


Ruling under a shadow of moral hierarchy: Regulatory intermediaries in the governance of prostitution

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Abstract

A key to understanding regulation through private intermediaries is how third-party actors are selected and controlled. This paper examines the question in prostitution policy, a value-loaded policy field that stimulates regulators to carefully select private intermediaries to avoid regulatory capture. By means of a novel data set on prostitution policy in 25 OECD countries (1960–2010) as well as with a comparative case study on two German states, the paper discovers that the responsabilization of private intermediaries is a slowly diffusing phenomenon, accompanied by strong public oversight. Moreover, the selection of private regulatory intermediaries is an ideology-driven process in which the congruence in (moral) goals is key for the establishment of any relationship, while regulatory capacities are secondary. Thus, private intermediaries generally rule under a “shadow of moral hierarchy” in prostitution policy. This emphasis on shared moral goals enriches the young research on regulatory intermediaries with a largely disregarded selection criterion, which is able to reduce the risk of regulatory capture by private actors in delicate regulatory areas.

Keywords: goal congruence, morality policy, prostitution policy, regulatory intermediaries.

1. Introduction

A key question of the regulation and governance literature concerns the shift from classic command and control styles of regulation to more collaborative modes of governance. Such collaborative forms of governance might include any alliance between regulators and regulatory targets but also partnerships between regulators and so-called regulatory intermediaries. Abbott et al. (2017b) define regulatory intermediaries as any actor that “provide assistance to regulators and/or targets, drawing on their own capabilities, authority and legitimacy.” These actors are diverse in form and function, ranging from profit-oriented credit-rating agencies (Kruck 2017) to nonprofit organizations supporting the enforcement of international human rights (De Silva 2017; Pegram 2017). Within this young literature on tripartite regulatory relationships between regulators (R), intermediaries (I), and targets (T) (RIT model), it is still debated how *private actors*, which take over a role as regulatory intermediaries, are selected and controlled (Abbott et al. 2017b).

The selection of private intermediaries is a particular serious question in terms of so-called morality policies (e.g. sex work, pornography), where new governance modes have become popular (Engeli & Rothmayr 2016; Euchner & Preidel 2018). This phenomenon is puzzling, since one might well ask why public regulators delegate responsibility for morality policies to private actors. The regulation of prostitution policy, for instance, is often accompanied by salient debates about the “right way of living” (Mooney 2001; Outshoorn 2004; Crowhurst et al. 2012; Wagenaar & Altink 2012). This includes decisions on fundamental principles such as human dignity, individual freedom, or public order. Such political choices often contradict each other and seldom can be upheld within one law. Specifically in the case of prostitution policy, regulators has to decide whether individual rights, such as occupational liberty, prove superior than collective goods, such as public order or a common definition of human dignity. In other words, the regulation of prostitution policy requires a consensus on the primacy of individual rights over collective goods, which in the end builds the fundament of the “moral order of a state.” Hence, decisions concerning the regulation of prostitution always coincide with a specific understanding of the

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overall moral order of a state. This means states that delegate responsibility on morality policies to private intermediaries run the risk of relinquishing their legal authority to define the moral order. In doing so, they become vulnerable to regulatory capture by illegitimate actors. Against this background, an analysis of the empowerment and selection of private intermediaries in a value-loaded policy field is it is theoretically highly promising to explore. Therefore, the main research questions are: (i) do we in fact observe any responsabilization of private intermediaries in the field of prostitution policy on a larger scale? and (ii) If so, how are these private regulatory intermediaries selected?

By means of a novel data set on prostitution policy in 25 OECD countries (1960–2010), this paper shows that responsabilization of private regulatory intermediaries is a slowly emerging phenomenon, which is accompanied by strong administrative and punitive public oversight. Second, the comparative case study on two German states discovers that the selection of private regulatory intermediaries is an ideology-driven process, in which the congruence in (moral) goals is key for the establishment of any relationship between public regulators and private intermediaries, and that regulatory capacities are secondary. Accordingly, private regulatory intermediaries in prostitution policy rule under a “very dark shadow of moral hierarchy” (Héritier & Lehmkuhl 2008), which systematically intends to prevent regulatory capture by private actors.

These findings enrich both the literature on regulatory intermediaries and the research on prostitution policy. First, it offers insights into the selection process of private intermediaries in highly contested regulatory area and detects a largely disregarded key selection criterion: the congruence in (moral) policy goals between the regulator and the intermediary. Additionally, this study introduces a new analytical framework that allows systematizing and operationalizing direct and indirect governance modes in the very complex field of prostitution policy. Finally, the study stands out by providing a large empirical ground, which integrates a novel data set on prostitution regulation in 25 OECD countries (1960–2010) with two in-depth case studies.

The following part reviews the current research on prostitution policy, its location in the morality policy research and its connection with the regulatory governance literature. Next, I introduce a theoretical framework followed by an elaboration of the research design and the related measurement approaches. Thereafter, the results of the cross-country comparison and the case studies are presented. The paper concludes with a critical discussion of the results and some suggestions for future research.

2. Morality policy analysis meets regulatory governance research and the RIT model: Merging distinct fields

Morality policy research, including prostitution policy analysis, has largely been developed independently of the literature on regulatory governance (see also Euchner & Preidel 2018). Thus, the responsabilization of private actors in regulating value-loaded issues and their role in shaping a state’s moral order is rather underexplored. This is puzzling because compared to classical types of regulatory policies, morality policies stimulate conflicts about societal values rather than material interests and thereby mobilize third-party actors more easily (Mooney 2001; Tatalovich & Daynes 2011; Knill 2013). More recently, however a growing number of scholars have begun to emphasize the role of private actors in morality policy regulation (McCann et al. 2014; Engeli & Rothmayr 2016; Euchner & Preidel 2018). For instance, in the field of assisted dying, the regulatory power of medical boards is prominently debated. In abortion policy and religious education, the influence of religious communities as regulatory actors has received increased attention.

The community of prostitution policy researchers often indirectly discusses the empowerment of private actors when examining implementation processes (Outshoorn 2004; Crowhurst et al. 2012; Wagenaar & Altink 2012; Östergren 2017; Wagenaar 2017; Wagenaar et al. 2017). NGOs, religious welfare organizations, sex workers, and, lately, managers of sex establishments¹ have been involved when developing implementation guidelines at the subnational level (Vermeulen & Persak 2014; Euchner & Preidel 2018). Some recent projects argue that indirect forms of governance are increasingly visible in prostitution policy (Scouler & Sanders 2010; Skilbrei 2012), and started to incorporate governance modes into classical typologies on national prostitution policy regimes (Östergren 2017).

In this realm, the concept of “regulatory intermediaries” proposed by Abbot *et al.* (2017b) is particularly valuable, since it allows us to distinguish among different involved actors – regulators, intermediaries, and targets of

regulation – and to disentangle complex networks into tractable analytical units. The so-called intermediaries “provide private assistance to regulators and/or targets, drawing on their own capabilities, authority and legitimacy” (Abbott et al. 2017b, p. 6). They can be public, private or hybrid in nature; located at the national, international or transnational level and taking over formal or informal roles (Brés et al. 2019). Moreover, regulatory intermediaries may take over diverse tasks throughout the policy cycle. This includes, for instance, the elaboration and “translation” of rules into implementation guidelines, the evaluation of alternative modes of implementation, or the monitoring of compliance. Moreover, they may help to create dialogue and trust between regulators and targets (Abbott et al. 2017b, p. 7, Abbott et al. 2017c). Regulators may use two techniques on how to engage intermediaries, either a “soft” form known as responsabilization through orchestration or a “hard” form described as responsabilization through delegation (Abbott et al. 2015, p. 9, Abbott et al. 2017c, p. 18). Although such intermediaries facilitate regulation, they also increase “the normative space” of regulation because they have their own objectives, which might deviate from regulators’ interests (Abbott et al. 2017a, p. 281). As a consequence, the regulator needs to control the activity not only of the target but also of the intermediaries; this is known as the problem of “regulatory capture.” (see for a definition Abbott et al. 2017c).

Kruck (2017) recent analysis of private credit-rating agencies and their role in the international financial system is a fitting example of the problem of regulatory capture related to regulatory intermediaries. The author shows how the oligopolistic structure of these intermediaries has led to flawed credit ratings and a lack of transparency, which are in the interests of neither the regulator nor of the general public but which could not be prevented by the group of regulators. De Silva (2017) reveals that even the International Criminal Court – a very serious international actor – is challenged to control intermediaries because it employs NGOs as so-called “sub-intermediaries,” making public control even more complicated.

Therefore, the newly emerging research on regulatory intermediaries concludes that the selection process is key to regulatory outcomes. “To understand the impact of intermediation, then, we need to understand from where intermediaries come” (Abbott et al. 2017a, p. 284). There are only a few studies exploring the selection of regulatory intermediaries, most of which focus on the international sphere (Marx & Wouters 2017; Pegram 2017),² where governance is much more complicated as a result of the absence of traditional instruments of regulatory command and control. Moreover, a great many private actors are available, which challenges the selection process. As a consequence, studying the selection of private intermediaries in a national setting facilitates the determination of a regulator’s selection criteria because the number of potential private partners is more limited. Furthermore, the analysis of morality policies, in contrast to more technical international public problems, which thus far prevails in the RIT literature, has a second advantage: because of the salience of these issues and their relevance for defining the moral order of the state, regulators are particularly careful when selecting private intermediaries, which may facilitate to reveal their underlying motives.

