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Lawyering on the Margins

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Lawyering on the Margins

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Lawyering on the Margins: How Lawyers are Becoming Important Tools for Advancing Health and Human Rights of the Most Marginalised

David Scamell, Tatyana Margolin and Constantin Cojocariu

In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment and fewer deaths. Not only is it unethical not to protect these groups; it makes no sense from a health perspective. It hurts all of us.

Ban Ki-Moon, UN Secretary General[1]

A drug user grabs a previously-used dirty syringe and quickly injects his dose as he sees a police officer approaching. A sex worker is threatened with pretrial detention and forced to perform sexual favours in order to avoid charges. A private house party is raided and the attendees, suspected of being same-sex attracted, are taken into custody, many beaten by police along the away. A trans[2] woman enters a clinic to get a sexual health test but is refused treatment and told to leave by the clinic's staff.

Drug users, sex workers and sexual and gender minorities[3] face unique challenges, yet they are all social groups that have been moved to the margins of the societies in which they live. Repressive laws, policies, practices and widespread stigma against personal drug use, sexual practices and identities that challenge hetero-normativity, and gender identities and expressions that do not conform to the male/female gender binary all derive from a moral conservatism that stands in opposition to the fundamental human rights principles of human autonomy and bodily integrity. Whilst moral conservatism is not directed exclusively at these groups, a common thread amongst them is that they are subjects of laws used explicitly as tools for marginalisation of certain orientations, identities and consistent behaviours in different societies across the world. In other words, drug users, sex workers and sexual and gender minorities are commonly deemed 'morally undesirable,' which is manifested through police reprisals and abuse from peers and social institutions, and often insurmountable structural barriers in accessing life-saving services.

Even though human rights protections are universal, drug users, sex workers and sexual and gender minorities are often prevented from asserting them. The criminalisation of drug use, sex work and same-sex behaviour, as well as the failure of many states to acknowledge the existence of trans identities, marginalises these groups within legal systems and significantly impacts their health and well-being. Research has shown that the unpredictable nature of police interventions leads members of marginalised groups to engage in risk-generating behaviour. For example, a drug user is more likely to reuse and share syringes if he or she fears a police raid, and sex workers are more likely to retreat to isolated areas if faced with the threat of police interference, are less likely to carry condoms and more likely to engage in rushed and unsafe sexual transactions.[4]

At the same time, the perceived absence of access to legal protection can leave drug users, sex workers and sexual and gender minorities more vulnerable to harassment and violence at the hands of police, clients, and general members of the public.[5] As a consequence, all four groups are at a significantly higher risk of being infected with HIV.[6] The relationship between repressive laws and the health of these populations is such that the UN's Global Commission on HIV and the Law recommended to member states that, in order to effectively address HIV, it is essential to decriminalise the possession of drugs for personal use, sex work, and sex between two persons of the same sex and enforce the right of trans people to have their affirmed gender recognised under law.[7]

However, rather than engage with these groups as members of society entitled to rights, too often governments dismiss their human rights obligations to drug users, sex workers and sexual minorities because they are 'criminals' before the law, or in the case of gender minorities, because they refuse to even properly acknowledge their legal existence. Marginalisation confounds this, by restricting access to the tools that individuals and groups need to challenge human rights violations. The theory that justice is blind does not match the reality of legal systems across the world, where prejudicial attitudes of judicial actors too often typecast drug users, sex workers, sexual and gender minorities as sick, perverse, deviant or lacking agency. Even progressive human rights actors and institutions are not immune. Despite the fact that these groups are subject to some of the most serious forms of human rights violations, most mainstream human rights organisations across the world have been slow in recognising the need to address these issues.

Justice For All?

An area where the marginalisation of drug users, sex workers and sexual and gender minorities within the justice system is most evident is in the lack of access for these groups to lawyers and legal advice, information and representation. Equipping members of marginalised groups with information about their basic rights and better yet, with a way to reach out to a lawyer or a paralegal who can quickly come to the scene of arrest or to the police station, or pursue a perpetrator to ensure that impunity for violence does not occur, can significantly improve their health outcomes. This is particularly true if the lawyer or paralegal is able to keep someone out of the criminal justice system altogether. Yet, too often, these groups go without legal advice and representation.

Deciding to work with drug users, advocating for the rights of sex workers or pursuing a legal career as a lawyer for sexual and gender minorities is usually not at the top of the list for those entering law school, not only because social justice lawyering as a whole is generally financially less rewarded and less valued within the legal fraternity, but also because law students are not immune to the stigma that exists around working with socially marginalised groups. For example, in Ukraine, a country with a high level of legal practitioners, most drug users never gain access to a lawyer;[8] and a 2008 report on human rights abuses experienced by sex workers in Kenya found that not one respondent surveyed had access to legal representation in court or whilst in prison.[9] But the problem is not limited to the absence of lawyers. Even in countries that do provide some type of free legal aid, these groups are amongst many populations that seek out such legal assistance and too often state-appointed lawyers, with heavy workloads, persuade their criminalised clients to accept unfavourable plea bargains so they do not have to 'deal' with them.[10] This contributes to the already deeply ingrained distrust of marginalised groups in the law and its representatives. At the same time, the entrenched historical, political and moral factors that have led to their marginalisation call for multi-faceted approaches from lawyers. Approaches that acknowledge the real-life individual experiences of drug users, sex workers and sexual and gender minorities, meet their clients 'where they are at', and at the same time, demonstrate a willingness to challenge the very laws and structures that perpetuate the cycle of criminalisation, stigma and marginalisation.

An Emerging Field of Social Justice Lawyering

While states continue to keep their legal systems at odds with marginalised groups, a new kind of lawyering has emerged, adopting these approaches in innovative and exciting ways. Lawyers in many parts of the world have been providing legal services and legal empowerment to sex workers, drug users and sexual and gender minorities for numerous years, however, very little recognition has been given to this work as a specific and unique field of public interest law. These lawyers are working towards social change for these groups, and believe that the law is an important means towards this end, rather than an end in itself. As increased attention is paid to challenging the criminalisation and marginalisation through the framework of human rights – for example, through the Global Commission on HIV and the Law, and as the concept of legal empowerment gains traction with the UN and other international bodies, there is a need to highlight the unique work being done by lawyers to empower these marginalised communities.

These lawyers are important not only for the practical results that they deliver to the population groups with which they work, such as getting someone out of pre-trial detention or suing the Ministry of Interior in order to stop unlawful police arrest of sex workers, but also for challenging and changing the existing power paradigm between marginalised groups and legal institutions. For an injection drug user whose life is penetrated with shame and rejection to have a lawyer stand up in court to fight for his or her right to treatment, to a fair trial, is a life-altering experience. This kind of legal empowerment can generate further positive transformations in the life of this particular person, encouraging him or her to seek treatment, for example, which may have been something that he or she was afraid of doing before. At the same time, the mere act of having lawyers defend them in court, appearing at pre-trial detention facilities and sitting across the table from government officials, 'speaks truth' to the power that has been used to try and keep drug users, sex workers and sexual and gender minorities on the margins.

Lawyering for the Marginalised Across the World

This edition of the Bulletin is dedicated to highlighting some leading examples of ways in which lawyers and marginalised communities in different regions and contexts have worked together to challenge human rights abuses experienced by drug users, sex workers and sexual and gender minorities.

In South Africa, a legacy of apartheid-era legal moralism is a highly criminalised sex industry that leaves sex workers across the country susceptible to disturbingly high levels of police and client abuse and harassment. Such violence creates structural barriers to vital health services and contributes to almost 20 per cent of new HIV infections being tied to sex work, in a country with the world's highest HIV burden.[11] In their article, David Scamell, Stacey-Leigh Manoek and Jennifer Williams (p.143) explain how the desire for greater social justice in South Africa that led to the development of one of the world's most progressive constitutions and democratic institutions that were bound by fundamental human rights principles, has created some space for sex workers, lawyers and other allies to fight back.

In the 2002 case of *S v Jordan and Others*[12] the Constitutional Court of South Africa found that the criminal laws relating to the selling of sex, owning and managing a brothel were not in violation of the new Constitution. In response, lawyers working with sex worker advocates have adopted a piecemeal approach to carving out rights for sex workers. Through a number of important cases, sex workers have fought to have their labour rights, right to due process, personal dignity and security recognised.

At the same time, lawyers have worked with the sex worker community to establish an innovative human rights defence programme that sees sex workers trained as paralegals, providing first-line legal support and documenting human rights abuses that are being used for further impact litigation and as part of a national campaign to decriminalise sex work.

Whilst the national contexts between South Africa and Canada differ, the experiences of sex workers in Vancouver's Downtown Eastside (DTES) are in many ways similar to those of their peers in Cape Town, Johannesburg and Durban. In an area with one of the highest levels of poverty, injecting drug use and concentrated HIV infections in North America, the force of repressive laws and police enforcement against sex work have been widely felt. In the late 1990s and early 2000s, serial killer Robert Pickton is believed to have murdered at least 49, and possibly more, women, most of them sex workers from the DTES. These murders and the untold other instances of violence against sex workers have occurred under the cloak of criminalisation that creates a culture where such human rights violations are carried out with impunity as sex workers are marginalised from the justice system that should be protecting them and are pushed away from the very health and social services that they need.

Darcie Bennett, Jill Chettiar, DJ Joe, Lisa Kerr, Sheryl Kiselbach, Katrina Pacey and Elin Sigurdson (p.110) illustrate how sex workers in the DTES have responded in a way that will have ramifications not only for themselves, but has increased the ability of other marginalised groups to access justice in Canada. As with South Africa, the emergence of a progressive Charter of Rights and Freedoms in Canada has spurred strategic impact litigation that has resulted in significant social change. Presented with a national parliament that was unprepared to take the step of removing the criminal laws that were literally costing lives in DTES and other parts of Canada, sex workers partnered with a progressive legal aid NGO to pursue a constitutional challenge. The case of *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society & Kiselbach*[13] provides an excellent illustration of the issues faced by highly marginalised groups in accessing justice through strategic litigation, with the unique strategies used by sex workers and their lawyers leading to a decision of the Supreme Court of Canada that has expanded the scope of legal standing to pursue challenges under the Charter.

Lack of an independent judiciary in Russia makes domestic courts an unlikely venue for social and political change, and activists have turned to international bodies, such as the European Court of Human Rights and the Human Rights Committee, to challenge the government's campaign of misinformation against science-based drug treatment. The country's HIV/AIDS epidemic has pushed people who use drugs to the utmost margins of society. The epidemic, one of the fastest-growing in the world, was originally driven by injection drug use, but due to the government's inaction, it is on its way to becoming generalised. Life-saving opioid substitution treatment (OST), an intervention that has been recognised as key in battling the spread of HIV transmission among drug users, is banned. To justify this irrational ban, the Russian government has been waging a campaign of misinformation about this form of treatment, keeping the general public from accessing scientific evidence of its effectiveness.

In their article (p.138), Mikhail Golichenko and Tatyana Margolin argue that the government is in violation of its domestic and international obligations to provide the general public with access to essential information about this critical public health issue. Their critical analysis starkly contrasts statements of government officials with domestic and international legal norms, making a compelling case that lack of accurate information about OST is not only violating the public's right to know, but is also contributing to the continuing growth of the HIV epidemic.

Courts in Europe, as elsewhere in the world, have proven an important actor in advancing the human rights claims of gender minorities. Foremost amongst these is the European Court of Human Rights, which has the potential to influence law and policy throughout the 47 members of the Council of Europe, with a total population of 800 million people. In its landmark 2002 judgment *Christine Goodwin v the United Kingdom*,[14] the Court recognised unambiguously for the first time that transgender people had a right to change their personal documents in order to reflect their gender identity. This however was a qualified right, and the Court left states the freedom to make legal gender recognition subject to extraordinarily intrusive requirements such as forced medical treatment and forced divorce.

In his article (p.118), Constantin Cojocariu provides a fresh assessment of the European Court of Human Rights' jurisprudence on the right of transgender people to legal gender recognition. He explores the implications of these judgments and highlights certain tensions in the Court's discourse on transgender rights. In particular, on the one hand the Court loftily proclaims a fundamental right to gender self-determination, and on the other hand restricts access to the right to 'post-operative transsexuals' on grounds which are insufficiently explained.

Furthermore, the Court's pronouncements on transgender rights appear to be predicated on favourable circumstances in the country against the cases were brought in the first place, leaving the matter open as to the standards applicable in countries where transgender people are deprived of any legal protections. The Court is called to clarify these tensions and rebuild its transgender jurisprudence on a sounder doctrinal base, that is more consistent with the values of human dignity and personal autonomy underpinning the European Convention on Human Rights.

An increasingly bright spotlight is being shone on the routine human rights violations committed against drug users, sex workers and sexual and gender minorities. These marginalised communities are organising at the local, national, regional and international level to challenge the moral conservatism that lies at the source of their oppression. Whilst the path to progress is by no means a linear one – witness the rise of anti-gay laws in some former Soviet Union countries – there is reason to believe that the systemic laws, policies and practices used to socially exclude these groups will be increasingly called into question.

Lawyers with a strong commitment to human rights and social justice have a vital role to play in this process. As either a member themselves of these communities, or an ally, lawyers can open access to a justice system designed to exclude and break down legal and social barriers that perpetuate discrimination and stigma. Lawyering on the margins, they can be strategic tools in important movements for change.

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1 UN Secretary General, SG/SM/11727/AIDS/142, Speech to the International AIDS Conference, Mexico City, 3 August 2008.

2 Trans is an umbrella term used by many people who do not identify with their assigned sex; frequently understood to include both transgender and transsexual people (those who have or wish to medically transition from one sex to another).

3 Sexual minorities refers to people whose sexual orientation, identity or behavior differs from the majority within their society, which is predominately heterosexual. Gender minorities refers to people whose gender identity or expression does not conform to society's dominant gender roles, based on the male/female binary. Lesbian, gay and bisexual (LGB) are considered sexual minorities, and trans (t) people are considered gender minorities, however LGBT is not a term that is universally used by people belonging to sexual and gender minority groups.

4 Wolfe, D., Cohen, J., Doyle, H. and Margolin, T., 'Breaking the links: legal and paralegal assistance to reduce health risks of police and pre-trial detention of sex workers and people who use drugs.' in Somner, M., Parker, R. (eds.) (2013) *Structural Approaches to Public Health*, Routledge, New York.

5 For example, a 2010 survey of men who have sex with men (MSM) in Kampala, Uganda found that 37 per cent of respondents had been subject to physical abuse during their lifetime. Source: Roehr, B. 'Closeted Calamity: The Hidden HIV Epidemic of Men Who Have Sex with Men', *Scientific American*, 25 August 2010.

6 According to UNAIDS, female sex workers are 13.5 times more likely to be living with HIV than are other women; the prevalence of HIV infection among men who have sex with men in surveys in capital cities is on average 13 times higher than that in the country's general population; the prevalence of HIV infection is at least 22 times higher among people who inject drugs than for the population as a whole in 49 countries with available data; and, the limited data that is available indicates that trans people are at significantly higher risk of HIV infection than the general population. Source: *Global Report: UNAIDS Report on the Global AIDS Epidemic*, 2012, Joint United Nations Programme on HIV/AIDS (UNAIDS), Geneva.

7 Global Commission on HIV and the Law (2012), *Risks, rights & health*, United Nations Development Programme, New York.

8 Open Society Institute Public Health Program (2008), *Tipping the Balance: Balance: Why Legal Services Are Essential to Health Care for Drug Users in Ukraine*, Open Society Institute, New York, http://www.opensocietyfoundations.org/sites/default/files/tippingthebalance.pdf [accessed 8 June 2013].

9 Federation of Women Lawyers Kenya (2008), *Documenting Human Rights Violations of Sex Workers in Kenya*, FIDA Kenya, Nairobi.

10 Lev Levinson's proposal to OSF, on file with the authors.

11 SACEMA (2009), *The Modes of Transmission of HIV in South Africa - An HIV incidence modelling components of the South African Know Your Epidemic: Know Your Response synthesis*, South African Centre for Epidemiological Modelling and Analysis (SACEMA) and the University of the Witwatersrand, Johannesburg.

12 2002 (6) SA 642.

13 2012 SCC 45 (CanLII).

14 Application No. 28957/95.

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Sex Workers United Against Violence and Kiselbach v Canada: An Innovative Approach to Strategic Litigation on Behalf of Marginalised Communities

Darcie Bennett, Jill Chettiar, DJ Joe, Lisa Kerr,
Sheryl Kiselbach, Katrina Pacey and Elin Sigurdson

Strategic litigation is an important tactic for movements in Canada that seek to advance social justice and defend human rights. With the enactment of the Canadian Charter of Rights and Freedoms[1] (the Charter) thirty years ago, certain fundamental rights became entrenched in Canada's Constitution, significantly expanding the social change potential of litigation. By articulating these fundamental rights and protections, the Charter places important limits on government powers. Hand in hand with these limits, the enactment of the Charter enhanced the power of the judiciary by empowering courts to strike down laws that violate a person's rights or to order government to take remedial actions.

Canadian Charter litigation has resulted in systemic legal changes on a number of key social justice issues such as same sex marriage,[2] drug policy reform[3] and women's reproductive rights.[4] However, this type of litigation is not without its challenges, which are explored in this paper through an examination of the case of *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society & Kiselbach*.[5] This paper tells the story of two plaintiffs and their tireless fight for justice for sex workers. The experience of the Downtown Eastside Sex Workers United Against Violence Society (SWUAV) and Sheryl Kiselbach provides insight into the role of Charter litigation in the fight for sex workers' rights in Canada. It also demonstrates the significant barriers that marginalised groups face in order to litigate their human rights claims. This paper will outline the creative and courageous ways that SWUAV and Kiselbach overcame those barriers, ultimately leading to a change in the legal landscape that has increased access to justice for other marginalised groups in Canada.

The Fight for Sex Workers Rights in Canada

In Canada, sex workers experience alarming rates of violence, abuse, social exclusion and discrimination. The Downtown Eastside neighbourhood of Vancouver has received particular attention, on both the national and international level, because over 60 street-based sex workers have disappeared from that neighbourhood over the course of the past several decades. This reality of missing and murdered women is not unique to Vancouver; it is a tragic reality in urban and rural communities across the country. The scale of these horrific events in Vancouver have, however, brought a number of issues into focus, including the dangerous working conditions faced by street-based sex workers and the failure of the police and criminal justice system to effectively respond to crimes against them. In comparison, indoor sex work has proven to be a much safer setting in terms of reduced levels of violence, but significant barriers remain in terms of access to employment protections, human rights and other supports that are available to other workers and communities.

The harms faced by sex workers can be attributed, in large part, to the impacts of the criminal laws that prohibit various aspects of adult sex work. While the exchange of sexual services for compensation is a legal activity in Canada, the criminal law prohibits many of the activities that relate to prostitution, such as communication in public, working indoors and working with or for others. An extensive body of research identifies how these laws create conditions that are conducive to violence, stigma and discrimination.[6] Based on these findings, a robust movement for the decriminalisation of adult sex work has emerged, with sex workers at the forefront of the movement, supported by human rights advocates and lawyers, women's organisations and public health experts, all of whom call on Canada to take an evidence and human rights-based approach to regulation of sex work.

Canada's sex workers' rights movement has employed a range of political and public education strategies to urge the federal government to shift Canada's legal framework away from criminal prohibition towards laws that recognise sex work as a labour issue. However, despite the compelling body of evidence demonstrating the necessity of decriminalisation to support sex worker safety, there has been no willingness on the part of the Canadian government to create this legal change.

The lack of political will to support decriminalisation became particularly evident when the government of Canada released the 2006 report, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*.[7] This report was the result of a three-year research and consultation initiative that examined the impact of Canada's criminal laws relating to prostitution. The Parliamentary Subcommittee on Solicitation Laws reviewed the relevant academic and community-based research and heard testimony from approximately 300 witnesses at public and private hearings and meetings across Canada. Despite extensive evidence and consistent recommendations from sex workers, academics, legal and human rights experts urging the Subcommittee to recommend full decriminalisation of adult sex work, the Subcommittee's final report failed to do so.

In fact, the report provided little direction for Canadian law and policy-makers, instead making the following broad statement: 'The Subcommittee recommends that the Government of Canada recognize that the status quo with respect to Canada's laws dealing with prostitution is unacceptable, and that the laws that exist are unequally applied.'[8] Three of the four political parties represented on the Subcommittee went slightly further by agreeing that sex work is a public health issue, as opposed to a criminal laws issue. Nevertheless, the report was deeply disappointing for sex workers and human rights advocates who had invested enormous time, resources and hope in the parliamentary process. Therefore, sex workers and allies across Canada began to look for other means to challenge the laws that criminalise sex work.

Sex Workers Unite Against Violence

In 2003, at the same time as the Subcommittee on Solicitation Laws was announced, sex workers from Vancouver's Downtown Eastside began to collaborate with lawyers, activists and law students working with a local human rights organisation, Pivot Legal Society,[9] to launch a campaign for human rights for sex workers. At that time Pivot did not have an established campaign in this area, nor did it have a position on the impact of the laws relating to prostitution. The organisation looked to sex workers to direct the development of the organisation's campaign goals and strategy. This collaboration resulted in a major report calling for the decriminalisation of sex work in Canada. *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws*[10] made a series of recommendations for legal and social reforms. The recommendations were based on a novel methodology for identifying the key issues: the collection of the legally sworn statements from 94 sex workers in the Downtown Eastside, who described their lived experience under Canada's criminal laws and their perspectives on law reform.

The *Voices for Dignity* project had a number of advocacy goals. First, the project aimed to document sex workers' experiences under Canada's prostitution laws and develop an evidence and human rights-based position on law reform. The 94 affidavits provided a strong body of evidence that pointed to the urgent need for Canada to repeal four sections of the Criminal Code that relate to adult prostitution. The second objective was to produce a constitutional analysis of the laws that could be submitted to government. The *Voices for Dignity* report included a constitutional analysis which concluded that Canada's prostitution laws violate sex workers' constitutionally-protected right to life, liberty, security of the person, equality, expression and association. Through political advocacy and public education efforts following the report's release, *Voices for Dignity* effectively put the government on notice: that it was Pivot's opinion, grounded in the evidence of almost 100 sex workers, that Canada's prostitution laws violate the constitutional rights of sex workers and that these laws would not and should not withstand a challenge in the courts. The hope was that this would motivate the federal government to use its legislative powers to reform these harmful laws.

