and follow these decisions through, even though it means that they have to do work they dislike" (Fick, Gould 2007, 23). As a matter of self-determination this is essential in providing the women with a sense of dignity and self-respect.

More frequent are statements that put the responsibility for the human dignity issues sex workers struggle with on the government and especially the police. In that regard it is pointed out that the criminal status of sex workers and the resultant stigmatisation foster the decrease of society's respect for sex workers' dignity and the increasing lack of self-respect that accompanies working in the business. As Kinnel points out "[a] further contributing factor in this violence is stigma, through which sex workers are seen as somehow less than human because of the moral taint of the work they do" (Kinnel 2001, 23). Research has even been able to prove a link between an increase in campaigns against prostitution and the number of murders of sex workers (Kinnel 2001, 24).

An example for society's disrespect for sex workers' dignity is the fact that the "view of sex workers as 'unchaste' and therefore 'unclean' means that when a sex worker is a victim of violence or illness it is often seen as somehow self inflicted or a form of 'punishment' for what they are doing" (Fick 2005, 49). Furthermore "[p]ersons engaged in sex work are often blamed for social problems or perceived as victims" (Fick 2005, 21). With this kind of argument SWEAT refers to the often observed strategy of blaming the actual victim that serves to take attention away from the responsibilities of certain institutions to protect those affected.

With regards to the right to equality and non-discrimination, SWEAT firstly points out that the stigmatisation and criminalisation of sex workers causes a societal perception of sex workers as being unequal and somehow justifiably discriminated against. With reference to the high levels of violence sex workers are exposed to, Nicolé Fick and Chandré Gould note that "such a percentage among any other population group would prompt a strong public response" (Fick, Gould 2008, 44). The organisation there shows sensitivity for the fact that part of the problems lies within society and societal actors who discriminate against sex workers on the mere basis of their way to earn a living. In contrast to that public perception of inequality, SWEAT uses the right to equality to point out that sex workers are members of South African society just as everybody else. The point is made that sex workers are discriminated against on the basis of gender and sexual orientation, which is obviously a violation of their constitutional rights (Fick 2005, 50; Fick, Gould 2007, 24). In some of its pamphlets and postcards SWEAT furthermore addresses violence against sex workers as a matter of concern for all women as it is a form of gender violence. It thereby attempts to provide a basis for South African women and all members of South African society more generally to identify with the human rights violations and abuses sex workers have to endure, which nonetheless affect a much broader sector of society. This seems to attempt to appeal to people's sense for the humanity and equality of sex workers.

By means of naturalising what sex work is, generalising the human rights problem, and the subjectification that is brought about through pointing out the positive influence sex work can have on sex worker's perception of their own dignity, the organisation attempts to challenge the secondary victimisation the parliamentary and quite often the public discourse

cause. This alternative discourse gives back to sex workers their human dignity and sense of being equal humans with equal rights, by pointing out their agency and the active role they play in taking life-changing and often life-saving decisions and placing them and the problems they face in the midst of society rather than making them a phenomenon of the periphery or an out-group as the parliamentary guided discourse does.

The Moralisation of the Discourse

In order to justify the criminalisation of sex work the parliamentary discourse, after declaring sex workers victims, undertakes to explain why they are also criminals. This is done mainly by moralising the issue at hand. For example, one Member of Parliament explains that sex work “[kills] the moral fibre of our community, but also works towards the spread of HIV and Aids and other diseases” (RSA 2004, 32). Another MP states that “decriminalising prostitution should not be viewed as a progressive act to be counted among the achievements of a free nation” (RSA 2008, 1632). With the moralization of the discourse the parliament appeals to society's perceptions of what is right and wrong and how this morality has to be protected and maintained. The fact that polygamy which is also a form of 'belief' or perhaps 'sexual orientation', is nonetheless recognised by the South African state, whilst a form of sexual behaviour that officially ascribes a woman several partners is not, hints to a specific view of how female sexuality should be lived. It strengthens the hegemonic masculinity of men being the ones determining sexual conduct and women being sexually passive. Furthermore supported by this is the perception that men have to earn women's sexuality namely not merely by means of money but rather a masculine performance. This is why buying sex from a prostitute is not considered to be conducive to male confidence (Bonthuys 2006, 397; Wojcicki 2002, 343).