There is a second literature stream in the field of regulatory governance that explores the empowerment of private actors in national settings. It discusses the phenomenon of responsabilizing third parties in crime policy (Garland 2001; Muncie 2006). Crime policy has long been characterized by an authoritarian style of governance (i.e. direct intervention “by means of the policy, the courts and the prisons” (Garland 2001, p. 124)). Yet since the 1980s, the use of “responsibilization” strategies has become a prominent characteristic of government policy in the United Kingdom and the United States (Garland 2001, p. 124). The main idea is to “shift primary responsibility for crime prevention and public security away from the state and toward businesses, organizations, civil society, individuals, families and communities” (Muncie 2006, p. 357). In other words, regulators aim to compel offenders to face up to their own responsibilities and to encourage the private sector and communities to take a more active role in reducing criminal opportunities (Muncie 2006, p. 357). The terminology indicates that the literature is aware of different municipal actors and the conflicts that might arise when delegating responsibility over value-loaded questions. Moreover, it offers a new perspective on how regulators may govern private intermediaries and targets; responsabilization includes not only the delegation of legal authority to private actors but also their administrative and punitive control in the event of misbehavior.

In sum, in contrast to the nascent research on the RIT model, the literature on responsabilization highlights the role of subnational actors and public oversight in reaching efficient solutions for contentious public problems, but it lacks the threefold distinction, which facilitates disentangling the complex, network-like actor environment in prostitution policy. Therefore, the integration of the RIT model and the literature on responsabilization is very

productive for understanding the empowerment, selection, and control of private intermediaries in the regulation of prostitution policy. Likewise, the RIT literature profits from an evaluation of its main concepts in a disregarded policy field and especially from insights into the selection process of private intermediaries, which itself remains an underexplored question (Zeegers 2019; Zeegers & Euchner 2019).

3. Explaining selection criteria for regulatory intermediaries in a morality policy field

The paper proceeds first by developing an analytical framework that systematizes the relationship between regulators, intermediaries, and targets in the governance of prostitution policy in a national context. This framework distinguishes between modes of governance in which the state *directly* approaches regulatory targets, and modes of governance in which the state *indirectly* approaches regulatory targets through *private* regulatory intermediaries. Such a distinction allows to trace changes in governance modes over time and to evaluate the relevance of indirect governance modes through private regulatory intermediaries. These private regulatory intermediaries may include profit- as well as nonprofit oriented third-party actors (e.g. entrepreneurs, NGOs) that are officially responsabilized by public regulators to assist them in governing regulatory targets (Abbott et al. 2017a; Brés et al. 2019). Specifically, the paper focuses on “downstream” stages of the regulatory process (Abbott et al. 2017b), in which public actors responsabilize private actors to support them in implementing a policy. So, the paper concentrates exclusively on private intermediaries that are officially entitled or enlisted to take over regulatory tasks and disregards private actors informally assisting regulatory targets (Brés et al. 2019). After presenting the general framework of direct and indirect governance modes in prostitution policy, a second section develops expectations about regulator’s selection criteria of responsabilizing *private regulatory intermediaries*.

3.1. Direct and indirect governance in prostitution policy: A new analytical framework

National governments have had major problems designing and implementing adequate solutions for the regulation of prostitution (Wagenaar & Altink 2012; Wagenaar et al. 2017). Wagenaar and Altink, for instance, explain that prostitution policy is exceedingly difficult to design and sustain effectively because it is an “instance of morality politics.” In other words, policy making is ruled by an “explicit ideology, it is highly emotionally charged and resistant to facts, and symbolism of policy formulation is more important than policy implementation” (2012, p. 279) These challenges in effective implementation of prostitution policy are discussed by many other scholars, who have discovered that governments often agree on vague national laws that leave considerable leeway for interpretation and hence result in deviating practices (e.g. Duarte 2012; Pates 2012; Euchner 2014). Unfortunately, few studies systematize the different governance approaches visible in prostitution policy. What do such direct and indirect modes of governance look like in the case of prostitution policy? Through which legal strategies can private intermediaries be responsabilized? And how can we operationalize these strategies?

Zeegers (2019) propose three different strategies through which a country might govern prostitution policy with support of regulatory intermediaries: (i) punitive responsabilization; (ii) administrative responsabilization; and (iii) facilitative responsabilization. Zeegers and Euchner (2019) define these forms “by the means through which third-party actors (regulatory intermediaries) are involved: criminal law, administrative law or financial and/or organizational support.” This paper picks up this threefold distinction and (i) contextualizes it by taking into account the regulator’s governance approach toward regulatory intermediaries *and* targets; and (ii) offers concrete suggestions for operationalization.

Accordingly, the paper distinguishes between *direct modes* of prostitution governance directed at regulatory targets and *indirect forms* of prostitution policy that culminate in the responsabilization and oversight of *intermediaries*. On a second level, the analytical framework proposes different types of steering strategies (i.e. *punitive, administrative and facilitative steering*) for each mode (i.e. direct vs. indirect), as well as the legal tools through which they may be implemented (see Table 1). The dark-gray area in Table 1 indicates the regulatory strategies and tools aiming mainly at the empowerment of regulatory intermediaries. The light-gray area indicates the strategies and tools for controlling third-party actors, while the white area reassembles those strategies and tools developed to govern regulatory targets.

Table 1 Conceptualization of governance modes in prostitution: A three-party relationship

Strategy	Direct governance			Indirect governance		
	Punitive steering	Administrative steering	Facilitative steering	Punitive steering	Administrative steering	Facilitative steering
Tools	Criminal sanctions	Adm. sanctions (e.g. monetary fines) Adm. entitlement (e.g. license sex worker) [†]	Ideational and material support (e.g. exit program) [†]	Criminal sanctions [†]	Adm. entitlement (e.g. license brothel manager, roundtables) Adm. sanctions (e.g. monetary fines) [†]	Ideational and material support (e.g. subsidies)
Addressees	T	T	T	I	I	I

[†]These aspects are not systematically covered in the large-*N* dataset. *Source:* Author’s concept based on Zeegers and Euchner (2019). T, Regulatory Targets, I, Regulatory Intermediary.

In the following sections, the three different steering strategies for direct and indirect modes of governance are described in more detail. First, many countries continue to legislate prostitution policy via a prohibitive regulatory approach, largely criminalizing activities related to prostitution and thus approaching regulatory targets directly (Euchner & Knill 2015). Criminal law offers the legal basis for such forms of direct intervention. Therefore, this paper speaks about strategies of *punitive steering* and suggests criminal sanctions as a main regulatory tool. Theoretically, both regulatory targets and intermediaries can be steered with this tool, but empirically, any control of intermediaries by criminal law is a rare phenomenon in a policy field that has experienced such a shift in governance tactics only recently (Zeegers 2019). Moreover, punitive steering activities directed at intermediaries must coincide with other regulatory strategies; otherwise, we would overlook a legal basis that classifies a private actor as an intermediary.³

The second strategy encompasses *administrative steering activities* directed at regulatory targets and intermediaries. Besides criminal law, administrative law is increasingly used in many policy fields as a legal tool with which to secure law enforcement. As Widdershoven point out, “The reparation of the infringement of the legal order is the primary goal, not punishment” (Widdershoven 2002, p. 446). In other words, administrative law is an instrument for educating citizens in a soft way. Therefore, it may offer a legal foundation for the responsabilization and control of third-party actors that may improve policy enforcement without criminal sanctions.

This paper proposes two legal tools to enact administrative liability: (i) administrative sanctions to steer targets and intermediaries; and (ii) administrative procedures to govern targets and to entitle intermediaries. Monetary penalties (i.e. fines) are the most frequent sanction in administrative law and the awarding of licenses to most frequent tool to responsabilize third-party actors. For instance, the introduction of licensing systems for brothel managers can be considered an adequate indicator of a country’s strategy of empowering regulatory intermediaries. By offering licenses to brothels, a regulator entitles third parties (brothel managers) to govern the behavior of targets such as sex workers and clients and thereby delegates a portion of its regulatory authority to private actors. This includes, for example, rules concerning working hours, prices for rented rooms, and health-care standards (van Wijk & Mascini 2019). This way of governing regulatory targets (i.e. sex workers) coincides with Abbott et al.’s (2017b) understanding of intermediaries as actors of indirect regulatory governance.

Finally, regulators may regulate the field through very soft regulatory strategies using positive incentives instead of tools of command and control for targets and intermediaries. Implementation failures and deviating social practices at the local level hint at the need for softer forms of governance as a means of persuading actors in the field. This paper suggests calling this strategy “facilitative steering” (Zeegers 2019; Zeegers & Euchner 2019) and operationalizes it via tools such as ideational, material, and organizational support. Due to the fact that many private actors (e.g. NGOs) receive public money, the key selection criterion is that regulators explicitly recommend or mention the private actor as regulatory partner in any official document (e.g. information brochure

or website). This strategy of responsabilization is inspired by the idea of orchestration, which was developed in the research field of international organizations (Abbott et al. 2015b). Here, intermediaries are not directly entitled or controlled through a top-down process but are rather “enlisted” through positive incentives (Abbott et al. 2015a, p. 9).