An important outcome of this process was the deep connection that emerged among sex workers who participated in the project and shared a commitment to activism. Once the *Voices for Dignity* report was launched in 2004 and that stage of the project had concluded, sex workers began discussing ways to continue to work together towards legal and social reforms that would improve the circumstances of sex workers in the neighbourhood and across the country. In 2005, they formed the 'Sex Workers Action Group'. The group's membership and leadership was composed entirely of current and former sex workers who live and/or work in the Downtown Eastside and who were interested in fighting for sex workers' rights. The Sex Worker Action Group distinguished their mandate from other Vancouver sex worker organisations in that their purpose was to create social change and engage in social activism, as opposed to a focus on service-delivery or client support.

In 2007, the Sex Worker Action Group incorporated as a non-profit society, and renamed themselves as the Downtown Eastside Sex Workers United Against Violence Society (SWUAV). From its inception, SWUAV was guided by two key principles: first, that the group should be 'by and for' current and former sex workers; and second, that the organisation's mandate was to improve the living and working conditions of current and former sex workers by engaging in activism and campaigns for social change. SWUAV's constitution sets out the organisation's objectives as follows:

- to improve working conditions for women working in the sex trade;
- to work toward better health and safety for women working in the sex trade;
- to work for systemic change that will improve the lives of women working in the sex trade, with a focus on street level sex workers;
- to work against all forms of violence against sex workers; to work against poverty, with the understanding that poverty is a driving force in many women's entry in the sex trade;
- to work against racism, sexism,

homophobia, transphobia and other forms or oppression that are major factors in creating dangerous and violent working conditions for women working in the sex trade;

- to create an organisation that is driven by the needs of street level sex workers, that incorporates their vision into all aspects of the organisation's work, and creates structures that are accessible to street level sex workers; to create structures and processes that work to empower sex workers by providing them with agency and a political voice; and

- to use the political voice of the organisation to lobby for policy and law change that will improve the lives and working conditions of women working in the sex trade.

All of SWUAV's members and directors are women who are currently or formerly engaged in sex work. Given the organisation's location in the Downtown Eastside of Vancouver, the women who get involved in the organisation are women who live with poverty, homelessness, addiction and mental and/or physical health issues. The majority of SWUAV's membership is of First Nations ancestry. All SWUAV members describe having experienced violence at some point in their lives. Women are invited to become members through information distributed in the neighbourhood and through word of mouth. SWUAV is committed to accessibility and does not maintain a formal membership list in order to ensure the confidentiality of its members.

Since it was founded in 2005, hundreds of women have been involved in SWUAV. There are many reasons for the organisation's effectiveness in connecting with extremely marginalised sex workers. The group maintains a structure with very low barriers to participation, meaning that SWUAV accepts women no matter where they are in their lives, and allows them to engage with the activities of the organisation as much or as little as they feel able to. SWUAV also maintains a climate of respect and dignity, ensuring that members feel heard, valued and empowered. Furthermore, SWUAV directors have remained committed to the social change purpose of the organisation, providing sex workers who are facing incredibly difficult circumstances in their lives with a space where they are empowered to make a difference in the world around them.

SWUAV's Fight for Justice

During the first two years of its existence, SWUAV's efforts were primarily focussed in two areas: movement building and political advocacy. The organisation spent its first few years engaging women from the community, inviting them to get involved with the organisation and building capacity among its members and directors. The members also continued to work closely with Pivot on political advocacy efforts, engaging with government through the Subcommittee on Solicitation Laws and encouraging government to carry out legislative and social reforms that would advance sex workers' rights and safety.

Like other sex worker organisations across the country, when the Subcommittee on Solicitation Laws failed to recommend decriminalisation in its final report, SWUAV lost faith in the potential for government to initiate these necessary legal reforms. Therefore, SWUAV members decided to take this issue out of the political realm and into the courts where evidence and human rights-based decision making was more likely to occur. SWUAV realised that where political action fails, litigation becomes the best option for enforcement of constitutional protections.

In 2007, SWUAV retained Pivot as their legal counsel and commenced a Charter challenge to Canada's prostitution laws. The legal challenge targeted four provisions of the Criminal Code of Canada:

- s 213 which prohibits communication in public for the purpose of engaging in prostitution;

- ss 210 and 211 which prohibit being found in, occupying, keeping or transporting a person to a common bawdy house;

- the aspects of s 212 that prohibit procuring persons over the age of 18 and living on the avails of adult prostitution.[11]

The claim alleges that the prostitution laws prohibit sex workers from taking a range of steps that would significantly improve their safety, such as working indoors, working collectively, having clear negotiations with clients and accessing police protection. As a result, the laws violate sex workers' right to life, liberty, security, equality, and freedom of expression and association.[12]

In order to initiate this legal action, SWUAV made the decision to name the organisation as a single plaintiff, as opposed to naming one or more SWUAV members as plaintiffs. This decision was necessary for several reasons. SWUAV was motivated to ensure that street-based sex workers – the membership of SWUAV – would drive this litigation so that it would accurately and effectively reflect the experiences of this criminalised and marginalised community of women. They were also aware of the risks and challenges of litigation, and decided that they would not proceed in a way that could increase the vulnerability of their members. Litigating the issue through a collective plaintiff was the best way to meet both of these goals. As it turned out, the decision to proceed with SWUAV as a named plaintiff would influence the course of this litigation for the next five years in an unanticipated way. This detour would result in a significant victory that altered the common law rules that determine access to Canadian courts by groups like SWUAV.

For SWUAV members, the decision to start the litigation as an organisation was both a strategic choice and one that was necessary to minimise the risks of litigation on those most affected by the laws under challenge. The court system in Canada is a highly public process with limited privacy protections or supports for litigants. For the members of SWUAV, and for sex workers in general, being public about involvement in this type of work can have severe consequences. Sex workers may face alienation and discrimination by friends, family and society at large. They could face eviction from their home or workspace or the loss of access to social assistance. They could lose custody or access to their children. They could face increased discrimination by police, the medical system and other social programmes. They could lose clientele and even face increased vulnerability to violence and abuse if their working conditions were destabilised. In light of these risks, individual sex workers were unable to come forward as individual litigants. SWUAV, however, is an entity that provided its members a chance to be involved in this important and complex litigation in a meaningful way, while also being able to offer them privacy protections through the anonymity provided to SWUAV members.

A further reason that SWUAV put itself forward as the plaintiff was related to the stress and strain involved for a plaintiff in this type of complex and controversial litigation. The case would require on-going and long-term engagement with counsel, and the ability to endure a lengthy trial and various levels of appeal that could carry on for five to ten years. For SWUAV members who face poverty, violent working conditions, significant health issues and unstable living situations, this level and length of commitment was impossible to take on individually. However, SWUAV provided a stable and consistent entity that could endure the pressures of litigation. SWUAV could ensure consistent contact with legal counsel and could provide the stability required for its members to engage fully with the litigation while also providing necessary flexibility and privacy to the women it represents.

SWUAV members also provide very important support to one another throughout this complex, controversial and emotionally difficult process. For the members of SWUAV, this litigation is not an academic or theoretical exercise. It is a matter of life and death. Given the dangerous situation created by the criminal laws, members of SWUAV are aware that every time that they go out to work could be their last, making it extremely important to provide emotional support throughout any process that touches on the reality of their lives.

The Lawyer-Client Relationship

Working with any corporate or organisational client can present challenges for counsel who must represent the interests of a group of people, as opposed to a single individual. Given that more than 200 sex workers are involved with SWUAV, it was important for Pivot to think carefully about the lawyer-client relationship, and particularly how the group would make decisions and instruct counsel. Katrina Pacey, as lead counsel and a long-time collaborator with SWUAV, recommended that the organisation delegate responsibility for instructing counsel to a 'litigation committee.' The committee would be empowered to meet regularly with counsel, provide instructions to counsel and present regular updates and reports to the broader membership.

This was a successful model in several respects. It enabled counsel to maintain steady communications. When working with very marginalised communities, ensuring consistent communication can be a challenge. Most SWUAV members do not have telephones, email or stable housing, so it is essential that counsel find a reliable way to communicate with the client so they can direct the litigation. The litigation committee provided a consistent group of women who were up to date on the litigation process and who were designated to make decisions on behalf the larger group, which provided both consistency and flexibility. Further, if particular members were experiencing health or other personal struggles and were unable to participate actively, there would always be other committee members that were available to instruct counsel.

The members of the litigation committee were also very effective in empowering each other throughout the litigation, and ensured that information was obtained and shared from both sides of the relationship. Committee members felt comfortable asking questions of counsel to ensure that they understood the legal issues, counsel's recommendations and the nature of the decisions they were being asked to make. This was a very important aspect of the lawyer-client relationship given the complexity of the issues and the importance that SWUAV was empowered to make fully informed decisions and to feel completely in charge of the process.

Pivot and SWUAV agreed that all legal representation would be on a *pro bono* basis (free of charge) and that Pivot would raise funds to cover litigation-related expenses. This agreement was vital to SWUAV's ability to pursue the case, given the organisation's very limited funding and the extensive legal and other resources that go into making this type of litigation possible. Pivot assigned Katrina Pacey as lead counsel on the case. Katrina then recruited a team of skilled and committed lawyers in private practice in Vancouver. As the litigation progressed, it became clear that this dedicated team of *pro bono* lawyers would be key to the success of this lengthy litigation. The case demanded thousands of hours of preparation and court time as they navigated complex and varied legal issues.

The Fight for Access to Justice

After much preparation and deliberation, SWUAV's action was filed in August 2007. It was not long before counsel received a letter from the government stating their position that SWUAV did not have 'standing', which means the legal right to bring an action before the courts. The government stated that in order to have standing, the plaintiff must be at risk of arrest or prosecution, or directly affected by the laws that are being challenged. It was the government's position that this type of constitutional challenge to legislation must either occur as part of a criminal prosecution or in a civil action where an individual active sex worker is named as the plaintiff.

Eager to avoid a battle over the procedural issue of standing, SWUAV and counsel attempted to satisfy the government that the litigation should proceed in this manner. They wrote a letter outlining the many barriers faced by members of SWUAV to initiating a legal claim. This proved unpersuasive. SWUAV and counsel also revisited the question of whether an individual active sex worker could be added to the claim. After many conversations with potential plaintiffs, the same challenges arose – how could an active sex worker, already facing criminalisation and various other vulnerabilities, take on the additional risks and burdens of major, complex and controversial litigation?

Fortunately, Pivot was connected with Sheryl Kiselbach, an activist, outreach worker and former sex worker in Vancouver. Before moving into her current position as an outreach worker, Kiselbach worked for 30 years in various aspects of the industry including on the streets of Vancouver. Her political goals were aligned with SWUAV, in that she was committed to the fight for decriminalisation and believed that street-based workers, who are the most intensely criminalised and suffer the most egregious violence, should drive the litigation. In early 2008, Kiselbach was added as a second plaintiff to the legal action. However, this did not convince the government to change their position on standing. The government maintained that, despite 30 years of involvement in sex work, including experiencing horrendous violence and criminal convictions for prostitution-related offences, the laws at issue in the litigation no longer affected Kiselbach. They took the view that the addition of Kiselbach, a former sex worker, as a plaintiff did not resolve the standing issue because she was not at risk of arrest and conviction for a prostitution-related offence.

On 17 September 2008, just five months before SWUAV and Kiselbach's trial was scheduled to begin, the government filed a motion to strike out the case on the basis that the plaintiffs lacked standing. If the court were to agree with the government and dismiss the claim, that motion would bring the case to an end.

The Law of Standing in Canada

Standing is an important aspect of Canadian law, aimed at ensuring that courts do not become overburdened with marginal or redundant cases, and that courts have the benefit of hearing from those most directly affected by the laws or government action.[13] The law of standing, acting as a gatekeeper to the courts, must also accord with access to justice principles so that the courts can fulfil their proper role within our democratic system of government, upholding our constitution.

There are two types of standing: private interest and public interest standing. Private interest standing is granted in case where a plaintiff's rights are directly engaged and where a court decision will have a direct effect on the plaintiff that has brought the claim. The alternative is public interest standing, which can be granted in cases where issues of public importance are raised, but the impugned laws do not directly affect the plaintiff. The idea of public interest standing is to ensure that laws are not immunised from judicial review because a privately affected plaintiff is unlikely to come forward with a case. At the time the government brought the motion to strike the SWUAV/Kiselbach claim, the leading decision on public interest standing set out a three-part test:

First, is there a serious issue raised as to the invalidity of legislation in question?

Second, does the plaintiff have a genuine interest in the validity of the legislation?

Third, is there another reasonable and effective way to bring the issue before the court?[14]

The government's position was that neither plaintiff was entitled to private or public interest standing. With respect to public interest standing, which became the central point of contention, the government argued that neither plaintiff satisfied the third part of the test, saying that there were multiple 'reasonable and effective ways' that this claim could be brought before the courts by individuals with private standing. It was this third branch of the test that became the central issue in this litigation, and the aspect of the test that would eventually be reformulated to improve access to justice for SWUAV, Kiselbach and other marginalised litigants in Canada.

The British Columbia Supreme Court

In October 2008, Justice Ehrcke of the British Columbia Supreme Court heard the government's motion. In advance of the hearing, both parties filed affidavit evidence in support of their positions. The government's evidence was aimed at proving four main points regarding other ways the SWUAV/Kiselbach claim could be brought. First, the government argued that a constitutional challenge of this sort could be brought in the context of a criminal trial. The government pointed to cases where accused persons, faced with criminal charges for prostitution-related offences, brought constitutional challenges to various sections of the Criminal Code.

Second, the government pointed to the case of *Bedford v Canada*,[15] which was underway in Ontario. This litigation was highlighted for two reasons: first, the *Bedford* case raised some of the same legal issues as the SWUAV/Kiselbach litigation, and second, an active sex worker had come forward as a plaintiff in that case. The government argued that the *Bedford* case demonstrated that an active sex worker could, in fact, come forward and initiate this type of constitutional claim, indicating the legislation would not be immune from challenge. Further, the government argued that an affidavit from a British Columbia sex worker had been filed in the *Bedford* case, and that this was proof that an active sex worker could be expected to come forward and engage openly in litigation of this sort. Finally, the government argued that public interest standing has been denied in a range of prior cases where the plaintiffs faced difficult circumstances, and that the court should do so in the SWUAV and Kiselbach case as well.

In response to the government's motion, counsel for SWUAV and Kiselbach filed evidence that there was no other reasonable and effective way for this claim to be brought by a directly affected sex worker. Their evidence included the 94 affidavits from street-based sex workers in the Downtown Eastside, collected for the *Voices for Dignity* report, outlining the very difficult circumstances of their lives and their desire for decriminalisation of their work. These affidavits, along with an accompanying paper previously written by Pivot about barriers to political participation faced by sex workers, illustrated the real and insurmountable barriers that prevent sex workers from being able to advance legal claims.

Counsel for SWUAV and Kiselbach also refuted the government's argument that this claim could be dealt with through a criminal proceeding. Criminal proceedings do not provide an opportunity to simultaneously challenge all of the provisions of the Criminal Code that relate to adult sex work, because the accused only has standing to challenge those sections under which they are charged. There had never been a case where most or all of the provisions of the Criminal Code that relate to adult sex work were at issue in a criminal trial. In the SWUAV and Kiselbach claim, the key issue was the intersecting effect of the provisions, alleging that the laws individually and collectively violate sex workers' constitutional rights.

Counsel for SWUAV and Kiselbach also argued that the Ontario litigation should not be a bar to granting public interest standing to the plaintiffs. First, the Ontario litigation was taking place in another province, and decisions by the courts in that province would not be binding in British Columbia. Second, the *Bedford* litigation did not challenge all of the laws at issue in the SWUAV and Kiselbach claim, nor did it raise the same constitutional questions.[16] Finally, counsel argued that the plaintiffs in this case brought a unique experience and perspective to this litigation, given their involvement in street-based sex work and the range of oppressions that impact their lives, which would not be represented by the differently-situated plaintiffs in the Ontario litigation.

With regards to the particular circumstances of Sheryl Kiselbach, counsel provided evidence about her past experience as a sex worker. In response to the government's claim that Kiselbach should have brought her Charter challenge when she was criminally charged, counsel pointed to the many reasons she was unable to do so at that time. The loss of privacy and her need to return to sex work as quickly as possible in order to maintain her income were her most pressing concerns and precluded her from being able to bring a challenge to the laws that harmed her. Kiselbach's evidence was clear that, at the time that she was facing criminal charges, she had to use whatever means to quickly resolve her legal issues because of the negative impact they were having on her life. Protracted Charter litigation was not a reasonable or plausible option while she was actively involved in the sex trade. Indeed, Kiselbach's evidence made clear that the government's claim about the potential for sex workers to bring a constitutional challenge in the course of a criminal prosecution were so unrealistic as to be rhetorical. Nor would it necessarily be 'effective', given the prosecution's power to stay a proceeding and make a piece of constitutional litigation disappear.

In December 2008, Justice Ehrcke rendered his decision, finding that neither plaintiff had standing to challenge the laws.[17] He largely accepted the government's submissions, dismissing SWUAV and Kiselbach's constitutional claim. The decision was devastating to the plaintiffs, who had fought hard for their day in court. These plaintiffs felt their expertise and experiences were erased by a system that failed to understand the reality of their lives and that denied their access to the court.

The British Columbia Court of Appeal

The following year, the plaintiffs successfully appealed the decision. The majority of the British Columbia Court of Appeal found that SWUAV and Kiselbach were entitled to public interest standing given the systemic and broad nature of their claim. The majority accepted that the claim could not be brought forward in any other reasonable and effective way. Writing for the majority, Madame Justice Saunders held:

In this case I respectfully conclude the judge failed to give sufficient weight to the breadth of the constitutional challenge and the comprehensive and systemic nature of the plaintiffs' theory. The balance struck by the jurisprudence is between judicial economy and openness to court review of seriously challenged legislation. In my respectful view, the third criterion, considering the claim in total, is met and the balance tips toward access to court review of the impugned legislation.[18]

The government responded by appealing the decision to Canada's highest court, which would have the final word regarding the fate of this litigation and the scope of the law of standing in Canada.

The Supreme Court of Canada

In January 2012, the plaintiffs and their legal team boarded a plane to Ottawa to oppose the government's appeal. Nine justices of the Supreme Court of Canada (SCC) would decide the fate of SWUAV and Kiselbach's challenge to the prostitution laws. Unlike the courts below, the SCC would also have the opportunity to revisit the test for public interest standing that was established by the 1992 *Council of Churches* decision and decide whether the test should be amended in some way.

In their submissions, the government made the same points argued in the courts below, and argued SWUAV and Kiselbach could not meet the current test for public interest standing. Counsel for the plaintiffs, with the support of a range of intervener organisations supporting a better test for public interest standing, made two arguments. First, under the test for public interest standing as established by the *Council of Churches* decision, SWUAV and Kiselbach argued they should be granted public interest standing given that there is no other reasonable and effective way for their claim to make its way before the courts. In addition, counsel raised a further argument, stating that the SCC should revise the test for public interest standing so as to accord with principles of access to justice.

After a five-year battle over standing, it was clear to the plaintiffs and their counsel that the law regarding public interest standing was creating substantial barriers for public interest litigants with important and viable legal claims. The old test suggested that if there is an option whereby a private interest litigant *may* (hypothetically) come forward, that option should be preferred and public interest standing should be refused. The old test empowered government to regularly bring motions to strike in an attempt to thwart public interest litigation. Further, a formulaic and rigid application of the test did not allow for recognition of the efficacy and efficiency that is possible when plaintiffs such as SWUAV and Kiselbach are permitted to litigate systemic Charter claims.

Counsel for SWUAV and Kiselbach therefore suggested revising the language of the third branch of the existing test, which asked 'whether there is another reasonable and effective way to bring the issue before the court.' The plaintiffs suggested that the third branch of the test should, instead, ask whether the public interest litigant presents *a reasonable and effective way of bringing the issues to court.* Counsel argued that it should not matter whether there is another reasonable and effective way for the issues to be litigated (such as by a litigant with private interest standing), but the court should instead focus on the appropriateness of the plaintiff(s) that are currently before the court. Further, when applying this reformulated test, counsel for SWUAV and Kiselbach argued that the Court should consider a range of factors, including:

i) whether the case is public interest litigation;

ii) whether the plaintiff is a 'public interest litigant' or at least represents a significant sector of the public alleged to be affected by the impugned laws;

iii) whether the plaintiff represents a vulnerable group in economic, emotional or social terms;

iv) whether the impugned laws may detract from the ability of affected individuals to mount and sustain an individual legal challenge;

v) whether the litigation raises issues that are likely to deter individuals from advancing them, such as issues of an intimate, private, or stigmatised nature; and

vi) whether the litigation is systemic and/or raises a comprehensive challenge to legislation or state action.[19]

The plaintiffs argued that this reformulated test would provide better guidance to trial courts, which would endeavour to ensure that only reasonable and effective litigation moves forward, as is their role. This reformulation would remove the arbitrary preference for individual litigation in cases of broad systemic impact.

Nine months later, a large crowd of sex workers, lawyers, allies and media gathered at the Pivot office in Vancouver to receive the judgment. Tears and hugs flooded the room when one of the lawyers exclaimed 'appeal denied' and the crowd realised that SWUAV and Kiselbach had succeeded in their five-year-long fight for access to justice. Elation grew when the plaintiffs realised that not only had they been granted public interest SCC with the reformulation of the test. The law of standing would no longer present the same barrier between marginalised litigants and their ability to bring public interest claims forward.

