



## Comments on on Criminal Law Amendment Bill to repeal the Sexual Offences Act

*CAP International – The Coalition for the Abolition of Prostitution is a coalition currently made of 35 frontline & survivors-led NGOs in 28 countries, united around a common objective : the abolition of the systems of prostitution and trafficking in human beings for the purpose of sexual exploitation. Last year, CAP member organisations collectively supported more than 17.000 prostituted persons in the world.*

The Department of Justice and Constitutional Development's draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022 (the Bill) proposes repealing (1) the Sexual Offences (previously Immorality) Act, 1957 in its entirety, and (2) section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Presented as a way to advance the rights of prostituted persons, this initiative appears to be based on a serious misunderstanding of the realities of prostitution, resulting from a lack of inclusion of sex trade survivors and frontline organisations in the construction of the bill.

### A total acceptance of the merchandisation of the bodies the most vulnerable women and girls.

On the ground, when we listen to the testimonies of women and girls who are or who have been in prostitution, when we analyse the studies made by researchers and lawyers, when we take into consideration the experiences shared by social workers and psychologists from all over the world, we observe that **prostitution is neither sex nor work, but constitutes in itself a form of violence against women : The repetition of sexual acts without physical desire, but instead experienced as the consequence of financial need, inequality or as an exploitation of vulnerability, constitutes sexual violence in and of itself.**

**The vast majority of prostituted persons have suffered from violence**, often sexual, before entering prostitution. Most of them are also victims of many forms of violence while in prostitution (physical, verbal, sexual, psychological).

**There is no "free " and "forced" prostitution : in reality the sexual act obtained by sex-buyers is always coerced.** Coerced either by the **physical coercion** of traffickers and pimps, or by the **socio-economic coercion** that pushes the most vulnerable women and girls into prostitution.

There will be **no equality between women and men as long as men think that they can buy access to women ' s bodies.** Prostitution is a part of a continuing patriarchal tradition of making women's bodies available for men's benefit.

**Prostitution is based on multiple forms of inequalities:** men's domination over women, rich over poor, North over South, majority groups over minorities. Women from minorities, poor, migrant and marginalised groups form nearly the totality of the prostituted persons in prostitution all over the world.

**These realities also apply to South Africa. By reframing prostitution as a form of «work», by normalising the endless exploitation of women's bodies as an acceptable income alternative, the government is sending an extremely sad message to its most vulnerable population, in particular women : if you are marginalised, we have nothing better to offer than being exploited in prostitution.**

### A disastrous impact observed in countries where the prostitution system has been decriminalised and legalised

In all countries that have fully decriminalised and legalised the prostitution system, the same consequences have emerged:

- **Germany, Holland and Spain have become hotspots for sex tourism and human trafficking.** Germany has become known as "The Brothel of Europe".<sup>1</sup>

<sup>1</sup> <https://www.bbc.com/news/world-europe-26261221>

- **The scale of the sex trade has exploded:** it is worth between 12 and 18 billion euros in Germany, 14 billion euros in Spain, and a mere 3 billion euros comparatively in France, which has adopted Partial Decriminalisation.<sup>2</sup>

- **Legalisation has provided a legal facade used by international trafficking networks,** as described among others by Manfred Paulus, a German police officer in charge of the fight against human trafficking for 30 years in Ulm, and now an EU expert:<sup>3</sup>

*In Germany we now have up to 100% of women imported from abroad for prostitution. It should be clear that a Belarusian woman from the Chernobyl area or a Roma from the ghetto in Romania can never make her way alone to Germany to work in prostitution. (...) The women are trafficked into the country, and in this sector, highly criminal structures have developed. Organised crime controls the business. The demanded distinction [between prostitution and human trafficking] gives reason for fearing the worst. There are obviously people involved who are not at all or too little informed about the milieu, and who, consciously or not, give in to the myth of "free" Prostitution, whispered to them by lobbyists. (...) But "voluntary" is just a magic word. If prostitution takes place "voluntarily", then the brothel operator, the bar owner and the john no longer have a problem. And then the police, judiciary and political systems are helpless. That is why many people really love this word. But the truth is quite different. Speaking of voluntariness is frankly, to my mind, quite cynical.*

*Today we have "noble" brothels, decorated in marble and stainless steel. This does not exclude pimps hiding behind this facade, and behind them some mysterious company...(but) if we look behind this letter-box company, then we discover (Eastern European) clans and mafia or (well-known gangs)."*