What is being determined is which ways of life are acceptable and which are not. Sex work as a life style that implies multiple partners and the usage of one's body and sexual skills for the purpose of earning money do not belong to the realm of what is socially acceptable. Human rights are thus being used as a tool to limit the scope of life choices one has and consequently the freedom to pursue one's life in a self-determined way. The parliament here builds on a reverse demarcation of in- and out-groups as compared to the SWEAT discourse: legitimised by inclusion is the “mainstream” of society, those who live their lives based on a non-deviant notion of sexuality. Sex workers are excluded from this. They constitute the out-group, pursuing their lives in morally unacceptable ways.

As parliament points out the moral decay that is implicate and inherent to sex work, it has to maintain a view of it as being inherently degrading and humiliating for the women, whilst it cannot and does not acknowledge its own role in the human rights violations. Thus a point of silence exists with regards to the role of the state in the violation of sex workers' human rights. Denying the state's own role in the human rights violations is effectively done and facilitated firstly by dehumanisation. Making sex workers criminal offenders and victimised objects makes them appear less worthy of protection. Condescension through moralisation of the subject and distancing itself from this conduct secondly facilitate this process. Furthermore, double standards are applied when sex work is criminalised but unofficial transactional sex is not condemned. A fourth strategy is the expansion of the target, which has been conducted when the criminalisation was extended from sex workers to include their clients as well. Last but not least the blaming of the actual victim as it happens when sex workers are declared victims of exploitation and abuse, whilst at the same time being criminals, who are responsible for their conduct, helps to legitimise state actions that might violate sex workers' rights. This is in stark line with the theorisations of state denial of human rights violations or the alteration of the meanings that accompany it (see for example Cohen 1993 and 1996).

By means of condescension, distancing and dehumanisation, the parliament creates a view of sex workers as being a severe danger to South African society and the morality it upholds. They are portrayed as endangering moral values and explicitly the health of the population and consequently the whole nation by spreading diseases like HIV/AIDS. In that way the pub-

lic is enabled to disconnect itself from the issues sex workers face and the groundwork is laid to make sex workers criminals that need not only punishment but from which society should be protected. Moralisation then serves to cover the inconsistency of the discourse, when it demarcates sex workers as both victims and criminals at the same time.

From victims to criminals

The last chapter explained how the parliamentary and the often complementary public discourse twisted the view of sex workers from victims in need of protection to criminals in need of punishment and a society that needs protection from them. Those that were supposed to be a victim are now being blamed for social evils such as the perceived moral decay and the spread of diseases. This is where the legal situation tries to grasp and solve the problem. The South African Sexual Offences Act of 1957 (formerly named the Immorality Act) and the Criminal Law (Sexual Offences) Amendment Act 32 of 2007 are the two legal bodies criminalising sex work. Lacking clear definitions at several instances and applying a highly moralised language the relevant sections criminalise keeping a brothel (sc. 2), procurement (sc. 10), detention for purposes of unlawful intercourse (sc. 12), assisting sex work (sc. 12A), enticing to commission of immoral acts (sc. 19), persons living off the earnings of sex work (prostitution) or assisting in selling indecent acts (sc. 20) (CALs 2007, 16) as well as “unlawful carnal intercourse for reward” (Sexual Offences Act, 1957). The prescribed penalties are imprisonment for up to three years and/or a fine of up to R6000 (sc. 22).

The parliament in this discursive move uses techniques of distancing and blaming of the actual victim in order to justify the criminal status of sex workers. They are being portrayed as a deviant, marginalised part of society from which the rest of society needs protection. As the perpetrators of crimes, sex workers become subjects of criminal law and are punishable there under.