Implications for Marginalised Litigants

SWUAV and Kiselbach's courageous fight for sex workers' rights has had a number of important social justice implications, and has made a substantial contribution to the sex workers' rights movement. Their work has amplified the voices of a community of women who are otherwise silenced and ignored. They have informed the national debate surrounding sex work and law reform, by bringing forth the voices of some of the most marginalised and criminalised women in the country. They have also developed an innovative model for engaging marginalised women in social activism and public interest litigation, which can serve as a model for other communities. At all times, sex workers' empowerment, safety and dignity has been the guiding principle for the organisation, resulting in an effective approach to social activism with the aim of being meaningfully representative of the people most affected by the targeted laws.

Although not originally intended to be a test case about the law of standing, the SWUAV and Kiselbach litigation has emerged as an important victory in the quest for access to justice. The Supreme Court of Canada's decision resulted in a significant and necessary shift in the test for public interest standing, which will benefit other marginalised litigants. Prior to this decision, marginalised people who wished to initiate Charter claims were faced with few options other than personally assuming the extraordinary demands and risks of litigation. The final decision in the SWUAV and Kiselbach case has opened up novel ways in which marginalised litigants can come forward, without forcing such litigants to individually take on undue risks and burdens. It is now increasingly possible to litigate collectively with other directly impacted persons, in support of one another and with sufficient individual protections. It is now possible to initiate litigation as a person formerly affected by laws, at a time when that person is in a sufficiently supported and stable position to take on a legal challenge. These changes address some access to justice barriers that have blocked litigation of important constitutional claims in Canadian history. The state of constitutional law and practice will benefit from these changes, as will our communities.

SWUAV and Kiselbach have put their case regarding the Charter challenge to Canada's prostitution laws on hold pending a decision from the Supreme Court of Canada in the *Bedford* litigation, which will decide many of the constitutional issues raised by SWUAV and Kiselbach. SWUAV and Kiselbach are prepared to proceed to trial if the Supreme Court upholds s 213 which prohibits communication in public for the purpose of engaging in prostitution; s 210 which prohibits being found in, occupying, or keeping a common bawdy house; or s 212(1)(j) which prohibits living on the avails of adult prostitution.

The SWUAV and Kiselbach case shifted the legal landscape and public consciousness of two of Canada's most pressing human rights issues: sex workers' rights and access to justice. The case provides both inspiration and precedent for law reform movements across the world attempting to extend the boundaries of human rights protection.

Darcie Bennett is Campaigns Director at the Pivot Legal Society, Jill Chettiar is Coordinator at the Downtown Eastside Sex Workers United Against Violence Society, DJ Joe is Director at the Downtown Eastside Sex Workers United Against Violence Society, Lisa Kerr is a Doctoral Candidate at New York University School of Law, Sheryl Kiselbach is Violence Prevention Coordinator at the PACE Society, Katrina Pacey is the Litigation Director of the Pivot Legal Society and Elin Sigurdson is a lawyer with Janes Freedman Kyle Law Corporation.

1 The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

2 See for example: *Halpern v Canada (Attorney General)*, 2002 CanLII 49633 (ON SC); *Hendricks c Québec (Procureur général)*, 2002 CanLII 23808 (QC CS); *Barbeau v British Columbia*, 2003 BCCA 406 (CanLII).

3 *R. v Parker*, 2000 CanLII 5762 (ON CA); *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII), [2011] 3 SCR 134.

4 *R. v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30.

5 *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII).

6 Jeffrey, L. and MacDonald, G. (2006) *Sex Workers in the Maritimes Talk Back*, UBC Press, Vancouver; Canadian HIV/AIDS Legal Network, 'Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution', 2005; Lowman, J. 'Violence and the Outlaw Status of (Street) Prostitution in Canada', *Violence Against Women*, 6(9), 2000, pp. 987-1011; Childs, M. et al., *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform*, Pivot Legal Society (June 2006) at <http://pivotlegal.org/Publications>.; Allinott, S. et al., Voices for Dignity: A Call to End Harms Caused by Canada's Sex Trade Laws, Pivot Legal Society (March 2004) at <http://pivotlegal.org/Publications>.; Shaver, F. et al. *Safety, Security and the Well-being of Sex Workers: A Report Submitted to the House of Commons Subcommittee on Solicitation Laws*, Sex Trade Research and Advocacy (July 2006) at <http://web2.uwindsor.ca/courses/sociology/maticka/star/pdfs/safety_and_security_report_final_version.pdf>.

7 Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights. *The Challenge Of Change: A Study Of Canada's Criminal Prostitution Laws*. Ottawa: Publishing, Public Works and Government Services, Canada, 2006. (Report of the Subcommittee on Solicitation Laws).

8 *Ibid.*, 87.

9 See Pivot Legal Society at <www.pivotlegal.org>.

10 Allinott, S. et al., *supra* note 6.

11 SWUAV and Kiselbach's constitutional claim challenges the following specific sections of the Criminal Code of Canada: ss 210, 211, 212(1)(a), (b), (c), (d), (e), (f), (h) and (j) and (3), and 213.

12 These rights and freedoms are protected by ss 2(b), 2(d), 7 and 15 of the Canadian Charter of Rights and Freedoms.

13 *Finlay v Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 SCR 607 at 631; *supra* note 5.

14 *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 SCR 236 at para. 36.

15 *Bedford v Canada*, 2010 ONSC 4264 (CanLII).

16 Nor should the existence of a similar claim in another jurisdiction constitute a bar against standing. SWUAV and Kiselbach argued that parallel litigation may be a procedural consideration for the court in determining its process and the timing of litigation steps, but does not provide a principled bar to standing of an individual or organisation.

17 *Downtown Eastside Sex Workers United Against Violence Society v Attorney General (Canada)*, 2008 BCSC 1726 (CanLII).

18 *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439 at para. 66.

19 *Supra* note 5 at para. 51.

Moving Beyond *Goodwin*: A Fresh Assessment of the European Court of Human Rights' Transgender Rights Jurisprudence

Constantin Cojocariu

The right of transgender people to change their documents in order to reflect their inner-felt gender identity is central to their ability to function adequately in society and be free from a range of human rights abuses including employment discrimination, verbal harassment, physical assault or denial of services. Despite this, however, gender recognition procedures are extremely cumbersome and include extraordinary requirements which interfere profoundly with fundamental rights, such as forced sterilisation, genital surgery or divorce.

Although fairly limited in terms of the number of judgments or substantive scope, the case-law of European Court of Human Rights (hereinafter referred to as 'the Court') has proven quite influential in changing national legislation or practice on legal gender recognition across the Council of Europe region.[1] The judgment in the case *Christine Goodwin v United Kingdom* in particular, rendered ten years ago, represented a turning point as the Court recognised for the first time that sex was not an immutable category and that states had an obligation to allow for the possibility of changing from one gender to another under the law.[2] While the *Goodwin* judgment represented a high water mark in the Court's transgender jurisprudence, it is probably fair to say that subsequent judgments did not add much to it in terms of substance. This article sets out to explore some of the reasons why that should be so and suggest ways to overcome the obstacles mounted by the *Goodwin* judgment in order to develop the protections available to transgender people under the European Convention on Human Rights (hereinafter 'the Convention').

For all its merits, the flipside of *Goodwin* is that it restricted access to legal gender recognition to 'post-operative transsexuals' and explicitly allowed states discretion to regulate the process of legal gender recognition. The Court has not sufficiently explained the rationale for singling out post-operative transsexuals for special treatment under the Convention mainly on the basis that they had undertaken genital surgery.

Similarly, the Court's construction of the margin of appreciation insulates a wide variety of state practices in the field of legal gender recognition from scrutiny under the Convention, including the imposition of forced divorce or forced sterilisation. This has led to a situation whereby transgender people are nominally entitled to generously stated autonomy rights that however, on occasion, amount to little in practice. The fragile grounding of the Court's transgender jurisprudence fatally undermines its effectiveness and therefore urgent revision is required.

This article offers a fresh assessment of some aspects of the Court's jurisprudence on transgender rights. Although the Court has not delivered many judgments in this area, disagreement persists amongst activists and legal writers on their implications for national authorities. One area of such disagreement relates to the issue of whether states have a duty to cover the costs of gender reassignment treatment. This article will suggest a solution to this disagreement that I believe is more consistent with the Court's jurisprudence.

Next, I will set out to explore certain inconsistencies in the Court's transgender jurisprudence revealing tensions which may be exploited by activists and lawyers in future litigation. In particular, many of the Court's transgender judgments are premised on circumstances specific to the country in question making it difficult to extrapolate any general principles applicable across Europe.

I will also analyse critically the manner in which the Court applied the margin of appreciation doctrine in transgender cases and the justifications it offered to support restricting access to legal gender recognition to 'post-operative transsexuals'.

I refer to certain recommendations made in the seminal viewpoint issued by Thomas Hammarberg, former Council of Europe Commissioner for Human Rights,[3] as benchmarks for the purposes of assessing the Court's jurisprudence in this area and as a practical common standard of achievement for future litigation. Namely, the Commissioner suggested *inter alia* that states develop 'expeditious and transparent' legal gender recognition procedures; that they abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity; and that they make gender reassignment procedures accessible for transgender persons, including by covering associated costs.

Whereas this article focuses on litigation before the Court, I do not mean to overstate the case for using courts as agents of social change in the particular field of transgender rights. I acknowledge the doubts raised by some commentators in relation to the viability of litigation as a tool capable to achieve the depathologisation of gender identity in relation to health care as well as to challenge the prevailing binary gender model.[4] Therefore this article focuses on legal gender recognition and practical ways in which this can be achieved gradually through litigation. The debate on depathologisation and the means to achieve it goes beyond the scope of this article.

Brief Overview of the Court's Transgender Jurisprudence

The Court has only ever found violations of the Convention in relation to transgender rights claims on seven occasions since 1992, the date from when *B. v France*, the first successful transgender case, was decided.[5] The applicants in all these cases had in common the fact that they were undergoing or had undergone gender reassignment surgery at the time when their cases reached the Strasbourg court. Most of these cases were related to claims for legal gender recognition, in countries where such recognition was unavailable or very difficult in law (*B. v France*,[6] *Christine Goodwin v the United Kingdom*,[7] *I. v the United Kingdom*[8] and *Grant v United Kingdom*[9]) or in practice (*L. v Lithuania*).[10] These cases were decided predominantly under Article 8 of the Convention on the right to private life. In *B. v France*[11] and *Christine Goodwin v the United Kingdom*,[12] the Court held that states had a positive obligation to legally recognise the gender identity of 'post-operative transsexuals', including, in the latter, for the purposes of marriage. In *L. v Lithuania*, the Court ruled that the failure to adopt enabling legislation facilitating access to legal gender recognition, after having recognised in principle a right to gender reassignment surgery as well as a right to change civil status was in breach of Article 8.[13]

In *Van Kück v Germany*[14] and *Schlumpf v Switzerland*,[15] the applicants complained about the unfairness of domestic proceedings regarding their claims for the reimbursement of the costs of gender reassignment treatment. Consequently, these cases resulted in breaches of Article 6 of the Convention on the right to a fair trial. In addition, the Court found violation of Article 8 due to the prejudiced attitude of domestic courts towards the applicants' gender identity.

Most transgender cases that reached the Court were however dismissed for a variety of reasons. The *Christine Goodwin* judgment reversed a line of legal gender recognition cases brought against the United Kingdom, in which the Court held that the state's interest in maintaining the integrity of the birth registration system outweighed in importance the detriment the applicants suffered as a consequence of non-recognition of their gender identity.[16] Post-*Christine Goodwin*, the Court rejected a number of challenges against various requirements attached to legal gender recognition such as medical treatment[17] and compulsory divorce.[18] In *P.V. v Spain*, the applicant complained about discrimination on account of her gender identity in the context of custody proceedings. Although the Court ultimately rejected her claim, this case is important as gender identity was recognised for the first time as a stand-alone ground for the purposes of the prohibition of discrimination under Article 14 of the Convention.[19]

Do States Have a Duty Under the Convention to Cover the Costs of Gender Reassignment Treatment?

Despite the limited scope of the Court's jurisprudence on transgender issues, there is no discernible academic and activist consensus on some of its implications for state parties to the Convention. For the purposes of this article I will focus in particular on the issue of whether states have an obligation under the Convention to cover the costs of gender reassignment treatment through their national insurance plans. Authoritative sources vary substantially on these issues, ranging from reading from the Court's case-law a right to have the state fund gender reassignment treatment into the Convention to denying that such a right exists altogether. It goes without saying that a credible interpretation of the Court's jurisprudence is an indispensable condition for developing a persuasive advocacy strategy seeking to secure higher standards of protection for transgender persons.

The above-mentioned Hammarberg paper on 'Human Rights and Gender Identity' made the bold claim that 'the case law of the European Court of Human Rights clearly requires states not only to provide for the possibility to undergo surgery leading to full gender-reassignment, but also that insurance plans should cover "medically necessary" treatment in general, which gender reassignment surgery is part of' (emphasis added). Human rights activists across the continent have since adopted on numerous occasions this statement in their campaigning activities at the national and regional level.[20]

The 2010 Committee of Ministers Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity adopted a more nuanced provision on the issue of costs. Thus, the Recommendation specifically contemplated the possibility that States may adopt 'decisions limiting the costs covered by health insurance for gender reassignment' which however had to be 'lawful, objective and proportionate'.[21] The explanatory report to the recommendation further clarified that the right to reimbursement said to derive from the Court's case-law was a qualified right:

The Court's case-law...requires contracting states...that insurance plans should cover "medically-necessary" treatment in general, which gender-reassignment may be a part of. Where legislation provides for coverage of necessary health-care costs by public or private social insurance systems, such coverage should then be ensured in a reasonable, non-arbitrary and non-discriminatory manner, taking into account also the availability of resources. (emphasis added)[22]

Finally, a 2012 European Commission report on the legal treatment of trans and intersex people in Europe which *inter alia* summarised the Court's transgender jurisprudence did not make any mention of a right to have the gender reassignment treatment costs derived from the aforementioned cases. Along similar lines, a World Health Organisation-commissioned report noted explicitly that the *Van Kück* Court 'did not rule that costs for gender reassignment should be covered by private or public health insurance under Article 8.'[23]

Since both the Issue Paper and Explanatory Protocol to the Committee of Ministers recommendation referred to the same two cases to support their position on the issue of costs – *L. v Lithuania* and *Van Kück v Germany* – it is appropriate to briefly analyse these judgments.

The *Van Kück* Court examined the manner in which domestic courts decided the applicant's eligibility to have the costs of his gender reassignment treatment covered by the state. The Court essentially decided that gender reassignment treatment qualified as medically necessary treatment, and that domestic courts lacked the requisite expertise to second guess medical experts on this aspect. Since Germany provided an entitlement to medically necessary treatment, it should by implication also cover the costs of gender reassignment treatment. The Court made the point explicitly that the case was not about the entitlement *per se*, but about how it was disbursed:

In the present case, the central issue is the German courts' application of the existing criteria on reimbursement of medical treatment to the applicant's claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such measures in general. Furthermore, what matters is not the entitlement to reimbursement as such, but the impact of the court's decisions on the applicant's right to respect for sexual self-determination as one of the aspects of her right to respect for her private life.[24]

In *Schlumpf v Switzerland*, a case decided six years after *Van Kück*, which it somewhat resembled, the Court stated expressly that 'it is true that the Convention does not guarantee any right to reimbursement of medical costs incurred as a result of gender reassignment treatment'.[25] Furthermore, this reading of its jurisprudence is consistent with the Court's often-stated position that the Convention does not provide a right to free medical health care, and that states benefit from a wide margin of appreciation in managing the finite financial resources at their disposal.[26] The Court also held that the Convention 'did not place an obligation on the Contracting States to alleviate the disparities between the levels of health care available in various countries'.[27] By virtue of these principles, the Court turned down claims regarding, for example, the state's failure to fund fully the cost of a drug used to treat the applicant's chronic and threatening condition[28] or to provide comprehensive haemodialysis treatment that could improve greatly the applicants' private and family lives.[29] The error made by those commentators who assumed a right to funding from the *Van Kück* judgment is likely due to an assumption that an entitlement similar to that available in Germany existed in all Council of Europe countries. This however does not appear to be the case, with different states having different levels of health care commitment,[30] a situation which the Court tries to accommodate in its jurisprudence.

Nor does the ruling in the case *L. v Lithuania* provide additional support to the claim in question. As mentioned above, the problem in *L. v Lithuania* stemmed from the state's failure to adopt enabling legislation after having recognised a right to gender reassignment surgery in principle. The Court thus referred repeatedly to the limited nature of the violation found, which it identified as a 'legislative gap'.[31] This reading of the judgment is consistent with that line of the Court's jurisprudence regarding state action that is not strictly required by the Convention.[32] Although states act within their margin of appreciation, the Court maintains a right to review such decisions to ensure that a fair balance had been struck between the various interests involved. The Lithuanian government actually informed the Committee of Ministers of its intention to repeal the provision from the Civil Code that gave rise to the violation of the Convention, in the context of the execution of its obligations derived from the Court's judgment.[33] The Lithuanian government maintained that this regressive proposal constituted an adequate means to ensure compliance, as opposed to adopting enabling legislation which was the approach the Court appeared to suggest. Although this solution goes against the spirit of the Convention that aims to progressively achieve higher standards of human rights protection, it reflects the above understanding of the Court's judgment and contradicts the more ambitious claims made among others in the Hammarberg report.

Considering, as demonstrated by the aforementioned judgments, the Court's reluctance to interfere with state discretion in matters pertaining to social and economic policy, including in the field of medical care, alternative strategies may be envisaged to argue a right to state-covered gender reassignment treatment. One solution is to emphasise the importance of state support in ensuring that transgender individuals are able to enjoy in practice the right to legal gender recognition as defined by the Court, seeing that costly gender reassignment treatment is a precondition to enjoying the right.

The point of departure would be to rely on the expansive construction of the right in the Court's jurisprudence. In the *Goodwin* case the Court linked the applicant's claim, defined as 'a right to personal development and the physical and moral security in the full sense', to the values of 'human dignity and human freedom' underpinning the Convention and the notion of 'personal autonomy' included in the scope of Article 8.[34] In the *Van Kück* case, the Court stated that 'gender identity was one of the most intimate areas of a person's private life'.[35] Along similar lines, 'the right to gender identity and personal development' constitutes 'a fundamental aspect of the right to respect for private life'.[36] Freedom to define oneself as a female or a male is 'one of the most basic essentials of self-determination'.[37] Finally, the Court recognised in the *Van Kück* case that the applicant had a 'right to sexual self-determination', which was one of the aspects of her right to private life.[38]

Whereby the Court currently allows states the discretion to make gender reassignment surgery a necessary and indispensable precondition to legal gender recognition, a lack of funding would make the right inaccessible in practice to the vast majority of transgender people. The Court is likely to engage in a balancing process, in the context of which the *obiter* in *L v Lithuania* that providing such a service would not represent a disproportionate burden on the state[39] may weigh to the advantage of any presumptive applicant.

Two observations are in order at this stage. First, this strategy is feasible only as long as gender reassignment treatment continues to represent a requirement for legal gender recognition. Once the medical and legal procedures are unlinked in line with the demands of the trans movement, this avenue would be closed.

Second, even in this scenario, one should not underestimate the difficulty of the task at hand. A disability case, *Sentges v Netherlands*, concerning the Dutch authorities' refusal to provide a disabled applicant with a robotic arm which could significantly improve his quality of life, provides an interesting analogy.[40] In that case, the Court acknowledged the difficulties encountered by the applicant and noted the 'very real improvement which a robotic arm would entail for his personal autonomy and his ability to establish and develop relationships with other human beings of his choice.' A parallel may thus be drawn in that both cases involve demands for costly state interventions designed to facilitate the enjoyment of autonomy and social inclusion rights. Unfortunately, the *Sentges* Court rejected the case as manifestly ill-founded mainly in consideration of the wide margin of appreciation available to the state in this area and the fact that the applicant had already received a state-funded electric chair.

The Court's Transgender Jurisprudence is Premised on Favourable Circumstances in the Country in Question

A close examination of the Court's jurisprudence on transgender rights reveals the fact that the standards developed therein are premised to a substantial extent on the conditions that were specific to the countries against which the cases in question were brought in the first place.[41] These countries already accommodated in some respects the special needs of the transgender community, particularly by providing them with some legal recognition and medical treatment. However, since these measures were incomplete, transgender people were left stranded in the grey area between the two sexes, something that the Court held was in breach of the Convention.

Thus for example, at the time when the *Christine Goodwin* judgment was adopted, the National Health Service in the United Kingdom already offered fully funded gender reassignment treatment. This was one of the factors which led to the Court's finding that transgender people had a right to legal gender recognition: 'where a state has authorised the treatment and surgery alleviating the condition of a transsexual…it appears illogical to refuse to recognise the legal implications of the result to which treatment leads.'[42] Similarly, in balancing the arguments for and against legal gender recognition, the Court placed weight on a governmental report reviewing the situation of transgender people in the United Kingdom and which made suggestions for improvement. This again shows that circumstances pertaining in the United Kingdom served as foundation for the Court's judgment.

The Court's rulings in the *Van Kück v Germany* and *Schlumpf v Switzerland* cases were similar in that they were premised on the relatively generous entitlements in those countries' health insurance systems to medically necessary treatment. In ruling in the applicants' favour, the Court took issue however with the way in which local courts determined who was eligible to benefit from such entitlements. Similarly, the outcome in *L. v Lithuania* was predicated on the government's failure to follow up on undertakings already made. The Court referred specifically in its judgment to 'the limited legislative gap' which the government failed to address.[43]

The tight link between the Court's holdings and the factual or legal set-up in the country against which the case was brought in the first place, as well as the variety of circumstances pertaining to transgender rights across Europe, make it somewhat difficult to extrapolate generally applicable principles from these cases. A legitimate question may in turn be asked in relation to the scope of obligations under the Convention with respect to countries that do not provide any recognition in their legislation or social policies to transgender people, either because of economic reasons or because of transphobic prejudice. In Macedonia for example, domestic legislation does not include any reference to transgender people, the possibility of changing one's documents to reflect their gender identity is at best doubtful, gender reassignment treatment is not available and its costs are not covered by national health insurance. Presumably, the obligation to have in place a legal gender recognition system still applies, which the Court is likely to construe independently of any state action that facilitates transition to the preferred gender. However, in the absence of any state support, such legislation will benefit a considerably smaller number of people, namely those who are sufficiently skilled to navigate the system and who manage to garner sufficient resources to complete their medical transition. In such circumstances it is doubtful that the right to legal gender recognition is a right that is 'practical and effective' and not 'theoretical or illusory'.[44] On this basis, an additional obligation on the part of the state may then be argued to facilitate the process of transition, including by providing support with the gender reassignment process, a point which I made above, and to which I will return again below.