3.2. Empowering private regulatory intermediaries through a morality-based selection process

Besides systematizing and operationalizing governance modes in prostitution policy over time, this paper is also interested in the selection criteria for private intermediaries. The main argument is that the *congruence of policy aims* between the regulator and the private intermediary is key to the selection process. The agreement on the policy paradigm is important because prostitution policy is a delicate issue that is “highly emotionally charged and resistant to facts” (Wagenaar & Altink 2012, p. 279), which makes it very difficult for opponents to reach a compromise. For instance, if a private actor opts for the abolishment of prostitution and the criminalization of clients whereas the regulator prefers a permissive approach acknowledging prostitution as a “normal job,” any agreement on a common solution is unlikely and deviating behavior of private intermediaries is likely. Similarly, the conflictive potential of this issue facilitates the identification of the preferences of the involved actors (Mooney 2001) and the selection of the most suitable private actors. An additional asset of a larger congruence in policy goals is that it reduces the risk of regulatory capture as both actors share similar policy aims and therefore, also limits regulator’s workload related to the oversight of private intermediaries.

The regulatory governance community has already discussed the role of policy agreement between regulators and private actors under the term “goal congruence” or “goal divergence” (Abbott et al. 2015b). Specifically, the literature on regulatory orchestration proposes that “governance actors are more likely to orchestrate when intermediaries with *correlated goals* and *complementary capabilities* are available” (Abbott et al. 2015b, p. 336). Thus, the authors do not prioritize one factor over the other, but their definition of “orchestrating intermediaries” clearly underscores the relevance of goal congruence. Abbott et al. (2015a, p. 4) explain that “In IGO orchestration, an IGO enlists and supports intermediary actors to address target actors in pursuit of IGO governance goals.” This means that shared interests of intermediaries and regulators are a prerequisite for the establishment of any regulatory relationship and that they are safeguarded over the course of collaboration by the constant ideational support from the regulator (cf. Abbott et al. 2015a, p. 14). Hence, the definition of orchestration by IGOs already includes the idea of shared understandings of public problems by the regulator and a third party.

This technique of indirect governance is expected to be fruitful in prostitution policy, as well, because serious value conflicts characterize policy decisionmaking and hence, should further impact on the implementation phase (Mooney 2001). In detail, one might assume that highly contentious debates among regulators about the “right way” of solving a policy problem should increase a regulator’s sensitivity in terms of shared values and goals when selecting private intermediaries in the postdecision phase, because otherwise long negotiated policy goals fear the risk to be turned down. In other words, if the “battle” is won by one regulatory party, this party is expected to avoid the involvement of private intermediaries with different goals in order to “save their moral victory.” In line with the policy implementation literature (Howlett 2018), one could even assume that “regulatory losers” will try to influence policy implementation by promoting private intermediaries with policy goals opposing the ones of “regulatory winners.” An important prerequisite of such an undermining strategy of the loser of the policy making processes certainly requires a certain room of maneuvering in the implementation stage (Hill & Hupe 2014). This room might be large if national laws are vague (Goyal 2018; Zeegers 2019); it means, if they include many indefinite terms or underspecify the implementing actor or tools (Hill & Hupe 2014, p. 26–29). Against this background, one could assume that goal congruence between private intermediaries and regulators is at least as important, or even more important, than regulatory capacities in the selection process of private intermediaries in regulating prostitution. Accordingly, the paper expects:

Main expectation: The congruence in the policy aims is a key feature required by private actors when reaching out for responsibility as regulatory intermediaries, which is at least as important or even more important than comprehensive regulatory capacities.

4. Research design, operationalization, and methods

This paper makes an important theoretical and empirical contribution because it relies on a uniquely comprehensive dataset on the regulation of prostitution policy that includes data for 25 OECD countries⁴ for a time period of 50 years (1960–2010), and complements this dataset with an in-depth comparative case study in two German states. This mixed-methods approach allows to describe changes in direct and indirect governance modes on a large scale (i.e. across countries and time) and additionally, is able to detect the causal mechanisms driving the selection of private intermediaries indirectly governing the field in the case studies.

The novel dataset includes rules as well as sanctions and was compiled in the realm of an ERC-funded project, exploring several morality policies (e.g. prostitution, homosexuality, pornography, and abortion) (2010–2016).⁵ Expert surveys serve as the main data source. In each of the countries under study, one or two experts have been invited to provide country-specific historical data on the development of the relevant national legislation over the entire observation period (1960–2010). An academic background in law or political science, a profound publication record as well as excellent knowledge in English were key for the expert selection process. So, all experts were scientists specialized in (social) regulatory policy or criminal and/or public law. Detailed questionnaires guided the country and sector experts. Moreover, the data delivered (i.e. the questionnaires as well as the pdf-files with original laws) was carefully cross-checked, based on secondary and primary literature, and finally translated into a coding scheme on a country-year basis (for more details, see Knill et al. 2015).

The new analytical framework presented in this paper requires a reorganization of the main data set in order to measure the development of direct and indirect governance modes. Data on facilitative steering is not collected in the research project, nor is it available in any other database for such a large country sample. Therefore, the idea and related regulatory tools are examined in a country case study on prostitution policy in Germany (see details below). In short, direct governance modes are assessed mainly via punitive and administrative sanctions directed at private targets, while indirect governance modes are captured via administrative entitlement procedures for private actors.⁶

The first empirical part maps the development of direct and indirect governance modes across countries and over time. As space constraints do not allow to summarize each country case individually, descriptive statistics are used to illustrate trends in regulation on an aggregate level. As discussed earlier, *punitive steering* is operationalized via criminal sanctions for all kinds of regulatory targets (e.g. brothel manager, pimps,⁷ sex workers, and clients). The variable captures the intensity of criminal sanctions employed for regulatory targets and is measured based on a seven-point scale quantifying the severity of criminal sanctions (e.g. duration of imprisonment, imprisonment with/without fine; see Table 2, left column) (Knill et al. 2015).⁸

The second strategy, *administrative steering*, is operationalized via the tools of administrative sanctions for all kind of targets and administrative licensing systems for brothel owners. Administrative sanctions are quantified along a two-point scale (see Table 2, right column) [Correction added on 2 December 2019, after first online publication: Citation of Table 3 has been corrected to Table 2. Table 3 has been moved accordingly.]. The variable “administrative entitlement” is binary, capturing whether a country adopted a licensing system for brothel managers.⁹ *Facilitative steering* activities are defined as ideational and material support for third-party actors. They are not systematically covered in the large-*N* dataset but empirically illustrated in the comparative case study.

Table 2 Assessment of the intensity of responsabilization by criminal and administrative sanctions

Criminal sanctions	Administrative sanctions
0 none	0 none
1 Imprisonment without fine (≤ 1 year)	1 Monetary fine
2 Imprisonment with fine (≤ 1 year)	2 Monetary fine or imprisonment
3 Imprisonment without fine (1–5 years)	
4 Imprisonment with fine (1–5 years)	
5 Imprisonment without fine (> 5 years)	
6 Imprisonment with fine (> 5 years)	
7 Life sentence/death penalty	

Source: Knill et al. 2015, Euchner & Knill 2015.

Besides offering an empirical overview of facilitative steering activities, the comparison between two German states (i.e. Bavaria and North Rhine Westphalia) serves explanatory purposes as it intends to identify regulator's selection criteria of private intermediaries through a process tracing technique. This technique is particularly useful to investigate causal mechanisms and hence, advance research fields that are still somewhat undertheoreticized (George & Bennett 2005). Germany is in a promising case to study because until 2016 the country had a relatively vague legal framework in place, including only three paragraphs that legalized brothels and defined prostitution as "regular job" but missed to specify more detailed implementation guidelines. This condition inspired and allowed subnational governments to responsabilize different regulatory intermediaries. The law reform adopted in 2016 specifies the conditions brothel managers must fulfill in order to act as intermediary and obligates sex workers to register and to attend health-care consultations on a regular basis.

The within-case comparison between North Rhine Westphalia and Bavaria increases the leverage of the study because responsabilization process of private intermediaries can be investigated in two states that have to comply with the same legal framework, but still employed completely different strategies in responsabilizing private actors. In short, the within-case comparison constitutes a very strong study design for examining the main argument because many theoretically relevant conditions can be controlled for (e.g. permissiveness of the legal framework, institutional structures within which the regulator rules, bureaucratic system). Yet as any other small-n design, one still has to discuss the limits of generalizing the findings beyond the explored cases (see conclusion).

The comparative case study relies on information gathered through the qualitative analysis of primary and secondary documents as well as eight semi-structured interviews with experts on prostitution policy in Germany. The selection of experts was guided by the idea to reflect the diversity of private actors involved as well as the diversity in positions toward the regulation of prostitution policy (i.e. street-level bureaucrats, NGOs representing sex workers' interests, NGOs representing brothel managers' interests, religious welfare organizations) (see Table A2 in the appendix for a full list of interview partners).

5. Regulating prostitution policy in OECD countries (1960–2010)

5.1. Prevalence of direct over indirect governance modes

The following cross-country analysis in 25 OECD countries over a period of 50 years discovers that direct governance modes remain prominent to this day, while indirect forms of governance, and hence the responsabilization of private regulatory intermediaries, have become common only recently and in only a limited number of OECD countries. Moreover, within the paradigm of direct governance, we observe a trend away from punitive toward more administrative steering activities.

