**SEX-WORKER FORUM OF VIENNA, AUSTRIA**

***Austria: Discriminations against Sex Workers
in the Rights to Work and to Health***

Information from Sex-Worker Forum of Vienna, Austria, to the United Nations Committee on Economic, Social and Cultural Rights for the examination of the fifth State Party report of Austria at the 51th Session in November 2013

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# Executive Summary

The key issue for this submission is the discrimination against sex workers in the rights to work and to health. Although sex work is legal in Austria and sex workers pay social security contributions and income taxes, a repressive system of regulations governs prostitution. These regulations perceive sex work exclusively through the perspectives of illegal immigration, morality, public order, trafficking, and “public health” (discussed along myths contrary to international standards), while they ignore issues of sex workers’ human rights, whence in Austria sex workers are treated like criminals.

As concerns the right to work (Articles 6, 7, 8), sex workers suffer on the one hand from Austria’s inadequate response to forced labor, which amounts to a toleration of the exploitation of prostitution by pimps, and on the other from lacking empowerment, which amounts to deliberate stigmatization.

As concerns the right to health (Article 12), Austria has established a system of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests, which lacks evidence about public health benefits, which contravenes international guidelines, and which discriminates against women. As a result of this system, women suffer from degrading treatment by vaginal inspections against their will, sex workers suffer from lacking respect for their dignity, when they attend the weekly health checks at public health offices, and women may suffer from unlawful private life intrusions by police suspecting illegal prostitution, regardless if they are in sex work or not.

Further concerns arise under Article 9, 10, 11, 13, and 15.

# Zusammenfassung (German Abstract)

Das *Sexworker-Forum*, ist ein internationaler Verein mit Sitz und Registrierung in Wien, der sich für die Achtung der Menschenrechte der erwachsenen Frauen, Männer und transsexuellen Personen im Umfeld der freiwilligen und selbstbestimmten Sexarbeit einsetzt. Dieser Bericht informiert den Fachausschuss der Vereinten Nationen für wirtschaftliche, soziale und kulturelle Rechte über die Situation der Sexarbeiter in Österreich und ergänzt damit den Bericht Österreichs bei der 51. Session im November 2013.

Kernprobleme in Österreich sind rechtliche Mängel, durch die Sexarbeiter vor allem im Recht auf Arbeit und im Recht auf Gesundheit benachteiligt werden.

* Österreich akzeptiert zwar die Sexindustrie als Wirtschaftszweig, aber nicht die Sexarbeiter. Dadurch werden sie im Recht auf Arbeit beeinträchtigt. Weder werden sie ausreichend vor Ausbeutung geschützt, noch gibt es Maßnahmen zu ihrer sozialen Absicherung und gegen ihre Stigmatisierung.
* Das österreichische System der „Kontrollprostitution“ ist Ursache dafür und mit der Menschenwürde der Betroffenen nicht vereinbar.
* Die behördliche Registrierung von Prostituierten, die verpflichtenden regelmäßigen HIV Tests und die Untersuchungen auf das Frei-Sein von Geschlechtskrankheiten schützt weder die Gesundheit der Sexarbeiter, was nicht einmal intendiert wird, noch die der Freier oder der Bevölkerung. Dieses System widerspricht auch internationalen Richtlinien. Hinzu kommt das Problem, dass dieses System zu systematischer erniedrigender Behandlung (Verletzung des Folterverbots) und zu Verletzungen des Privatlebens durch gesetzlose Polizeimaßnahmen geführt hat.

# Background

## Author and Sources

Sex-Worker Forum is an international incorporated non-governmental not-for-profit organization, chartered at Vienna under registration number 699583522. The Forum works to protect and promote the human rights of adult women, men and transgender persons in voluntary sex work.

Empirical evidence for this report comes from court documents,[[1]](#footnote-1) media reports, scholarly research, and also from publications by the government, by NGOs with an interest in sex work, and by local community social work organizations.[[2]](#footnote-2) However, the basis for this submission is the knowledge obtained from unpublished cases. It has been written and discussed in the internal area by the sex workers of the multi-lingual internet platform www.sexworker.at. There, in an area closed to the public, sex workers, whose real identity is verified but not disclosed, are offered a medium where they can provide authentic information, in particular about human rights violations affecting them. The final form was then approved by the board of Sex-Worker Forum.

## Definition and Stratification of Sex Work

The report focuses on the human rights situation of sex workers. The term *sex work* has a broad meaning. For this submission, it refers to sexual behavior of consenting adults, which involves physical contacts in exchange for monetary gains. Thereby, this term refers strictly to voluntary sex work, to distinguish it from criminal exploitation. The term prostitution is avoided for its negative connotation and used only in the legal context. The author strictly distinguishes between migration and trafficking: Many sex workers are immigrant women, for whom the decisions to migrate and to enter sex work have been the last resorts in their struggle for subsistence. Their underlying reasons for migration or entering sex work are not topic of this report, as these are outside the control of Austria. Nor does the author consider the discussion in feminist academic circles,[[3]](#footnote-3) whether sex work is a human rights violation *per se* of the *“prostituted women”*. Instead, this report takes a grassroots’ perspective and describes the situation in Austria, as perceived by the sex workers themselves.

Sex work has many facets, which reflect the diversity of cultures, ranging from cybersex to traditional indigenous styles; some authors distinguish up to 45 different forms.[[4]](#footnote-4) By far the most sex workers are women, but there are also male and transgender sex workers. Academic studies estimate that in Europe about 1.4 percent of the adult female population, who are in the reproductive age, is engaged in some form of voluntary sex work.[[5]](#footnote-5) For Austria with a population of 8.4 million in 2012 this would result in the estimate of about 30,000 women in sex work (1.4% of women 18 to 60, i.e. 50% of female population, who in turn is 50% of the population).

In Austria, commercial sex work is regulated by prostitution laws (see section 1.3 below). Using definitions from UNDP,[[6]](#footnote-6) this differentiates sex work by the legal status in the following four groups:

* *Legal sex work* means commercial sex work, mostly of women, who registered as prostitutes and obey the regulations of prostitution. Examples are street prostitution or sex work in brothels. About 5,000 women are registered as prostitutes.[[7]](#footnote-7)
* *Illegal prostitution* means voluntary commercial sex work, mostly of women earning their living by providing direct, formal and open sexual services to their clients, but who did not register as prostitutes, or who registered, but violated other regulations (sex work not in tolerance zones of Eastern provinces, sex work not under the control of brothels in Western provinces). About 5,000 women are in commercial sex work, but not registered.[[8]](#footnote-8)
* *Indirect sex work* refers to a grey area, where often sex work is not the primary source of income. Thus, women in massage parlors may offer sexual services in the clandestine. Escorts pretend that they offer social company, only, as otherwise escort agencies would face criminal prosecution for procurement into prostitution. Sexual assistants for the handicapped would not perceive their sexual services as prostitution, either. However, from one moment to the next, indirect sex workers may end up in illegality, if authorities reject the legal fiction upon which their activities were based. About 5,000 to 10,000 women are in this grey area.[[9]](#footnote-9)
* *Other (private) sex work* means certain forms of private sexual life, which may have a commercial appearance, but no commercial substance. It includes women, who are supported by regular friends in exchange for sexual favors (“*femmes libre*”), or women in the swingers’ lifestyle, who occasionally accept money for their presence at parties (e.g. bridging a shortage of female guests at swingers’ clubs). *De iure* sex life with merely occasional provision of sex for money qualifies as private life.[[10]](#footnote-10) However, *de facto* Austrian authorities treat women with unconventional private sex life as illegal prostitutes. This group is comprised of the remaining 10,000 to 15,000 women of the estimated 30,000 women, who offer sex for money.

## Legal Regulations of Commercial Sex Work

In Austria, commercial sex work is legal, but regulated at three administrative levels: national, provincial (“Länder”), and communal. These regulations put sex workers under strict police control, subject to manifold obligations (e.g. Administrative Penal Act, AIDS Law, Alien Police Law, Civil Code, Immigration Police Law, Income Tax Law, National Insurance Act, Penal Code, or Venereal Diseases Act), but without effective protection of their rights.

* Commercial sex workers are required to be self-employed. They have to pay income tax and sales tax one year in advance. Due to lacking education and language skills, many sex workers lose track of the necessary documentations and their income tax is prescribed on the basis of excessive *ex officio* tax assessments, ignoring their actual poverty.
* Sex workers are required to pay social insurance, but they do not enjoy protection of labor law and only partially of social law.
* Sex workers are required to register as prostitutes with the local authorities (police department or municipal authority, depending on the province). Registration is based on the Health Checks Directive under the Venereal Diseases Act, together with provincial regulations.
* As part of the registration, sex workers are obliged to attended weekly mandatory inspections for STIs, quarterly mandatory tests for HIV (prescribed by AIDS Law), and to carry a special document (control card) with them that confirms these checks. Sex workers are required to always carry it and show it to police. In the case of an infection, authorities confiscate it until about three weeks after the completion of treatment. Failure to register, to carry the registration card, to attend the mandatory vaginal inspections and HIV tests, or to obey the additional provincial regulations, is a misdemeanor that is penalized under the Administrative Penal Act with fines of 20,000 €, prison terms, and for migrant sex workers in addition expulsion and deportation. Women may be forced to attend vaginal inspections against their will. [[11]](#footnote-11)

Laws of the nine Austrian provinces address the provision of sexual services.

