

## **Criminal, victim, social evil or working girl: legal approaches to prostitution and their impact on sex workers**

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This presentation will focus on the existing legal approaches to prostitution, the moral and ideological presumptions underlying the different legislative models and their impact on the working and living conditions of women and men working in the sex industry. It will also touch on the current debate on sex work, including the views of sexworkers themselves. Specific attention will be given to the Netherlands, where the sex industry has been decriminalised since October last year.

Basically four different legal regimes can be discerned. The traditional way is to classify them as the prohibitionist, the abolitionist, the regulamentarist and –more recently - the labour approach. I will use those classifications too. However, it must be kept in mind that any classification is also a simplification. In practice distinctions are not always easily to draw and actual legal practices may vary considerably, depending on exactly what is prohibited and how strict those prohibitions are enforced.

All legal regimes, with the exception of the labour approach, have as a common starting point the moral condemnation of prostitution and are designed to control and suppress the sex industry. Prostitution is seen as either a social evil that should be eliminated or as an inevitable or even necessary evil that has to be accepted and controlled. The first position is supported by arguments holding that prostitution is incompatible with human dignity or - a more contemporary ‘feminist’ argument - that prostitution as such constitutes a violation of women’s human rights akin to slavery. The second position is motivated with arguments referring to the interests of the state, such as the maintenance of public health and public order, or to ‘natural’ male needs.

### *The prohibitionist model*

The most repressive legal regime is the absolute prohibition of prostitution as such. Prostitution is a criminal offence: all activities related to prostitution are prohibited and all parties involved are criminalised, including the prostitute (yet most countries ignore the client). Prostitutes are seen as deviants or criminals who either need to be forcibly re-educated or punished. An example is the United States (except Nevada).

Although this type of legislation purports to eliminate prostitution there is no evidence that countries where prostitution is outlawed have been even remotely successful in achieving this aim. Rather than to eliminate prostitution, the illegality of prostitution as such renders prostitutes fully dependent on third parties. Since they have no legal protection at all – for they themselves are liable to arrest and prosecution – they find themselves in the complete power of brothel owners and middlemen on the one hand and police officers and court officials who are willing to turn a blind eye in exchange for money or free sexual services on the other hand. This is prone to make prostitution a very lucrative source of income for all involved parties, including the police, with the exception of the prostitutes themselves.

### *The abolitionist model*

The laws of the majority of countries however, including all EU countries, are based on what is called the abolitionist model. Central feature of this model is that prostitution in itself is not an offence, but any 'exploitation of the prostitution of another person' is criminalised, that is, any involvement of a third party. Within this view prostitutes are not seen as deviants or criminals, but as victims. The underlying idea is that prostitution persists only through the efforts of procurers and pimps, the 'third parties', who induce women into prostitution to profit from her earnings. Therefore the abolition of prostitution and the protection of women against this evil can best be achieved by penalising those 'third parties', that is, anyone recruiting for, profiting from or organising prostitution. The prostitute herself, on the other hand, should not be penalised, as she is a victim.

This view strongly reflected in the 1949 *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*. As stated in the Preamble, prostitution is seen as 'incompatible with the dignity and worth of the human person and endanger[ing] the welfare of the individual, the family and the community...' or, translated into more modern feminist language, as sexual exploitation of women and a violation of women's human rights.

The abolitionist movement finds its roots in 19th century England. Originally it was a response to the double morals for men and women and the abundant abuses in brothels. The aim of the original founder of the movement, Josephine Butler, was not so much the abolition of prostitution as well as the abolition of the existing system of state regulation of brothels, which sanctioned and legitimised those abuses. In the eyes of Butler, prostitutes themselves should be left alone to ply their trade. However, her followers quite quickly turned it into a moral hygiene movement against prostitution, reason for Butler, by the way, to quit the movement.

The term 'abolitionism' refers to the 19th century movement for the abolition of slavery. Like in the 19th century abolitionists fought for the abolishment of slavery, modern abolitionists fight for the abolishment of prostitution as 'sexual slavery', or 'white slavery' as it was originally called. Analogous to the traditional concept of slavery, prostitutes are seen as slaves that need to be freed and to made conscious of their oppression.

However, unlike the original concept of slavery, in this case the idea of 'sexual slavery' is not linked to the abolishment of certain conditions and a certain type of relationship – namely ownership of one person over another person -, but to the abolishment of the activity as such. Rather than by its conditions, prostitution is by its very nature considered to be a form of violence against women and a violation of women's human rights. Consequently, any distinction between consent and coercion is rejected, as prostitution is believed to be forced by definition.