5.1.1. *Direct governance: Combining punitive with administrative steering of regulatory targets*

In order to trace patterns of *direct* governance modes in prostitution policy, this paper first shows aggregate and disaggregated statistics of criminal sanctions for all types of targets involved in prostitution policy (i.e. sex workers, brothel managers, pimps, clients) (see Fig. 1); then it displays patterns of administrative sanctions, which is considered an equally important tool for governing regulatory targets directly (see Fig. 2). First, the box plots in Figure 1 (left-hand side) show that on average, the median value of criminal sanctions remained rather stable over time. In the 1960s as well as today, targets are sanctioned with imprisonment less than 1 year on average (excluding human traffickers). A second finding is that today many countries punish targets with lower sanctions than earlier on (indicated by the absence of the lower whisker of the box plot in 2000 and 2010).¹⁰ However, this approach varies seriously across regulatory targets as the disaggregated overview of criminal intensity uncovers (right-hand side of Fig. 1). While clients and sex workers are faced with relatively low criminal sanctions on average, brothel managers and pimps are sanctioned more harshly in most of the countries. Moreover, since the 2000s, clients and sex workers have rarely been governed via criminal sanctions; in the last decades, brothel managers have been faced with reduced levels, while pimps have been severely punished. In the early 1960s and 1970s, if pimps were caught by the police, they were imprisoned for about 1 year. Today, they are confronted with incarceration of up to 5 years on average. Brothel managers and sex workers, by contrast, experienced a decrease in punishment over time (see gray cuboid and gray circles). These observations coincide with the development in the rules dimension of prostitution policy because many countries adopted strict forced prostitution

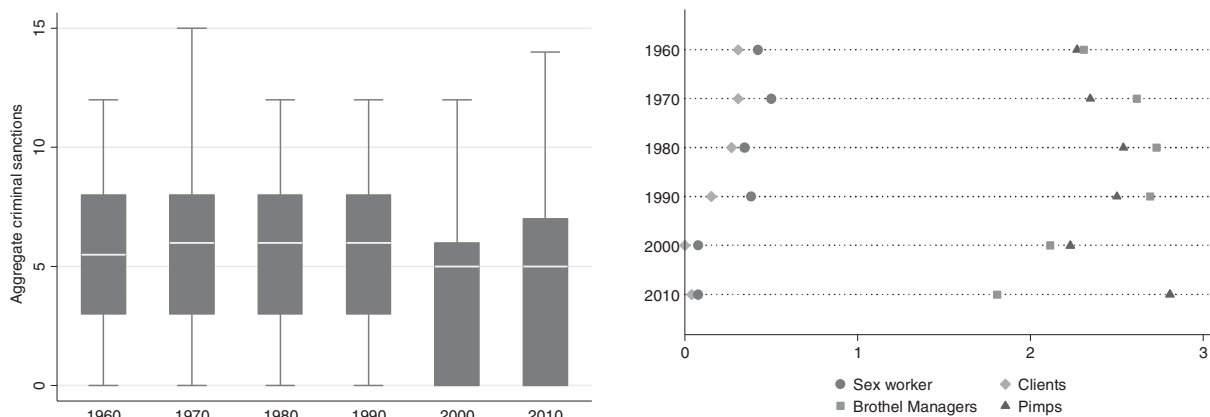


Figure 1 Criminal sanctions for targets: aggregated and disaggregated (1960–2010). Source: Author’s compilation based on MORAPOL data. *N* = 25 OECD countries.

laws in order to protect sex workers from sexual exploitation but lifted bans on sex establishments. Moreover, these empirical overviews indicate which regulatory targets may turn into regulatory intermediaries (i.e. clients, sex workers themselves, and brothel managers). One may argue that public regulators punish those targets less severely (or not at all) whom they consider to be potential partners in solving prostitution-related problems.

These changes in punitive strategies of direct governance are also reflected in the long-term trends of direct administrative steering activities in the country sample. Figure 2 (left-hand side) shows the relevance of administrative sanctions increases over time; while in the 1960s, few countries employed this tool, its frequency of use has increased among nations over the last decades. Similarly, the median value increased. In other words, while in the 1960s and 1970s, fines were relatively uncommon, today more and more countries punish illegal behavior of targets in the prostitution market with monetary fines and/or with incarceration.¹¹ Clients in the early years of the observation period (until the 1980s), for instance, were rarely punished by administrative sanctions (see light crosses in the graph). Brothel managers, sex workers, and pimps, by contrast, were more often punished with monetary fines, a tendency that has increased in the last two decades, complementing the findings in terms of punitive steering. In other words, sex workers and clients tend to be governed mainly via administrative sanctions, a lighter form of legal punishment for illegal behavior. Brothel managers and pimps, by contrast, tend to be governed by punitive and administrative sanctions, indicating that these potential government partners may face strong control and harsh punishment in the event of misbehavior. In sum, the analysis discovers that *direct* forms of governance have been dominant in the regulation of prostitution policy among OECD countries to the present

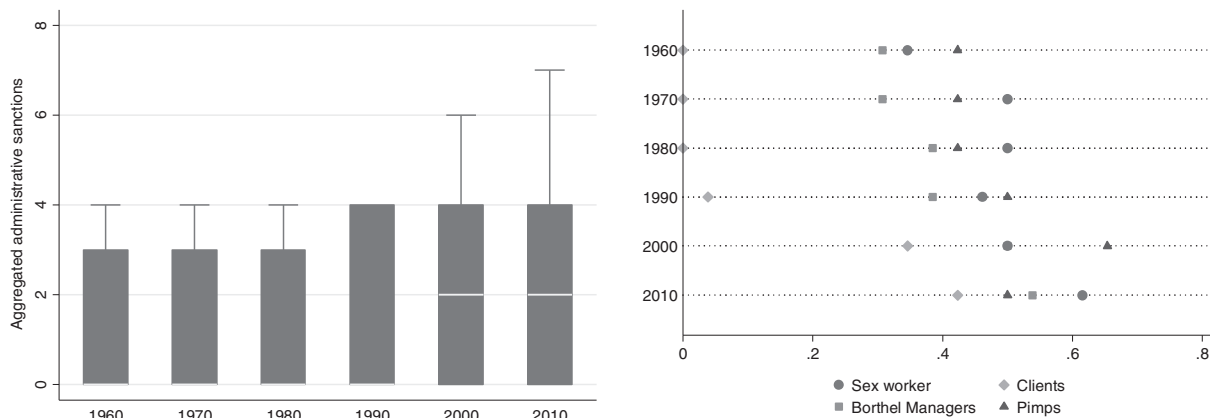


Figure 2 Administrative sanctions for targets: aggregated and disaggregated (1960–2010). Source: Author’s compilation based on MORAPOL data. *N* = 25 OECD countries.

today; what changes over time, however, is the group it addresses. In recent years, those actors who are considered reasonable private partners (i.e. intermediaries) are sanctioned less severely over time.

5.1.2. Indirect governance: Administrative entitlement of regulatory intermediaries

This tendency of employing administrative sanctions for a certain group of targets today coincides with the development of the introduction of licensing requirements for brothel managers, interpreted as an act of *indirect governance* and thus as an instance of responsabilization of private regulatory intermediaries. The pie chart in Figure 3 displays the sum of countries having such licensing systems in place for each decade between 1960 and 2010. We observe that the pie sections become larger over time, which means that an increasing number of countries responsabilize third parties. Between the 1960s and the 1990s, two to three countries employed such licensing systems for brothel managers; in the last two decades, this number has increased to seven. Prominent examples in that regard are Germany, the Netherlands, Austria, Turkey, and Switzerland. The remaining countries (about 20) clearly rejected this specific strategy of delegating responsibility to managers of sex establishments (e.g. the United Kingdom, the Scandinavian countries, Russia, and Japan). Therefore, we find a limited but slowly spreading trend of delegating administrative responsibility to brothel managers and a resulting change in governance modes culminating the empowerment of private regulatory intermediaries.

This last empirical picture confirms an assumption made in early parts of the paper: Strategies of administrative responsabilization of intermediaries are closely related to the policy paradigm of “permission with recognition” (Euchner & Knill 2015) (cf. Figure A3 in the Appendix). This means that those countries following a rather permissive legal approach to prostitution also tend to authorize private parties in contributing to public regulation and implementation via the tool of licensing. Such licensing systems seems to be less common in countries following an abolitionist policy paradigm. However, this does not mean that responsabilization processes of intermediaries are absent in countries following a more restrictive approach. Clients, for instance, are sometimes enlisted as regulatory intermediaries in order to support the regulator in identifying victims of human trafficking and sexual exploitation (Erikson & Oscar 2019). Thus, clients can be enlisted by facilitative steering activities, such as ideational support and information material, and similarly controlled by administrative or punitive sanctions. In other words, the degree of regulatory permissiveness may determine a country’s strategy on how to implement indirect governance modes (punitive, administrative, or facilitative), but it does not necessarily determine the general decision of whether to use instruments of indirect governance. As we are at the very beginning of analyzing prostitution policy from this analytical angle, we cannot make any concluding statement at this moment, yet. However, the following within-case comparison of two German states contributes to open the black

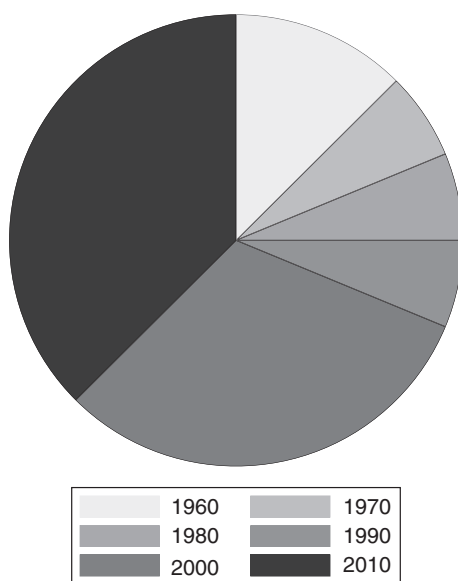


Figure 3 Administrative responsabilization: Licensing system for intermediaries (1960–2010). Source: Author’s compilation based on MORAPOL data. $N = 25$ OECD countries.

box of indirect governance modes in prostitution policy by showing that even under the same legal framework, subnational entities may foster different strategies of responsabilizing regulatory intermediaries, although motivated by an identical rationality.