* In Vorarlberg, sex work is *de facto* prohibited: The province restricted sex work to licensed brothels and municipalities prevented the issue of licenses. As all prostitution is illegal, it still exists, but is under the control of pimps.
* Five provinces confine sex work to licensed brothels only and issue licenses (Carinthia, Salzburg, Styria, Tyrol, and Upper Austria). Of these provinces, Tyrol restricts sex work most, pressuring sex workers into illegality and therefore into the hands of pimps.[[12]](#footnote-12)
* Three provinces prohibit sex work outside of designated tolerance zones (Burgenland, Lower Austria, and Vienna).
* Further, nowhere in Austria may women offer sex work in their own premises (resulting in police intrusions into private homes of women suspected of sex work, see section 5.6 below).

# General Issues (Articles 2, 3, 4)

Key issues of this report are deficiencies in the enjoyment of the right to work and the right to health. These deficiencies are also discriminations against women in the enjoyment of the rights under this Covenant.

* The author acknowledges that in a time of economic crisis budgetary constraints may make the full realization of all economic and social rights more difficult. However, the principle of progressive realization (Article 2) prohibits deliberately retrogressive measures (General Comment 3/1990 of this Committee at § 9), in particular if directed solely against vulnerable groups. Sex workers are known to be a vulnerable population, and worldwide their well-being and health is largely affected by government policies.[[13]](#footnote-13) As will be elaborated in the sections below, Austrian regulations and policies for prostitution control cause impediments for them.
* Further, the author acknowledges that the considered policies and regulations are couched in gender neutral terms and affect only a small population. However, as most persons in sex work are women, the resulting factual interferences specifically impair women in the enjoyment of certain rights. Therefore, these interferences are (indirect) discriminations against women that contravene Article 3 about equal rights of men and women. Concerning male-to-male sex workers, these deficiencies are discriminations due to the “other status” of being a sex worker and as such they contravene § 2 Article 2.
* As will be explained in the sections below with respect to Article 4, none of these discriminations is legitimated by the nature of the rights of this Covenant and none of these discriminations can claim to serve *“the general welfare in a democratic society”*. On the contrary, discriminatory policies resulted in stigmatization, which in itself is a form of violence against women.[[14]](#footnote-14) Thereby with all due respect the author requests that the consideration of these issues be guided by the principle[[15]](#footnote-15) that *“basing one’s judgment on respect for human dignity does not mean taking a moralistic approach, however. It means respecting people’s decisions and choices as long as they harm no one else.”*
* There are also barriers in the access to remedies against discrimination.[[16]](#footnote-16) Despite the concerns and previous recommendation to Austria by this Committee under Article 2,[[17]](#footnote-17) *“there is no comprehensive institutional and legislative framework for the protection and promotion of human rights in Austria”*.[[18]](#footnote-18) Further, although Austria ratified several international human rights agreements and Article 9 Federal Constitutional Law would commit Austria to fulfill these obligations, the provisions of this Covenant are not part of the domestic legislation: Individuals may not invoke these provisions before national courts.[[19]](#footnote-19)

The described discriminations illustrate Austria’s complacency about women’s economic rights in general (Article 3). This is demonstrated statistically in terms of the *Cingranelli-Richards Human Rights Data Project* (CIRI), specifically its index WECON.[[20]](#footnote-20) It quantifies deficiencies in women’s economic rights and makes them comparable across countries. The focus is on discrimination against women in the right to work: the right to non-discrimination by employers (equal pay for equal work, equality in hiring and promotion practices) and to job security (maternity leave, unemployment benefits, no arbitrary firing or layoffs), the rights to freely choose and to pursue a gainful employment without the need to obtain consent by a male relative, to be free from sexual harassment in the workplace, and to work at night or in occupations classified as dangerous (e.g. military, police force). According to this index, whereas Austrian law grants certain economic rights to women and Austrian government is aware of the obligation to enforce these rights, this enforcement was not vigorous during most of the present reporting period (starting in 2006), when compared to other countries (with better index values).

The author accepts that that nowhere in the world there is perfect equality between men and women. However, when compared to other European high-income countries (e.g. Norway, Sweden), the level of discrimination against women in Austria is significant and vulnerable groups, such as sex workers, are actually deprived of their rights.

# Right to Work (Articles 6, 7, 8)

## Key Issues

The right to work is defined by Articles 6 to 8 in conjunction (General Comment 18/2005 of this Committee at § 8). This right

1. protects against forced labor (§ 1 of Article 6), whereas Austria shows lacking vigilance against trafficking into prostitution and sexual exploitation (section 3.2);
2. protects against unreasonable legal restrictions in choosing ones occupation (§ 1 of Article 6), whereas Austria *de facto* permits sex work as sole job option for asylum seeking women (section 3.3);
3. obliges states to empower everyone to find decent work (§ 2 of Article 2), whereas Austria ignores the specific needs of women in sex work for training programs (section 3.4);
4. obliges states to ensure just and favorable conditions of work (Article 7), whereas Austrian policies at all levels (national, provincial, communal) make working conditions in sex work deliberately harmful (section 3.5); and
5. guarantees the right of self-organization to promote these rights (Article 8), whereas Austria discriminates against sex worker human rights defenders (section 3.6).

These issues do not depend on the question whether sex work is “decent work” or not. Forced labor is a violation of human dignity, regardless of the character of work (item a). Likewise, extreme legal restrictions of one’s capabilities are incompatible with human dignity (item b). The obligation to alleviate poverty asks the State Party to focus on vulnerable groups (item c). And as Austria accepts sex work as a legal source of income (section 1.3), this entails the obligation not to deliberately worsen the working conditions of sex workers (item d). Further (items c and d again), if Austria nevertheless wishes to push back sex work, first sex workers, mostly women, need to be empowered to find alternative ways in earning a living for themselves and their families. Finally, human rights are inalienable and therefore it does not matter, whose economic, social and cultural rights are defended (item e).

## Inadequate Response to Forced Labor (Article 6, § 1)

Forced labor is a blatant violation of the right to freely choose ones work and states have the positive obligation to protect. Thereby, the meaning of forced labor is the same as in § 1 Article 2 ILO Convention 29 (General Comment 18/2005 of this Committee at § 9), whence it includes trafficking into prostitution and sexual exploitation.[[21]](#footnote-21)

The Fifth State Party Report of Austria does not mention forced labor and considers trafficking (item 41a) only in the misleading context of Article 10 (protection of the family). The author acknowledges that in Austria there exist criminal law provisions to prevent the sexual exploitation of women by pimps, traffickers, or procurers.[[22]](#footnote-22) However, as shown below, actual protection is inefficient. In addition, there are deficiencies in the law, as trafficking within the State Party territory is ignored by Austrian law, although this is a human rights violation,[[23]](#footnote-23) too, and although *“being trafficked within one’s country, as opposed to being trafficked internationally, is associated with higher risk of rights violation”*.[[24]](#footnote-24)

Lacking protection against trafficking into prostitution and sexual exploitation is illustrated by the following figures:

* Regarding the European Union, ILO in 2012 states an average of estimated 1.5 persons in forced labor per 1,000 inhabitants.[[25]](#footnote-25) For a population of 8.4 million this amounts to estimated 12,600 persons. Of them, 22% are sexually exploited, 79% of them adults, mostly women, which results in estimated 2,200 sexually exploited and/or trafficked women (7.5% of all women in sex work). Due to its geographical location at the centre of Europe, Austria is affected by human trafficking as both a transit and destination country, whence the actual number of victims may be higher.
* The deplorable situation of these victims is made worse by police corruption. By data of the International Organization for Migration, worldwide 8.9% of trafficked or otherwise sexually exploited women report police officers as clients;[[26]](#footnote-26) in Austria these are estimated 200 women. Thereby, as reported by UNODC,[[27]](#footnote-27) police officers may collude with pimps, who offer them free sex with the victims of exploitation. As the officer cannot assume the consent of the victim, such behavior is rape.[[28]](#footnote-28)
* However, law enforcement apparently ignores these crimes: In 2011 federal police suspected 123 crimes of sexual exploitation and/or trafficking; courts sentenced 20 perpetrators.[[29]](#footnote-29) Thus, criminal law is enforced in only 20 of 2,200 cases of sexual exploitation (0.9%), whereas justice is denied to the remaining 99.1% of victims, as pimps and traffickers enjoy factual impunity.

In addition, Austrian authorities are not prepared to adequately identify and support victims of trafficking or sexual exploitation.