Finally, there is another aspect to this problem. As we have seen above, by and large, the Court has had the opportunity to deal with cases brought against countries that are relatively benevolent towards transgender people, and I include here medical professionals as well. The Court has constantly chided domestic courts for second guessing medical professionals who took the side of transgender claimants. As discussed elsewhere,[45] this is inherently problematic, as it feeds the pathologising discourse portraying transgender persons as mentally ill.

In addition, however, it ignores the possibility that the medical profession in some countries could prove hostile to transgender health claims due to transphobic attitudes as well as medically outdated or restrictive understanding of what criteria must be fulfilled in order for a person to be considered transgender that exists across many countries. The Court's approach in its case law means that domestic courts are deprived of their ability to censor medical opinion in such a situation. Transgender cases can in fact be contrasted with disability cases, where applicants tried, and succeeded to some extent, to persuade the Court that some court scrutiny is necessary as a safeguard aimed at restraining the inherent paternalism of doctors. For example, the Court has warned on occasion that medical professionals should not be trusted with ultimate decision-making power and that exacting procedures and safeguards should be in place regulating the medical professional's powers in relation to compulsory medical treatment and hospitalisation.[46]

The Emphasis on Gender Reassignment Treatment in the Court's Jurisprudence is Insufficiently Explained

In *Goodwin v United Kingdom* the Court operated a distinction between 'fully-achieved and post-operative transsexuals'[47] and other transgender people for the purposes of enjoying a supposedly universal and fundamental right to 'sexual self-determination' under Article 8 of the Convention. At the same time however, the Court failed to explain in a convincing manner what the rationale was underpinning this distinction, and did not offer any definitions of notions it employed such as 'gender reassignment treatment' or 'post-operative'. Furthermore, the Court foreclosed any possibility of elaboration in the future on these aspects by allowing states discretion to decide on the procedural and substantive requirements attached to legal gender recognition (including with respect to deciding who qualifies as a 'post-operative transsexual'). This is important as many people coming under the broader transgender umbrella will not or cannot undergo gender reassignment treatment for medical, financial or religious reasons or simply because they do not see medical intervention as part of their gender transitioning.[48]

Future litigation should encourage the Court to examine the justifications underpinning these distinctions in a critical manner, which hopefully would lead to their displacement. The next two sections will examine the modicum of reasoning the Court offered in support of the above mentioned distinction as well as the current construction of margin of appreciation in transgender cases.

During the pre-*Goodwin* era, the Court emphasised the importance of preserving the integrity of the British birth registration system, perceived as an important public interest, to the detriment of the applicants' interest to have their gender reassignment legally recognised.[49] In the *Goodwin* case, the Court reconceptualised the interests involved and reversed this jurisprudence by holding that the integrity of the birth registration system was no longer the prevailing argument in the proportionality analysis under Article 8. These facts however were specific to the United Kingdom, since in continental civil law countries such as France, it is usually easier to rectify birth certificates, a fact which led to the first successful transgender challenge in *B. v France*.[50]

The Court has not identified the public policy rationale underpinning the distinction between post-operative transsexuals and other transgender people for the purposes of legal gender recognition. In Goodwin, the Court mentioned 'the inconvenience' society may experience as a result of gender changes, and referred generally to repercussions in the areas of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, the Court went on to dismiss these concerns as 'far from insuperable', in view of the importance of enabling 'individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost'.[51] In the *L. v Lithuania* judgment, the Court mentioned briefly resource implications for the state budget as a possible justification for the government's failure to implement a functional legal recognition scheme. The Court however noted that the

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Abbreviations

ACHR

American Convention on Human Rights

CmEDAW

Committee on the Elimination of Discrimination Against Women

CEDAW

Convention on the Elimination of All Forms of Discrimination Against Women

ECHR

European Convention on Human Rights

ECtHR

European Court of Human Rights

HRC

Human Rights Committee

IACtHR

Inter-American Court of Human Rights

IACmHR

Inter-American Commission on Human Rights

ICCPR

International Covenant on Civil and Political Rights

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EQUALITY, DISCRIMINATION; CHILDREN, VIOLENCE; WOMEN; VIOLENCE; FAMILY LIFE

Violation of Article 2 (a), (b), (c), (e), (f) and (g) – duty to establish all appropriate means to eliminate discrimination against women, Article 5 – duty on states to modify the social and cultural patterns of conduct of men and women and to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, Article 12 - duty on states to take all appropriate measures to eliminate discrimination against women in the field of health care, Article 15(1) – duty on states to accord to women equality with men before the law in conjunction with Article 2(c) and (e) – of the CEDAW

SVP v Bulgaria

Communication no. 31/2011, Decision of the CmEDAW, 12 October 2012

V, a Bulgarian citizen and resident of Pleven, Bulgaria, was sexually assaulted by a neighbour on 24 June 2004, when she was seven years old. She told S, her mother, who filed a complaint with the authorities. The perpetrator, B, was indicted for sexual molestation on 17 April 2006. At that time, sexual molestation was punishable under the State's criminal code by no more than five years in prison, and therefore was not a 'serious crime' under the criminal code. As a result, B was permitted to enter into a plea-bargain agreement under which he admitted his guilt and received a three-year suspended sentence (plea bargains were not permitted for serious crimes.) S was not permitted to bring a civil claim against B in connection with B's prosecution. She therefore brought a civil tort claim on behalf of V and on 5 February 2008 received a judgment of approximately EUR 15,000 for moral damages. Because the law did not provide for a state actor to enforce the judgment, S hired a private bailiff to execute on the judgment. The bailiff was only able to collect approximately EUR 500 from B, but S had to pay approximately EUR 1,500 to implement the execution process. B continued to live in an apartment block adjacent to V's home and she repeatedly expressed fear of further harm from him. After the assault, V was diagnosed as mentally retarded and having an affective disorder, mania without psychotic disorder, which S claimed resulted from B's sexual assault on V.

S brought a communication before the CmEDAW arguing that, among other things, the State failed to take steps to effectively protect V against sexual violence, failed to ensure V's right to effective compensation, failed to ensure V's rights to health, including reproductive health and education, failed to provide V with proper rehabilitative services and failed to guarantee V's right against re-victimisation by B. She argued these failures violated Articles 1 and 2(a), (b), (c), (e), (f) and (g), read in conjunction with Articles 3 and 5; and Articles 12 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women.

The Committee held that: (1) the State failed to adopt criminal laws that effectively punished rape and sexual violence and failed to apply laws in practice through effective enforcement, in violation of Article 2(b); (2) the State failed to provide laws to support and protect victims of sexual violence in violation of Article 2(a), (f) and (g); (3) Article 158 of the State's criminal code, which provides that sexual crimes are not punished where prior to punishment there is a marriage between the man and woman, should be repealed and the State's failure to have repealed it following the Committee's earlier recommendation to do so in connection with a prior matter violates Article 2(g) of the Convention; (4) the failure to repeal Article 158 of the State's criminal code reflects harmful gender stereotypes, contrary to Article 5; (5) the failure of existing State legislation to provide mechanisms for protecting victims of sexual violence from re-victimisation violated V's rights under Article 2(a), (b), (e), (f) and (g), read together with Articles 3 and 5(1); (6) the State's failure to adopt measures to combat sexual violence against women and girls or to address consequences of sexual violence on women's and girls' enjoyment of their rights violated V's rights under Articles 2(c) and 15; (7) the State's failure to implement health care and other policies addressing the sexual violence V experienced, and its failure to provide appropriate health services to V violated her rights under Article 12; (8) the State's failure to provide V with an

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adequate mechanism to obtain compensation or a State-sponsored scheme for executing on judgments violated V's rights under Article 15(1) in conjunction with Article 2(c) and (e); (9) the State should provide V with appropriate reparations, including monetary compensation; (10) the State should adopt specified changes to State laws, including amendments to provide effective protection from re-victimisation and to provide appropriate support and financial compensation to victims, and enact new policies, including health care protocols and hospital procedures, to address sexual violence against women and girls.

EQUALITY, DISCRIMINATION; PRIVATE LIFE; FAMILY LIFE; FAIR HEARING

Violation of Article 24 – right to equal protection, in conjunction with Article 1(1) – right to be free from discrimination and in conjunction with Article 19 – rights of the child and Article 1(1), Article 8(1) – right to a fair trial, in conjunction with Article 19 and Article 1(1), Article 11(2) – right to privacy, in conjunction with Article 1(1), Article 17(1) – rights of the family, in conjunction with Article 1(1) – of the ACHR

No violation of Article 8(1) – right to a fair trial – of the ACHR in relation to the decisions of the Supreme Court and the Juvenile Court

Atala Riffo and Daughters v Chile

Case no. 12.502, Judgment of the IACtHR, 24 February 2012

AR married RJ in 1993. They lived in Chile and had three daughters. In 2002, AR and RJ ended their marriage and agreed that AR would maintain the care and custody of the daughters. In November 2002, the female partner of AR began living in the same house with AR and her daughters. In January 2003, RJ filed a custody suit with the Juvenile Court of Villarrica. The Juvenile Court granted provisional custody of the daughters to RJ. In October 2003, after the Juvenile Court judge was disqualified, the acting judge of the Juvenile Court rejected RJ's petition for custody and ordered that the daughters be handed over to AR. RJ appealed and sought a temporary injunction. In November 2003, the Court of Appeals granted the injunction, but in March 2004, after two judges withdrew, the Court of Appeals rendered the injunction without effect. In April 2004, RJ filed a remedy of complaint with the Supreme Court, which granted permanent custody to RJ.

According to the IACtHR, the Juvenile Court based its provisional custody decision, *inter alia*, on the following arguments: (1) 'Whereas [...] the respondent, having expressly acknowledged her sexual choice, cohabits with her partner in the home she shares with her daughters, [...] thereby altering the normal family routine, giving preference to her personal interests and well-being over the emotional well-being and social development of her daughters' and (2) 'Whereas, the fact that the respondent has given preference to her own well-being and personal interest over carrying out her role as a mother, under conditions that could affect the subsequent development of the minors in the case, [...] there is no conclusion other than that the petitioner presents more favorable arguments on behalf of the best interest of the girls, arguments which, in the context of a heterosexual and traditional society, take on great importance'.

According to the IACtHR, the Supreme Court concluded that: (1) 'no regard was given to the testimony in either the permanent custody proceeding or the provisional custody file with respect to the deterioration of the social, family and educational environment of the girls since the mother began to cohabit with her homosexual partner, or to the possibility that the girls could be the target of social discrimination arising from this fact'; (2) 'the testimony of persons close to the girls, such as the house maids, refers to games and attitudes of the girls that reflect confusion about the sexuality of the mother, which they could have perceived in the new cohabitation scheme at their home'; (3) '[AR] put her own interests before those of her daughters when she chose to begin to live with a same sex partner, at the same home where she raised and cared for her daughters, separately from the girls' father' and (4) 'the potential confusion over sexual roles that could be caused in them by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected'. The Supreme Court also deemed the girls to be in a 'situation of risk' that placed them in a 'vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions and

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acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development'.

Separately, during the course of the custody proceedings, starting in March 2003, a disciplinary proceeding was carried out against AR. AR was a judge in the criminal court in Villarrica. The disciplinary proceeding alleged that AR used her subordinates to comply with the Juvenile Court proceedings and that AR issued public statements in a newspaper about the custody suit and her sexual orientation. In connection with the disciplinary proceeding, a judge from the Court of Appeals conducted an extraordinary visit to the criminal court in Villarrica. In April 2003, the Court of Appeals approved the visit and filed charges against AR which resulted in its issuing a severe warning to AR for the use of resources and staff to comply with proceedings ordered by the Juvenile Court. The IACtHR noted that the report prepared by the visiting judge, which was later approved by the Court of Appeals and used to base its charges against AR, stated that 'it is impossible to ignore the fact that her peculiar emotional relationship has transcended the private sphere with the appearance of the aforementioned publications, which clearly damages the image of both [AR] and the Judicial Branch'.

Ultimately, this case concerns the alleged international responsibility of Chile for discriminatory treatment and arbitrary interference in the private and family life suffered by AR due to her sexual orientation, and in the legal process that resulted in her loss of the care and custody of her three daughters. This case also concerns Chile's alleged failure to take into account the best interests of the daughters, whose custody and care were determined without having regard to their rights, and on the basis of alleged discriminatory prejudices. The IACmHR requested the IACtHR to declare Chile responsible for violating Articles 11, 17(1), 17(4), 19, 24 and 25 of the ACHR, in relation to Article 1(1), together with reparation measures.

The Court held that: (1) Chile violated Article 24, in conjunction with Article 1(1), to the detriment of AR because (a) the Juvenile Court's provisional custody decision was based mainly on AR's sexual orientation, (b) the Supreme Court and Juvenile Court used abstract, stereotyped, and/or discriminating arguments to justify their decisions, and (c) with respect to the disciplinary inquiry of AR, differentiation against AR in the inquiry based on her sexual orientation was discriminatory; (2) Chile violated Article 24, in conjunction with Articles 19 and 1(1), to the detriment of the daughters because the discriminatory treatment against their mother had repercussions for the daughters, since it was used as grounds to decide that they should not continue to live with their mother; (3) Chile violated Article 11(2), in conjunction with Article 1(1), to the detriment of AR because (a) during the custody proceeding, based on a stereotyped vision of the scope of AR's sexual orientation, there was arbitrary interference in her private life, given that sexual orientation is part of a person's intimacy and is not relevant when examining aspects related to an individual's suitability as a parent and (b) although the disciplinary investigation against AR began with legal grounds and did not end with any disciplinary sanctions against AR for her sexual orientation, it did investigate her in an arbitrary manner, which constitutes interference with AR's right to privacy, and which extends to her professional sphere; (4) Chile violated Articles 11(2) and 17(1), in conjunction with Article 1(1), to the detriment of AR and the daughters because in the provisional custody decision the grounds presented by both the Juvenile Court and Supreme Court were not an appropriate measure to protect the daughters' best interest and had the result of separating the family constituted by the mother, her partner and the daughters and amounted to arbitrary interference with the right to private and family life; (5) Chile violated Article 8(1), in conjunction with Articles 19 and 1(1), to the detriment of the daughters because the Supreme Court simply based its decision on the alleged best interest of the three daughters without giving reasons for why it considered it legitimate to contradict the wishes expressed by the daughters during the custody proceeding, particularly given the connection between a child's right to participate and the goal of complying with the principle of the child's best interest; (6) Chile violated Article 8(1), in conjunction with Article 1(1), with respect to the disciplinary investigation against AR, to the detriment of AR because the extraordinary visit and the disciplinary investigation were conducted without the necessary subjective impartiality; (7) Chile did not violate Article 8(1), in relation to the decisions of the Supreme Court and the Juvenile Court, because there was neither specific evidence to disprove the presumption of the judges' subjective impartiality, nor any convincing elements that might call into question the objective

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impartiality of the Juvenile Court's decision regarding provisional custody or of the judgment of the Supreme Court; (8) its judgment constitutes *per se* a form of reparation; (9) Chile shall provide medical and psychological or psychiatric care, free of charge and in an immediate, appropriate and effective manner, through its specialised public health institutions to those victims who so request it under terms set forth in the judgment; (10) Chile shall issue certain publications relating to the Court's judgment, within six months; (11) Chile shall hold a public act of acknowledgment of international responsibility with regard to the facts of this case; (12) Chile shall, within a reasonable period of time, continue to implement permanent education programmes and training courses directed at public officials at the regional and national levels, particularly with respect to judicial officials in all areas and at all levels of the judicial branch; (13) Chile shall pay USD 42,000 to AR and USD 10,000 to each daughter; (14) Chile shall, within one year, submit a report to the IACtHR concerning the measures adopted in compliance with the judgment; (15) the IACtHR shall monitor full compliance with the judgment, by virtue of its authority and in compliance with its duties according to the ACHR, and shall consider the case concluded once Chile has fully complied with the measures ordered in the judgment.

EQUALITY, DISCRIMINATION; WOMEN, VIOLENCE; FAMILY LIFE; PRIVATE LIFE

Violation of Article 2(b), (c), (d) and (e) – duty to establish all appropriate means to eliminate discrimination against women, in conjunction with Article 1 – definition of discrimination and Article 3 – duty on states to take all appropriate measures, including legislation, to ensure the full development and advancement of women, Article 5(a) – duty on states to modify the social and cultural patterns of conduct of men and women and Article 16(1)(c), (d), and (f) – duty on states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations – of the CEDAW

Jallow v Bulgaria

Communication no. 32/2011, Decision of the CmEDAW, 23 July 2012

IJ met her husband, a Bulgarian national, in 2006 while he was doing business in the Gambia. In 2007 IJ and her husband were married, and at the time IJ was already pregnant with their child (a daughter born in October 2007). In August 2008, IJ moved, with her daughter, from the Gambia to Bulgaria, and began living with her husband in Sofia. According to IJ, upon arriving in Bulgaria, both she and her daughter were physically, psychologically and sexually abused by her husband. In November 2008, after social workers and police officers were called to IJ's house, IJ and her daughter left and went, first, to a non-governmental organisation, and then to a municipal shelter, before returning home several days later. In March 2009, without having ever spoken with IJ, the regional prosecutor's office terminated its pre-trial investigation of IJ's husband, which stemmed from the police officers' reports from November 2008. Thereafter, the police were called several times to stop domestic violence against IJ, but each time police officers only gave IJ's husband oral warnings. In July 2009, IJ's husband filed an application with the regional court, alleging that both he and his daughter had been assaulted and threatened by IJ. Based on her husband's allegations, the regional court issued an emergency

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protection order, banning IJ from her home and temporarily relocating IJ's daughter to the custody of her husband. The emergency protection order remained in effect until March 2010, even though the regional court had dismissed her husband's application in December 2009. During this time, IJ was only allowed to visit with her daughter once, and only received limited information from Bulgarian authorities regarding her daughter's location and condition. In March 2010, IJ and her husband agreed to a divorce (by mutual agreement), which was approved by the court, and which gave IJ custody of her daughter but was on terms otherwise unfavourable to IJ.

The Committee held that: (1) because the police and the regional prosecutor's office failed to engage in a suitable and timely investigation of IJ's allegations of domestic violence (both in November 2008, and later in the context of her husband's application with the regional court), the State violated its obligations under Article 2(d) and (e), read in conjunction with Articles 1 and 3, of the CEDAW; (2) because the regional court's protective order separated IJ from her daughter for approximately eight months, based on her husband's statements and without consideration of the incidents of domestic violence previously reported by IJ, the State violated its obligations under Article 2(b) and (c), read in conjunction with Articles 1 and 3, of the CEDAW; (3) because the State failed to protect IJ's equal rights in marriage and as a parent, and to regard her daughter's interests as paramount, the State failed to take all appropriate measures under Article 5(a), and Article 16(1)(c), (d), and (f), of the CEDAW; (4) the State should provide IJ and her daughter with appropriate compensation; (5) the State should take measures to ensure that women victims of domestic violence have effective access to protection and to justice, take measures to ensure that incidents of violence are taken into account in determining custody and visitation rights for children, and provide appropriate and regular training for judges, state workers and law enforcement personnel.

EQUALITY, DISCRIMINATION; WOMEN, VIOLENCE; PRIVATE LIFE; PROPERTY

Violation of Article 1 – definition of discrimination, Article 2(d) and (e) – duty to establish all appropriate means to eliminate discrimination against women and Article 16(1)(h) – duty on states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations in relation to property – of the CEDAW

No violation of Article 14(2)(h) – duty on states to take all appropriate measures to eliminate discrimination against women in rural areas and in particular to ensure the right to enjoy adequate living conditions and Article 15(4) – duty on states to accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile – of the CEDAW

Kell v Canada

Communication no. 19/2008, Decision of the CmEDAW, 28 February 2012

CK, a Canadian aboriginal woman, began a common-law relationship with WS in 1989. In late 1991, CK and WS entered into an Agreement for Purchase and Sale with the Northwest Territories Housing Corporation ('the Housing Corporation') for a house on leasehold land in the Rae-Edzo community, which housing was earmarked for the indigenous population (CK was a member of the indigenous population, WS was not.) CK was subsequently subjected to spousal abuse from WS, which worsened when CK got a job and became financially independent. In February 1992, without CK's knowledge, WS asked the Housing Corporation to remove CK's name from the Assignment of Lease (which was the document that certified the co-ownership of the house by CK and WS). At the time of his request, WS was a member of the board of the Rae-Edzo Housing Authority. In June 1993, the Housing Corporation complied with his request. In early 1995, when CK took employment without the consent of WS and sought refuge in a battered women's shelter, WS changed the locks on the house and denied CK access. CK was subsequently presented with a letter from WS's lawyer,

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requesting that she vacate the home, which she did.

The Committee held that: (1) an act of intersectional discrimination had taken place against CK in violation of Article 1 of the CEDAW, in that CK was an aboriginal woman who was a victim of domestic violence; (2) CK's rights under Article 2(d) and (e) of the CEDAW have been violated as a result of the State's failure to ensure that its agents provide effective legal protection for CK by respecting the Agreement for Purchase and Sale, and by the State's failure to ensure that the changed Assignment of Lease was declared void; (3) the facts do not reveal a violation of Article 14(2)(h), or Article 15(4) of the CEDAW, in that the information before the CmEDAW does not show that the acts of discrimination suffered by CK are related to her originating from a rural area or that she was prevented from residing in another property in the Rae-Edzo community; (4) CK's rights under Article 16(1)(h) of the Convention have been violated in light of the facts that CK was a victim of domestic violence, WS tried to stop her from working, CK was evicted from her home while she was seeking protection from domestic violence, and when CK's name was removed from the Assignment of Lease, the Housing Corporation did not inform CK of the removal or take her economic contribution into consideration.