Before continuing with the second empirical part, we first summarize the main findings of the country-comparative analysis. First, any direct governance of prostitution remains prominent until today, but indirect forms of governance, and thus, the empowerment of private actors slowly diffuse across the country sample. Second, direct forms of governance are increasingly implemented via administrative instead of criminal law, particularly with regard to those regulatory targets, which are potential intermediaries for the government in later stages (i.e. sex workers, brothel managers).

5.2. A morality-based selection process: Empowering regulatory intermediaries in two German states

The following within-case comparison between two German states examines the second research question and hence, the selection criteria regulators employ in such a contested regulatory field as prostitution.

5.2.1. *Responsibilization of regulatory intermediaries in North Rhine Westphalia and Bavaria*

The two German states, North Rhine Westphalia and Bavaria, employ completely different governance strategies in implementing national prostitution law and in responsabilizing private intermediaries for this task. Thereby, both cases reflect the large spectrum of regulatory approaches vivid in Germany for coping with the manifold problems related with prostitution policy (Pates 2012; Euchner 2014; Grohs 2019). North Rhine Westphalia heavily relies on indirect governance modes and the responsabilization of a specific set of private actors, whereas Bavaria is much more reluctant in delegating responsibility to private actors and if the states does so, it prioritizes a specific group of private actors over others (see Table 3).

First and in line with the conclusion of the previous part, both German states employ *direct modes of governance*, which coexist with indirect regulatory measures, that were derived from the national laws on prostitution policy from 2001 and 2016 (see the first row in Table 3). In detail, both states punish pimping with imprisonment of up to 5 years. Moreover, they obligate sex workers to register at the mayor hall and to participate in health-care counseling on a regular basis (German Prostitution Law 2016, §§ 3–11). The states differ “only” in the fees they charge. In North Rhine Westphalia registration and health-care counseling are free for sex workers, whereas in Bavaria each service costs 35 €. Administrative fines for sex workers in case of noncompliance encompass a fee of 1,000 € at most. This is similar in both states because the national law specifies the monetary fine; as in the

Table 3 Direct and indirect governance modes in two German states

	North Rhine Westphalia	Bavaria
DIRECT		
Administrative	Licensing sex workers (fee: –, fine: up to 1,000€) [†] Health-care consulting sex worker (fee: –, fine: up to 1,000€) [†]	Licensing sex workers (fee: 35€, fine: up to 1,000€) [†] Health-care consulting sex worker (fee: 35€, fine: up to 1,000€) [†]
Facilitative	None	None
Punitive	Pimps: up to 5 years	Pimps: up to 5 years
INDIRECT		
Administrative	Roundtable Prostitution Licensing brothel managers (fee: 500–3,500 €, fine: up to 50,000€) [†]	- Licensing brothel managers (fee: 500–5,000€, fine: up to 50,000€) [†]
Facilitative (key actors)	Madonna e.V. Mitternachtsmission e.V. Aidshilfe e.V. Kober e.V.	Mimikry e.V. Marikas e.V. Jadwiga e.V. Solwodi e.V.
Punitive	Up to 3 years for non-compliant brothel managers	Up to 3 years for non-compliant brothel managers

[†]Valid since 2017, based on the newly adopted prostitution law (BGBl. I S. 2372). Sources: Land Nordrhein-Westfalen (2014), Bayerischer Landtag (2017), Gesundheit (2019). German Criminal Law §§180–183.

case of criminal punishment of pimps (German Prostitution Law 2016, § 32). In practice, however, the administrative fines for sex workers are often lower with about 50 € (Bayerischer Landtag 2018). Both states are reluctant in reaching out regulatory targets directly by facilitative steering activities; instead, they prefer to responsabilize private intermediaries to rule targets. However, as the following analysis will show, both states collaborate with completely different private regulatory intermediaries and employ different strategies of responsabilization.

North Rhine Westphalia enlists four NGOs (i.e. Madonna, Mitternachtsmission, Deutsche Aidshilfe, and Kober) to offer social services for targets in the field, whereas Bavaria (and specifically the city of Munich) enlists Mimikry, Marikas, Jadwiga, and Solwodi. While the former NGOs are specialized in consulting sex workers in all kind of legal affairs (e.g. social law, health-care law) and partly are founded by former sex workers, the latter organizations are (also) known as experts of forced prostitution and human trafficking. All eight organizations are mentioned on the webpages of the state governments as central partners, and all of them are financially supported by the state government or municipalities within the state (see annual reports of the organizations; interviews 01, 02, 06).

Besides promoting different NGOs by means of facilitative steering activities, the key difference between both states lies in the strategy of administrative responsabilization. North Rhine Westphalia established a so-called “prostitution roundtable” (*Runder Tisch Prostitution*) in 2010, where local bureaucrats, sex workers, sometimes brothel managers and representatives of the sex industry negotiated and formulated jointly implementation guidelines for the national law from 2001 (Interview 03, Interview 01) (for the Netherlands, see Wagenaar 2006). Bavaria, by contrast, avoided to install such a roundtable, despite being approached by different actors. The Green Party in Bavaria, for instance, requested to establish a prostitution roundtable in 2016 (Zeitung 2016). In North Rhine Westphalia, private actors were entitled to formulate jointly with state actors rules on registration or control procedures for brothel managers. The particularity of this initiative was that not only the aforementioned NGOs and two sex workers were invited, but also a representative of the newly established union of sex workers (Bufa e.V.) and a representative of the associations of sex establishments (UEGD e.V.). Although, the latter two were not “regular” members of the roundtable, they have been invited as experts several times between 2010 and 2014 (Land Nordrhein-Westfalen 2014). The chair of the roundtable, Claudia Zimmermann-Schwartz, explained that “in order to make reasonable decisions and consider the different problems and needs of sex workers, we require more information – not only from the scientific community but also from people from the field” (ZEITonline 2013).

Finally, both states have implemented similar administrative steering activities in terms of brothel managers, after the adoption of the new national law on prostitution policy in 2016. Through a licensing system, the subnational governments may entitle now brothel managers to employ sex workers and to define their working conditions. The monetary fees of this administrative entitlement procedure are comparable in both states as well as the administrative and punitive fines in case of noncompliance. First, the data indicates that Bavaria is much more reluctant in granting licenses to brothel managers than North Rhine Westphalia (Landtag Nordrhein-Westfalen 2017). In *Unterfranken*, a smaller administrative district within Bavaria, for instance, only two out of 42 brothel managers received a regular license, whereas 39 granted a preliminary version and one request was fully rejected (Bayerischer Landtag 2018).

In sum, indirect governance modes are clearly visible in both German states because subnational regulators responsabilize private actors via different strategies. However, it is unclear why some private actors are selected in one state but not in the other, despite the nation-wide distribution of these organizations (e.g. Deutsche Aidshilfe or Solwodi). Second, we do not know why the empowerment of regulatory intermediaries seems to be a much more vivid in North Rhine Westphalia than in Bavaria. The following part discusses these open questions by referring back to the theoretical concept of “moral goal congruence.”

5.2.2. How to explain this pattern?

When the “prostitution roundtable” was established in *North Rhine Westphalia* in 2010, a left-wing coalition of Social Democrats and Greens was governing the state.¹² Thus, a group of political actors was ruling that strongly supported the goals of the national law from 2001 (also adopted by a left-wing government coalition). Although in the meanwhile, this law was strongly criticized as facilitating pimping and procuring (Pates 2012; Euchner 2014; Grohs 2019), especially members of the Green Party continued to back up the reforms and the related

goals. Their main argument was that sex workers require better working conditions, professional counseling, and supervision as it would be unrealistic to assume that the demand of sexual services will decrease through any prohibitive approaches. Such approaches would push sex workers into the underground, where the risk of sexual exploitation is much higher. The Social Democratic had a much harder time to defend the reform of 2001, especially after some scandals on so-called “flat-rate brothels” became public in the mid-2000s (Euchner 2014). In North Rhine Westphalia, the responsible state minister, Barbara Steffens, was a member of the Green party and thus, tried to uphold the framing articulated in the early days of the reform (Land Nordrhein-Westfalen 2014). The public servant in charge of the roundtable on prostitution, Claudia Zimmermann-Schwartz, explained in the final report that the government reaches out for an “emancipated society without segregation. This includes, among other things, to accept the decision of some people to work in the prostitution sector and (to accept) that they have to be protected by law” (Land Nordrhein-Westfalen 2014, p. 4).