* The author acknowledges that victims may claim compensation under the Victims of Crimes Act (not mentioned by the State Party). However, they need to be legal residents, a condition that cross-border trafficked women may not meet.[[30]](#footnote-30)
* Moreover, as the above statistics illustrates, 99.1% of victims are not identified. However, if a victim is not recognized as such, because the trafficker is not prosecuted, the victim is not entitled to compensation.
* As the United Nations Committee on the Elimination of Discrimination against Women noted with respect to Austria,[[31]](#footnote-31) trafficked women, who could rescue themselves and applied for asylum, often were not identified as victims, as the *“officers who are in charge of asylum applications in the State party are not sufficiently trained to identify victims of trafficking.”*
* There is also a systematic problem, as the political discourse worldwide does not clearly distinguish between voluntary sex work, trafficking and sexual exploitation.[[32]](#footnote-32) As a consequence, if a trafficked woman with an illegal residency status reports to police that she has been trafficked and exploited in illegal prostitution, she faces administrative fines for illegal prostitution, which she necessarily admitted, and she has to leave the country, as she admitted illegal immigration, too. Authorities perceive her as a lawbreaker, whose testimony is not considered as sufficient proof against alleged perpetrators.

The following case illustrates this problem:[[33]](#footnote-33) In January 2011, a woman was deported to Nigeria, who allegedly was a victim of trafficking and sexually exploited by pimps in Vienna. She witnessed against the traffickers and pimps, but her complaints about her situation had no consequences, except for putting her under considerable risk of retaliation by pimps. However, Austrian authorities did not protect her and denied that she could be a possible victim of an international crime. Instead they treated her as an illegal immigrant and prostitute.

## Denial of Work to Asylum-Seekers (Article 6, § 1)

In Austria, asylum seekers are not permitted to accept any “regular” form of employment, except begging or prostitution (section 7 Federal Support to Asylum Seekers Act). Although this has been criticized in the public discourse, Austria is not willing to ease access to the labor market. As this Committee stressed (General Comment 18/2005 at § 1), the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. The denial of any opportunity for decent work over a time span of several years does not respect human dignity and leads to social exclusion.

Further, support for asylum seekers is far from adequate. The author acknowledges that Austria shelters asylum seekers in refugee camps and provides for their basic needs; however:

* Spending per refugee is 41% below the Austrian subsistence level. Thereby, Austrian subsistence level is defined by the minimal monthly *per capita* social assistance benefits, in 2010 this was 744 €.[[34]](#footnote-34) By comparison, Austria provides in average 439 € per month in cash and in kind for each asylum seeker.[[35]](#footnote-35)
* Without sufficient income asylum seekers face undue constraints. They cannot afford legal assistance during their asylum procedure. (They receive free legal aid, but at poor quality, resulting usually in deportation.) They are also *de facto* restricted in participation in the social and cultural life. This amounts to social exclusion.
* Moreover, the situation of asylum seeking women is unacceptable, as Austria does not protect them against violence. For women living in refugee camps, rape by security guards or inmates is a permanent threat.[[36]](#footnote-36) Thus, for asylum seeking women the right to work is a prerequisite for a life in dignity, as they need income to obtain adequate and safe housing.
* The excessive length of proceedings to handle asylum applications causes uncertainty and suffering, too. Therefore, asylum seekers should be given a chance to become integrated in Austrian society. This may mean that the constitutional protection of private and family life would hinder their expulsion.

## Lacking Empowerment (Article 6, §§ 1 and 2)

Most women are in sex work for economic reasons: As they cannot find another job, sex work has become their only viable remedy to alleviate their poverty. As the labor market becomes more specialized and economies demand higher levels of skill, ever more women find themselves in such a precarious situation. Articles 6 and 11 require the State Party to react, as without support and capacity building by training programs they may not be able to improve their living conditions on their own.

The feminization of poverty and in particular the low net incomes of women in sex work are illustrated by the following statistics.

* As to the economic background, in 2010 poverty was defined by an income of less than 1,031 € per month.[[37]](#footnote-37) In 2010, 13% of women had earning below the poverty level.
* Single mothers are a high risk group for poverty, as they may not find jobs after parental leave. In particular, they may not find jobs that allow them to care for their children.
* Migrants are another high risk group. For instance, they have particularly high drop-out rates from the school system (see State Report, item 65). About 80% of commercial sex workers are immigrants, most of them living in poverty.[[38]](#footnote-38)
* According to government statistics,[[39]](#footnote-39) accumulated annual incomes of estimated 30,000 women in sex work (section 1.2) are estimated at 429 million Euros. Hence, the monthly average net income is estimated 1,192 € and close to poverty line. In the low-paid segments (street prostitution) current market prices are 15 € per job;[[40]](#footnote-40) here expected income is way below the poverty line.

Contrary to the obligation under Article 6, the Austrian social welfare system does not foresee specific support for the vulnerable group of sex workers, in particular women. On the contrary, as outlined in the section below, from the moment on, when a woman enters sex work, she suffers from the stigma attached to prostitution. It compromises her prospects to re-enter the regular labor market. In such a situation, considering also her lacking or outdated skills for a qualified job, as alternatives to sex work there remain only low-paying, low-prestige dead end jobs without prospects for a better life. Even women rescued from sexual exploitation may perceive the working conditions in such jobs as inferior to their previous situation.[[41]](#footnote-41) Without empowerment, these women remain caught in poverty and they have little opportunity for movement up the status ladder.

Article 6 would require the State Party to provide them with opportunities for acquiring skills to enhance their chances for a regular employment of their choice. However, Austrian prostitution policies are based on the legal fiction that sex workers are self-employed. Therefore, they are not covered by unemployment insurance and are not eligible for state sponsored training programs. Instead, some charities offer training, but as sex workers are considered to be self-employed, they are not entitled to paid vacations either, whence many cannot afford to take part. Thus, on the one hand sex workers are *de facto* denied access to social welfare, but on the other they are required to contribute to the social welfare system with taxes and social insurance payments.

## Deliberate Stigmatization (Article 7)

Most women entered sex work, as their right to decent work was not respected, which left sex work as their only viable option (sections 3.3. and 3.4). Rather than accepting the resulting moral liability and help these women to escape poverty (section 3.4), Austria further impedes them by stigmatization that is a direct consequence of State Party policies at the national, provincial and communal levels. This resulted in risks of exploitation and harmful working conditions.

The following case of 2010 illustrates the ongoing stigmatization that spills over to women in general.[[42]](#footnote-42) The city of Vienna asked a female tenant to prove conclusively that unproven allegations about her prostitution were false. Otherwise the city would terminate the rental agreement and she would become homeless. (The woman was young and had different friends, which some of their neighbors did not accept.) As it is impossible to prove, not to engage in sex work clandestinely, the woman could only retain her apartment, as her case stirred public controversy. A registered sex worker in her situation would have lost her home.

Concerning policies at the national level, stigmatization is caused by the “immorality status” of sex work, referring to a judicial interpretation of section 879 Civil Code.

* According to a key ruling by the Austrian Supreme Court of Justice of 1989, the contract to exchange sex for money between a sex worker and her client was contrary to public moral (3Ob516/89 of 28.06.1989): If a customer did not pay, the sex worker could not initiate a civil action. As a consequence, there was no legal option to negotiate contracts based on sex work, sex work was not recognized as a trade, a profession, or another gainful occupation and sex workers did not have any legal remedy, if clients denied them the payment of their services. Consequently, Austria denied sex workers the right to fair wages. Only recently did the Supreme Court of Justice partially revoke this key ruling (see 3Ob45/12g of 18.04.2012), but up to date, there has been no case in Austria, where a sex worker successfully sued a customer to pay for the provided sexual services.
* In international case law behavior of clients amounts to rape, if they use deceit to obtain sexual services from sex workers without pay.[[43]](#footnote-43) However, in another ruling (10Os182/84 of 07.11.1984), Supreme Court of Justice took criminal responsibility away from such clients, if they just wanted save money and did not use brute force. Moreover, Supreme Court of Justice denied sex workers criminal law protection against exploitation by pimps, as the owner of a brothel may determine the conditions of sex work (4Ob78/93 of 29.09.1993). Such lack of judicial protection of sex workers makes working conditions in sex work harmful.
* Austria does not protect the rights of sex workers to rest, leisure and reasonable limitation of working hours. Further, due to the “immorality status” sex workers in brothels could not sue the brothel owner for payment and they still depend on the mercy of the brothel owner, if and how much of their earning they actually receive. In particular, in no brothel in Austria can sex workers enjoy periodic holidays with pay, nor do they receive extra remuneration for work on public holidays.
* Moreover, stigmatization extends to everyday life. Supreme Court of Justice assessed sex work as anti-social behavior and a “*degradation of the performer’s intimate sphere”* (1Ob728/85 of 15.01.1986 and 2Ob23/03a of 12.06.2003). In line with such rulings, alleged sex work still is a legal reason to exclude women from their legal rights to inheritance (section 768 Civil Code), it is a legal reason for divorce, friends of sex workers may lose their jobs in civil service,[[44]](#footnote-44) and authorities could remove the children from a sex worker and place them under foster care.