EXPRESSION; EQUALITY

Violation of Article 19(2) – right to freedom of expression, read in conjunction with Article 26 – right to equal protection before the law – of the ICCPR

Fedotova v Russian Federation

Communication no. 1932/2010, Decision of the HRC, 31 October 2012

IF is an openly lesbian woman in the Russian Federation who is actively involved in promoting the rights of the lesbian, gay, bisexual and transgender community. On 30 March 2009, IF displayed posters near a secondary school building that stated 'Homosexuality is normal' and 'I am proud of my homosexuality.' Police interrupted her activity, and a justice of the peace later convicted her of violating section 3.10 of the Ryazan Region Law on Administrative Offences (the 'Administrative Law') and charged her a fine of 1,500 roubles. The Administrative Law reads, in part: 'Public actions aimed at propaganda of homosexuality (sexual acts between men or lesbianism) among minors shall be punished with administrative fine of between one thousand five hundred and two thousand roubles'.

IF appealed her conviction to the Oktyabrsky District Court of Ryazan, asking the court to revoke her conviction and to assess the compatibility of the Administrative Law with Articles 19, 29 and 55 of the Constitution of the Russian Federation, which, respectively, prohibit discrimination on the ground of social status, guarantee the right to freedom of thought and expression, and permit individual rights and freedoms to be restricted only by federal law. The court upheld IF's conviction, holding that the Ryazan Region Law was federal law and that the Administrative Law's restrictions on freedom of expression were necessary and appropriate for the protection of the morals of minors. IF appealed the court's decision to the Constitutional Court, which dismissed her appeal.

On 10 February 2010, IF filed a communication with the HRC. IF argued that the Administrative Law violated Article 19(2) of the ICCPR, which provides for the right to freedom of expression. IF also argued that the Administrative Law violated Article 26 of the ICCPR, which provides for equal protection of all individuals before the law.

The State argued that IF had not exhausted all available domestic remedies because she could appeal to the Supreme Court of the Ryazan Region and further appeal to the Supreme Court of the Russian Federation, if necessary. The State also argued that IF's communication was an abuse of submission because she had not been discriminated against. According to the State, IF's conviction was based upon her violation of the Administrative Law and not on her sexual orientation.

The Committee held that: (1) IF had exhausted all remedies and the HRC was not precluded from examining IF's communication; (2) IF's communication was not an abuse of submission; (3) there was no doubt that there has been a restriction on the exercise of the author's right to freedom of expression guaranteed by Article 19(2); (4) the State party had not shown that a restriction on the right to freedom of expression in relation to 'propaganda of homosexuality' – as opposed to propaganda of heterosexuality or sexuality generally – among minors was based on reasonable and objective criteria; (5) IF had not made any public actions aimed at involving minors in any particular sexual activity or at advocating any

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particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it; (6) accordingly IF's conviction under the Administrative Law was a violation of her rights under Article 19(2) of the ICCPR, read in conjunction with Article 26; (7) the State party is to provide an effective and enforceable remedy; (8) the State party must, within 180 days, provide information about the measures taken to give effect to the HRC's decision and (9) the State party is requested to publish the present decision and to have them widely disseminated in the official language of the State party.

EXTRAORDINARY RENDITION; MOVEMENT, EXTRADITION, DEPORTATION; TORTURE; LIBERTY & SECURITY, DETENTION, ENFORCED DISAPPEARANCE; REMEDIES; PRIVATE LIFE; FAMILY LIFE

Violation of Article 3 – prohibition of torture or inhuman or degrading treatment, Article 5 – right to liberty and security, Article 8 – right to respect for private and family life and Article 13 – right to an effective remedy – of the ECHR

El-Masri v The Former Yugoslav Republic of Macedonia

Application no. 39630/09, Judgment of the ECtHR (Grand Chamber), 13 December 2012

On 31 December 2003, KM, a German national, took a bus from Germany to the former Yugoslav Republic of Macedonia to take a vacation. When the bus arrived at the Macedonian border, the border guards interrogated him about possible ties with several Islamic organisations. Following KM's interrogation, armed men drove him to a hotel in Skopje, Macedonia. KM was detained in a hotel room where he was watched 24 hours a day by a team of men. KM was repeatedly interrogated in English, in which he had limited proficiency. The men refused KM's requests to contact the German embassy. On the thirteenth day of his confinement KM began a hunger strike. KM did not eat for the ten days he remained confined to the hotel. On 23 January 2004, he was blindfolded, handcuffed and driven to the Skopje airport. At the airport, KM was severely beaten and stripped of all clothing. The men then placed a bag over his head, chained his arms and legs and marched him to a CIA-operated plane, which was surrounded by armed Macedonian guards. KM was flown to Afghanistan and placed in the 'Salt Pit', a CIA-run facility near Kabul. During his confinement, KM was repeatedly interrogated, threatened and insulted. His requests to meet with a German official were refused. KM began another hunger strike and his health deteriorated. On the 37th day of his hunger strike, KM was force fed through a tube inserted into his nose. On 28 May 2004, KM was blindfolded, handcuffed and flown to Albania, where he was subsequently flown to Germany.

On 13 December 2005, the President of the Parliamentary Assembly of the Council of Europe asked the Assembly's Committee on Legal Affairs and Human Rights to investigate allegations of 'extraordinary renditions' in Europe. Senator Dick Marty of Switzerland was appointed as special rapporteur. The resulting report, issued in 2006, set forth Macedonia's position with respect to KM's visit to the State. The State's position was based on a review of its official records. The State confirmed that KM arrived at its border on 31 December 2003, and that the border guards interviewed him, but that KM was interviewed in accordance with applicable European standards and subsequently released on that day. The State claimed that it was able to confirm that KM stayed at the hotel in Skopje, as a registered guest, until 23 January 2004 when KM left the Macedonian border to enter Kosovo. However, this report, together with another report issued in 2007 by Senator Marty, described extensive evidence corroborating KM's account of events, not the State's account.

Other international inquiries were also launched to investigate allegations of 'extraordinary renditions' in Europe, including with respect to KM's allegations. For example, the European Parliament set up a Temporary Committee on Extraordinary Rendition which led to the European Parliament adopting a resolution on 6 July 2006 condemning KM's abduction by the CIA and the degrading and inhuman treatment inflicted on KM by the State. The resolution further condemned the

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measures taken by the State to investigate KM's allegations as inadequate.

On 7 April 2006, the German Bundestag (Federal Parliament) appointed a committee to review the activities of the secret services. The committee issued its findings on 18 June 2009 and concluded that the core facts of KM's allegations were credible and that the State's denial that KM was detained at the hotel, mistreated and transferred to Afghanistan is 'clearly incorrect'.

On 6 October 2008, KM lodged a criminal complaint with the Skopje prosecutor's office against unidentified law-enforcement officials. On 18 December 2008, the prosecutor rejected KM's complaint as unsubstantiated based on two reports prepared by the State's Department for Control and Professional Standards, which reiterated the State's version of events. The prosecutor did not interview KM or personnel working at the hotel at the material time. According to KM, he was not notified of the decision to reject his complaint until 22 November 2010.

On 20 July 2009, KM lodged an application with the ECtHR alleging that the State violated his rights under Articles 3, 5, 8 and 13 of the ECHR. The section of the ECtHR that initially handled the application relinquished jurisdiction in favour of the Grand Chamber.

The Court held that: (1) the State's claim that KM failed to comply with the six-month rule under Article 35(1) is dismissed because the starting point for the six-month time limit was not 18 December 2008 when the prosecutor rejected KM's complaint, but rather when KM learned about the rejection, and the State failed to demonstrate that KM received notice of that rejection before 20 January 2009; (2) the State violated the procedural aspect of Article 3 by failing to conduct an effective investigation into KM's claims of mistreatment; (3) the State's mistreatment of KM at the Skopje hotel violated Article 3; (4) KM's mistreatment at the Skopje airport constituted torture within the meaning of Article 3; (5) by transferring KM to the CIA, the State violated Article 3 because it knowingly exposed KM to the risk that he would be mistreated in violation Article 3; (6) the State's holding KM in the Skopje hotel for 23 days was arbitrary in violation of Article 5; (7) the State is responsible for violating KM's rights under Article 5 while KM was detained in Afghanistan from 23 January through 28 May 2004 because it not only failed to protect KM from being detained in violation of Article 5 but it also actively facilitated his detention in Afghanistan by handing him over to the CIA when the State knew or should have known that KM would be mistreated in violation of Article 5; (8) the State violated the procedural aspect of Article 5 by failing to conduct a meaningful investigation after KM made credible allegations that he was arbitrarily detained; (9) the State violated Article 8 because the State's interference with KM's right to respect for his private and family life was not 'in accordance with the law'; (10) by failing to conduct an effective investigation into KM's allegations of mistreatment in violation of Articles 3, 5 and 8, the State violated Article 13 because it did not give KM an effective remedy for his grievances; (11) the State is to pay KM EUR 60,000 in respect of non-pecuniary damages.

LIBERTY & SECURITY, DETENTION; TORTURE; REMEDIES

Violation of Article 6(1) – right to life, Article 7 – prohibition of torture and cruel, inhuman or degrading treatment or punishment, Article 9 – right to liberty & security of the person, Article 10(1) – right for all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person and Article 16 – right to recognition everywhere as a person before the law – of the ICCPR

Violation of Article 2(3) – obligation on states to provide a remedy for breaches of rights – read in conjunction with Articles 6(1), 7, 9, 10(1) and 16 re B and Article 2(3) read in conjunction with Article 7 re M – of the ICCPR

Benali v Libya

Communication no. 1805/2008, Decision of the HRC, 1 November 2012

On 9 August 1995, B, a Libyan citizen, was arrested by the Libyan Internal Security Agency and held in secret detention at Abu Slim prison. In September 2000, B's relatives were informed that B was alive and allowed to visit him in prison. During those visits, B told his relatives he had been regularly tortured and was never charged with a crime or brought before a judge. On 15 October 2002, B was released from prison. On 16

February 2005, after several months of renewed harassment from the Internal Security Agency, B went to the British embassy to request a visa to travel to the United Kingdom. He was thereafter arrested, transferred to Benghazi, and tortured for many days. B was secretly detained at the Al Abiar detention centre until 2006, when he was transferred again to Abu Slim, where he was abused and often held in solitary confinement. From May to September 2006, B's relatives were allowed to visit him monthly. During those visits B relayed that he suffered grave abuses and had still not been charged with a crime. In October 2006, after a riot broke out at the prison, B was no longer allowed visits. On 23 March 2007, B disappeared from Abu Slim and his whereabouts were unknown until 26 April 2009 when one of B's brothers was allowed to visit him at Abu Slim once more.

M, a brother of B living in the United Kingdom, brought this communication before the HRC without making any attempt to bring a claim domestically in Libya. He argued that Libya's unacknowledged and incommunicado detention of B, and B's subjection to acts of torture and prolonged confinement, in total disregard for established legal procedures and without provision for adequate domestic mechanisms for seeking redress from the State, violated Articles 2(3), 6(1), 7, 9(1)-(4), 10(1) and 16 of the ICCPR. The State failed to cooperate with the HRC and did not respond to requests for information concerning the admissibility or merits of M's communication.

The Committee held that: (1) given the State's failure to respond, the HRC was not precluded under Article 5(2)(b) of the ICCPR from considering M's communication prior to exhaustion of domestic remedies; (2) where the author's allegations are corroborated by credible evidence, and further clarification of that evidence depends on information held by the State, the HRC may consider the author's allegations substantiated where the State fails to provide contrary evidence; (3) by causing B's enforced disappearance and deprivation of his liberty, followed by refusals or failures to acknowledge that fact, the State had violated its duty to protect B's life in violation of Article 6(1); (4) the three periods in which the State held B in incommunicado detention violated Article 7; (5) the anguish and distress caused by the disappearance of his brother violated Article 7 with respect to M; (6) by twice arresting B and holding him in incommunicado detention without access to defence counsel, without informing him of the grounds for his arrest, and without bringing him before a judicial authority, the State had violated Article 9; (7) by subjecting B to acts of torture and holding him in inhuman conditions during his detention, the State violated Articles 7 and 10(1); (8) by intentionally removing B from the protection of law for prolonged periods of time and systematically impeding his and his relatives access to potentially effective remedies, the State deprived B of the protection of law in violation of Article 16; (9) the State's failure to provide B with an effective domestic remedy violated Article 2(3) read in conjunction with Articles 6(1), 7, 9, 10(1) and 16 vis-à-vis B, and Article 2(3) read in conjunction with Article 7, vis-à-vis M; (10) pursuant to Article 2(3) the State was obligated to provide M with an effective remedy, including freeing B if still detained (or restoring his body to his family, if dead), conducting a thorough investigation into B's treatment, prosecuting and punishing responsible parties, and providing B and M with appropriate compensation.

PRIVATE LIFE; LIFE; FAMILY LIFE; POSITIVE OBLIGATION ON STATES; EQUALITY, DISCRIMINATION

Violation of Article 5(1) – right to integrity, Article 7 – right to personal liberty, Article 11(2) – right to be protected from arbitrary or abusive interference with private and family life and Article 17(2) – right of men and women to marry and to raise a family of the ACHR with regard to Article 1(1) – right to be free from discrimination – of the ACHR

Gretel Artavia Murillo & Ors v Costa Rica

Communication no. 17/2008, Judgment of the IACtHR, 28 November 2012

GA and others were Costa Rican nationals who argued through the IACmHR that their human rights had been violated as a result of a presumed general prohibition on in vitro fertilisation effective in the Republic of Costa Rica since 2000, due to a Costa Rican Supreme Court decision. The IACmHR submitted the case against Costa Rica before the IACtHR alleging that the Costa Rican Supreme Court decision arbitrarily interfered with the right to family privacy and the right to raise a family as protected by Articles 11(2), 17(2) and 24 of the ACHR because it restricted their right to be treated to overcome their biological disadvantage of being unable to conceive. The IACtHR received 49 *amicus curiae* briefs from several institutions and individuals related to this case, out of which only those presented by the Equal Rights Trust and the Human Rights Clinic for the University of Texas, INTERIGHTS and the ones presented by Marcelo Ferreyra, Rosa Posa, Bruna Andrade and Mario Pecheny were admitted.

In addition to making certain procedural objections, Costa Rica also argued that it had not committed any breach of the ACHR. Costa Rica stated that its Constitutional Court had declared unconstitutional only one type of in vitro fertilisation and that in the event that in vitro fertilisation technology were to advance in a way that human embryos would not be lost, in vitro fertilisation would be allowed.

The Court held that: (1) the arguments delivered by Costa Rica were overruled; (2) Costa Rica violated Articles 5(1), 7, 11(2) and 17(2) with regards to Article 1(1) of the ACHR; (3) Costa Rica must adopt necessary measures in order to annul the prohibition on in vitro fertilisation and provide assistance to those who intend to use such method; (4) Costa Rica must regulate aspects which it considers necessary to implement in vitro fertilisation methods in an orderly manner and provide inspection and control measures for institutions and professionals that practice in vitro fertilisation; (5) Costa Rica must make in vitro fertilisation available through public health plans and treatments; (6) Costa Rica must provide victims with free and immediate psychological assistance for a period of four years beginning from the date of the Court's judgment; (7) Costa Rica must publish the Court's judgment in the Costa Rica Official Gazette and make the entire sentence available for the public for one year from the date of its judgment; (8) Costa Rica must implement permanent human rights, non-discrimination and reproductive rights education and training programmes oriented towards its judicial system; (9) Costa Rica must pay the amounts set forth in the judgment as compensation for damages, fees and expenses incurred by the plaintiffs; (10) Costa Rica must submit a report to the Court within a year of its judgment that contains information on the measures taken by Costa Rica to comply with the judgment; (11) Costa Rica must take measures to ensure that the resolutions set forth in the Court's judgment are fulfilled.

RELIGION; CULTURE; WORK; EQUALITY, DISCRIMINATION

Violation of Article 9 – right to freedom of thought, conscience and religion – of the ECHR in the case of NE

No violation of Article 9 – right to freedom of thought, conscience and religion – taken alone or in conjunction with Article 14 – prohibition of discrimination – of the ECHR in the case of SE and GM

No violation of Article 9 - – right to freedom of thought, conscience and religion – taken in conjunction with Article 14 – prohibition of discrimination – of the ECHR in the case of LL

Eweida & Ors v The United Kingdom

Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of the European Court of Human Rights, 15 January 2013

The ECtHR joined the complaints of four applicants in this decision. The first applicant, NE, worked as check-in staff for British Airways Plc, a private company. British Airways had a policy requiring employees to cover religious clothing and accessories under their uniform. When NE, a Coptic Christian, tried to wear a cross necklace that was not covered by her uniform at work, her manager refused to let her work. British Airways would not let her return to her position as check-in staff until she agreed to cover her necklace and instead offered her a different position where she would not have contact with the public so that she could openly wear her necklace. NE refused the new position. After several months of public scrutiny in Britain, British Airways reversed its policy. NE returned to work in her old position. After returning to work, she filed a complaint against British Airways before the Employment Tribunal in December 2006, claiming violations of regulation 3 of the Employment Equality (Religion and Belief) Regulations 2003 and a breach of her right to manifest her religion under Article 9 of the ECHR. The Employment Tribunal dismissed all claims. She appealed to the Employment Appeal Tribunal and to the Court of Appeal, who both upheld the decision of the Employment Tribunal. The Supreme Court refused NE's leave to further appeal.

The second applicant, SC, worked as a nurse for a government hospital. Hospital policy did not permit employees to wear necklaces around patients for health and safety reasons. SC, a practicing Christian, sought an exception to wear a cross necklace around her neck at all times. The hospital refused her request, though offered alternative solutions such as wearing the cross on a lanyard with her identification, which SC denied because there would be times that she would still not be permitted to wear the cross. SC was moved to a temporary non-nursing position, which later ceased to exist. SC filed a complaint against the hospital before the Employment Tribunal in November 2009, complaining of direct and indirect discrimination on religious grounds. The Employment Tribunal dismissed all claims. SC did not appeal the ruling because of the outcome in NE's case.

The third applicant, LL, was employed by the London Borough of Islington as a registrar of births, deaths and marriages. After the Civil Partnership Act 2004, which permits the legal registration of civil partnerships between two people of the same sex, went into effect, Islington decided that all registrars of births, deaths and marriages would also be civil partnership registrars. Based on religious grounds, LL refused to register any civil partnerships. LL underwent a disciplinary hearing because her refusal to register civil partnerships violated her employer's equality and diversity policy, and she was asked to sign a new job description that required her to register civil partnerships. LL filed a claim against her employer before the Employment Tribunal in December 2007, complaining of direct and indirect discrimination on grounds of religion or belief and harassment. The Employment Tribunal held that there had been direct and indirect discrimination against LL. The local authority appealed the decision to the Employment Appeal Tribunal, which reversed the decision of the lower court. LL appealed to the Court of Appeal, which upheld the decision of the Employment Appeal Tribunal. The Supreme Court refused LL's leave to further appeal.

The fourth applicant, GM, was a relationship counselor and sex therapist employed by Relate Avon Limited, a private company. GM was a practicing Christian with deeply held beliefs against homosexuality, and he believed that he could not do anything that endorsed homosexual activity. On several occasions, he had conversations with his employer about his religious beliefs and its potential to interfere with his ability to counsel same sex couples. On each occasion, GM stated that he would not let his beliefs interfere with his work. Relate eventually terminated GM upon the belief that GM was not being honest and would refuse to counsel same sex couples. GM filed a claim against Relate before the Employment Tribunal in 2008, complaining of direct and indirect discrimination, unfair dismissal and wrongful dismissal. The Employment Tribunal dismissed all claims. He appealed to the Employment Appeal Tribunal, which upheld the decision of the Employment Tribunal. The Court of Appeal refused GM's leave to further appeal.

The Court held that: (1) in the case of NE, there has been a violation of Article 9 as the company's uniform code did not strike a fair balance in limiting her rights and that it was not necessary to examine her complaint under Article 14, taken in conjunction with Article 9; (2) in the case of SC, her complaint of direct discrimination was inadmissible and that there has been no violation of Article 9, taken alone or in conjunction with Article 14; (3) in the case of LL, there has been no violation of Article 14, taken in conjunction with Article 9; (4) in the case of GM, there has been no violation of Article 9, taken alone or in conjunction with Article 14; (5) the State must pay EUR 2,000 to NE plus taxes and interest for non-pecuniary damages and EUR 30,000 plus interest for costs and expenses; (6) the remainder of the applicants' claims are dismissed.

budgetary burden on the state was not 'unduly heavy' considering the low number of potential beneficiaries of the scheme.[52]

Furthermore, the *Goodwin* Court chose to refer to the on-going debates that were taking place in the United Kingdom regarding the necessity to legally recognise transgender people in their preferred sex. Referring to domestic case-law and the works of the Report of the Interdepartmental Working Group on Transsexual People published in 2000, the Court stated 'that any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals.'53 Even if we assume the validity of these concerns, a pertinent question may arise about the extent to which they apply beyond the United Kingdom to the Council of Europe region more widely.

Finally, the Court has repeatedly suggested in its jurisprudence that the 'manifest determination' of individuals who had undertaken genital surgery is a factor that should be taken into account in the applicant's favour in transgender cases.[54] It is however unclear why the Court singles out genital surgery as a marker of determination as opposed to, for example, living a lifetime according to a gender identity which differs from the sex assigned at birth, without undergoing any surgical treatment, or undergoing only 'partial' surgical treatment.