The four selected NGOs in North Rhine Westphalia largely share this understanding of prostitution and are widely known as defenders of pro-regulative approaches. The most prominent NGOs are Madonna and Deutsche Aidshilfe. While the former is one of the first associations founded by sex workers in 1991, the latter is also an experienced actor in the field, focusing on male prostitution (interview 01, interview 02). The Deutsche Aidshilfe initiated, for instance, so-called “train-the-trainer” programs for sex workers. The main idea of the project was to train sex workers in health and safety issues related to sexual practices and then have these newly trained workers offer trainings to their colleagues in other cities or other sex establishments (interview 02). The main advantage of the program is that sex workers can reach out to their colleagues more easily and can establish more trustful relationships. In other words, sex workers, who are coordinated by the Deutsche Aidshilfe – which is itself partially coordinated by the state through public funding – would take over the role of regulatory intermediaries in order to support the state in the protection of public health and safety. Since the new law obligates registered sex workers to have regular health-care consultations with specialized street-level bureaucrats, it is unclear whether such pilot projects will continue in the future. The Mitternachtsmission in Dortmund and Kober have both religious roots. While the former is sponsored by a Protestant welfare organization (Diakonie), the latter is associated with the Social Catholic Women’s Association (Sozialdienst Katholischer Frauen). Differently than one might expect, both organizations share the primary goals of the state government as they explicitly consult sex workers in terms of social or labor law and do not only offer exit programs as some of the selected private intermediaries in Bavaria. A representative of Diakonie explained that “we are against the prohibition of prostitution, as otherwise they (sex workers) will disappear in illegality. Then they are not any more accessible and will be at the mercy of all kind of criminal actor.” (interview 06) Moreover, the expert added that organizations with religious roots prevail in the sector (“we are without competitors”) because it cannot be earned as much money as in other sectors of social welfare (e.g. elderly care).

In Bavaria, two of the four selected regulatory intermediaries defend a completely different understanding of sex work and accordingly, offer dissimilar services. This concerns in particular Solwodi and Jadwiga. The main mission of both organizations is to help victims of sexual exploitation and human trafficking. Jadwiga is a small NGO with a strong focus on Bavaria and financial support from InVia, a Catholic organization dealing with women’s rights (Jadwiga 2017). Solwodi, by contrast, is an international NGO founded by a German nun in 1985. It has almost 20 counseling centers in Germany, including four in Bavaria (interview 04). This means, both regulatory intermediaries are specialized in accessing women, who are forced to work in the prostitution sector. Mimikry and Marikas are only locally organized and are rather small with about seven employees (e.g. social workers, psychologists, and translators). Moreover, they also receive large financial support from the Diakonie and the city of Munich (Marikas 2015; Mimikry 2015). Mimikry’s main mission is to consult female sex workers in social and labor law but also to discuss exit strategies. Marikas primarily supports male sex workers (project called “neon light”) and offers shelter for a limited number of days. Hence, the responsabilized private actors in Bavaria follow a different understanding of prostitution than the selected NGOs in North Rhine Westphalia because these NGOs highlight much stronger the involuntary aspect of prostitution and its negative side effects (e.g. increased risk of organized sexual exploitation and human trafficking), and therefore primarily aim at helping female and male sex workers to leave the sector (interview 08, interview 06). This goal largely coincides with the primary aim of the government in Bavaria. Since 1949, the Christian Social Union is ruling the state and was together with its “big sister,” the Christian-Democratic Union, the main opponent of the German prostitution

reform of 2001 (Euchner 2014). In the plenary debate, the Christian-Democratic parliamentarian, Maria Eichhorn, argued, for instance, “degrading human bodies to a product injures the moral concept of the German Constitution” (Plenary Protocol BT-Drs. 14/196: 19195).

In sum, in both states the regulator and the responsabilized private intermediaries basically defend common moral goals in terms of prostitution. The regulator in North Rhine Westphalia and the responsabilized regulatory intermediaries support a regulatory approach that intends to improve the conditions for sex workers and hence, results in an “emancipated society without segregation” (Land Nordrhein-Westfalen 2014). Bavarian regulators and the majority of responsabilized regulatory intermediaries, by contrast, perceive sex work as an act of human degradation. As a result, goal congruence in moral values is certainly an important criterion that guides the selection process of regulatory intermediaries in both German states and thus, explains the diverse regulatory landscape in Germany with regard to prostitution policy (interview 02). A remaining question is: How important is goal congruence compared to classical explanatory factors, such as governance capacity?

As the description of the organizations has shown, most of them are nonprofit organizations, lacking larger financial and human resources. States, cities, or religious welfare organizations are their main sponsors. The largest organization is the Deutsche Aidshilfe Dortmund with 37 employees (but only two of them explicitly consult male sex workers), followed by the Mitternachtsmission Dortmund with 15 employees (seven explicitly consult sex workers) and Solwodi Bavaria with about 13 social workers and psychologists (interview 04). The key capacity these NGOs possess is their expertise and their long experience in the field, coinciding with the ability to access regulatory targets easily. In the highly sensitive sector of prostitution, this is a highly valuable ability because state actors generally lack trust and competence in dealing with this specific group of targets. This is also the reason why most NGOs employ social workers or even former sex workers. However, as the description has shown, the perceived regulatory capacities of private actors to act as intermediaries highly depend on the ideological position of the regulator. Solwodi, for instance, is also located in some cities in North Rhine Westphalia and the Deutsche Aidshilfe also in Bavaria, but neither the Bavarian government promoted any serious collaboration with the Deutsche Aidshilfe nor the North Rhine Westphalian government with Solwodi. As a result, expertise and longstanding experience matter, but they are evaluated based on the congruence in moral goals.

Finally, there is one last question to reflect on: it is still unclear why North Rhine Westphalia installed a “prostitution roundtable” and thus, responsabilized private actors via administrative law, while Bavaria avoided to do so and hence, restricted the involvement of private actors in the regulation of prostitution policy. One interview partner argued that there is not just one single approach to regulating prostitution policy in German states; instead, we find two logics, separated by the so-called “Weisswurst-Äquator” (“Bavarian veal sausage equator”). The southern states, Bavaria and Baden-Württemberg follow a completely different approach to indirect governance at the local level than the northern states (interview 02). The former two states have been led for many decades by conservative Christian Democrats which consider the legal recognition of sex workers a critical issue and favor a state-centered approach. Prostitution is primarily defined as a matter of law and order, and thus, the issue is a of responsibility of the police and less so of alternative private actors. Although the government in Baden-Württemberg has recently changed, the historical legacy still seems to dominate its approach toward prostitution and the collaboration with selected private actors. In other words, short-term government changes do not interrupt long established and trustful relationships between public bureaucrats and private actors (interview 01, interview 05). A representative of the Catholic welfare organization (Caritas) in Bavaria said that “we do not offer social support for sex workers in our diocese as the Diakonie is doing a very good job here. We do not have to be active in all kind of sectors. But I know from other dioceses, where it is the opposite way around... for instance, the Nordic ones. This all depends on the historical development” (interview 08). Thus, the political and cultural legacy in private-public collaborations seems to account not only for the selection of specific private partners but also for the prominence of regulatory intermediaries in prostitution policy per se.

As a result, one may conclude that regulatory intermediaries in Germany’s prostitution policy basically rule under the constraints of a morality-based selection process, largely supporting the main expectation. The political elites in German states refrain from responsabilizing private actors that contradict their central policy aims. Instead, they delegate regulatory responsibility to private parties that share their fundamental understanding of prostitution policy and agree on similar policy solutions (Erikson & Oscar 2019). In consequence, the process of entitling and enlisting private actors as regulatory intermediaries depends very much on the congruence in issue positions, while regulatory

capacities are secondary. Moreover, the political and cultural legacy in private–public collaborations and the related tradition of framing prostitution may affect a regulator’s willingness to empower private intermediaries.

6. Conclusion

The paper examines governance modes in the field of prostitution policy over 50 years and across 25 OECD countries with a specific focus on the empowerment of private regulatory intermediaries. It discovers that while direct modes of governance remain prominent to this day, indirect forms of governance – and thus the responsabilization of private regulatory intermediaries – have become increasingly popular. Additionally, a comparative case study of two German states shows that the selection of private intermediaries is strongly ideology-driven, indicating that congruence in (moral) goals is key to the establishment of any relationship between regulators and private intermediaries. Regulatory capacities, such as expertise and close contact with regulatory targets are secondary because they are evaluated through an ideology-driven lens.

This morality-based selection process in combination with strong punitive and administrative oversight limit the risk of regulatory capture by private actors and avoid criticism for leaving fundamental questions of a state’s moral order to morally contested and non-legitimized actors. Accordingly, one might argue that the empowerment of private intermediaries approximates a ruling under a so-called “shadow of moral hierarchy” (Héritier & Lehmkuhl 2008; Börzel and Risse 2010) because regulators responsabilize or enlist private intermediaries based on moral considerations and at least formally threaten them with criminal and administrative sanctions in the event of misbehavior. In the same line, by up-holding direct governance approaches regulators still maintain their prerogative role in the field. In practice, this means that private actors take over a double role; they are targets and intermediaries at the same time. Brothel managers and sex workers may contribute to the formulation of implementation guidelines in their role as intermediary and similarly have to cope with these rules in their role as target.