Policies by provinces and communities worsen the situation of sex workers, either deliberately in order to chase them away and bar sex work altogether, or due to ignorance of the reality of their lives. As a result, they violate the right to safe working conditions.

* As an illustration, some municipalities tried sweeping prohibitions, which Constitutional Court declared as unconstitutional.[[45]](#footnote-45)
* Other municipalities and district authorities utilized the combined effect of the legal regulations at different levels to maximally restrict sex work.[[46]](#footnote-46) Thereby often most elementary human rights of the concerned persons were ignored: There are cases, where women were fined for illegal prostitution, although authorities could not prove it.[[47]](#footnote-47)
* The latter approach is exemplified by the implementation of the Vienna Prostitution Law since the end of 2012. Administrative regulations, based e.g. on the building code, were used to shut down many of about 450 small premises that hitherto offered safe working places to about 2,000 women, including room maids, waitresses and women in sex work. Moreover, about 120 women in street prostitution were pushed to the outskirts in order to ensure decorum in urban life. The impact for the concerned women has not been considered in the formulation of these measures: They are now without infrastructure and therefore at higher risk of harm.[[48]](#footnote-48)
* Policies of most Austrian provinces prefer large brothels, as these are generating more tax revenues. Thereby, the inevitable dangers of organized crime, sexual exploitation and trafficking are deliberately ignored:[[49]](#footnote-49) For, in view of the generally weak financial and legal position of sex workers, policies that prohibit sex work outside of brothels or pressure sex workers to work for brothels make them vulnerable to exploitation. For, in order to pay the room rent in the brothel, social security, taxes, and often the pimp, who actually controls the brothel, sex workers become easily trapped in escalating financial obligations leading to debt-servitude; their expenses are fixed, but their income is not.
* Sex work of a few women in their own premises would be a safe and crime-free form of pay sex with barely any nuisance; it could be socially optimal.[[50]](#footnote-50). For, if sex work is not spatially concentrated, it is less controlled by pimps, as the ratio of income to efforts is unfavorable to them. Moreover, it causes fewer nuisances. However, in Austria this form of sex work is prohibited in all provinces.

It follows that Austria applies double moral standards: Sex industry as economic sector is accepted, with a preference for large brothels, but sex workers are not.

## Barriers to Self- Organization (Article 8)

Fulfillment of Article 8 is a key condition in securing the right to work. However, in Austria there exist neither sex worker trade unions, nor community-based sex worker organizations, and existing trade unions ignore sex worker issues. Rather, in Austria social workers of local community social work organizations inform policy makers about sex worker issues, as any sex worker speaking out in public would face stigmatization (see above). Further, as Austrian authorities do not perceive sex workers as part of civil society, they do not listen to them. This by itself indicates the lacking promotion of Article 8.

Also this author is not a trade union, the focus being on defending the human rights of sex workers. Nevertheless, Article 8 would also protect the author against discrimination. The following account reports experiences of this author, which indicate that Austria does not fully respect Article 8 rights. From 2010 till present, this author wished to open a bank account for purposes of charity, but all banks refused, as they disapproved of the name “Sex-Worker Forum”, which they associated with immorality. Neither was it helpful to explain to them that the forum is a human rights defender, as now banks feared negative repercussions for their business with public bodies.

This case gives also rise to the concern that there are no regulations that would hinder a financial institution to exclude anybody at any time from financial services for whatever reasons. It suffices that a bank manager disapproves of the sexual conduct of a woman, closes her account and warn other banks about her alleged immorality. As a consequence, the woman may face financial exclusion and she would also lose a decent job, because *“without a bank account, it is virtually impossible to access employment […] as one of the pre-conditions for signing an employment contract for the future employee is having a bank account number”*.[[51]](#footnote-51)

# Right to Social Support (Articles 9, 10, 11)

Women in sex work suffer from restricted Access to social security (Article 9) and insufficient maternity benefits (§ 2 Article 10). For, although women in sex work pay social insurance, insurance coverage often is insufficient, especially in the case of pregnancy: Many sex workers cannot afford to take maternity leave. Moreover, in view of their income from sex work they are not eligible to receive social assistance, even if the income is small. Moreover, sex workers in general are not insured for unemployment, even if they are in brothels or in other forms of *de facto* employment. They are not protected against arbitrary dismissal from a brothel and are not entitled to receive severance pay.

Children, who are victims of sexual exploitation, do not receive adequate support and protection (§ 3 Article 10). Rather, provinces set a minimum age for prostitution and “child prostitutes” face administrative penalties. These regulations have been criticized repeatedly by the United Nations Committee on the Rights of the Child, but Austria did not react.[[52]](#footnote-52)

Another issue of sex work is the feminization of poverty (§ 1 Article 11 together with Article 3). As explained in 3.4, single mothers are a high risk group for poverty. In order to better care for their children, they may enter sex work. However, this income does not suffice to improve their standard of living, yet from now on the stigma on prostitution hinders that they find another job.

# Right to Health (article 12)

## Key Issues

The right to health under § 1 Article 12 protects against non-consensual medical treatment (or similar interference), it guarantees sexual autonomy (the right to control one’ own health and body), and it entails the positive obligation of governments to provide an effective system of health protection. It protects also the rights to privacy and protection against torture and degrading treatment (General Comment 14/2012 of this Committee at §§ 3 and 8): *“These and other rights and freedoms address integral components of the right to health.”*

In Austria, the legal obligations of sex workers to register as prostitutes and to undergo regular gynecological inspections and HIV tests infringes upon these Article 12 rights in several aspects:

1. In Austria, police routinely forces women suspected of illegal prostitution to vaginal inspections by health officers against the will of the concerned women. This is a violation of Article 12 that amounts to degrading treatment, which is absolutely and irrevocably prohibited by international law.
2. Further, in violation of the Article 12 obligation to maintain minimal professional standards, the implementation of the health checks is deficient, as there are regularly reports about degrading treatment of sex workers by health officers, who are over-tasked by the number of women, whom they have to inspect daily.
3. Referring to § 2c Article 12, there is no evidence for public health benefit from mandatory health checks and HIV tests. Rather, such interventions contravene both the *International Guidelines on HIV/AIDS and Human Rights* of UNAIDS and the *HIV & AIDS Recommendation R200* of ILO.[[53]](#footnote-53) Basically, they are counterproductive for STI and HIV prevention: Registered sex workers are pressured by clients to jeopardize their health by offering sex without a condom, and illegal prostitutes are driven underground and are not reached by public health programs.
4. The very existence of such laws discriminates against women (Article 3) in the enjoyment of the right to health (Article 12). For, although these laws are formulated in gender neutral terms, *de facto* they restrict the rights of women, as most sex workers are women, while there are no similar obligations for men, who are clients of sex workers. Further, these laws focus on the protection of the health of men, who are clients of sex workers, rather than on the health of women in sex work.
5. Additional discrimination against women is caused by law enforcement: If the unconventional sexual life of a woman lets police suspect illegal prostitution, she is targeted by police investigations. This resulted in reports about police harassment, violations of private homes and degrading treatment, in particular in the context of unlawful undercover investigations. Thus, in violation of Articles 3 and 12, Austria does not respect the sexual autonomy of women. Clients do not suffer from such intrusions.

It follows that obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests are not instruments to reach the highest attainable standard of health in the meaning of Article 12. Rather they expose sex workers to the risk of degrading treatment and other human rights violations, they are counterproductive for HIV prevention, and they discriminate against women (Article 3).

## Degrading Treatment by Forced Vaginal Inspections

In 2010, journalists observed that there are involuntary examinations at the Vienna Communal Health Office:[[54]](#footnote-54) Police accompanied handcuffed women to gynecological examinations against their will and even watched these examinations. Such examinations are a routine in Austria, although the European Court of Human Rights qualified forced medical investigations of the intimate sphere as degrading treatment and a violation of the private life.[[55]](#footnote-55) Austria thus applies systematically torturous medical interventions, although the prohibition of torture and degrading treatment under international law (*ius cogens*) is absolute and irrevocable.

Sadly, worldwide women in sex work suffer from such treatment. For instance, with respect to Azerbaijan, the United Nations Committee on Discrimination criticized that *“forced medical control of prostitutes, where such measures were not implemented with respect to clients … [was] discriminatory and might be counterproductive”*.[[56]](#footnote-56) Further, that Committee expressed concern that in Indonesia the problem of HIV/AIDS had been attributed to women in prostitution and that women had been subjected to forced vaginal examinations.[[57]](#footnote-57)

There are also forced HIV tests as part of criminal prosecution: HIV positive persons are criminalized for consensual sex with informed partners. They face criminal sanctions under the Penal Code (three years prison term), even if they themselves do not know their HIV status.[[58]](#footnote-58) This is counterproductive for public health, as by criminalizing sex workers who are infected, authorities discourage them from being tested voluntarily and undergo treatment. Therefore Austria should repeal such criminal law regulations. HIV-positive persons, also sex workers, are no threat to public health, if they consistently undergo retroviral therapy and use condoms. Education of clients about their own responsibility for risk reduction is a much more effective instrument for infection control than the application of criminal law.