In modern days this view is represented by the French Abolitionist Movement and the American Coalition Against Trafficking, but a similar view you will find with the European Women's Lobby. Prostitutes are basically seen as passive victims of the social and economic system that need to be 'rescued' and protected from exploitation.

The price of this protection, however, is that prostitutes are turned into 'non-persons': objects rather than subjects. They are considered neither equal nor legitimate partners in the debate, that is: independent persons capable of assuming individual agency and of judging their own situation and formulating their own needs, demands and perspectives. Prostitutes who are not willing to comply to the identity of victim and who, for instance, demand working rights are

discredited as either suffering from a false consciousness (and thus in need of being made aware of their oppression), or as mentally damaged as a result of the abuse they have suffered (and thus in need of therapy), or as being paid and manipulated by pimps who after all have a great interest in legitimising the sex industry (and thus corrupt). Although in theory, a distinction is made between prostitution, which is seen as degrading, and the prostitute who should be respected, it is quite difficult to see how respect for prostitutes can be promoted if their work is seen as inherently degrading. It is equally difficult to see how the interests of women are served by excluding prostitutes' rights organisations from the political debate as has been done in the past and is still promoted by some feminist groups.

Until the last few decades, the debate on prostitution was totally dominated by the abolitionist approach, as reflected in the 1949 Convention. Although this convention is ratified by very few states, prostitution laws of the majority of the European countries are based on an abolitionist view. Prohibitions include recruitment for prostitution, aiding and abetting, managing a brothel, rental of premises for prostitution, procurement, pimping and living off the earnings of prostitution.

In practice this means that, although to be a prostitute as such is not liable to punishment, to actually work as a prostitute is de facto made unlawful, since any type of work requires some form of organisation, such as the renting of working space, bringing in customers, co-operation with colleagues, et cetera. This places prostitutes in a profoundly ambivalent legal position. They are allowed to work, but working as such is literally or de facto prohibited. The law itself deprives prostitutes of crucial means to assure an income, e.g. facilities to recruit clients, to advertise, to hire accommodation, or to conclude labour contracts.

In a pure abolitionist legal model individual prostitution is left free, only the 'third parties' are prosecuted. That means that prostitutes can work legally as long as they work alone and no other profit making parties are involved. In practice however, prohibitions often also aim at prostitutes - like those that prohibit soliciting, loitering or advertising -, and/or their non-profit making associates - like partners and adult children of sex workers-, thus severely limiting not only the space for a professional life but also for a private life, and coming very close to a prohibitionist system. In France for example, two prostitutes cannot hire a flat and work together, since automatically the one will be considered the pimp of the other.

Although meant to protect prostitutes, the impact of such anti-prostitution legislation on the women concerned is invariably a combination of isolation, stigmatisation, marginalisation and social exclusion. Organisation of prostitutes is impeded by the stigma and the criminal charges attached to prostitution, which prevent women from publicly asserting themselves. The prohibition of any legal organisation of prostitution encourages its association with (organised) crime. Even improvement of working conditions (such as good sanitary equipment or the supplying of condoms) may be considered in law as 'promoting' prostitution, as exemplified by court rulings in Germany. Moreover, especially prohibitions on living off the earnings of prostitution reinforce the social isolation of prostitutes through making it difficult or impossible for them to live and share an income with other persons, including their partners, family or children, as these may be charged with pimping or living off the earnings of prostitution (Italy, France, Great Britain, Sweden.)

A special case is Sweden, where since 1999 clients have been criminalised. (However, Sweden is not the first country to do so, also Great Britain and Ireland penalise clients, all be it less far reaching, such as prohibitions on kerb crawling). Though motivated by a mix of abolitionist and feminist arguments (prostitutes are presented as victims that need to be

protected from sexual exploitation), in fact Sweden can now be qualified as a semi-prohibitionist system, as it de facto leaves the abolitionist principle of freedom of individual prostitution. The prostitute is not prosecuted, but concretely the act of prostitution is prohibited because of the sanctions weighing on the client. The criminalisation of clients has been defended by feminist arguments, but precisely from a feminist view serious objections can be made against this measure. The most fundamental feminist objection is that sex workers and their views have been excluded from the debate, neglecting the right of women to speak up for themselves and to have a legitimate voice in any debate concerning their situation.