- **Male demand for the buying of sexual acts has exploded, normalising the objectification of women's bodies.** By giving a transactional value to sex, these societies have witnessed a form of "uberisation" of sex, particularly amongst young people. In the Netherlands for instance, it is now legal for a driving instructor to propose a sexual act to his students as a means of payment.<sup>4</sup> In Spain, it has become normal for young people to go to a brothel to celebrate a birthday or a success.<sup>5</sup> In Germany, 1 million men go to the brothel every day.<sup>6</sup> In Spain, 40% of men admit to having paid for sex at least once in their lives.<sup>7</sup> This figure comparatively is 9% in Sweden, which has adopted Partial Decriminalisation.<sup>8</sup>

- **The registration system has been proven irrelevant and inefficient and the « rights for sex-workers » have remained an illusion:** In Germany, after 20 years of implementation of the "sex work" approach, only 23.000 prostituted persons<sup>9</sup> of over 400.000<sup>10</sup> had asked for the "Sex-worker" legal status in 2021. Not because it provides "rights", but because it was requested by brothels to keep their license. The vast majority of prostituted persons, even in a very "legalist" country such as Germany, have remained outside of the registration system. Because getting a registration number and so-called health checks do not meet their primary need. Indeed, when we genuinely ask prostituted persons what they need, their primary answer is that they wish to exit prostitution.<sup>11</sup>

## The Creation of a situation of legal insecurity

The government of South Africa seems unaware of its international and domestic obligations regarding prostitution and trafficking in persons. South Africa has signed and ratified several treaties, including:

- **The UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others,** which states in its preamble that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person.

Article 1: *The Parties to the present Convention agree to punish any person who, to gratify the passions of another:*

*(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.*

Article 2: *The Parties to the present Convention further agree to punish any person who:*

*(1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;*

*(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.*

<sup>2</sup> [https://www.fact-s.fr/#gallery\\_5-26](https://www.fact-s.fr/#gallery_5-26)

<sup>3</sup> <https://ressourcesprostitution.wordpress.com/2014/09/03/prostitution-and-human-trafficking-cannot-be-separated-interview-with-manfred-paulus/>

<sup>4</sup> <https://edition.cnn.com/2015/12/21/europe/driving-lessons-sex-netherlands/index.html>

<sup>5</sup> <https://eldiariosolidario.com/prostitucion-jovenes-espana>

<sup>6</sup> <https://business.time.com/2013/06/18/germany-has-become-the-cut-rate-prostitution-capital-of-the-world/>

<sup>7</sup> <https://www.epe.es/es/igualdad/20220123/cuatro-espanoles-admite-haber-sido-13139177>

<sup>8</sup> <https://link.springer.com/article/10.1007/s10508-020-01843-3>

<sup>9</sup> [https://www.destatis.de/EN/Press/2022/07/PE22\\_277\\_228.html](https://www.destatis.de/EN/Press/2022/07/PE22_277_228.html)

<sup>10</sup> <https://www.bbc.com/news/world-europe-26261221>

<sup>11</sup> <https://www.irishexaminer.com/news/arid-30978567.html>

Article 6 : prohibits the implementation of a registration / regulation system on prostituted persons: *Each Party to the present Convention agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.*

- **The (Palermo) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children**, in particular its Article 9(5), that includes to *adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.*

- **The CEDAW Convention, Article 6**: *States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.*

**The Decision by South Africa's Ministry of Justice also goes against the Constitution of South Africa:**

- **"Human dignity" is recognised as a founding value of the constitution of South Africa.** Prostitution is recognised as **incompatible with Human Dignity** by the Convention of 2 December 1949 signed and ratified by South Africa. **The concept of Human Dignity does not change whether it is mentioned in the constitution or in international treaties to which South Africa is a State party.**

- **The Constitutional Court decision O'REGAN J and SACHS J, 2002**, that says the following: *(a) prostitution itself is degrading to women; (b) it is conducive to the violent abuse of prostitutes by both clients and pimps; (c) it is associated with and encourages international trafficking in women; (d) it leads to child prostitution; (e) it involves an increased risk of spreading sexually transmitted diseases ; (f) it goes hand in hand with a high rate of drug abuse; (g) it is closely linked to other crimes such as assault, rape and even murder;*

(Page 72): *The issue of prostitution must therefore be examined not through the prism of certain popular conceptions of morality, but through the prism of constitutionally articulated values, especially those that concern the right of all citizens to live in a state where gender equality is increasingly becoming a reality.*

Therefore, this reform would put South Africa in a situation of direct violation of its Founding Values, Constitutional jurisprudence and international obligations.