## Degrading Treatment at Public Health Offices

Both the United Nations Committee against Discrimination of Women in 2013 and the United Nations Committee against Torture in 2010 were concerned about the implementation of the mandatory health checks, as Austria does not respect the dignity and privacy of the affected women.[[59]](#footnote-59) Austrian Parliament inquired Austrian Government about measures to stop this degrading treatment, but government declared no interest.[[60]](#footnote-60) Consequently these concerns persist.

The following information from media reports illustrate the untenable situation: Women sex workers in Vienna are bound to attend weekly gynecological inspections at the Vienna Communal Health Office. It is only accessible for 20 hours a week, and grossly understaffed with three to four doctors on duty, who then handle each gynecological inspection in about 1 to 2 minutes.[[61]](#footnote-61) Journalists, who visited it, reported about humiliating circumstances and lacking hygiene, use of non sterile instruments, and they interviewed women, who suffered from physical injuries and pain as a result of the inspection.[[62]](#footnote-62) There are not even multilingual brochures to inform properly about the medical interventions (to explain e.g., what STIs are in the focus of inspections, and what are not, e.g. *condyloma*). The situation is not better at other Austrian cities. For instance, the public health officer of Klagenfurt, Carinthia, requested sex workers to undress and line up in a row of 40 women, so that he could complete the “health check” in an hour or less. In Salzburg, a certain health officer repeatedly injured sex workers, but the office ignored complaints.

Austria did not even implement the most straightforward remedy, namely to allow sex workers consult doctors of their own choice for health checks. Medical interventions, which ignore the right to choose a doctor, who one can trust, are not consensual. Thus, such interventions violate Article 12. As a consequence, sex workers are also exposed to the risk of degrading treatment by over-tasked health officers.

## Counterproductive Character of Prostitution Laws

Austria applies essentially the same regulations of prostitution that Germany abolished in 2001. This (in Germany abolished) prostitution law, was characterized by Special Rapporteur on Health:[[63]](#footnote-63) It was *“designed to combat venereal disease, required prostitutes to undergo mandatory medical examinations. This law legally stigmatized sex workers as being almost solely responsible for the spread of venereal disease, despite the absence of epidemiological studies to support this.”* Also in Austria the only purpose of mandatory health checks is the protection of public health against allegedly unhealthy sex workers.[[64]](#footnote-64) However sex workers are known not to be vectors for sexually transmitted infections.[[65]](#footnote-65) Rather, such infections are driven by irresponsible behavior of man and women alike, whereby women would suffer most, as e.g. HIV infection risk for unprotected sex is ten times higher in the path of a man to a woman than in the path of a woman to a man.[[66]](#footnote-66) Thus, the very logic of Austrian prostitution laws contradicts evidence-based medicine: Society does not need protection against sex workers, but conversely sex workers would need the protection of society. If they were empowered, then out of self-interest they would educate customers in safer sex practices.[[67]](#footnote-67)

However, registration, vaginal inspection and HIV testing do not empower women. On the contrary, in 2008 the Government of Austria admitted negative health impact for women, as clients of sex workers assume that mandatory testing of health workers keeps their own risk for infections low, whence they pressure sex workers for sex without a condom (*supra* note  at p 35). Thus, Austrian regulations are a factor that makes HIV and STI infection risk higher for women; in view of the diagnostic window this risk then increases also for their male clients. Further, such regulations drive illegal prostitutes underground, away from health care interventions, thus making the system of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests largely ineffective: 83% of the 30,000 women in sex work are outside the system, as they did not register (statistics: section 1.2). This is an outcome that is to be expected from the very system of mandatory testing:[[68]](#footnote-68) *“Mandatory testing is against the principles of human rights, and furthermore, these approaches chase sex workers away, when what is needed is cooperation.”* For this reason, in 2010 the Office of the High Commissioner of Human Rights voiced concerns that Austria’s approach may be counterproductive for HIV-prevention.[[69]](#footnote-69) Actually, when compared to Germany with a similar socio-economic situation, but no registration or forced health checks of sex workers, HIV incidence in Austria is twice as high,[[70]](#footnote-70) and also incidence of Syphilis is significantly higher in Austria, than in Germany.[[71]](#footnote-71) This offers evidence that the Austrian system is counterproductive with respect to HIV and STI prevention.

The *International Guidelines on HIV/AIDS and Human Rights* of UNAIDS (supra note ) were informed from such considerations. They summarize in § 115: *“HIV prevention and care for women are often undermined by pervasive misconceptions about HIV transmission and epidemiology. There is a tendency to stigmatize women as ‘vectors of disease’, irrespective of the source of infection. As a consequence, women who are or are perceived to be HIV-positive face violence and discrimination in both public and in private life. Sex workers often face mandatory testing with no support for prevention activities to encourage or require their clients to wear condoms and with little or no access to health-care services.”* It continues on § 137 with respect to compulsory HIV tests, as e.g. required by Austrian AIDS Law: *“This coercive measure is often utilized with regard to groups least able to protect themselves because they are within the ambit of Government institutions or the criminal law, e.g. soldiers, prisoners, sex workers, injecting drug users and men who have sex with men.* ***There is no public health justification for such compulsory HIV testing****. Respect for the right to physical integrity requires that testing be voluntary and that no testing be carried out without informed consent.”*

In 2010, the *HIV & AIDS Recommendation R200* of ILO (supra note ) recommended to implement these guidelines. European Court of Human Rights endorsed these guidelines, too.[[72]](#footnote-72) The importance of these guidelines was also emphasized by this Committee, when it recommended their application to Algeria and Colombia,[[73]](#footnote-73) and by the United Nations Committee on the Rights of the Child, when it recommended their implementation to Bosnia, Equatorial Guinea, Nicaragua, Sri Lanka, Sudan, Togo, and Ukraine.[[74]](#footnote-74) In 2013 the United Nations Committee on Discrimination against Women expressed concerns about mandatory HIV testing of sex workers and recommended the implementation of UNAIDS guidelines to Austria.[[75]](#footnote-75)

The author considers that any medical intervention that is legally prescribed and enforced by police is fundamentally incompatible with the Article 12 protection against non-consensual medical treatment, if there are no substantial proven public health benefits. It follows: Austria applies a system of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests. These medical interventions are not truly consensual, as they are based a legal obligation, whence they are a restriction of the Article 12 right to health and personal autonomy. However, these interventions cannot be justified in terms of Article 4, as there is no proven public health benefit from them; instead there are negative impacts upon public health. They are thus unethical and in violation of Article 12. Hence, Austria should consider an amendment of AIDS Law, prohibit compulsory testing, and guarantee rights to confidentiality and to protection against discrimination for those who are HIV-positive.

## Discrimination against Women by Health Checks

Worldwide, there are serious concerns about the indirect discrimination against women (Article 3) in the enjoyment of Article 12 by obligatory registrations of prostitutes, mandatory vaginal inspections or compulsory HIV tests. For, by requiring only sex workers to comply to such medical interventions, authorities are stating that they are not interested in the health of the sex worker but are merely concerned with the health of the client.

For instance, the United Nations Committee on Discrimination against Women Committee was concerned about legislation in India that encouraged mandatory HIV testing. And there were concerns about Greece, as sex workers were publicly shamed and made responsible for HIV.[[76]](#footnote-76) The Committee expressed also concern about mandatory registration of sex workers in the Netherlands, as it may expose registered sex workers to serious risks for their safety.[[77]](#footnote-77) (According to UNDP, *supra note* , *“sex workers are often targeted for harassment and violence because they are considered immoral and deserving of punishment.”*) In Hungary, Constitutional Court judged that the very obligation of women to register as a prostitute is incompatible with the dignity of the concerned woman.[[78]](#footnote-78) More generally, the unilateral character of obligations for sex workers that are enforced and de facto criminalize them, while there are no similar obligations for clients, or such obligations are not enforced, is seen as a discrimination against women in ever more countries, e.g. Taiwan.[[79]](#footnote-79)

Austria applies such a system of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests. It makes women in sex work responsible for HIV and STIs and imposes upon them obligations to protect the health of their male clients (section 5.4). However, neither did Austria prove the need for such protection of men (after all, the responsibility for consensual sex rests also on the clients), nor did Austria introduce laws to protect sex workers: Rather, Austria absolves the male clients of sex workers from responsibility, whence they pressure sex workers for sex without a condom (section 5.4). There is no justification (Article 4) for this differentiation.