The organisation SWEAT in turn uses a discourse about labour rights and the freedom of trade as well as the rights to privacy and equality as they are all enshrined in the South African Constitution in order to challenge this criminalisation, practically and rhetorically.

It is acknowledged that sex work does in cases come with unfavourable to exploitative labour conditions: “Indeed, where the working conditions in the indoor sector are extremely exploitative they differ little from the exploitative conditions that trafficking victims are subjected to” (Fick, Gould 2007, 15). But rather than leaving it with that it is frequently pointed out that

“[d]ue to the nature of their work sex workers are also vulnerable to exploitative labour practices when they work at agencies. Even if they do have a contract with their employer, these contracts cannot be enforced. Some of the exploitative practices that sex workers experience include being fined, being forced by agencies to work long hours or not being allowed to leave the premises” (Fick 2005, 9; see also Fick, Gould 2007, 23).

The argument that sex work is inevitably the result of coercion is simply refuted by the finding that “only one respondent of 28 said they were being forced to sell sex” (Fick, Gould 2007, 18). Although not being a representative number, this indicates a low level of forced prostitution in the respective research project – a finding that has been confirmed elsewhere (see for example Fick, Gould 2008, 131ff).

In addition to that SWEAT criticises that “[...] legally prohibiting sex work infringes on people's fundamental right to earn a living” (Fick 2005, 6). With that line of thought the organisation addresses not only sex workers, whose right is infringed, but also the society in general, whose right is potentially or as a matter of principle infringed, even though they might not want to make use of it with regards to becoming a sex worker. It thus addresses the potential of state intervention and restriction of people's lives that has been so rejected after Apartheid. This point serves to normalise the former statements by making them an

issue that affects every South African rather than only the socially marginalised group of sex workers.

SWEAT's deliberations around the right to privacy are interesting because they do not actually pivot on what is enshrined in the Bill of Rights as the right to privacy:

“Everyone has the right to privacy, which includes the right not to have
 (a) their person or home searched;
 (b) their property searched;
 (c) their possessions seized; or
 (d) the privacy of their communications infringed” (Art. 14).

In contrast to those provisions, SWEAT argued that the criminalisation of sex work is an infringement on sex workers' privacy as it intervenes in one of the most personal conducts: sexual intercourse. It furthermore argued that the Sexual Offences Amendment Act of 2007 criminalising prostitutes' clients perpetuates this rights violation beyond the sex work industry: “This has implications for the large numbers of people in South Africa who engage in transactional sex (exchanging sex for food or a place to stay)” (Fick 2007, 36). The argument is made that the new provisions enable the state to intervene in any sexual interaction that is rewarded in some way or another even though it is consensual sex between adults. Thus the privacy of many South African citizens might be affected in a negative way.

The organisation's publications furthermore point out that discrimination plays an important role as a problem imposed on sex workers by the state's discriminatory attitude and legislation on the subject. In comparison to other countries' legislation on sex work, SWEAT states that “prostitution laws and law enforcement practice typically discriminate against prostitutes” (Fick, Gould 2007, 24).

SWEAT's demand for the rule of law

One of the problems SWEAT emphasizes most is the absence of the rule of law when it comes to handling sex workers in South Africa.

Whilst parliament uses legalism and legalistic terms to show that the crime of sex work requires punishment, it fails to acknowledge that many of the problems and concerns expressed by sex workers and organisations representing them are brought about by the failure to implement the rule of law.

With regards to this neglect SWEAT again points out a number of human rights violations that only occur because sex workers' human rights are not respected by the police as a representative of the state. Mostly criticised here is the frequently violent police conduct.

Firstly, the right to equality, which includes the right to equal treatment before the law and by the state (Constitution of South Africa, Art. 9), is being severely violated. Assuming that sexual orientation can be defined broadly enough to include sexual identity, sex workers, who live their sexuality in a way that they make money with it and put it for sale, can be considered a sexual minority. Within this definition, the state and police practice in South Africa discriminates against sex workers in various ways. For example, “[in] three cases the police refused to help, simply because they knew that the person making the complaint was a sex worker” (Fick 2006, 16). Another example is that female identifying transgender sex workers are being kept in cells with male prisoners which are in turn encouraged to rape them. This not only constitutes a violation of the bodily integrity of these sex workers, but also discrimination based on gender.