An additional finding is that the political and cultural legacy of a state seems to influence its affinity for indirect governance approaches. The political culture is strongly influenced by the historical party-political leadership of a geographical entity because some political parties are more prone to implement participatory forms of governance than others (e.g. Green parties versus Conservative parties). However, this can be mediated by the framing of a public problem: if prostitution is perceived as an issue of public order and crime instead of a problem of gender equality, then direct instead of indirect governance modes seems to be more likely.

Finally, the study illustrates that in federal countries, subnational governments may turn into public regulatory intermediaries that are able to undermine national goals through the empowerment of specific private actors, sharing their moral policy goals. Especially, facilitative steering strategies of responsabilizing private actors can be abused to silently push through opposing ideas through the backdoor because these strategies are often not codified in national or subnational laws and hence, are less transparent compared to punitive or administrative steering activities. In other words, although subnational states may prevent regulatory capture through a morality-based selection process of private intermediaries, these states – in their role as public intermediaries – are able to capture the national regulator through the empowerment of private actors with policy interest deviating from national goals. This discussion shows that not only private but also public actors are able to take over a double role in the complex, multilevel setting of governing prostitution policy.

These findings enrich the literature on prostitution policy and the literature on regulatory intermediaries in three innovative ways. Most importantly, the paper highlights the role of morality and congruence in moral goals as key selection criteria, which could be relevant to international regulatory problems as well (e.g. public security). Admittedly, it is unsurprising that congruence in moral goals is key for the selection of private intermediaries in a policy field that deals with the fundamental moral order of a state. However, other public problems discussed under the RIT framework (but from a different analytical angle), such as the containment of public security or the protection of human rights (De Silva 2017; Pegram 2017), also highlight the role of preferences related to the moral order of international regimes, pointing to the broader relevance of the selection criterion.

Having said this, one has to add that the within-case comparison between two German states bears many advantages but faces also weaknesses, which do not undermine the main argument but may limit its generalization. This concerns specifically the federal structure of Germany and the underspecified national law from 2001, which have allowed subnational regulators to experiment with indirect governance strategies in a way that might

be less common in more centrally organized states. Without the opposition of the second chamber, in which the federal states were represented and formed a counter majority, the national government eventually would have been able to formulate concrete implementation guidelines that could have streamlined the implementation process and thus, limit the freedom of “opposing” subnational regulators in selecting private intermediaries. At the same time, also in more centralized countries, subnational or local actors do have considerable discretion in implementing national prostitution law (Jahnsen & Wagenaar 2017; Wagenaar 2017). Accordingly, it is certainly promising to re-evaluate the findings of the study in more centralized states with more specific prostitution laws.

Besides these new insights into indirect governance modes within a value-loaded policy field, one might question from a normative point of view whether a strategy of responsabilizing private actors is appropriate to contain the moral order of a country and to govern many vulnerable or disadvantaged regulatory targets. For instance, are such “train-the-trainer” programs for health-care education the “ethically right” way of governing? Should we really try to save costs by such nonformalized easy-to-use formats for such a delicate question? On the other hand, more cost-intensive and authoritarian styles of governance also experience much criticism, as the debates in Germany and the Netherlands about obligatory health-care consultations for registered sex workers show.

In sum, through the analysis of a morality issue, we have gained important new theoretical insights for the research on indirect governance and the RIT model in particular, but we have also provoked some normative questions about the appropriateness of empowering private intermediaries. Nevertheless, several aspects remain open for future scientific projects. Most importantly, the composition of regulatory intermediaries and their historical ties with regulators require a more careful scientific examination (including a country’s culture of collaborating with private actors), since it might affect the trustworthiness of these actors and thus impact the selection process.

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Endnotes

- 1 This paper uses the term “brothel managers” since in several countries, they are treated as “regular entrepreneurs.”
- 2 Pegram (2017) explores the governance of human rights at an international level and detects, for instance, that if states are allowed to select their own national intermediaries, implementation deficits arise in terms of international human rights conventions. Similar difficulties appear if intermediaries are self-selected since these actors may mainly aim to gain international reputation and, in the specific case of international labor governance, to keep and attract business (Marx & Wouters 2017).
- 3 Some scholars describe the threat of (criminal) punishment for selling or buying sex as being part of a strategy of self-regulation of targets (e.g. Scouler & Sanders 2010; Skilbrei 2012, p. 255).
- 4 Austria, Brazil, Belgium, Chile, Denmark, Finland, France, Greece, Germany, India, Ireland, Italy, Israel, Japan, the Netherlands, Norway, Portugal, Poland, Sweden, Spain, Switzerland, Russia, Turkey, the United Kingdom, and South Africa.
- 5 The MORAPOL project was funded by an ERC Advanced Grant (2010–2016) and led by Professor Christoph Knill.
- 6 The dataset does not allow to identify whether criminal or administrative sanctions are directed at an actor’s role as regulatory target or at its role as regulatory intermediary. Since responsabilization processes are rather recent phenomena in prostitution policy, the data are interpreted as being directed at regulatory targets but are carefully analyzed and interpreted. Moreover, the dataset cannot offer a solid foundation for the tool of administrative entitlement of regulatory targets.
- 7 Pimps are defined as actors that organize sex work and receive as income a portion of the earnings of sex workers.
- 8 See for some descriptive statistics Table A1 in the Appendix.
- 9 Data on licensing systems for sex workers, and hence for regulatory targets, are not included in this or any other larger data set.

- 10 This trend varies to some extent across the country samples (see Figure A1 in the Appendix).
- 11 See for a disaggregated overview by country in Figure A2 in the Appendix.
- 12 The left-wing coalition government ruled from 2010 until 2017. Before, from 2005 until 2010, the Christian Democratic party had taken over. However, this is one of the few exceptions in the history of North Rhine Westphalia because since 1969 the Social Democrats were the most powerful political actor.

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7. APPENDIX

Table A1 Descriptive Statistics

Variable	Obs	Mean	Std. Deviation	Min	Max
<i>Criminal sanctions</i>					
Average	1,352	5.37	3.63	0	15
Sanctions sex workers	1,352	0.31	0.82	0	4
Sanctions clients	1,352	0.19	0.62	0	3
Sanctions brothel manager	1,352	2.42	1.95	0	6
Sanctions pimps	1,352	2.45	2.07	0	6
<i>Administrative sanctions</i>					
Average	1,352	1.50	1.86	0	7
Sanctions sex workers	1,352	0.51	0.83	0	2
Sanctions clients	1,352	0.11	0.40	0	2
Sanctions brothel manager	1,352	0.40	0.79	0	2
Sanctions pimps	1,352	0.49	0.84	0	2
<i>Licensing brothels</i>	1,350	0.09	0.29	0	1

Source: Author's compilation based on MORAPOL data.

Table A2 List of Expert Interviews

Shortcut	Expert	Date
Interview_1	Madonna e.V. (NGO counseling sex workers), NRW/Berlin	13th of August 2014
Interview_2	German HIV Association (NGO supporting drug addicted women), NRW/Berlin	17th of July 2014
Interview_3	BesD e.V. (NGO representing interest of sex workers), Berlin	12th of August 2014
Interview_4	Solwodi e.V. (NGO supporting victims of forced prostitution and human trafficking), Munich	1st of December 2014
Interview_5	UEGD e.V. (NGO representing interests of brothel managers), Laatzen (Northern Germany)	11th of November 2014
Interview_6	Board Member Diakonie Germany, Berlin	25th of January 2019
Interview_7	Board Member Diakonie Bavaria, Munich	26th of November 2018
Interview_8	Board Member Caritas Bavaria, Munich	10th of October 2018

Source: Author's compilation.