Thus, the concerns of the cited authorities about the discriminatory character of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests applies to Austria: Austrian prostitution laws that restrict the freedom of women in sex work to control their own health discriminate against women in sex work in the enjoyment of Article 12 in two aspects, namely first, as there are no similar obligations for their male clients and second, as the purpose of these obligations serves only the interests of the male clients.

## Additional Issues for Health Checks

UNAIDS and the government of Guatemala agreed about the following characterization of mandatory health checks that applies as well to Austria:[[80]](#footnote-80) *“The health code requires sex workers to undergo a sexual health check which is not designed to be holistic care but the fulfillment of a requirement that often generates no benefit and instead promotes or creates police abuse and extortion.”* Such problems are directly linked to any system of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests. For, aside from Austria, there are only few countries in Europe, where registrations of sex workers as prostitutes and mandatory health checks are foreseen, and in all these countries these regulations caused serious human rights concerns: Germany abolished such regulations in 2001 for concerns mentioned in section 5.4 above. Problems for Greece, Hungary and the Netherlands are mentioned in section 5.5 above. In Latvia, registration and health checks resulted in stunning reports of lawlessness.[[81]](#footnote-81) By judgments of European Court of Human Rights, in Switzerland registration caused unlawful detention and a violation of data protection;[[82]](#footnote-82) and in Turkey registration resulted in unfair proceedings and torture.[[83]](#footnote-83)

Similar problems with police harassment are common in the law enforcement of Austrian regulations of prostitution. The root causes are on the one hand the prostitution laws, and on the other a systematic lack of precautions against police harassment and unlawful police investigations against sex workers. Very common are undercover investigations to discover illegal prostitution, although such investigations are unlawful: They violate private homes of women and subject them to degrading treatment, as police uses sex as a weapon to debase them.

The following cases illustrate different types of police harassment: In September 2011, members of the National Human Rights Advisory Board (a subsidiary of Ombudsman Board) observed police measures against illegal street prostitution in Vienna. The board was appalled by the degrading treatment of the women, and by the evident discrimination.[[84]](#footnote-84) There are also reports about women suffering from intimidating nightly visits by police officers, who suspected illegal prostitution; in one case even an eight years old child was traumatized.[[85]](#footnote-85) Several undercover investigations were brought to court, with proceedings lasting several years, but never was a police officer made responsible for misconduct.[[86]](#footnote-86) In all these cases, an undercover officer contacted a young woman under the false pretense of being a customer for pay sex and was invited to her apartment. There he humiliated her, as he first had sex-talk and often let her pose nude, only to inform her in the bedroom about the deceit; often the officer forcefully let his colleagues enter the home of the woman to expose her nude to their views. In one case, in May 2005, the situation escalated, leaving the woman handcuffed, with bare breasts, and bruised, but the obvious concern of possible rape, and thus of torture, has never been investigated.[[87]](#footnote-87)

It follows that the policy instruments of obligatory registrations of prostitutes, mandatory vaginal inspections and compulsory HIV tests generate additional risks for sex workers to suffer from police harassment that violates privacy and may reach the threshold of degrading treatment. Women with an unconventional sexual life, who want avoid this risk, can only change their conduct, or register as a prostitute (yet again with the risk of degrading treatment: section 5.3). Thus, Austria *de facto* restricts the sexual autonomy of women, protected by Article 12. As several court cases cited above demonstrate, also women not in illegal prostitution came into the focus of police, as their sexual life did not conform to gender stereotypes. Hence, also under the aspect of indirect consequences of prostitution laws Austria discriminates against women (Article 3 together with Article 12).

Another concern is the *de facto* impunity for police harassment, which may also be counterproductive for public health. For,[[88]](#footnote-88) *“policies that prosecute violence perpetrated by police or clients, or promote proven public health standards regarding condom use and promotion of safer sex, would not only ameliorate the conditions which make sex workers particularly vulnerable to HIV infection but would facilitate their use of needed services.”* In order to ensure that police misconduct is effectively investigated, Austria should adopt as legally binding the recommendations of the United Nations Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[[89]](#footnote-89)

# Cultural Rights (Articles 13, 15)

With respect to § 1 Article 13 the author notes that Austria did not ratify the the UNESCO Convention against Discrimination in Education and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Both ratifications would support the integration of trafficked persons (several with academic background) into Austrian society.

With regards to § 1 Article 15, there are negative spill-over effects of prostitution laws to another disadvantaged social group: Prostitution laws ignore that many persons with disabilities need enabling conditions to develop their sexual life. If their social contacts are restricted (e.g. due to immobility), they may not be able to develop their sexual self without the aid of sexual assistants. However, if sexual assistants would visit them, in several provinces this would be illegal prostitution. For, in the province of Vorarlberg, sex work is prohibited altogether; in other provinces (e.g. Tyrol) sex work is confined to brothels and prohibited elsewhere. Thereby, *de facto* persons with disabilities are denied sexual autonomy. This violates the positive obligation of states to support persons with disabilities in this respect under § 1 Article 15 (General Comment 5/1994 at §§ 37 ff). Already Rule 9 of the United Nations’ Standard Rules of 1993 on the Equalization of Opportunities for Persons with Disabilities asks states to give persons with disabilities the opportunity to develop sexual life.

A specific problem arises for persons with disabilities, who are under guardianship. The author acknowledges that for persons incapable of exercising sexual autonomy special measures are to be taken to protect their rights and interests. However, persons with disabilities should be protected from paternalistic approaches, which restrict their autonomy despite their capacity of exercising it. For, although they may have problems in organizing their finances, they may very well make their own informed decisions about their sexual life. However, their guardians may impose their own moral convictions upon their wards and deny them access to their own money for the purchase of sexual services. Austria does not provide remedies against such a denial of sexual autonomy.

Another problem concerns sex work of persons under guardianship. Some provinces (e.g. Upper Austria) want protect them against sexual exploitation and prohibit registration of persons with disabilities for sex work, if they are under guardianship. This prohibition does not make exceptions for persons, who have the mental capacity to make decisions about their sexual life. Yet, if these persons nevertheless practice sex work, the alleged “protection” turns against them: They are fined under the Administrative Penal Act, rather than supported as potential victims of sexual exploitation.

# Recommendations

Austrian policies towards voluntary sex work should change in agreement with the international consensus that sex workers and other marginalized populations should not be stigmatized and denied the protection of the law. The author therefore recommends that Austria uses the United Nations Human Rights Based Approach and revises at all levels the legal regulations related to sex work accordingly. Respect for the human rights of women in sex work needs to become a founding principle of Austrian prostitution policies.

To this end, Austria needs to repeal all laws that de facto criminalize sex work, implicate its immorality or in any other way do not respect the sexual autonomy of women. In particular the obligation to register as a prostitute, undergo regular health checks and HIV tests violates the dignity of women and needs to be revoked. Instead, Austria should more vigorously address the crimes of sexual exploitation and trafficking, and provide adequate redress for victims, regardless of their residency status. In the regulation of commercial prostitution, the focus should be on the empowerment of sex workers to reduce their vulnerabilities. Thereby, sex work that is visible to the public might be regulated, but not through policing that leads to *de facto* criminalization. Sex work that is invisible to the public should be respected as private life, whereby safeguards against unlawful police intrusions are needed.

Austria should also reconsider the current interpretation of Article 9 Federal Constitutional Law and allow that all ratified international human rights agreements, including this Covenant, become part of the domestic legislation, and that individuals may directly invoke the provisions of these agreements before national courts.