Furthermore, it not only adds to the stigma, which never can be in the interest of women - sex workers and non sex workers alike -, but it also leads to less safe working conditions by reducing negotiation time between prostitute and prospective client.

### *The regulamentarist model*

Although most EU member states formally prohibit any 'exploitation of prostitution', in practice most countries have more or less extensively regulated prostitution, thus combining abolitionist legislation with a regulatory practice. A fact that could be called ironic with a view to the original aim of the abolitionist movement.

Within a regulamentarist approach, prostitution is considered at once morally reprehensible and impossible to eradicate from society. Rather than a moral evil that needs to be eliminated, prostitution is seen as an inevitable or even necessary evil. The existence of prostitution is more or less accepted, but at the same time considered a threat to public health and order. From an endangered species, prostitutes are turned into a dangerous species.

To protect society against the dangers of this 'necessary' evil, prostitution (and prostitutes) is controlled through the introduction of regulations and various state sanctioned measures in the interest of public order, public health, public morals or public decency, masculine needs, the need to protect 'decent' women, tax payment, public nuisance and visibility. Prostitutes, however, are not given legal rights as workers; neither does the state take responsibility for their working conditions.

Regulation generally takes place through different forms of mandatory registration and other methods of state control. These include mandatory medical checks to protect 'public health' (that is, not the health of the women concerned, but the health of their clients and their wives); prohibitions on working outside certain areas or places; prohibitions regarding soliciting, loitering or related activities; licensing systems; and regulations on the nationality and residence status of the women concerned (e.g. prostitution of local women is allowed, but migrant women lose their staying permit if found working in prostitution), often with corresponding penalties for women who fail to comply with those regulations, such as fines or imprisonment. In addition, the tax authorities in many EU countries, e.g. France, Germany, Belgium and Austria, impose taxes on income from prostitution, even when profiting from prostitution is formally prohibited.

Principal motivation behind such regulations is not the interests and well-being of prostitutes or their protection against violence or abuse, but the protection of society against this 'necessary evil'.

Like in the abolitionist approach, prostitutes are not considered to be bearers of rights and the working and living conditions of women are not considered a state responsibility.

Apart from the risks of being arrested, fined or deported for not being able or willing to comply with the various regulations, such regulations often carry negative results for the

women involved in terms of their stigmatising and marginalising effects. Forced registration with the police, for example, can be used to prevent women from entering or leaving the country, and can negatively affect their future employment opportunities and the liberty to change professions if they so choose.

In addition, especially mandatory registration tends to create a difference between 'legal' and 'illegal' forms of prostitution. Many women do not want to register for fear of the stigmatising effects. Other women cannot register because of their illegal status, like most migrant workers. In both cases women end up in an illegal circuit with all the negative consequences this entails.

Although the international debate is still marked by the abolitionist view (even when in practice in most countries the existence of prostitution is more or less recognised and regulated), the abolitionist approach is no longer unchallenged.

### *The labour model*

New approaches are being developed, starting from the point of view of sex workers themselves. Instead of excluding sex workers from the debate, as has been unquestioned for centuries, their participation is considered an essential condition for the development of any policy on sex work. Simultaneously, in many societies the right of the state to legislate sexual morality is put under question.

Over the years, prostitutes have increasingly organised and fought their exclusion from the ordinary rights which society offers to others, advocating the recognition of sex work as legitimate work and the decriminalisation of prostitution businesses, so that regulation of the sex industry can be achieved under civil and labour law instead of criminal laws, thus moving the focus of the debate from moral positions to working conditions and workers rights

Such a perspective opens a whole new array of instruments to combat violence and abuse in the sex-industry. Strategies aim at the recognition of women's work in the informal sectors as legitimate work, including work in the sex-industry, at labour law protection for the women involved and at improving working conditions. By treating sex work as work, the repression of exploitative and abusive conditions becomes possible with basically the same mechanisms and instruments as have been developed from the beginning of the 20th century to curtail abuses in other industries, that is, labour law and civil law.

In fact, it is an interesting question whether the exclusion of the informal labour sectors – in which predominantly women work - from labour law protection, is not a form of indirect discrimination and therefore a violation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

In the case of prostitution for example, brothel-keepers and employers clearly are in positions of power, as long as prostitutes lack any legal protection of their rights as workers. The power-balance between prostitutes and brothel-keepers/employers would significantly change if prostitutes could legally conclude civil and labour contracts; if they could sue abusive employers and clients; if they could enter into collective labour agreements as a result of collective bargaining between employers and employees; if they could insure themselves against the consequences of unemployment or illness; if they would be entitled to state benefits and pensions; and if labour regulations would be applicable to work in prostitution - all measures that are common to regular professions.