## A repetition of neo-colonial policies

The Ministry of Justice's decision to replicate the Dutch and German models on prostitution in South Africa carries a heavy historical legacy. It is **a replication of the policies of regulation and industrialisation of prostitution of women from the most marginalised groups, implemented during colonisation by the Spanish, French and British empires.**

During the colonial conquests, like the territories invaded, women's bodies were battlefields, appropriated and subjugated. The sexual and economic exploitation of colonised women was a power issue for the colonisers, in order to satisfy the male demand for sexual acts, especially from soldiers in the colonial troops. Thus, it was the Spanish Conquistadors who organised, regulated and industrialised the sex trade in Latin America. It was also the British colonial forces who set up the systems of legal prostitution in India ("Chaklas") and the French colonial forces in their colonies ("Zones of tolerance"). It was also for this reason that most anti-colonial leaders, such as Thomas Sankara<sup>12</sup>, put an end to the systems of legal prostitution, perceived as a national humiliation, during decolonisation.

**In South Africa in particular, policies of tolerance and legalisation of prostitution were established by the colonial regimes.** The first mention of a policy of tolerance dates back to 1652: the colonial administration of Jan van Riebeeck, (Dutch East India Company) allowed the sex trade, including brothels, to develop in the Cape Colony.<sup>13</sup>

Following the occupation of the Cape Colony by the British in 1795, prostitution became regulated under the Contagious Diseases Act: **the imperial regime then gave prostituted women the "right" to be examined by doctors, in order to « reduce the risk » of epidemics among the colonial population.** The Contagious Disease Act was promulgated in the Cape Colony in 1885, calling for the registration and regulation of prostituted women.<sup>14</sup>

It is the same regulatory system, now promoted and funded by major Western donors, that the Ministry of Justice wishes to reintroduce in South Africa.

**Thus, the policy proposed by the Ministry and the colonialist policies of the past have in common the fact that they do not consider at any time the accompaniment and reintegration of women from the most marginalised groups towards an exit from prostitution: on the contrary, these policies approve the provision of the most precarious women's bodies to the service of men, who remain allowed to use their socio-economic domination over them.**

<sup>12</sup> <https://www.thomassankara.net/thomas-sankara-ecrit-au-congres-mondial-des-prostituees-octobre-1986/>

<sup>13</sup> Gaum, Liezl. "Turning Tricks : a Brief History of the Regulation and Prohibition of Prostitution in South Africa." Stellenbosch law review 14, no. 3 (2003): 319–336.

<sup>14</sup> Ibid

Instead of fighting the patterns of sexist, racist, and socioeconomic oppression that drive the most marginalised individuals into prostitution, these policies accept, normalise and legalise them.

### **There is a Third Way between the criminalisation of prostituted persons and the legalisation of their exploitation**

Between the prohibitionist model that unfairly criminalises prostituted persons, and the regulationist model that normalises their exploitation, there is third way : the **Abolitionist model**, which allows for the decriminalisation and protection of prostituted persons, while repressing their exploiters. This model, adopted by countries such as France, Sweden, Norway, Ireland, Northern Ireland, Canada and Israel, is based on 5 pillars :

- 1. Full decriminalisation of all prostituted persons;**
- 2. Access to an exit programme, including socio-economic, psychological and legal support;**
- 3. Criminalisation of the demand for the purchase of sexual acts, which is the sole purpose of the sex trade,**
- 4. Criminalisation of all forms of pimping;**
- 5. Sensitisation on the realities of prostitution, in particular among the youth and the male population, and training frontline professionals.**

The implementation of this model in the above-mentioned countries has had extremely positive effects compared to other models. It has reduced the demand for the purchase of sex acts, decreased the size of the sex trade, and enabled hundreds of prostituted persons to emancipate themselves from the prostitution system in a sustainable way.

Therefore, we strongly encourage the Ministry of Justice to :

- **Review and fulfill its international and constitutional legal obligations** on prostitution and trafficking in persons ;
- **Include sex trade survivors and frontline organisations** in the construction of the bill ;
- Understand the realities of the prostitution system **not only through a hygienist, distorted vision of « risk reduction »,** but as a matter of **equality between women and men** (as the Constitutional Court demands) and of **social justice** ;
- **Conduct a serious study on the impact of decriminalisation and legalisation policies on the prostitution system** in the countries where they have been implemented ;
- **Amend the bill so that it only decriminalises prostituted persons and gives them access to an exit route, while strengthening the criminalisation of those who exploit them, the pimps and sex buyers.**