**Approved by Sex-Worker Forum of Vienna**

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1. Austrian legal information system (link: www.ris.bka.gv.at) [↑](#footnote-ref-1)
2. The author’s homepage links to: AIDSHILFE Vienna, LEFÖ Vienna, LENA Linz, SOPHIE Vienna, and SXA Graz. Jurisprudence is cited from the national legal information system (*supra* *note*) and population data are from Statistik Austria (www.statistik.at). For supplementary information about sexual exploitation of children, the author refers to ECPAT Austria (www.ecpat.at). In addition, the author refers to the European Community sponsored research TAMPEP (http://tampep.eu) and the Global Network of Sex Work Projects (www.nswp.org). [↑](#footnote-ref-2)
3. *Farley* (2004), Violence Against Women, **10**, pp 1087 ff [↑](#footnote-ref-3)
4. *Harcourt/Donovan* (2005), Sexually Transmitted Infections, **81**, pp 201 ff. [↑](#footnote-ref-4)
5. *Vandepitte et al* (2006), Sexually Transmitted Infections, **82**, Suppl 3, pp 18 ff. For Austria, a similar estimate is due to TAMPEP (link: *supra note*). [↑](#footnote-ref-5)
6. *United Nations Development Programme* (2012), Sex Work and the Law in Asia and the Pacific, New York, Joint publication of UNDP with UNAIDS and UNFPA. [↑](#footnote-ref-6)
7. *Task Force Menschenhandel* (2008), Prostitution in Österreich, Office of the Federal Chancellor, Vienna [↑](#footnote-ref-7)
8. Federal Chancellor (supra note ) estimates 3,000 illegal prostitutes for Vienna (other estimates: 6,000, compared to between 1,500 and 2,500 registered prostitutes, depending on the reference year), which extrapolates to 5,000 to 10,000 illegal prostitutes in Austria. [↑](#footnote-ref-8)
9. The lower estimate is the difference to the above upper estimate for illegal prostitution, while the upper estimate takes care of the different shades of grey. [↑](#footnote-ref-9)
10. Where sexual behavior is not commercial, e.g. not visible in the public, it is private life. Austrian Constitutional Court confirmed this repeatedly since 1978 (VfSlg 15.632 of 14.10.1999, see also 8.272 of 1978, 8.907, 10.363, 11.926). Administrative Court confirmed this, too (VwGH 2004/09/0219 of 20.11.2008, 2009/13/0011 of 25.01.2012; related: 2005/09/0181 of 22.11.2007); see also European Court of Human Rights, *Dudgeon v United Kingdom* of 22.10.1981 (c.f. *Wildhaber/Breitenmoser*, Internationaler Kommentar zur Europäischen Menschenrechtskonvention: Kommentierung des Artikels 8, Cologne 1992, margin no 114). In Common Law, too, the intrinsic private life character of sex work is accepted, see *Chamallas* (1988), Southern California Law Review, **61,** pp 777 ff). [↑](#footnote-ref-10)
11. Coercive medical interventions are permitted in exceptional circumstances, only. In these cases, certain international guidelines have to be respected; see this Committee, General Comment 14/2000 at § 34. Austria does not respect the relevant guidelines of UNAIDS and ILO, see section 5.1 below. [↑](#footnote-ref-11)
12. The factual restriction of legal sex work in Tyrol is demonstrated by the following figures: In 2009, in Tyrol with a population of 0.7 Mio there were eight brothels and legal sex work was confined to these brothels, while in Salzburg with a smaller population of 0.5 Mio there were 37 brothels. [↑](#footnote-ref-12)
13. *Della Giusta/Di Tommaso/Stroem* (2009), J. Population Economics, **22**, pp 501 ff. [↑](#footnote-ref-13)
14. *Seshu* (2003): The Violence of Stigmatization, UNAIDS Issue Paper [↑](#footnote-ref-14)
15. *Parliamentary Assembly of the Council of Europe* (2007), Prostitution, which Stance to Take, Strasbourg [↑](#footnote-ref-15)
16. United Nations Committee on the Elimination of Discrimination against, CEDAW/C/AUT/CO7-8 of 01.03.2013 at §§ 10 ff [↑](#footnote-ref-16)
17. This Committee, E/C.12/AUT/CO/3 of 25.01.2006 at §§ 8 and 19 [↑](#footnote-ref-17)
18. *Shaheed* (2011): United Nations Independent Expert/Special Rapporteur in the Field of Cultural Rights, A/HRC/17/38/Add.2 of 16.05.2011 at § 21 [↑](#footnote-ref-18)
19. This policy of Austria is based on a ruling by the Constitutional Court in 1975 (VfSlg 7.608). [↑](#footnote-ref-19)
20. Explanation: CIRI (Link: www.humanrightsdata.org) assesses governments’ respect for 15 groups of internationally recognized human rights on an annual basis, from 1981 to 2010, and for 195 countries of the world. Based on the U.S. Department of State’s Country Reports about human rights, at least two country experts of CIRI independently code the situation, following a detailed set of instructions. [↑](#footnote-ref-20)
21. European Court of Human Rights, *Rantsev v Cyprus & Russia* of 07.01.2010, whereby Article 4 ECHR uses the mentioned ILO definition of forced labor. [↑](#footnote-ref-21)
22. The list of item 41a of the State Party Report might be complemented by referring to sections 104, 104a, 214, 215, 215a, 216, or 217 Penal Code. [↑](#footnote-ref-22)
23. United Nations Human Rights Committee, General Comment 28/2000 at § 12 [↑](#footnote-ref-23)
24. *Bettio/Nandi* (2010), European J Law and Economics, 29, pp 15 ff [↑](#footnote-ref-24)
25. *International Labor Organization* (2012), Global Estimate of Forced Labor, ILO SAP-FL, Geneva [↑](#footnote-ref-25)
26. *Di Tommaso/Shima/Strom/Bettio* (2009), European J Political Economy, 25, pp 143 ff [↑](#footnote-ref-26)
27. *United Nations Office on Drugs and Crime* (2011). The Role of Corruption in Trafficking in Persons, UNODOC, Vienna [↑](#footnote-ref-27)
28. See the reasoning concerning witness D.B. by ICTY Appeals Chamber, *Prosecutor v Kunarac, Kovač & Vuković*, IT-96-23 of 12.06.2002 at §§ 151, 218. [↑](#footnote-ref-28)
29. The criminal statistics is from Federal Ministry of the Interior, Crime Report 2011 to the Parliament (homepage of Parliament) and from Statistik Austria (court cases).

The 123 suspected perpetrators identified by police in 2011 were: 52 cases of trafficking for sexual exploitation under section 217 Penal Code, 20 cases of trafficking also for other purposes under section 104a Penal Code, and 51 cases of pimping under section 216 Penal Code; the number of victims (cases) was about the same as the number of identified perpetrators.