Secondly, SWEAT emphasizes the role police conduct plays in violating sex workers' right to freedom of the person and bodily integrity. This is far more often pointed out than the violence and human rights violations prostitutes experience at the hands of pimps or clients. Although “[n]ot all sex workers had negative perceptions of the police” (Fick, Gould 2008, 58), a “survey found that 47 percent of them have been threatened with violence by police,

12 percent have been forced to have sex with police officers (i.e. raped), and 28 percent of sex workers been asked for sex by policemen in exchange for release from custody” (Fick, Gould 2008, 55). Conduct of this kind implies that the sex workers' right to security and safety is violated by the police in numerous ways: they are deprived of their freedom arbitrarily; they are exposed to violence, treated in an inhumane way and deprived of the control over their body.

Whilst there is an understanding that sex workers also experience violence from clients and procurers, the “experience at SWEAT indicated that the highest level of violence against sex workers come from the police and law enforcement sectors” (Fick 2005, 8). Thus there are clear indications for a brutalisation of the relationship between sex workers and the police as agents of the state.

Closely linked to the above human rights violations is the fact that sex workers often cannot enjoy their right to just administrative action and the rights of arrested, detained and accused persons. They provide that “1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair [...]” (Bill of Rights, Art. 33) and that “1. who is arrested for allegedly committing an offence has the right [...] (d) to be brought before a court as soon as reasonably possible [...], (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and (f) to be released from detention if the interests of justice permit, subject to reasonable conditions” (Bill of Rights, Art. 35). SWEAT postulates an image of the government as permanently failing to provide services, let alone just and lawful administrative action, to sex workers. Firstly, there is the concern that police does not take serious and help sex workers who for example report having been raped (Fick, Gould 2007, 18). Thus a general feeling of discomfort about interaction with the police emerged amongst sex workers and a belief that they will not be assisted even though their report to the police might be unrelated to their work.

Secondly, there is the practice of frequent arrests without trial that has become a severe problem for people in the sex work industry. As SWEAT reports, “[m]ost had been arrested three times [within the month prior to the survey]” (Fick, Gould 2008, 59). Furthermore “[s]ex workers are often held for 48 hours and then released without seeing a magistrate or they are fined arbitrary amounts for these offences” (Fick 2005, 8).

A third problem is the treatment sex workers are being exposed to when in police custody. They are “often refused permission to make a phone call and let their families know where they are. SWEAT has had reports of people being refused medical treatment for burn wounds and dislocated shoulder while in police custody” (Fick 2005, 51; see also Fick 2006, 15). Another example of the maltreatment at the hands of the police is the abandonment of arrested sex workers in remote areas – often enough after asking for sex or money in exchange for being released – by police officers (Fick 2006, 15).

These extensive elaborations on police conduct show that there are several levels on which the rights of sex workers are infringed in police custody. Either the arrest is per se unlawful or the treatment sex workers experience when in police custody is inhumane, degrading and consequently unlawful.

Fourthly, SWEAT refers to the freedom of movement as one of the basic rights being violated. It states that “[...] allegations relating to the restriction of movement of South African sex workers and extreme exploitation were also gathered during the qualitative interviews” (Fick, Gould 2007, 20), although – at another point – it points out the rarity of such incidents.

Again the organisation's main focuses in this regard are the government and the police. According to them, sex workers have frequently reported to feel limited in their freedom of movement due to their fear of police harassment and arrests: “19 percent of sex workers have had to change the place where they work due to police harassment” (Fick, Gould 2008, 55). Others “spoke of similar experiences of feeling trapped in their homes, unable to go to the shop or to buy daily necessities without the threat of being arrested” (Fick 2005, 51; see

also Fick 2006, 14). It is thus indicated that the restriction of movement that is initiated by the police practice of arbitrary arrests and harassment does not only affect prostitutes when they are out in the streets for work, but amounts to them feeling permanently inhibited even in their free-time and with regards to matters that are not related to their work.