The Court's Misuse of the Margin of Appreciation Doctrine in Transgender Cases

The way in which the Court has defined the margin of appreciation available to states in relation to legal gender recognition is currently the major stumbling block preventing a more expansive interpretation of the Convention as applied to transgender people.[55] In *Goodwin*, the Court decided that the 'appropriate means of achieving recognition of the right' to legal gender recognition came within the states' margin of appreciation.[56]

At the same time, the Court has not clarified the exact scope and contents of the margin of appreciation available to states in this area, whether in Goodwin, or in subsequent cases. This has given rise to substantial uncertainty with respect to the protections available to transgender persons under the Convention. The margin of appreciation as currently construed appears to cover procedural details but is not probably broad enough as to allow arbitrariness. At the same time, it appears to include vehemently contested requirements such as forced medical treatment (including treatment that leads to sterilisation) or compulsory divorce.

The Court has not yet solved in a satisfactory manner the question of whether the margin of appreciation is as wide as to allow authorities to impose procedures that are extremely lengthy and complex, making access to legal gender recognition exceedingly difficult. In *Nunez v France*, the Court stated squarely that such elements as waiting times fall squarely within the margin of appreciation.[57] Although *B. v France* predated the articulation of the margin of appreciation standard in *Goodwin*, it is nevertheless instructive to highlight the fact that the Court in that case has taken a more nuanced position. The applicant in *B. v France*, a transgender woman, undertook gender reassignment surgery abroad. Domestic courts rejected her legal gender recognition claim *inter alia* because the applicant did not follow the procedures for sex change applicable in France. Once the applicant decided to undertake surgery abroad, this fact practically annihilated any claim for gender recognition that she could make under French law. The Court waived the French government's objections in this respect and held that it was more important that the operation involved the irreversible abandonment of the external marks of Miss B's original sex, and that her manifest determination was an important factor to be taken into consideration.[58] This seems to suggest that the margin of appreciation is not over encompassing. However, the finding in *B. v France* has not been confirmed subsequently.

Presumably, however, the margin of appreciation cannot go as far as to allow systems of registration that are arbitrary and unpredictable, a feature that is present in certain European countries. A right to legal gender recognition is solidly anchored in the Court's jurisprudence. In addition, whatever the system chosen by the state to ensure the realisation of the right, it has to be consistent and clear to all those concerned. For example, the Court has stated in *Goodwin v United Kingdom* that 'the coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention'.[59] The judgment in *L. v Lithuania* may be read in the same vein, considering the Court's insistence on the authorities' failure to fill gaps in national legislation. At the same time however, although the Court has described in detail in its *B. v France* judgment domestic case-law on legal gender recognition in France that was highly inconsistent on similar facts, it failed to draw any conclusions on this basis from the point of view of compliance with the Convention.[60]

States appear to be entitled, on the basis of their margin of appreciation, to impose substantive preconditions such as compulsory divorce, compulsory medical treatment and compulsory sterilisation. This was confirmed by the Court for example in the case *Stella Nunez v France*, in which a transgender woman wished to have her gender legally recognised before finalising her gender reassignment treatment. The applicant had already begun hormone treatment and had received mammary implants. Relying on *Goodwin*, the Court found that the legal definition of a 'post-operative transsexual' for the purposes of legal gender recognition came within the state's margin of appreciation. Contracting states were only obliged to legally recognise a person's gender reassignment once 'final' surgery was completed.[61] As a matter of principle, the margin of appreciation should be narrow where 'a particularly important facet of an individual's existence or identity is at stake'.[62] This must surely mean that measures interfering *inter alia* with an individual's right to physical integrity, such as legislation conditioning access to legal recognition on medical treatment leading to sterilisation, could not be left to state discretion and exempt from Court scrutiny.

In the compulsory divorce case *H. v Finland*, the Court offered a slight variation on the margin of appreciation theme. In examining the compatibility of compulsory divorce legislation with the Convention, the Court stated, relying on its holding in Goodwin, that 'the matter of regulating the effects of the change of gender in the context of marriage falls within the appreciation of the Contracting State'.[63] However, the Court has not relied on the margin of appreciation doctrine to decide the case, and instead engaged in a balancing exercise on the substance of the case. Although the outcome of the case was ultimately negative, this is a notable development as it may indicate that the Court may be amenable to narrow down the margin of appreciation available to states in this area.

The *Van Kück v Germany* and *Schlumpf v Switzerland* judgments reveal another tension in the Court's understanding of margin of appreciation as applied in legal gender recognition cases. Because these cases were argued mainly on the basis of the right to fair trial, and did not concern legal gender recognition *per se*, the Court was able to apply a much stricter scrutiny, criticising authorities for applying a two-year waiting time in an inflexible manner (in *Schlumpf*), for questioning the reality of the applicant's transsexuality and for asking her to prove that gender reassignment treatment was medically necessary (in *Van Kück*). However, where for example the issue of waiting times arose in the context of legal gender recognition (in *Nunez v France*), it would in all likelihood be exempt from Court scrutiny as coming within the state's margin of appreciation. We see again evidence to support the aforementioned conclusion that Court scrutiny is stricter in countries that already offer some support to transsexuals (such as, in *Van Kück* and *Schlumpf*, funding for gender reassignment treatment), as opposed to countries which withhold any support whatsoever, and where consequently the situation of transsexuals is more difficult.

Conclusion

In this article I reviewed certain aspects of the Court's jurisprudence on transgender rights that are less clear and/or somewhat controversial. Even if there are relatively few judgments in this area, their implications are subject to divergent interpretations. In particular, the existence of a right to have the costs of gender reassignment treatment covered by states is doubtful at best. The Court's rulings depend to a large extent to circumstances specific to the states against the respective cases have been brought in the first place. Paradoxically, the Court found it easier to rule against countries which already offered some support to transgender people. This however begs the question of the extent to which the Court's rulings lend themselves to be applied in countries were the situation of transgender people is the most difficult. In particular, in the absence of proper reasoning, the Court's distinction between post-operative and pre-operative transsexuals for the purposes of legal gender recognition is untenable in the long-term and should be revised. Finally, the excessive breadth of the margin of appreciation made available to states insulates from Court scrutiny national practices in the field of legal gender recognition which on their face interfere with fundamental human rights, as well as preventing any re-assessment of the more problematic aspects of the *Goodwin* judgment.

Future litigation before the Court should highlight such inconsistencies and encourage the Court to review its jurisprudence, particularly in light of circumstances prevailing in countries without coherent legal gender recognition legislation and where transgender people are subjected to high levels of prejudice and hatred. If anything, the trends cited by the Court in support of its *Goodwin* ruling, favouring 'the increased social acceptance' of transgender people, as well as their right to sexual self-determination free from unnecessary and abusive medical requirements continued over the past twenty years. Additionally, the emergence of gender identity as a protected ground in international law as evidenced at regional and international level, should lead to a fresh reassessment by the Court of its transgender jurisprudence, in particular by narrowing down the margin of appreciation available to states in this area.

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1 Helfer, R. and Voeten, E., *International Courts as Agents of Legal Evidence from LGBT Rights in Europe* (9 July 2012), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526>.

2 For a good analysis of the significance of the *Christine Goodwin* judgment see Sandland, R., *Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights*, Feminist Legal Studies 11: 191-209, 2003.

3 *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, CoE Commissioner for Human Rights, 29 July 2009, Section I, available at <https://wcd.coe.int/ViewDoc.jsp?id=1476365#P277_71330>.

4 See for example McGill, J. and Kirkup, K., *Locating the Trans Legal Subject in Canadian Law: XY v Ontario*, (2013) 33 Windsor Review of Legal Social Issues 96.

5 I do not count here those judgments in cases brought by transgender claimants where their gender identity was inconsequential to the Court's adjudication, such as for example *Halat v Turkey*, no. 23607/08, 8 November 2011.

6 *B. v France*, 25 March 1992, §63, Series A no. 232-C.

7 *Christine Goodwin v the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

8 *I. v the United Kingdom* [GC], no. 25680/94, 11 July 2002.

9 *Grant v the United Kingdom*, no. 32570/03, §41, ECHR 2006-VII.

10 *L. v Lithuania*, no. 27527/03 (Sect. 2), ECHR 2007-IV – (11.9.07).

11 *B. v France, supra* note 6.

12 *Christine Goodwin v the United Kingdom* [GC], *supra* note 7. The judgment in *L. v the United Kingdom* is, for all respects and purposes, identical to that in *Christine Goodwin*. In *Grant v the United Kingdom*, the court applied the *Goodwin* holding and held that the applicant should benefit from a retirement pension in agreement to her acquired gender, *Grant v the United Kingdom*, see *supra* note 9.

13 *L. v. Lithuania, supra* note 10.

14 *Van Kück v Germany*, no. 35968/97, §70, ECHR 2003-VII.

15 *Schlumpf v Switzerland*, no. 29002/06, §112, 8 January 2009.

16 See for example *Rees v the United Kingdom*, 17 October 1986, Series A no. 106, *Cossey v the United Kingdom*, 27 September 1990, Series A no. 184 or *Sheffield and Horsham v the United Kingdom*, 30 July 1998, *Reports of Judgments and Decisions* 1998-V.

17 *Nunez v France*, (dec.) Application no. 18367/06, 27 May 2008.

18 *H. v Finland*, no. 37359/09, 13 November 2012, currently on appeal before the Grand Chamber of the Court.

19 *P.V. v Spain*, no. 35159/09, §30, 30 November 2010.

20 See for example *Joint contribution by ILGA-Europe and Transgender Europe towards the European Commission's monitoring of the implementation of the Gender Goods and Services Directive (Dir. 2004/113/EC) and the Gender Recast Directive (Dir. 2006/54/EC) in the EU Member States*, June 2011, p.10, referring to the Commissioner's Paper, available at <http://www.ilga-europe.org/home/publications/policy_papers/report_on_gender_discrimination_in_employment_and_access_to_goods_and_services_june_2011>.

21 *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on ground of sexual orientation or gender identity* (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), Appendix, §36.

22 *Ibid.*, Explanatory Memorandum, §35-36.

23 Westeson, J., *Sexual Health and Human Rights in the European Region*, International Council on Human Rights Policy, 2012, p.97.

24 *Van Kück v Germany, supra* note 14, §70.

25 *Schlumpf v Switzerland, supra* note 15, §77.

26 *Pentiacova and Others v Moldova* (dec.), no. 14462/03, ECHR 2005-I.

27 *Hristozov and Others v Bulgaria*, nos. 47039/11 and 358/12, §113, ECHR 2012 (extracts).

28 *Nitecki v Poland (dec.)*, no. 65653/01, 21 March 2002.

29 *Pentiacova and Others v. Moldova (dec.), supra* note 26.

30 See along the same line, Clements, L. and Simmons, A., 'European Court of Human Rights: Sympathetic Unease', in Langford, M., (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008, p.419.

31 *L. v. Lithuania, supra* note 10, §59.

32 See for example *S.H. and Others v Austria* [GC], no. 57813/00, §97, ECHR 2011, *Evans v the United Kingdom* [GC], no. 6339/05, §81, ECHR 2007-I, *R.R. v Poland*, no. 27617/04, §187, 200, ECHR 2011 (extracts).

33 See the document issued by the Lithuanian government titled 'Updated Information on the Execution of the ECHR Judgment in the Case L. v. Lithuania', dated 18 April 2013 and available on the Committee of Ministers' website at <http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Info_cases/Lithuanie/L18042013.pdf>.

34 *Christine Goodwin v the United Kingdom, supra* note 7, §90.

35 *Van Kück v Germany, supra* note 14, §56.

36 *Ibid.*, §75

37 *Ibid.*, §73.

38 *Ibid.*, §78.

39 *L. v. Lithuania, supra* note 10, §59.

40 *Sentges v the Netherlands (dec.)*, App. No. 27677/02, 8 July 2003.

41 With the notable exception of *B. v France* where the Court took issue with the fact that, as opposed to the situation in the United Kingdom, the French authorities did not provide even the modicum of accommodations in view of the applicant's gender identity. However, this judgment does not significantly alter the tenor of my demonstration as the Court did not clearly spell out whether the state had to recognise the applicant's gender identity as a result of the violation found, see *B. v France, supra* note 6, §63. *B v France* has in the meantime been effectively overruled by the Christine Goodwin judgment, widely acknowledged to be the leading case in respect of state obligations in the field of legal gender recognition.

42 *Christine Goodwin v the United Kingdom, supra* note 7, §78.

43 See *supra* note 10.

44 *Artico v Italy*, 13 May 1980, §33, Series A no. 37

45 See Sivonen, L., 'Gender Identity Discrimination n European Judicial Discourse', in *Equal Rights Review*, Volume Seven (2011), pp.11-26.

46 *H.L. v the United Kingdom*, no. 45508/99 (Sect. 4), ECHR 2004-IX – (5.10.04), §124; *L.M. v Latvia*, no. 26000/02 (Sect. 3) (Eng) – (19.7.11), §51.

47 *Christine Goodwin v the United Kingdom, supra* note 7, §91.

48 See for example Tobin, H. J., 'Against the Surgical Requirement for Change of Legal Sex', Case W. Res. J. Int' L., [Vol. 38:2], pp.393-435].

49 See for example *Cossey v the United Kingdom, supra* note 16, §38-39.

50 *B. v France, supra* note 6, §52.

51 *Christine Goodwin v the United Kingdom, supra* note 7, §91.

52 *L. v Lithuania, supra* note 10, §59.

53 *Christine Goodwin v the United Kingdom, supra* note 7, §86-91.

54 See for example *B v France, supra* note 6, §55 and *Van Kück v Germany, supra* note 14, §77.

55 See Sandland, *supra* note 2, p.200 *et seq.*

56 *Christine Goodwin v the United Kingdom, supra* note 7, §93.

57 *Nunez v France (dec), supra* note 17.

58 *B. v France, supra* note 6, §55.

59 *Christine Goodwin v the United Kingdom, supra* note 7, §78.

60 *B. v France, supra* note 6, §§23-24, 55.

61 *Nunez v France (dec), supra* note 17.

62 *Evans v the United Kingdom* (no. 6339/05), 10 April 2007, §77.

63 *H. v Finland, supra* note 18, §49.

Right to Know: True or False?

Mikhail Golichenko and
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Russia is home to the fastest-growing HIV epidemic in the world, chiefly driven by injection drug use. However, to the puzzlement of the impacted populations, public health activists and international NGOs that work to battle HIV/AIDS, the Russian government continues to ban opioid substitution treatment (OST) that is internationally recognised and accepted as the most effective method of treating opiate addiction.

This article will discuss the legal ban on this form of treatment, looking both at action taken by police and government agencies, and at individual statements made by government representatives. The article will then consider the right to information as part of the right to health, focusing specifically on whether this right encompasses the right to accurate information under domestic law and international human rights standards, before looking at remedies.

The World Health Organization (WHO) defines OST as the administration of thoroughly evaluated opioid agonists (most frequently, methadone or buprenorphine) by accredited professionals to people with opioid dependence, for achieving defined treatment aims. When combined with psychosocial assistance, it is considered by the WHO to be the most effective method of treatment of opioid dependence.[1] OST is endorsed by the UN General Assembly and the Commission on Narcotic Drugs,[2] the Economic and Social Council (ECOSOC),[3] and the International Narcotics Control Board (INCB).[4] The UN Office on Drugs and Crime and the UN Joint Programme on HIV/AIDS (UNAIDS) strongly recommend OST as a core intervention for HIV/AIDS prevention among people who inject drugs.[5] Methadone and buprenorphine are listed by WHO as essential medicines to be used in substance dependence programmes.[6] Availability of essential medicines has been emphasised by the Committee on Economic, Social and Cultural Rights (CESCR) as one of the underlying determinants of health.[7] OST has been successfully implemented in over 60 countries, including the USA, Australia, Canada, China, Iran and India. Russia is the only country among the 47 members of the Council of Europe that bans this form of treatment.

The legal ban on OST is enforced not only by actual prohibition of this type of therapy, but also by blocking objective information about it. Information about OST is one of many targets of the law that prohibits so-called 'drug propaganda'.[8] The broad legal definition of this type of propaganda is exacerbated by arbitrary law enforcement. Below are some examples of the application of this law:[9]

- In May 2004, the Federal Drug Control Service (FDCS) sued an online bookstore <www.books.ru> for distributing the Russian edition of the book *Marijuana: The Forbidden Medicine* (Grinspoon and Bakalar, Moscow, Ultra-Kultura, 2003). FDCS demanded that the book be removed from circulation because it contained 'drug propaganda'.[10] A Moscow court fined the company that owned the online bookstore. Similar cases were initiated in several other cities where the book had been distributed.[11]

- In April 2006, the FDCS Department in Tatarstan (a region of the Russian Federation) launched an administrative investigation into the activities of medical doctor and professor Vladimir Mendelevich who promoted scientific discussions on OST through his website. As a result, the website was shut down.[12 & 13]

- In April 2009, the Federal service on surveillance of communications and mass media in Permsky krai (a region of the Russian Federation) followed the order of the FDCS Department of Permsky krai that prohibited a local newspaper New Companion to post photos of a painting by a contemporary Russian painter Dmitry Vrubel. The order categorised the painting as 'drug propaganda'. Subsequently, the FDCS order was sent to the curator of the exhibition with a request to remove the picture or restrict access of children to the exhibition.[14]

- In June 2009, the Supreme Court of the Russian Federation upheld the lower courts' judgment in favour of the FDCS's order to impose a fine for illicit advertisement of narcotic means by selling belt buckles with the image of a hemp leaf.[15]

- In February 2012, the website of the Andrey Rylkov Foundation for Health and Social Justice was shut down at the order of FDCS for 'propaganda of [opioid] substitution therapy'.[16]

Apart from actively blocking information about opioid substitution therapy, when the growing epidemic, international pressure and plethora of scientific evidence made defending the ban on substitution treatment more difficult, the government chose another path: promulgating lies, frequently via its official representatives, both in the domestic sphere and internationally.

In January 2013, the Minister of Health, in her reply to a Member of Parliament, stated:

Methadone therapy sentences a patient to a quick death within a year or a year and a half after commencing such a therapy ... As a matter of fact, the European Union already started slowly repudiating substitution therapy.[17]

The Director of the FDCS, the agency that spearheads the drug war, has on many occasions provided misleading information about OST. Below are some excerpts:

- On 15 April 2011: '*There is no OST in Sweden and the USA*'.[18]
- On 21 June 2012: '*OST does not have clinically proven [positive] results*'.[19]
- On 25 September 2012: '*There is no scientific evidence of the effectiveness of substitution therapy*'.[20]

The Senior Representative of the Ministry of Health made a speech at the 52nd session of the Commission on Narcotic Drugs in March 2009:

There is no evidence that the use of methadone and buprenorphine facilitates treatment of drug addicts.[21]

In 2007, Mr Ivanets, at that time the Chief Drug Treatment Doctor of Russia, referred to scientific discussion of substitution treatment as drug propaganda, prohibited by law:

They [drug treatment doctors] won't be in favor [of OST], they are not idiots. There is a law: if they are in favor, they will be arrested for propaganda of narcotic drugs.[22]

In 2009 Mr Onischenko, the Chief Sanitary Doctor of the Russian Federation, underlined:

The Russian Federation is not alone in its resistance to methadone. In the USA, where methadone is produced, the laws of the country prohibit its free circulation in the society and don't allow substitution treatment.[23]

It is not difficult to prove that this information is false. Hundreds of scientific papers, both peer-reviewed and those published by the World Health Organization,[24] provide strong evidence that OST facilitates treatment of opioid dependence. OST continues to be available in 27 countries of the European Union, including Sweden, which has shown no signs of scaling-down its treatment programmes.[25] Out of 47 countries in the Council of Europe, OST is banned only in Russia. Similarly, the U.S. National Institute on Drug Abuse considers methadone and buprenorphine to be effective medications for treatment of opioid dependence;[26] there were about 1,400 methadone programmes in the USA in 2006, providing services for 254,000 clients;[27] the U.S. Centers for Disease Control and Prevention call methadone maintenance treatment 'the most effective treatment for opiate addiction.'[28]

Though freedom of information questions have received wide coverage in legal and other publications, the situation in Russia brings up a question of different nature: do Russian citizens have the right to receive accurate information? By providing wilful misinformation, does the Russian government violate its citizens' right to access information?

International Legal Norms

According to the International Convention on Economic, Social and Cultural Rights (ICESCR),[29] the right to health is an inclusive right, extending not only to timely and appropriate health care services, but also to the underlying determinants of health, such as access to health-related information.[30]

The ICESCR considers access to information an essential element of the right to health.[31] Access to information concerning chief health problems in the community, including methods of preventing and controlling them, is listed among the priority obligations related to the right to health.[32] The ICESCR declares that the obligation to fulfil (promote) the right to health 'requires states to undertake actions supporting people in making informed choices about their health.'[33] Deliberate mis-representation of information vital to health protection or treatment is considered a violation of the state's obligation to respect the right to health.[34]

Misinformation as a Violation of the Right to Receive Information

One can argue that the right to receive information is not violated if a state provides any information on drug treatment with OST, regardless of whether this information is misleading (false) or not. Laws prohibiting 'false news' have long been debated in various countries, and in many cases 'false news' provisions were struck out in favour of freedom of expression.[35] But in most of the 'false news' cases, the accused were either journalists or publishers who faced criminal prosecutions for unreliable information under vague laws. In the case of misleading information about OST in Russia, the misinformation is promulgated by state authorities and via state-sponsored channels. Thus, the question turns on whether the Russian government is violating the right to receive information on the health matter of a general public interest, particularly taking into account the authorities' insistence on actively preventing distribution of evidence-based information about OST.

Domestic Laws

According to the Federal Law No 8-FZ of 9 February 2009 'On access to information about activities of the authorities,' information on the activities of state authorities shall include information created by state bodies within their mandate (Article 1(1)). One of the main principles of access to information is the principle of reliability of the information about activities of the state authorities (Article 4(2)); one of the main legal requirements of the information posted by state bodies is that this information be reliable (Article 11); and those who seek information (consumers of information) shall have the right to receive reliable information.