The 20 criminal convictions were: 8 cases of trafficking for sexual exploitation under section 217 Penal Code, 1 case of trafficking also for other purposes under section 104a Penal Code, 2 cases of slavery under section 104 Penal Code, 9 cases of pimping under section 216 Penal Code. [↑](#footnote-ref-29)
30. *Planitzer/Probst/Steiner/Unterlerchner* (2011). Entschädigung für Betroffene des Menschenhandels in Österreich, Vienna [↑](#footnote-ref-30)
31. CEDAW/C/AUT/CO7-8 of 01.03.2013 at § 2 [↑](#footnote-ref-31)
32. *Cusick et al* (2009), Critical Social Policy, 29, pp 703 ff; *Weitzer* (2010), Sexual Research & Social Policy, 7, pp 15ff. [↑](#footnote-ref-32)
33. Source: “News” of 20.01.2012. [↑](#footnote-ref-33)
34. Homepage of Federal Ministry of Social Affairs: 744 € = 558 € social assistance + 186 € rental aid (year 2010) [↑](#footnote-ref-34)
35. In 2010 Austria spent 100 million € for 19,000 asylum seekers (source: TAZ of 25.07.2010); this is 439 € per month for each asylum seeker (100 million € / 12 month / 19,000 beneficiaries). [↑](#footnote-ref-35)
36. Source: *Altinisik* (2010), Zivilrechtliche Aspekte der Flüchtlingsbetreuung, doctoral thesis, Univ. Innsbruck [↑](#footnote-ref-36)
37. For income data (definition of poverty) and single mothers: Statistik Austria (topic “Armutsgefährdung”); for migrant women: Upper Austria Chamber of Labor, Frauenmonitor, Linz 2011; for general information: *Gächter* (2009), Handbuch Armut in Österreich, Vienna [↑](#footnote-ref-37)
38. For more information about the social stratification of sex workers see the resources of TAMPEP (link: *supra* *note* ). [↑](#footnote-ref-38)
39. *Statistik Austria* (2009), Volkswirtschaftliche Gesamtrechnungen, Revisionen 2008/2009, Wien, p 15. [↑](#footnote-ref-39)
40. According to Administrative Court, judgment VwGH 2011/01/0006 of 31.05.2012, the price of sexual intercourse is 20 €; blow jobs and masturbation cost significantly less, resulting in 15 € average. [↑](#footnote-ref-40)
41. *Shih* (2009), Humanitarian Work: The Production and Consumption of Jewelry Made by Trafficked Women. MA thesis, UCLA, Los Angeles. [↑](#footnote-ref-41)
42. Sources: “Kurier” of 03.08.2010 and “Der Standard” of 03.08.2010. [↑](#footnote-ref-42)
43. The perpetrator cannot assume consent of the victim to such sexual acts. In Italy, Corte Suprema di Cassazione confirmed (3rd Chamber, case 8286 of 17.12.2009, published at 03.03.2010) that the consumption of sexual services offered by a sex worker without paying her is a criminal act of sexual violence. [↑](#footnote-ref-43)
44. Administrative Court ruling VwGH 2006/12/0169 of 14.06.2007 [↑](#footnote-ref-44)
45. Constitutional Court, in judgment VfSlg 19.159 of 23.09.2010, declared the provincial prohibition of advertisements for brothels in Tyrol as unconstitutional and in VfSlg 18.023 of 04.12.2006 declared the municipal prohibition of prostitution within the city boundaries of Oberwart, Burgenland, as unlawful. [↑](#footnote-ref-45)
46. The questionable character of such legislation is well known: “To put it crudely, but accurately, the law is perverted”, see *Packer* (1968), The Limits of the Criminal Sanction, Stanford, pp 328 ff [↑](#footnote-ref-46)
47. In Tyrol women with swingers’ lifestyle, who placed advertisements seeking fellow swingers, were fined for soliciting illegal prostitution. Administrative Court confirmed the fines, admitting that prostitution was not proven (judgments VwGH 2011/01/0209 of 19.09.2012, 2010/01/0062 of 19.04.2012). [↑](#footnote-ref-47)
48. Where street prostitution was restricted to unsafe places or completely prohibited (which restricts it to places, where police does not care for security), women became significantly more often victims of murder. More generally, expert testimonies confirmed that sex work is safer indoors, than outdoors (Superior Court of Ontario, *Bedford v Canada*, 2010 ONSC 4264 of 28.09.2010). [↑](#footnote-ref-48)
49. For Vienna, police admitted that pimps have factual control over the largest brothels, but there would be no way to stop them (source: “Der Standard” of 31.10.2012). Literature confirms criticism of large brothels, as a concentration of capital in the hands of few translates into power, also vis-à-vis authorities; *Langley*, Encyclopedia of human rights issues since 1945, Greenwood Press, 1999, p 66. [↑](#footnote-ref-49)
50. This is recognized in New Zealand, where since 2003 small owner-operator brothels comprising four or fewer sex workers do not need a license (see *UNDP, supra note* ). [↑](#footnote-ref-50)
51. European Commission consultation document (2009), Financial Inclusion: Ensuring Access to Basic Bank Account, MARKT/H3/MI D [↑](#footnote-ref-51)
52. CRC/C/AUT/CO/3-4 of 05.10.2012 at § 64; CRC/C/OPSC/AUT/CO/1 of 03.10.2008 at §§ 29 and 31 [↑](#footnote-ref-52)
53. *UNAIDS* (2006) International Guidelines on HIV/AIDS and Human Rights, Joint United Nations Program on HIV/AIDS, Geneva; *ILO* (2010), HIV & AIDS Recommendation R200, Geneva [↑](#footnote-ref-53)
54. Kurier” of 20.05.2010 and “Falter” of 09.06.2010 [↑](#footnote-ref-54)
55. ECtHR: *Yazgül Ilmaz v Turkey* of 01.02.2011; *Duval v France* of 26.05.2011; *Y.F. v Turkey* of 22.10.2003; *Juhnke v Turkey* of 13.05.2008 [↑](#footnote-ref-55)
56. CEDAW/C/AZE/1 and A/53/38/Rev.1 at § 65. [↑](#footnote-ref-56)
57. Committee on the Elimination of Discrimination against Women, Background paper concerning article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/2003/II/WP.2 of 13.05.2003 at § 17 [↑](#footnote-ref-57)
58. By sections 178, 179 Penal Code, a person, who does not know about the own HIV infection, may nevertheless be penalized for negligence, see *Mayerhofer*, (2000), StGB, Vienna. Also, unsafe sex with the consent of the informed partner may be penalized. However, there is no prosecution of safer sex (Supreme Court of Justice, ruling 11Os171/97 of 25.11.1997). Moreover, Regional Criminal Court Vienna accepted, that a HIV positive women practicing unsafe sex had no criminal intent, as due to retroviral therapy the virus count was too low to cause infection risk (source: “Der Standard” of 01.06.2012). [↑](#footnote-ref-58)
59. CEDAW/C/AUT/CO7-8 of 01.03.2013 at §§ 29-30; CAT/C/AUT/CO/4-5 of 14.05.2010 at § 20 [↑](#footnote-ref-59)
60. Interpellation: *Schwentner et al* to the Federal Minister of Women’s Affairs, 5874/J XXIV. GP of 24.06.2010 [↑](#footnote-ref-60)
61. The opening hours are from the homepage of the Health Office (20 hours per week, namely Monday to Friday between 8 am and 12 am). According to „Die Presse“ of 01.06.2010 and of 11.07.2010, in 2010 between 2,200 and 2,500 women in sex work regularly consulted the Vienna Health Office, whereby of seven doctors only three to four were on duty per day. This means that in average doctors spent between 1.5 minutes (=3 doctors times 20 hours times 60 minutes / 2,500 sex workers) to 2.2 minutes (=4 times 20 times 60 / 2,200) per gynecological check. [↑](#footnote-ref-61)
62. “Kurier” of 20.05.2010 and “Falter” of 09.06.2010 [↑](#footnote-ref-62)
63. *Grover* (2010), Report of the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A/HRC/14/20 of 27.04.2010 at § 39 [↑](#footnote-ref-63)
64. Office of the Federal Chancellor: Legal Services, document IV-51.749/2-1/81 of 16.04.1981 [↑](#footnote-ref-64)
65. *Ward et al.* (1999), Sexually Transmitted Infections, **75**, pp 340 ff [↑](#footnote-ref-65)
66. *Varghese et al.* (2002), Sexually Transmitted Diseases, **29**, pp 38 ff [↑](#footnote-ref-66)
67. *Sanders* (2006), Social Science & Medicine, **62**, pp 2434 ff [↑](#footnote-ref-67)
68. *Wolffers & Van Beelen* (2003), The Lancet, **361**, p 1981; link from WHO: www.who.int/hiv/topics [↑](#footnote-ref-68)
69. A/HRC/16/69 of 20.12.2010 at § 38 [↑](#footnote-ref-69)
70. *UNAIDS* (2012), Report on the Global AIDS Epidemic [↑](#footnote-ref-70)
71. *Robert Koch Institut* (2009), Epidemiologisches Bulletin, **49**, Berlin [↑](#footnote-ref-71)
72. ECtHR, *Kiyutin v Russia* of 10.03.2011 at § 34 [↑](#footnote-ref-72)
73. CESCR: E/2002/22 of 2001 at § 842; E/2002/22 of 2001 at § 799 [↑](#footnote-ref-73)
74. CRC/C/150 of 2005 at § 563; CRC/C/143 of 2004 at § 349; CRC/C/150 of 2005 at § 641; CRC/C/132 of 2003 at § 79; CRC/C/121 of 2002 at § 269; CRC/C/146 of 2005 at § 168; CRC/C/121 of 2002 at § 311 [↑](#footnote-ref-74)
75. CEDAW/C/AUT/CO7-8 of 01.03.2013 at §§ 29-30 [↑](#footnote-ref-75)
76. CEDAW/C/GRC/CO/7 of 01.03.2013 [↑](#footnote-ref-76)
77. CEDAW/C/NLD/CO/5 of 05.02.2010 at §§ 30-31 [↑](#footnote-ref-77)
78. Hungarian Constitutional Court, judgment 28/C/2005 of 10.01.2011, AB-Bulletin 20/1 [↑](#footnote-ref-78)
79. Supreme Court of Taiwan in an interpretation of 06.11.2009 [↑](#footnote-ref-79)
80. *UNAIDS* (2008), UNGASS progress reports: Guatemala. Geneva [↑](#footnote-ref-80)
81. *Crago* (2009), Arrest the Violence – Human Rights Abuses against Sex-Workers in CEE/CA. SWAN and Open Society Foundation, Budapest [↑](#footnote-ref-81)
82. ECtHR, *Khelili v Switzerland* of 18.10.2011 about data protection; *Kaiser v Switzerland* of 15.03.2007 about unlawful detention; there are also concerns about police harassment: CEDAW/C/CHE/CO/3 of 07.08.2009 [↑](#footnote-ref-82)
83. ECtHR, *Ömer Köseoğlu v Turkey* of 10.06.2008; ECtHR, *Halat v Turkey* of 08.11.2011; according to AI, torture of sex workers is common: *Amnesty International* (2011), Not an Illness nor a Crime, London [↑](#footnote-ref-83)
84. *National Human Rights Advisory Board* (2012). Bericht des Menschenrechtsbeirates zu Identifizierung und Schutz von Opfern des Menschenhandels, Vienna, 2012, see p 27 [↑](#footnote-ref-84)
85. *Austrian Ombudsman Board* (2005), Bericht an den Wiener Landtag, Vienna, p 31 (case VA W/666-POL/04, BPDion P92/f/05). A related case is Constitutional Court, VfSlg 18.302 of 05.12.2007 [↑](#footnote-ref-85)
86. Sample judgments by Administrative Court: VwGH 2009/13/0011 of 25.01.2012; 2004/09/0219 of 20.11.2008; 2006/09/0044 of 15.05.2008; 2006/09/0045 of 15.05.2008; 2005/09/0181 of 22.11.2007; 2005/01/0039 of 26.03.2007; 2005/09/0033 of 29.05.2006. These cases concern Lower Austria, Upper Austria, Vienna and Tyrol. [↑](#footnote-ref-86)
87. Administrative Panel of Tyrol, case number 2005/22/1335-23 of 29.12.2005 [↑](#footnote-ref-87)
88. *Gruskin et al.* (2007), Reproductive Health Matters, **15**, pp 4 ff [↑](#footnote-ref-88)
89. Istanbul Protocol, UN document HR/P/PT/8/Rev.1 of 2004 [↑](#footnote-ref-89)