Not only on non-governmental level but also on governmental level, the abolitionist approach is no longer unquestioned. Both the Netherlands and Germany provide examples of the process of decriminalisation of sex work.

### *The Netherlands*

In the Netherlands, last year a bill to decriminalise the sex industry has passed. Since October 2000 the commercial operation of sex businesses on a consensual basis is no longer against the law, while at the same time the sanctions on the use of deceit, violence or abuse are raised. The essence of the new law is that any recruitment for sex work or any extraction of work by means of violence, threat with violence, deceit or abuse of authority is against the criminal law. It is not important whether or not the person concerned worked in the sex industry before, knew she or he would work in prostitution, or would like to continue to work in the sex industry under independent conditions. The core of the crime is deceit and coercion – in relation to the conditions of recruitment as well as in relation to the conditions of work – , not sex work. At the same time, brothels are subjected to a licensing system and have to meet certain standards concerning hygiene, fire safety, etc.

The abolition of the ban on brothels has taken away the legal barrier to recognise sex work as legitimate work and accords sexworkers the same rights and same protection under labour and civil law as other workers. It means, under Dutch law, that labour and civil law become directly applicable to the sex industry. This raises a whole new range of questions on the application and meaning of general laws covering work and working relations for the sex industry, e.g. in the area of labour relations (self employed vs. employee/employer relationship and its consequences) and social security (pensions, unemployment benefits, pregnancy arrangements, sick-leave, social benefits, et cetera.), which have to crystallise over the coming years. Many of those issues the sex industry has in common with other types of ‘informal labour’, thus raising the interesting question what characteristics are specific to sex work (and thus need adaptation of e.g. labour law) and what features sex work has in common with other types of work.

For the time being, however, we see a government that does not bother with these questions at all and finds it utterly difficult to leave behind the old morals and fixation on control, despite the fact that one of the officially declared aims of the bill has been the improvement of the position of prostitutes.

At this moment, the new possibilities that decriminalisation has offered are mainly used to develop new instruments for control and regulation of the sex industry, rather than to take positive measures aimed at sex workers to improve their position, to develop and introduce labour standards in the sex industry, to regulate labour relations, to support the labour emancipation of prostitutes and to lift existing discriminatory practices of both public and private institutions (such as the denial of access to social benefits and refusal by insurance companies and banks to accept sex workers as clients).

Moreover, the government is not willing to take the full consequences of the new law, that is, the recognition of prostitution as legitimate and legal work that is regulated and protected by the same laws as other types of work. The most revealing and tragic example of this incoherence is that sex work is the only type of work for which it is categorically and legally impossible to obtain a work permit. This excludes migrant sex workers from the legal sex

industry and pushes them further underground, where before they were tolerated in the Dutch sex industry. Underlying motive is for a great deal fear of 'being flooded by waves of foreign prostitutes', in combination with a general tendency to increasingly restrictive immigration laws. Ironically, it has been defended with anti-trafficking rhetoric, which is really the first time that I have heard argued that women are better protected against violence by giving them fewer rights. Rather than improving their situation, the change of law has thus worsened conditions for them profoundly. By only legalising half of the workers, and not the other half, the government demonstrates how thin their verbal adherence to the improvement of the position of prostitutes is.

You might say that what we have now looks more like a regulamentarist system than ever. However, there is one fundamental difference. Where in the regulatory system prostitution is extensively regulated but sex workers are not given workers rights, the Dutch decriminalisation of the sex industry does give sex workers rights.

Prostitutes do have the same rights as other workers now and can dispose over the same legal instruments that other workers and citizens dispose of to expose discriminatory measures from private AND public bodies, including the state. In this respect, the courts will and already do play an important role, by judging discriminatory measures by the same laws that apply to other workers and citizens. With some exceptions, they do this surprisingly open minded and often with interesting results, like the judge who ruled that a municipality is not allowed to impose a total ban on street prostitution as this is in violation with the right to free choice of occupation.

To conclude: I am still optimistic as I am convinced that, no matter how long it may take for all parties involved to get used to the new situation, once rights are given, they will be employed in the end.

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