The Law lists 'placing information on the activities of state bodies on the Internet' as one of the methods of ensuring access to information (Article

6(2)), including via official websites of state bodies (Article 10), where the state shall post 'texts of official speeches and statements of the heads of state bodies and of their deputies' (Article 13(6)).

Members of the general public can therefore reasonably expect that information posted on official state websites is truthful. If state agencies fail to ensure that the information they provide is reliable according to the Law No 8 of 9 February 2009, the individual right to receive information is violated. It is an even grosser violation in cases when the state authorities limit free access to information on the subject while providing misinformation on that very subject, which is the case with OST.

OST Statements as Information Under the Law No 8 of 9 February 2009

According to the Law No 8, then, official speeches and statements of heads and deputy heads of state bodies shall be classified as information about the activities of state authorities, since this information is posted on official websites of the state bodies. This information must therefore be reliable.

Statements of the Head of the FDCS and the Head of the Sanitary Service (Rospotrebnadzor)

On the one hand, the above-quoted statements of Mr Ivanov, the Head of the FDCS, and of Mr Onischenko, Chief Sanitary Doctor, appear not to be official speeches or statements as they were made during interviews with newspaper journalists. On the other hand, these interviews were then published using the interviewee's official titles as their professional opinions, not in their individual capacity. For example, in his interview, Mr Ivanov not only made comments with regard to drug-related trends, but rather made broad statements regarding the FDCS as the agency leading the nation's drug control efforts. Furthermore, these interviews were posted on the official website of the FDCS in the special section 'Statements of Mr. Ivanov'. Because Mr Ivanov made these statements in his official capacity, and they were later posted on the FDCS website, it is fair to conclude that they fall under Law No 8 of 9 February 2009, which requires official statements and information to be reliable. Similarly, this law would apply to Mr Onischenko's statements.

Statement by officials from the Ministry of Health

A speech of the Minister of Health made to the Members of Parliament shall undoubtedly be qualified as an official statement under Law No 8 of 9 February 2009, thus also falling under the requirement of reliability.

The OST statement of Ms Krivonos, who heads a department within the Ministry of Health, is posted on the official website of the Ministry. Ms Krivonos is not a Head or a Deputy Head of the Ministry. But she made the false statement (quoted above) in her capacity as an official representative of Russia's Ministry of Health during the High Level Segment of the 52nd Session of the UN Commission on Narcotic Drugs. Thus, this statement can also be classified as an official statement under the Law No 8 of 9 February 2009 and would have to also meet the requirement of reliability.

International Standards

According to the European Court of Human Rights (ECHR), the freedom to receive information 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.'[36] At the same time, governments do not have an obligation to provide information or access to official documents, with the exception of cases in which information of general public interest is requested by the press or another social watchdog.[37] States may, however, have an obligation to provide information under other provisions of the European Convention on Human Rights.[38]

The UN Human Rights Committee (HRC)[39] sets up a broader framework for the right to receive information. It embraces the right to access information held by public entities, including 'records held by a public body, regardless of the form in which the information is stored, its source and the date of production'.[40] According to the HRC '[t]o give effect to the right of access to information, State parties should proactively put in the public domain Government information of public interest,' which should include information regarding human rights enshrined in the International Covenant on Civil and Political Rights.[41] Information-sharing and consultation with impacted communities is an important component of the decision-making process when actions of the authorities may substantively compromise the way of life and culture of a minority group.[42]

The UN Special Rapporteur on the freedom of expression has endorsed a set of principles that require state bodies to ensure access of the general public to information, including records held by public bodies.[43]

Does the State's Obligation to Provide Access to Information Imply That This Information Must be Truthful?

We argue that the answer is yes. A state's obligation to provide information about its activities cannot be fulfilled by disseminating false information, which is arguably equally or more harmful to the public as no information at all. When a government provides false information in order to justify its deeds or compromise calls for change, the public remains lethargic to the protection of its rights. Government-supplied misinformation prevents positive changes, as well as true transparency and accountability. It adds false legitimacy to decisions, often arbitrary ones that impact communities and their enjoyment of basic human rights.

This is especially true in the case of Russia, where the government strives to create an information monopoly over OST. The government disseminates false information about this form of treatment, while equating objective information about the subject to drug propaganda. In other words, the state authorities prohibit any favourable information about OST, but welcome and actively promote any and all information which would compromise it. This double-standard may have a chilling effect on journalists or other social watchdogs who would otherwise wish and be in a position to provide the public with objective information about evidence-based drug treatment, as they can logically conclude that any favourable information about OST will be categorised by drug control authorities as drug propaganda. In this manner, the state authorities establish an information monopoly over OST. Distribution of misleading information serves a crucial role in this monopoly as a flagstaff to demonstrate to journalists, medical professionals and the public which information is acceptable, and which is not.

According to the ECHR, 'the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities.'[44] The state creates barriers to distribution of accurate information about OST. This leads to an information vacuum which the state fills with the false information. The press and other social watchdogs receive clear signals from the government on what to report about OST and what not to report in order to avoid prosecution for drug propaganda.

One can assert that state authorities in Russia are not in a position to block every bit of objective information about OST, especially English-language websites and other web resources. However, falsities supplied by state officials dominate the Russian-language web. The mere fact that state authorities obstruct free information about OST and against this background provide a myriad of false statements about it is evidence of the government striving to prevent the general public from receiving truthful information in violation of Russia's domestic laws. Taking into account the Law No 8 of 9 February 2009, the public have legitimate reasons to expect that the information posted on the official websites of the state drug control and health bodies about OST is reliable. Misled, the public is ignorant about effective health intervention such as OST and as a result is not willing to question the ineffectiveness and inefficiency of the current system of drug dependence treatment and HIV prevention. The violation of the public's right to receive truthful information triggers a violation of the right to health.

What Shall be the Remedy?

In order to satisfy its national and international obligations, state officials must retract false statements about OST and distribute reliable information about the issue, which has been grossly misrepresented to the public. Russia already has the necessary laws in place that limit the legitimacy of false information coming from the state. However, positive legal practice related to these laws is yet to be established. Moreover, there are no clear guidelines on this topic on the international level. In this legal uncertainty, the right to true information from the state is at a high risk of not being justiciable.

Lack of an independent judiciary in Russia makes domestic courts an unlikely venue for social and political change. One possible remedy that is being pursued by Russian civil society activists is strategic litigation in the international human rights bodies, such as the European Court for Human Rights and the UN Human Rights Committee.

In September 2011, the Andrey Rylkov Foundation for Health and Social Justice (ARF)[45] filed a request for information from the President of the Russian Federation regarding the government's implementation of recommendations given to the Russian Federation by the Committee on Economic, Social and Cultural Rights. In response to this request, the Ministry of Health, acting on behalf of the Administration of the President, provided ARF with the false information about OST and did not address the actual request to fulfil Russia's international obligations. National courts dismissed this matter and failed to give any consideration to ARF's claim of violation of the right to receive true information. In April 2013, after exhausting the domestic remedies, ARF filed an individual complaint to the Human Rights Committee.

In March 2012, Russian journalist Alexander Delphinov went to court in Moscow after the FDCS blocked ARF's website for propaganda of OST. Mr Delphinov argued that the state authorities violated his freedom of expression in two ways: by preventing him from accessing information about OST that ARF was willing to impart, and by distributing false statements about OST by the head of the FDCS and other senior public health officials. The local court dismissed Mr Delphinov's claims. In March 2013, after exhausting domestic remedies, he filed an application with the European Court of Human Rights.

In 2014, the Human Rights Committee is scheduled to consider the next periodic report of the Russian Federation. Russian activists plan to address the issue of true information as part of a shadow report to the Committee.

Lack of accurate information about OST is not only violating the public's right to know, but is also contributing to the continuing growth of the HIV epidemic in a country where the disease is already spreading faster than anywhere else in the world. It is imperative that Russia begins to meet its domestic and international obligations, taking an important step in addressing its public health emergency.

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2 High Level Segment of the Commission on Narcotic Drugs, 'Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem', para. 20, March 2009, adopted by the UN General Assembly's Resolution 64/182 of 18 December 2009.

3 ECOSOC Resolution 2004/40.

4 International Narcotics Control Board, *Report of the International Narcotics Control Board for 2008,* New York, INCB, 2009, E/INCB/2008/1, paras. 24 and 25, 6, at <http://www.incb.org/incb/en/publications/annual-reports/annual-report-2008.html>.

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Piece by Piece: The Approach of Sex Work Litigation in South Africa

David Scamell, Stacey-Leigh Manoek and Jennifer Williams

Post-apartheid South Africa has a strong tradition of social justice litigation. Armed with one of the world's most progressive constitutions, numerous human rights movements have gone to court to create systemic change aimed at righting past wrongs and transforming South African society. The push for the government to provide life-saving HIV anti-retrovirals culminated in the landmark decision of the South African Constitutional Court in *Minister of Health v Treatment Action Campaign*,[1] a case that is held as a symbol of the global movement for access to essential medicines. A year prior, the campaign for adequate housing, denied to significant parts of South Africa's population as a result of apartheid, found its legal foundation through *Government of the Republic of South Africa and others v Grootboom and others*,[2] a ground-breaking ruling that is recognised internationally as one of the most important cases to date on economic, social and cultural rights.

The movement for the rights of sex workers in South Africa has also utilised litigation as a strategy towards addressing the systemic human rights violations experienced by those who sell sex. The sex industry in South Africa is a highly criminalised one, with a hybrid of national criminal laws and provincial municipal by-laws, most of which date back to the apartheid era, used to control those engaged in sex work. Both the buying and selling of sex are criminal offences, as is the keeping or managing of a brothel, and living off the earnings of prostitution.[3]

Criminalisation creates and enforces stigma, and most sex workers in South Africa have been pushed to the margins of society, making them easy targets for police abuse and harassment.[4] At the same time, the criminalised nature of the work that they do means that sex workers are not afforded the same labour rights as others.

Starting with *S v Jordan and Others*[5] (hereinafter referred to as 'Jordan'), a number of important cases have been taken by sex worker advocates in an attempt to challenge the oppressive laws, policies and practices around sex work in South Africa.[6] The *Jordan* case sought to use the provisions in the interim Constitution to strike down the criminal laws relating to sex work, with advocates arguing that the national laws prohibiting prostitution and keeping or managing a brothel violated the guaranteed rights to human dignity, economic activity, privacy and gender equality.

At the time that the appellants launched their appeal, the interim Constitution was in effect. When the matter was referred to the Constitutional Court, the Court had to determine which Constitution was applicable. The Court decided that 'the issue of which constitution applies is governed by item 17 of Schedule 6 of the Constitution which provides that proceedings that were pending when the Constitution came into force, shall be governed by the interim Constitution unless the interests of justice require otherwise'.[7] Therefore the provisions relating to the rights of human dignity, economic activity, privacy and gender equality in the interim Constitution was used, because it was in force at the time of their arrest.

The decision of the majority of the Constitutional Court to dismiss the appellants' claims forced advocates to shift their strategy. With the prospect of a Constitutional Court ruling in favour of removing the criminal laws on sex work minimised, advocates adopted a piecemeal approach to systemic change. Cases have been brought, and won, that advance sex workers' labour rights and right to due process, personal dignity and security, with the courts appearing more comfortable to etch out specific rights for sex workers than to overturn the existing punitive legislative framework for the sex industry.

Social justice lawyering has played an important role in the South African sex worker rights movement.. This article examines the dynamic legal approach of sex worker advocates over the past decade to advance the rights of sex workers in South Africa. Beginning with the decision in *Jordan*, the article will trace the shift towards piecemeal legal reform through the cases of *Kylie v Commission for Conciliation Mediation and Arbitration and Others*[8] (hereinafter referred to as 'Kylie') and *SWEAT v The Minister of Safety and Security and Others*[9] (hereinafter referred to 'the *SWEAT Interdict* case'). Recognising that these cases are part of a broader approach, consideration will also be given to how other strategies such as peer-based paralegals, human rights documentation and direct lobbying have been embraced in order to improve the lives of sex workers in South Africa.

Jordan – A Missed Chance to Strike Down Sex Work Criminalisation

Sex workers in South Africa experience human rights violations at crisis levels. They report alarmingly high levels of abuse and harassment whilst working, either from police or from clients,[10] face discrimination in accessing health and social services,[11] and experience stigma which often impedes their ability to access other forms of employment if they decide to leave the sex industry. In spite of the fact that human rights abuses occur on a daily basis, and are often extreme and repeated due to the criminalised nature of sex work, such abuses are often carried out with impunity. As they are considered criminals for the work that they do, sex workers face significant barriers in accessing justice for abuses committed against them. The fact that police are often the perpetrators makes it even more difficult for redress to be sought.

The intrinsic relationship between the abuses experienced by sex workers and the criminalisation of the sex industry in South Africa has been the foundation for advocacy towards decriminalisation for the past two decades. In 2002, advocates had an opportunity to push for the criminal laws relating to sex work to be struck down as unconstitutional when the South African Constitutional Court heard the case of *Jordan*. The case involved three women who were charged for offences relating to prostitution when on 20 August 1996 an undercover police agent paid for a pelvic massage at a brothel in Pretoria. The woman who performed the massage was charged with committing unlawful carnal intercourse in exchange for reward, under s 20(1)(a) of the Sexual Offences Act 23 of 1957. The owner of the brothel was charged under s 2 (owning a brothel) and the manager under ss 3(b) (managing a brothel) and 3(c) (making profit from a brothel) of the same Act. All three women admitted in the Magistrates Court that they contravened the Sexual Offences Act but claimed that the law was unconstitutional and therefore should be declared invalid. Since the Magistrates Court has no power to declare statutes unconstitutional, they did not resist conviction in that court.

After being found guilty and sentenced by the magistrate, they appealed to the Pretoria High Court to have the provisions set aside. In a judgment handed down on 2 August 2001,[12] the High Court held that s 20(1)(a) of the Act, which penalised sex for reward, was unconstitutional.[13]

Before the Constitutional Court, the three appellants to the High Court decision challenged the constitutionality of ss 20(1)(a), 2, 3(b) and 3(c), using a number of arguments. For s 20(1)(a), it was argued that the application of the section to the consensual selling of sex by an adult in a private space, such as where the erotic massage in question took place, violated the right to privacy under s 14 of the Constitution.[14]

The argument put forward was based upon a conservative hierarchy of sexual interactions, with the appellants submitting that the right to privacy infringed does not give rise to the level of protection afforded to marital and other permanent personal relationships, but is equivalent to the recognised right to privacy afforded to ‘one night stands’, regardless of the fact that a commercial element exists in the sexual interaction.

They also argued, given that the vast majority of sex workers in South Africa were female, that the criminalisation of the seller of sex only within s 20(1)(a), meant that the provision violated the right to substantive gender equality found under s 9 of the Constitution.[15]

Echoing the common demand of the sex worker movement, both domestically and across the world, the applicants argued that the criminalisation of selling sex violated sex workers guaranteed right to trade (s 22 of the Constitution). Whilst it may sit outside of mainstream business practices, it was contended that people engage in sex work for the same reasons as other trades, as means of financial survival and therefore, sex workers should be afforded the same protections as workers in other trades in South Africa. That sex work may be considered immoral or unacceptable was not a justification to narrowly interpret the right.

The final direct constitutional violation alleged the general right to liberty (s 12 of the Constitution)[16] as the penalty of imprisonment could be invoked, despite the fact that this did generally not occur. In order to demonstrate the extent to which criminalisation impacted on the daily lives of sex workers in South Africa, the appellants also argued that s 20(1)(2) indirectly violated a range of constitutional rights – namely the right to equality before the law,[17] the right of access to healthcare, the right to security of persons[18] and to be free from all forms of violence, and the right to dignity.[19]

The appellants argued that as the constitutional rights of sex workers outlined in respect to s 20(1)(a) were inseparable from the conduct of brothel type activities, the provisions prohibiting brothels under s 2 and ss 3(b) and (c) were also unconstitutional. Specifically they argued that brothels held value for the rights of sex workers beyond being a place through which the activities of sex work took place. Given the potential risk of violence faced by sex workers from police, clients and the general public, surrounding structures such as brothels and managers could offer protection.

More so, that the South African government was either unwilling or unable to provide sex workers with protection against abuse, whilst maintaining a prohibitionist approach to brothels that was at best ineffectively enforced, supported the need for criminal prohibitions on brothels to be removed and replaced instead with ‘regulatory measures that are realistic for local conditions’.[20]

As respondent, the South African government based its argument on the premise that sex work was a serious social ill and the provisions of the Sexual Offences Act of 1957 in question served the important objective of addressing this problem. Although acknowledging that there was ‘no perfect cure for the social ills of prostitution’, the legislative approach taken by the government was one to which it was open to choose. Accordingly, it argued that this prohibitionist approach did not limit any constitutional rights of the appellants, though if such limitations were found by the Court, they were justifiable under s 36(1) of the Constitution.[21]

According to the government, the social ills that were either inherent or inevitably associated with sex work included the degradation of women, the level of violence abuse against those involved in the industry, the link between sex work and trafficking into the industry, the existence of child prostitution, the role that sex work plays in the spread of sexually transmitted disease, the high levels of drug abuse in the industry, the increase in associated crimes and general public nuisance where sex work takes place.

In addition to arguing that prohibition was a legitimate response to the social ills caused by prostitution, the government sought to challenge the alternative of legalisation or regulation which was proposed by the appellants. The crux of this argument laid in the proposition that legalisation or regulation of the sex industry would result in an increase in its size and consequently an increase in the supposed problems that it causes, something that the Constitution compelled the government to address.

To support its argument, the government primarily relied on evidence from Dr Farley and Dr David Phillips, who suggested that the legalisation of the industry in some Australian states had led to a boom in sex work and its associated ills. At the time, Dr Phillips was the head of the Festival of Light South Australia, a Christian organisation committed to eradicating prostitution.

On 9 October 2002 the Constitutional Court handed down its ruling, finding that ss 2, 3(b), 3(c) and 20 (1)(a) of the Sexual Offences Act were not in violation of the Constitution. All eleven judges found that the constitutional challenges based on the right to human dignity, freedom of person and economic activity failed, but were split by a margin of 6-5 on the question of whether s 20(1)(a) violated the right to non-discrimination on the basis of sex, with the majority finding no violation.

In writing for the majority, Ngcobo J's ruling on the issue of whether the provision amounted to direct discrimination was based on a literal reading of the text, which is gender-neutral, and therefore could in theory apply to anyone who engaged in sex for reward. Although s 20(1)(a) was only directed at the seller of sex, the buyer could also be found guilty of commissioning an offence under either the common law or the Riotous Assemblies Act, which meant that there was no case of indirect discrimination. Treating the two parties to the act differently under the law was justifiably open to the government as 'one of the effective ways of curbing prostitution is to strike at the supply'.[22]

O'Regan J and Sachs J, in the minority opinion, challenged the finding of the majority by undertaking a contextual analysis of the law, which found that, in general, in South Africa it is women who are the sellers of the sex, and therefore punished under s 20(1)(a). Men, as the buyers of sex, are at most subject to criminal liability as an accomplice to a crime, which carries much less social stigma than being a primary offender. According to O'Regan J and Sachs J, this 'directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact between prostitute and client is therefore directly linked to a pattern of gender disadvantage which [the] Constitution is committed to eradicating'.[23]

On the question of whether the provisions violated the appellants' constitutional right to economic activity,[24] both the majority and minority judgments were in agreement that even if such a right could be applied to sex work, the government was still entitled to take the steps that it had taken in attempting to prohibit the industry, given that 'there can be no doubt that it does have an impact on the quality of life'.[25] This impact was based on the Court's finding that an association between prostitution and 'violence, drug abuse and child trafficking' was established fact.[26]

The other major focus of the Court's decision was on the issue of whether criminalisation violated the right to privacy. Both the majority and minority found that the right to privacy that a person has when engaging in sex work is a limited one, and the limitations on the right to privacy are justified by the legitimate purpose of the government in prohibiting the sex industry. According to Ngcobo J, the government can legitimately interfere in sexual activity at the point where that activity involves sex being sold. For O'Regan J and Sachs J, the fact that a sex worker engages in a private act of sex in the most public of spheres, the marketplace, takes them 'far away from the inner sanctum of protected privacy rights'.[27]

The decision of the Court in *Jordan* revealed a problematic and contradictory characterisation of sex workers and the sex industry in South Africa. As outlined above, the Court accepted biased evidence which enabled it to make broad generalisations associating sex work with violence, drug use and child trafficking, thus providing a justification for excluding a class of South Africans from a range of Constitutional rights because of the job they do. To support their arguments, the government turned to notoriously anti-sex work feminists, Catherine McKinnon and Andrea Dworkin, quoting academic references that are driven by ideological theories rather than empirical evidence.[28] Tellingly, a number of the points of arguments raised by the government were supported by evidence from Dr Melissa Farley, a US-based scholar who was subsequently found by the Ontario Superior Court of Justice in a case examining the constitutionality of the Canadian criminal laws on sex work to lack credibility as an independent expert witness because her ideological position on the issue of sex work rendered her unable to provide an objective opinion.[29]

The Court's view of sex workers is disturbing in that it is of the view that if one engages in prohibited conduct, sex workers open themselves up for violations of their human rights. The Court remarked that their rights are not violated since the sex worker 'makes herself liable for arrest and imprisonment by violating the law', and that the diminished dignity of sex workers 'arises from the character of prostitution itself'.[30] It is unfortunate that the judges in this case didn't consider the constitutionality of the criminalisation of sex work. Rather than interrogate the efficacy and reasonableness of criminalisation, the judges worked from the premise that sex work is indeed a crime, and that the violation of the human rights of sex workers was a consequence of engaging in a prohibited activity and not a result of criminalisation.[31] The question whether sex between consenting adults should continue to remain criminal should be a matter of balancing the social benefits resulting from criminalisation against the social, human and financial costs of invoking criminal sanction. Seen in this light, it should not be hard to conceive why the laws against sex work should change.[32]

While the minority judgment found that in differentiating between female sex workers and their male clients, the law perpetuates sexual stereotyping of women, O'Regan J and Sachs J accepted and adopted the view that the selling of sex is inherently degrading and problematic, a view derived from patriarchal notions of acceptable and unacceptable forms of female sexual activity. According to O'Regan J and Sachs J:

Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable [emphasis added].[33]

Sex workers, like countless other types of workers in South Africa, use their bodies in order to sell a service, yet because that service involves sexual activity it is the bodies of sex workers that are singularly commoditised, justifying a limitation on their claims on the rights to dignity, privacy and economic activity.