The numerous examples used by the organisation give their allegations a rather personal touch. By using the method of narrativisation, the authors aim at enabling the reader to identify with the victims or at least be able to see them as victims of police violence rather than perpetrators of sexual crimes.

The previous chapters' analysis can be summarised schematically as follows:

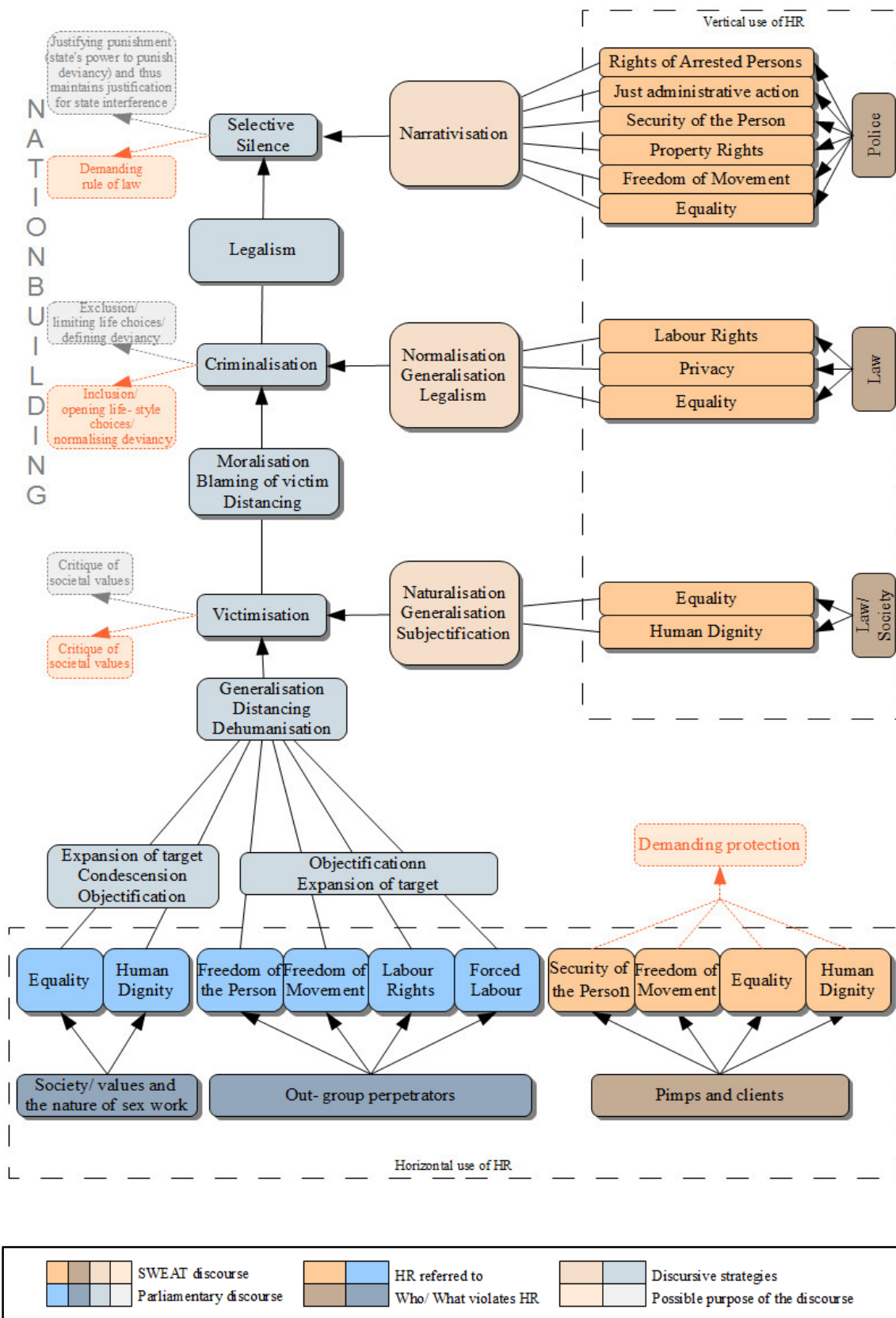


Abbildung 1: Summary Analysis of SWEAT's and parliamentary discourse

Conclusions

The previous analysis has shown that different actors can refer to the very same human rights for very different purposes and thus draw very different conclusions of what sex work is and how sex workers need to be treated.

The South African parliament mainly uses human rights to justify the current criminalisation of sex workers. After taking into account that society and the values dominating it play a considerable role in the victimisation of sex workers, parliament applies a moralised discourse with references to human rights to delineate sex workers as an out-group. They are portrayed as a group of people that pursues a deviant form of sexuality. By claiming the right to sell their sexuality they become positioned at the margins of society and are thus not considered what is seen as a good South African citizen. In addition to that, parliament, in its discussions, turns a blind eye on the role the police, as a representative of the government, plays in the human rights violations sex workers experience.

The organisation SWEAT in turn uses a human rights language to challenge that very same criminalised status of sex workers in South Africa. It points out both the human rights violations by pimps and clients and the ones by the police and the legal situation.

Rather than marking sex workers as a marginalised out-group, SWEAT utilises human rights to position sex workers and their human rights issues at the midst of society. They refer to human rights abuses in a way many women can identify with. Furthermore, with regards to the active role the police play in those violations, it uses human rights to demand the rule of law when handling sex workers.

The organisation's researchers and authors use discursive strategies such as narrativisation, normalisation, subjectification or naturalisation to bring the problem closer to the 'average' citizen and make it understandable for and relevant to a broad sector of society. These strategies thus also serve to localise the human rights language, which can be a rather abstract one. Making these issues relevant to sex workers and every other member of society enables the organisation to draw more support and address this issue in society as well as towards relevant organisations fighting for human rights and especially sex workers' human rights, on a global scale.