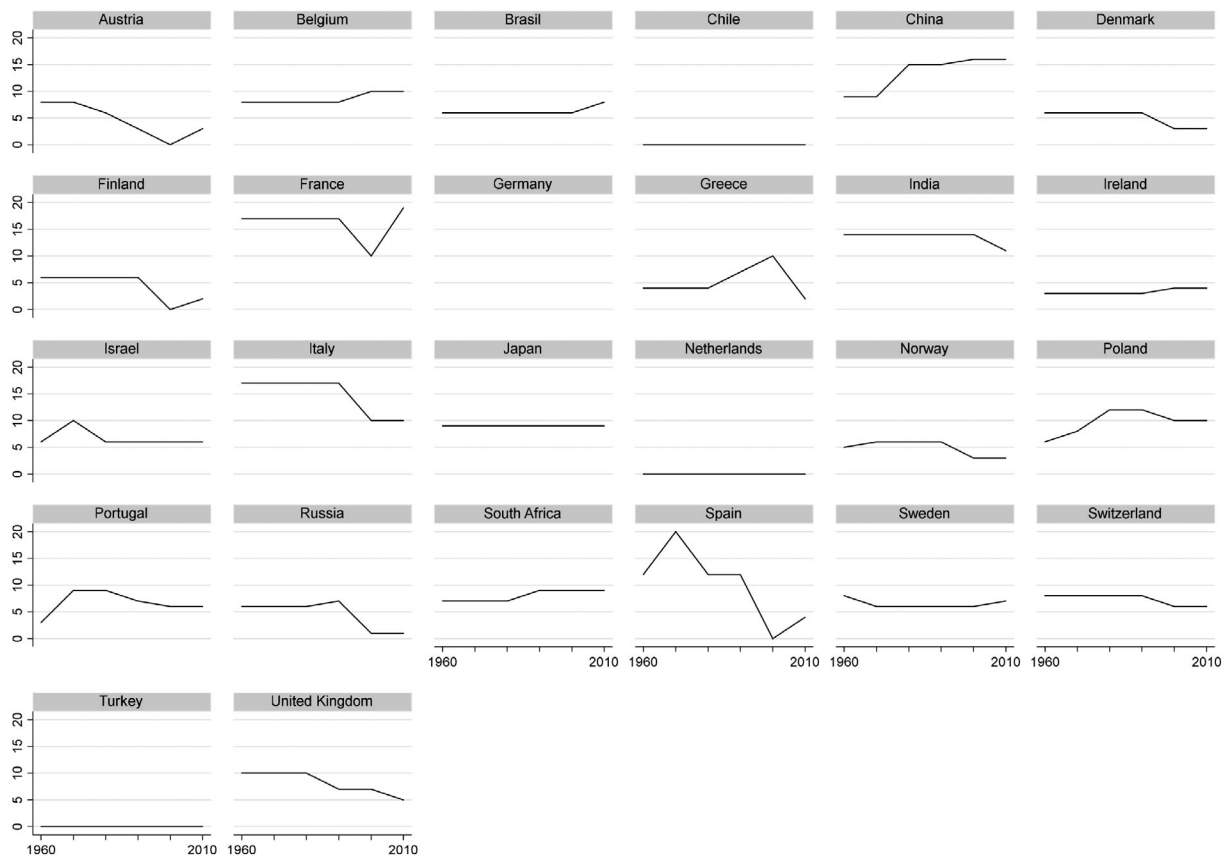


Figure A1 Criminal sanctions by country (1960–2010). Source: Author’s compilation based on MORAPOL data. $N = 25$ OECD countries.

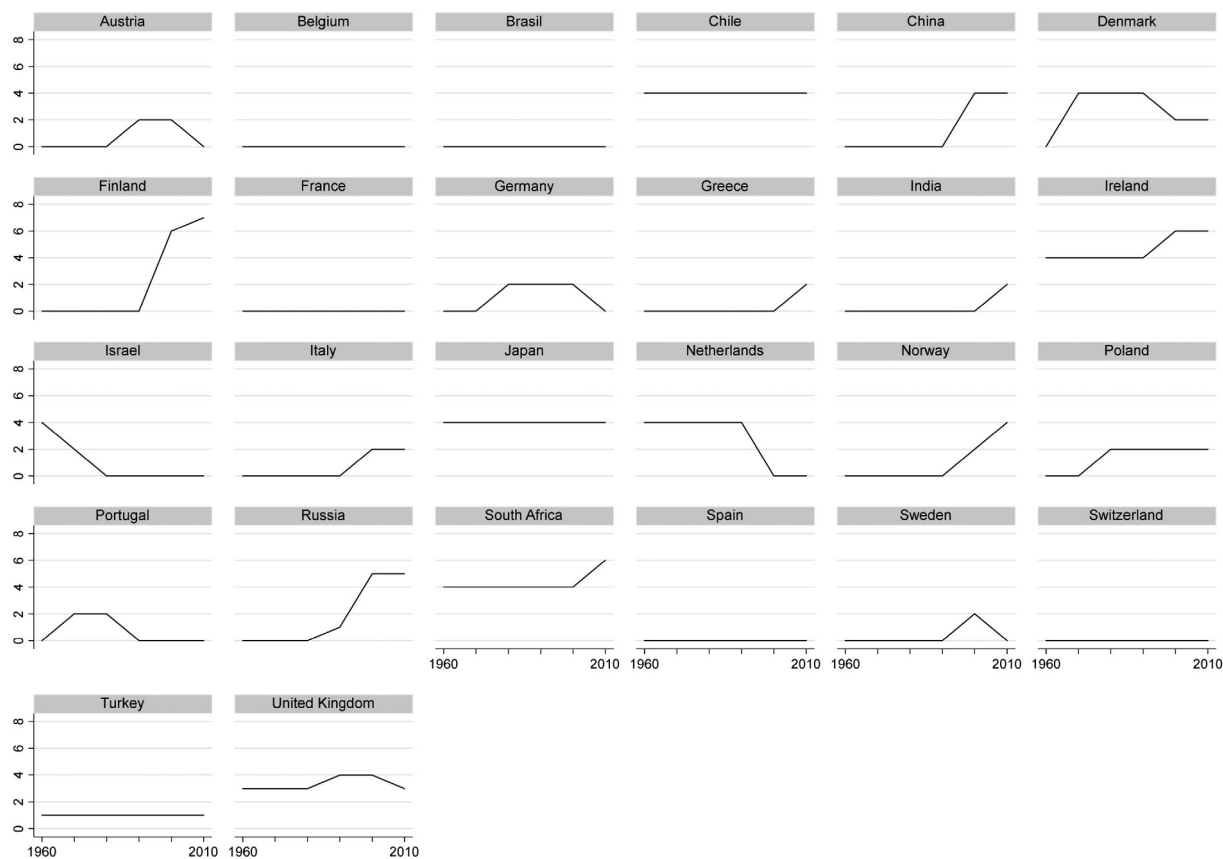


Figure A2 Aggregated administrative sanctions by country (1960–2010). Source: Author’s elaboration based on MORAPOL data. *N* = 25 OECD countries.

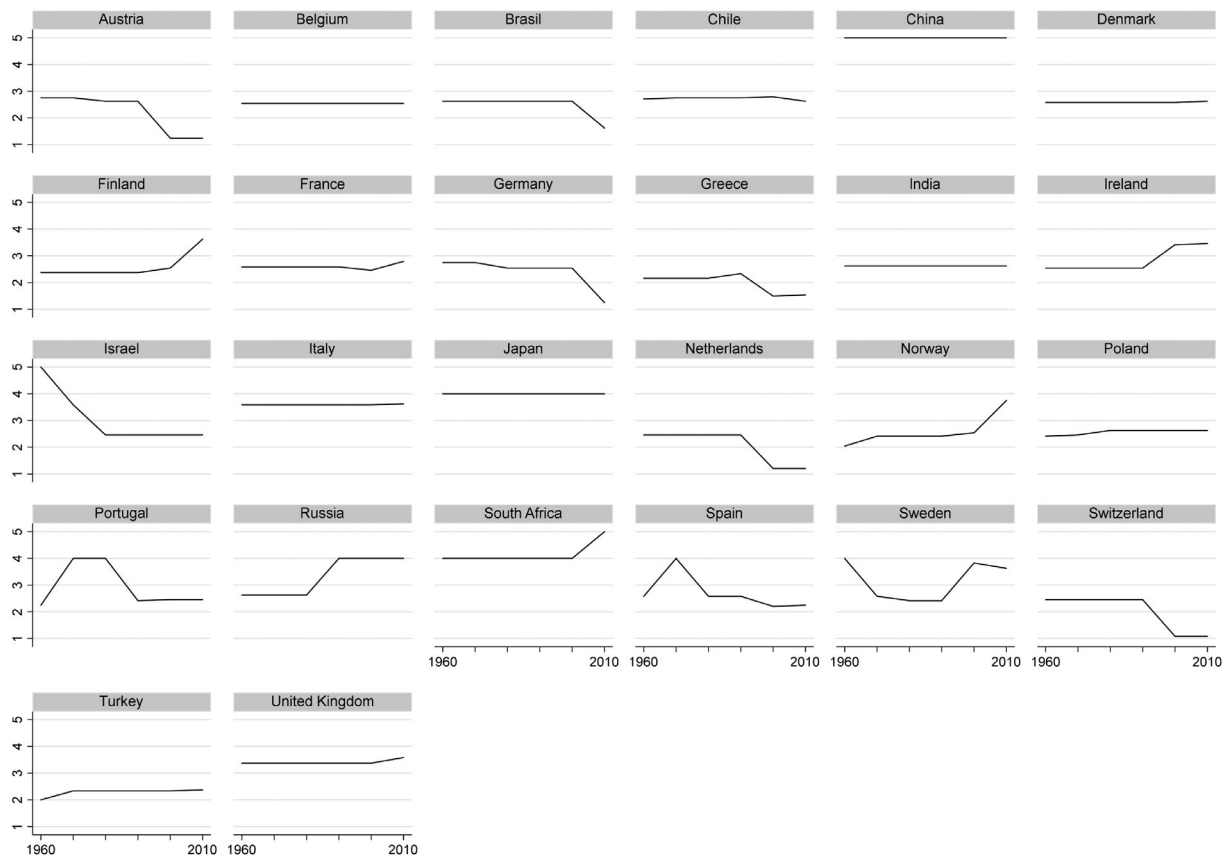


Figure A3 Development of rules of prostitution policy in OECD countries (1960–2010). Source: Author’s compilation based on MORAPOL data and Euchner & Knill 2015. *N* = 25 OECD countries.