The reasoning and language employed by the Constitutional Court in *Jordan* suggested that the decriminalisation of sex work in South Africa would not be won in the near-term through the courts, and necessitated a re-think by the sex worker movement and its allies, namely the Sex Worker Education and Advocacy Taskforce ('SWEAT') and the Women's Legal Centre ('WLC'), in how to use strategic litigation to advance the rights of sex workers. The decision was made to adopt a new litigation strategy utilising a piecemeal approach, with litigation targeting specific injustices or abuses, and SWEAT and WLC approaching particular relevant courts to seek relief in the form of acknowledgement of constitutional human rights for sex workers.

Kylie – Sex Work as Work Under the South African Constitution

Following *Jordan*, the case of *Kylie* was the first in the piecemeal approach which aimed to establish that sex workers had labour rights under the Constitution and give sex workers locus standi to have labour disputes heard at the Commission of Conciliation, Mediation and Arbitration (the CCMA), the main South African body dealing with labour disputes. The case involved a sex worker, Kylie, employed to provide sexual services at a massage parlour, whose employment was terminated in April 2006. Kylie sought to have the matter arbitrated through the CCMA in August 2006, but in December 2006, Commissioner Bella Goodman handed down a decision that the CCMA did not have jurisdiction to hear the matter as Kylie was a sex worker and therefore her employment was unlawful.

An appeal against this decision was made to the Labour Court of South Africa, which was dismissed in a July 2006 ruling by Cheadle AJ. Although the Court held that the definition of an 'employee' in s 213 of the Labour Relations Act 66 of 1995 ('the LRA') was probably wide enough to include someone whose employment was unenforceable at common law, sex workers were not entitled to protection under the LRA because it would be contrary to a common law principle entrenched as a founding value of the Constitution, that the courts 'ought not to sanction or encourage illegal activity'. Cheadle AJ couched this in the principle of legality which he characterised as a constitutional right rather than a common law principle, and which he prioritised over other relevant constitutional rights, creating an artificial hierarchy of rights and attracting criticism. In doing this, he missed a rather practical point that a remedy could be provided that does not require reinstatement, therefore Kylie, SWEAT and WLC sought relief on appeal.

Before the Labour Appeal Court of South Africa, Kylie's counsel looked to the Constitution and specifically s 23(1), which states that 'Everyone has the right to fair labour practices.' It was argued that the scope of the common law principle that the courts should not sanction or encourage illegal activity through enforcement of contracts was limited by the operation of s 23 of the Constitution and s 185 of the LRA, which provides a right for all employees not to be unfairly dismissed. The Constitution provided protection for all South Africans engaged in work, including sex workers.

The decision of the Labour Appeal Court, handed down by Davis JA on 28

May 2010, was an important victory for the labour rights of sex workers. The Court adopted an extremely broad approach[34] to the scope of the right to fair labour practices by citing previous rulings of the Constitutional Court which found that the term 'everyone' used in the Constitution meant that the South African Bill of Rights should apply to a very broad constituency of people. The key dictum of O'Regan J and Sachs J in *Jordan* which stated that sex workers were not 'stripped of the right to be treated with dignity by their customers', was used by Davis JA to suggest that that same level of dignity was owed to sex workers by their employers. Therefore, s 23 of the Constitution, 'which, at its core, protects the dignity of those in an employment relationship'[35] should apply to sex workers.

Turning next to the question of whether the Court was able to provide relief for Kylie, Davis JA outlined how when presented with cases that involved illegal contracts or transactions, various South African courts had employed a degree of flexibility in providing relief to one or more of the parties where it was necessary to prevent injustice or to satisfy the requirements of public policy. Noting that the objects of the LRA and s 23 of the Constitution were to ensure that those particularly vulnerable within an employer-employee relationship were protected under law, Davis JA ruled that:

where a sex worker forms part of a vulnerable class by the nature of the work that she performs and the position that she holds and she is subject to potential exploitation, abuse and assaults on her dignity, there is...no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalised in the LRA.[36]

The ruling in *Kylie* meant that the doors of the South African legal system could not be closed to sex workers, opening up space from which to develop the law in areas such as damages claims for loss of dignity as a result of police abuse. The psychological effect of the judgment was perhaps more far reaching. It was met with some surprise and challenged society to accept sex workers as people with human rights that are not disqualified from constitutional protection. It also transformed thinking by accepting sex workers as employees. However, the ruling in *Kylie* did have limitations. Having a right to protection did not guarantee that a sex worker such as Kylie should have access to all remedies afforded under the LRA. The Labour Appeal Court found that it would not necessarily be open to the CCMA to order that a sex worker be reinstated or compensated in the event of unfair dismissal; as such orders would be furthering an illegal activity.

However, it ruled that this did not mean an absolute prohibition on remedies under the LRA, leaving it up to the CCMA and other courts to determine each case based on its facts and by weighing up the principle which prohibits the enforcement of illegal contracts against the principles enshrined in the Constitution which 'promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community'.[37] Davis JA also ruled that s 23 of the Constitution did not mean that sex workers had a constitutional right to form a trade union in order to assert a right to work, as to do so would be to use a trade union as a vehicle to further the commission of a crime.

Despite the limitations of the *Kylie* ruling, given the decisiveness with which the Constitutional Court had dismissed a range of constitutional rights claims in *Jordan*, the outcome of *Kylie* represented a significant legal victory for sex workers in South Africa. As the sex worker was supported by her manager in her claims, the issue of right to fair labour practices was not raised in *Jordan*, allowing the Labour Appeal Court in *Kylie* to examine s 23 *vis-à-vis* sex workers without being directly bound by the former Constitutional Court decision on the issue. As discussed above, the Constitutional Court in Jordan minimised the constitutional claims of sex workers in part by characterising their engagement in the sex industry as a mitigating factor for such claims. The significance of the *Kylie* decision is that Davis JA was able to use the minimum recognition afforded in the dictum of O'Regan J and Sachs J as the foundation for broadening the rights of sex workers, by recognising that their engagement in sex work made them more worthy of constitutional protection, not less. It should be noted that the decision in *Kylie* was very much based on protecting vulnerable sex workers, who have limited economic opportunities besides sex work. The arguments around some sex workers choosing the profession weren't explored in the judgment.

The *SWEAT Interdict* – Challenging Unlawful Arrest and Police Harassment

In *Jordan*, the minority judgment also provided that sex workers had a right to be arrested or charged under s 20(1)(a) in a constitutional manner. In other words, whilst the criminal law itself did not violate the right to dignity of sex workers, it also did not leave it open for the police to engage with sex workers in any manner they chose, under the guise of enforcing the law. It was to this issue that SWEAT, working with the Legal Resources Centre ('LRC') turned their focus as part of the piecemeal approach to litigating for the rights of sex workers.

Under the criminalised system in South Africa, SWEAT was witnessing significant numbers of sex workers in the Western Cape being arrested and detained by police without charge, with the threat of the law being used by law enforcement officials as a tool to intimidate, harass and control sex workers. In response, on 20 March 2007, SWEAT brought an application to the Western Cape High Court under s 38 of the Constitution, seeking an order declaring that no member of the South African Police Service ('SAPS') or the Cape Town City Police ('the City Police') was entitled to arrest workers in the Cape Metropolitan area for an ulterior purpose, and interdicting and restraining the police from unlawfully arresting sex workers.

SWEAT argued that it was entitled to this relief on the basis that members of SAPS and the Cape Town City Police routinely used the powers of arrest conferred by the Criminal Procedure Act No. 51 of 1977 ('the CPA') to arrest sex workers for the ulterior purpose of harassing them rather than for the lawful purpose of having them prosecuted. To support their claim, SWEAT submitted affidavits from former and current sex workers which included detailed information of mistreatment and inappropriate behaviour by SAPS and the Cape Town City Police. Evidence presented to the court indicated that sex workers were regularly detained overnight in police cells and taken to the magistrates' court cells the next morning, where they were being released after being detained for a few hours, with no attempt to prosecute a charge.

The respondents opposed the application arguing that there were material disputes of fact. In response, SWEAT stated that they sought relief from the court only on a matter of principle, arguing that there was no real factual dispute. SAPS had admitted that sex workers were rarely prosecuted, as evidenced by police records such as from the Claremont district in Cape Town which showed that in 2006, 106 sex workers were arrested, but none were prosecuted. The matter of principle was whether it was lawful for members of SAPS and the City Police to arrest and detain sex workers in circumstances where they knew with a high degree of probability that no prosecution would result.

SWEAT argued that if the respondents had knowledge that prosecution would not occur but routinely arrested sex workers anyway, then the actions of the police did not serve a legitimate purpose, which in effect made such arrests unlawful. Further, SWEAT argued that the evidentiary record demonstrated that arrests made under these circumstances were carried out for an ulterior purpose, namely to harass and intimidate sex workers.

The respondents contradicted themselves in their arguments. On the one hand they argued that the police were obliged to carry out the arrests of sex workers as part of their crime prevention duties. They further argued that the arrests of sex workers were made with the intention of carrying out further investigation before prosecuting the arrestees. On the other hand they claimed that sex workers were arrested because they committed crimes in the presence of the arresting officers, hence no further investigation was required before prosecution. They also argued that it would be unprecedented to make an order forbidding an organ of the state from carrying out its constitutional obligations, *vis-a-vis* their duty to prevent crime. Lastly, they argued that the police had no control over whether prosecutions were brought, or even for how long arrested persons were detained.

Fourie J rejected the arguments of the respondents and held that the police officers, who affected the arrests of the sex workers, did not do so with the required object or purpose of having the sex workers prosecuted. This was so because they knew with a high degree of probability that no prosecutions would follow. He concluded that consequently such arrests were unlawful, and made an order that the members of SAPS in the Cape Metro area and Cape Town City Police were interdicted and restrained from arresting sex workers for a purpose other than to bring the arrestees before a court of law in order to face prosecution, and from arresting sex workers while knowing with a high degree of probability that no prosecution will follow such arrests. Further, the Court directed the respondents to take all steps reasonably necessary, within their respective areas of responsibility and authority, to prevent SAPS and City Police members from breaching the order.

'Empowering sex workers to challenge human rights violations'

Although two important legal victories had been achieved through *Kylie* and the *SWEAT Interdict* case, the human rights violations of sex workers continued. As a result, WLC and SWEAT recognised the need to inform sex workers of the legal victories, create awareness of rights, increase sex worker mobilisation and make access to justice available to sex workers. WLC needed to work more closely with sex workers to overcome their initial mistrust and suspicion of the legal system, in order to develop further cases to be taken as part of their piecemeal litigation strategy. Learning from the outcome of *Jordan*, and, specifically, the type of evidence that swayed the Constitutional Court, WLC and SWEAT realised that they needed compelling documentation from across South Africa to illustrate that police abuse arising as a result of the criminalisation of the sex industry, was widespread and severe.

A few months after the *SWEAT Interdict* case decision was handed down in 2009, SWEAT, WLC and Sisonke (the national sex workers movement of South Africa, which had grown in recent years) established an innovative legal empowerment project, 'Every Sex Worker, a Human Rights Defender'. As the legal partner in the project, the WLC's main tasks were to provide individual legal assistance to sex workers who wished to challenge the human rights violations that they experienced, run free weekly legal clinics, document the human rights violations that sex workers experience, lead human rights defence training and continue to pursue strategic impact litigation to expand legal jurisprudence towards stronger protections of sex worker rights. Underpinning these activities was an important commitment to shifting the traditional power dynamic between lawyer and client, particularly where the client comes from a marginalised background.

The experience of WLC since the project commenced provides instructive lessons about how lawyers and progressive legal clinics should work with sex workers. Although they had engaged with individual sex workers as clients previously, WLC acknowledged the need to outreach to the sex worker community in the Western Cape, and where possible, across the rest of South Africa. They started the project by hosting a legal clinic once a week at SWEAT and Sisonke's office during the time that sex workers congregated for a weekly peer information sharing and learning meeting, known as creative space. At the start of the creative space, lawyers from WLC would introduce themselves, request permission to attend and engage in dialogue with sex workers about their rights. Sex workers were then given the opportunity to approach WLC lawyers should they wish to take any legal or rights issue further.

At the beginning of the project it was evident that there was a lack of rights awareness, with many sex workers having internalised the social stigma attached to their work. Furthermore, sex workers were reluctant to challenge perpetrators for fear of reprisal. WLC responded by incorporating legal and human rights education into existing trainings hosted by SWEAT and Sisonke, with WLC taking the lead in discussing the rights of sex workers under the South African Constitution and outlining the possible legal remedies for the range of abuses that sex workers were being subject to. At the same time, WLC presented their piecemeal litigation strategy in an attempt to ensure that sex workers not only informed the work, but participated in leading it as well. It was through this process of providing rights awareness training that WLC was able to legitimately seek advice from the sex worker community on how to pursue strategic litigation.

As the project progressed there were a committed few who attended every creative space, training and event, and WLC realised that they were not reaching the full sex work community. In response, WLC established a peer-based paralegal programme, hiring four sex workers as paralegals. The role of each paralegal was to interact, educate and engage with the community of sex workers in order to provide legal advice and support. Paralegals attended all outreaches, creative spaces and legal clinics. They assisted with the documentation of human rights abuses by using the human rights violations questionnaire that WLC and SWEAT drafted. Later, the role of the paralegals was increased to include assisting sex workers with after hour's police bail applications (one paralegal bailed eight sex workers at the same time who had been rounded by police earlier that night), assisting sex workers who instructed WLC to contest municipal by-law fines and provided after hours legal advice to sex workers across South Africa through the paralegal helpline service.

The ability of peer paralegals to reach out to sex workers who had not previously engaged with lawyers or formally sought to challenge the abuses against them has yielded important victories in the push for sex worker rights in South Africa. The evidence documented as part of the project formed the basis of a research report titled, 'Stop Harassing Us! Tackle Real Crime!'.[38] This report draws on the views and voices of more than 300 sex workers in Cape Town, Johannesburg, Pretoria, Durban and Limpopo, all of whom approached WLC for information on their rights or legal assistance between September 2009 and July 2011.

The report's findings highlight the gap between the rights enshrined in the South African Constitution and treatment meted out to sex workers. Almost one in six of the sex workers who approached the WLC had been sexually or physically assaulted, and one in three had been harassed, by the police. Of the 45 per cent of sex workers that had been arrested, more than 85 per cent of those arrests had been carried out by a police officer who was not wearing proper identification, and almost half of those who had been arrested were held beyond the 48 hour maximum permitted by law. Almost half of all sex workers who were arrested reported being placed in cells that were dirty, wet and smelled bad, that had toilets that did not work and/or mattresses and blankets that were dirty. WLC also participated in a six country research project, 'Criminalizing Condoms', led by Open Society Foundations that analysed police practices of using condoms as evidence of sex work.[39]

The rights violations uncovered through the successful partnership between WLC, SWEAT and Sisonke has been used to push for changes in police practices and garner political support for the decriminalisation of sex work. The South African Deputy Minister of Police, following a meeting with 200 sex workers at SWEAT's offices, committed to police training on the rights of sex workers and a zero tolerance of police misconduct towards the sex worker community. The MEC for Health in the Western Cape and the head of the Cape Town Vice Squad agreed to desist profiling sex workers and confiscating and destroying the condoms found in their possession. Using 20 sex worker statements attesting to the extreme violence by police, as documented by the paralegals and WLC, a letter was submitted to the United Nations Special Rapporteur on Violence against Women, who committed to urging the South African government to investigate such claims of rights violations. These various advocacy victories form an important backdrop to an increasingly prolific national debate on whether South Africa should finally take the step of decriminalising its sex industry, a debate that is being led by the voices of sex workers themselves.

In addition, WLC also submitted a letter of complaint to the Commission for Gender Equality (CGE) to investigate human rights abuses against sex worker and the CGE relied on the report when taking a position in favour of decriminalisation of sex work.

Conclusion

The law and the legal system in South Africa has long been a source of oppression for sex workers, with criminalisation ensuring that those who sell sex remain socially stigmatised and excluded from many facets of society, including the health system and other social services. Perversely, criminalisation has helped to position the police force, whose role it is to prevent violence, harassment and intimidation, as the main perpetrator of rights violations against sex workers in the country. The criminal justice system has been a source of punishment rather than redress.

Despite a strong record of landmark, progressive decisions directed towards enfranchising various marginalised groups within South African society, the decision in Jordan demonstrated that the Constitutional Court was not prepared to interpret the South African Constitution in a transformative manner on the issue of sex work. Notwithstanding the division on the issue of sex discrimination, the Constitutional Court conclusively dismissed the prospect of the progressive Constitution being used to strike down the criminal laws on sex work by accepting the argument that criminalisation served the legitimate purpose of addressing the social ills that the government associated with the sex industry.

The change in approach taken by sex worker advocates in response to regressive decision in Jordan indicates that there is space in South Africa to advance the legal rights of sex workers, albeit through incremental reform. The Labour Appeal Court of South Africa in *Kylie* was able to interpret the Constitution using a broad approach which understands the South African Bill of Rights to be one that affords protection to everyone in society, particularly the most vulnerable such as sex workers. The *SWEAT Interdict* case showed that police could no longer use the criminal law as a tool of control over sex workers, where no real possibility of prosecution existed.

The importance of these legal victories in the march towards legal and social equality and justice for sex workers in South Africa has taken place as legal allies have deepened and strengthened their partnership with the sex worker movement, challenging the exclusion that sex workers have long felt from accessing justice. Training sex workers as paralegals, meeting sex workers 'where they are at' through weekly legal clinics and outreach, and engaging sex workers as advisors in developing litigation strategy have all gone some way in bridging the gap between lawyers and the sex worker community. The result is an increasing body of documentation and evidence of the systemic human rights abuses faced by sex workers under a criminalised system.

Such evidence is a strong advocacy tool for convincing politicians and policy-makers of the need for change, as is being done by WLC, SWEAT and Sisonke in their national campaign for decriminalisation. It can also be legally persuasive, as shown by the dozens of affidavits from sex workers accepted as fact in the SWEAT Interdict case. If, in the future, the criminal laws relating to sex work are heard once again by the Constitutional Court, and it is able to overturn its decision in Jordan, it will be because of the strategic change in course that sex worker advocates and legal allies have taken since: etching out legal victories in specific areas and empowering the voices of sex workers to put a glaring spotlight on the exact abuses that the South African Constitution was drawn up to protect against; a spotlight that the Court may find hard to ignore.

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1 [2002] ZACC 15, 2002(5) SA 721 (CC).

2 [2000] ZACC 19, 2001(4) SA 46 (CC).

3 See ss 2-20, Sexual Offences Act of 1957 and s 11, Criminal Law Amendment Act of 2007.

4 For example, 70 per cent of sex workers who approached the Women's Legal Centre, based in Cape Town, for legal advice complained of some form of police abuse or harassment. Source: Women's Legal Centre, *Stop Harassing Us! Tackle Real Crime!*, 2012, Cape Town, p.4.

5 [2002] ZACC 22, 2002(6) SA 642 (CC).

6 The focus of this article is on litigation and advocacy relating to sex worker rights since Jordan. For analysis of the advocacy that took place prior, see Gardner, J., 'Criminalising the act of sex: Attitudes to commercial sex work in South Africa' (chapter) in Steyn, M., van Zyl, M. (eds), *The Prize and the Price: Shaping sexualities in South Africa*, 2009, HSRC Press, Pretoria.

7 Item 17 of Schedule 6 provides that "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

8 [2010] ZALAC 8, 2010(4) SA 383 (LAC).

9 2009(6) SA 513 (WCC).

10 *Supra* note 4, p.4.

11 *Supra* note 4, p.17.

12 Reported as *S v Jordan and Others* 2002(6) SA 642 (CC); 2002 (11) BCLR 1117 (CC), p.17, para. 34.

13 That section reads: '20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. (1) Any person who.. (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward;...shall be guilty of an offence.'

14 Section 10 of the interim Constitution.

15 Section 8 of the interim Constitution.

16 Section 11 of the interim Constitution.

17 Section 8 of the interim Constitution.

18 Section 11 of the interim Constitution.

19 Section 10 of the interim Constitution.

20 *Supra* note 5, Applicant Heads of Arguments, para. 100.

21 Section 33(1) of the interim Constitution.

22 *Supra* note 5, para. 15.

23 *Supra* note 5, para. 60.

24 Interim Constitution, Article 26. Although the appellants invoked Article 22 (right to trade) under the 1996 Constitution in their heads of argument, the Court decided that the case should be interpreted using the interim Constitution as this was in effect at the time that the original case begun.

25 *Supra* note 5, para. 56.

26 *Supra* note 5, para. 24.

27 *Supra* note 5, para. 83.

28 For example, in their heads of argument the government quoted a 1992 speech from Andrea Dworkin at Michigan Law School where she said 'In prostitution, no woman stays whole. It is impossible to use a human body in the way women's bodies are used in prostitution and to have a whole human being at the end of it, or in the middle of it, or close to the beginning of it. It is impossible. And no woman gets whole again later, after'.

29 *Bedford v Canada*, 2010 ONSC 4264, paras. 353-6.

30 Gardner, J., *Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa*, p.335.

31 *Ibid.*, p.338.

32 *Ibid.*

33 *Supra* note 5, para. 66.

34 *Supra* note 7, para. 16.

35 *Supra* note 7, para. 26.

36 *Supra* note 7, para. 44.

37 *Supra* note 7, para. 56.

38 *Supra* note 4.

39 Open Society Foundations, *Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk*, 2012, OSF, New York.

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