The parliament in turn applies strategies like distancing, dehumanisation, legalism, objectification or condescension, in order to mark sex workers as an out-group who is, on the one hand, a victim of circumstances, violent clients and pimps and the like, and on the other hand blamed for social evils and its own situation.

Following the above analysis, human rights in this discourse can be seen as serving different functions on different levels.

On the level of morality and the individual, the parliamentary discourse marks what is acceptable and legitimate and what is not. Sexual deviance is thus being defined. SWEAT in turn attempts to normalise the perceivably deviant and tries to open up a new, different lifestyle, which ought to be possible, when human rights are to foster human self-determination.

With regards to the societal level, the parliamentary usage of a human rights language seems to demarcate who is part of South African society and thus the new nation, and who is not. SWEAT in turn uses the very same human rights to show that sex workers are part of the bigger society and that the abuses they endure are of concern to and can affect every other member of South African society, the perpetrator being the police or an abusive client.

On the level of the state as the governing body, parliament firstly makes use of human rights to justify criminalisation and the control of its citizens and their sexuality, whilst SWEAT makes the point for the protection and sexual freedom the state should guarantee its citizens. Secondly, human rights violations serve to justify state intervention in rather personal

matters. Taken to the more abstract level, state power and its legitimate power monopoly are being reasserted. SWEAT's discourse here seems to attempt to limit the potential for state intervention, whilst at the same time also reasserting the protectionist function of the state.

All in all human rights thus fulfil the following very different, almost opposing functions in the discourse surrounding sex work in South Africa: limitation vs. opening up of different life styles and moralities; exclusion vs. inclusion of certain members of society; criminalisation vs. legitimisation and normalisation of deviancy; extension vs. limitation of state intervention in personal affairs; demand for control vs. protection.

Further research needs to be done on other discourses in order to confirm these functions, but the above analysis indicates that human rights are an instrument for specific objectives, rather than an end in themselves.

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