VIII. SEX WORK

1. **Introduction**

This chapter examines how laws governing the exchange of sexual services for money or goods (often called ‘sex work’ or ‘prostitution’) influence the sexual health of persons in sex work, as well as facilitate or prevent discrimination, abuse and violence against them. States vary in how they approach prostitution or sex work in the law. Many use criminal law to prohibit various aspects of prostitution. Some countries penalize the sex worker, making selling of sex an illegal activity. Other countries claim that sex work by nature is related to men’s dominance over women and should be understood as part of the phenomenon of male violence against women. In this view, the sex worker is seen as a victim rather than as an offender. A few countries in Europe have, with this approach as their point of departure, decided to penalize the customers instead of the sex workers. Other states permit buying and selling of sexual services, subject to administrative regulations that govern work and labour practices generally. Others have developed regulatory schemes directed specifically at the people, conditions, and venues involved in the exchange of sexual services for money or goods, with strong penalties for violating these rules. In many countries sex work is unregulated, in the sense that exchanging sexual services for remuneration is not prohibited but also not perceived as a legitimate economic activity. These countries tend to penalize activities surrounding sex work such as pimping, procuring, and brothel keeping. All these models, with variations, exist in the European region.

Criminalization in particular marginalizes people in sex work: to avoid arrest, detention, or conviction, as well as general harassment and surveillance, people may distance themselves or hide from authorities in law, health and education, as well as from family; migrate to other towns or countries; or otherwise organize their lives outside formal social structures. Criminal convictions for prostitution have lasting social consequences, in addition to their direct effects through fines or detention. Criminal records may bar individuals from gainful employment, public housing, or other social benefits. Even in states that do not criminalize prostitution (but more so in states that do), people in sex work face significant social stigma. This stigma is variously linked to disapproval of sex for non-reproductive purposes or sex outside or before marriage, particularly for women, as well as the short-term exchange of sexual services for money. This stigma constrains sex workers from seeking support and enables abuse with impunity at the hands of both state and non-state actors, and also erects barriers to sex workers taking steps individually or through organizing to claim their rights, including rights to health.

Research on sex work finds that it takes multiple forms. Most exchanges of sex for money, food, or resources occur in informal labour sectors, often in combination with other work, as a livelihood strategy. Sex work is found at all socio-economic levels, with corresponding differences in income, danger, and vulnerability. The selling and buying of sexual services take place in a range of physical environments, including brothels, bars, clubs, homes, hotels, cars, streets, and out-door settings. The

857 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

858 In the following, the author uses the terminology as employed in the discussed documents. In these documents the predominant terms tend to be ‘prostitution’ and ‘prostitutes.’ When not directly referencing specific national or regional laws, the author uses the terms ‘sex work’ and ‘sex workers’ to describe the practices of, and the people engaged in, exchanging sexual services for money or goods, either regularly or occasionally. This definition of sex work is drawn from the UNAIDS Guidance Note on HIV and Sex Work (2009), citing UNAIDS Technical Update Sex Work and HIV/AIDS (2002). However, we acknowledge that sex workers might not be the best term to convey the multitude of people doing sex work or exchanging sexual services for money, as many people may not necessarily call themselves by this term, or have this ‘identity’.

859 The literature (English language) of the last two decades about prostitution law often characterizes legal approaches to prostitution with a set of terms claiming to delineate essential categories: abolitionist; prohibitionist; regulationist, as well as using the terms to decriminalize, to legalize, and to regulate. Despite their ubiquity, these categories do not enable careful analysis. First, the categories suggest that there are clear boundaries between ‘types’ of legal approaches, such that one can assign any national or local law to one category. These assignments are in fact very problematic; for example, does one consider systems that decriminalize the seller and criminalize the buyer “prohibitionist” or partial decriminalization? Further analysis grounded in empirical research reveals that it is mistaken to call this decriminalization, even of the seller, because in practice the person selling sex is not free of criminal surveillance. For example, sex workers may be taken into custody in order to be questioned or to ensure their evidence in any prosecution of the buyer. Furthermore, this taxonomy attends exclusively to laws governing the exchange of sexual services, ignoring the many overlapping laws (found in other parts of the criminal code, such as statutes punishing vagrancy or indecent conduct, as well as health codes, zoning and other administrative laws) that effectively penalize sex work over and above the offences listed in the criminal code. Finally, even more confusion has been engendered over the meaning and distinctions between ‘legalized’ and ‘regulated’ prostitution, as some use the term ‘regulation’ to refer to prostitution-specific registration and surveillance schemes, while others use the term to refer to any system in which the government plays a role in setting the conditions of work (which may be comparable to state regulation of safety and health in restaurants or other service sectors). As noted in the discussion in the text, different legalization schemes can be vary greatly in their promotion of equality, autonomy and health, as well as in their impact on sexual health.

860 Trafficking into prostitution or sex work is discussed in Chapter 5F. Conditions discussed here include a range of abuses, denial of rights, and other injustices, which do not, however, meet the definition of trafficking. See discussion of trafficking, below.
context of sex work ranges from highly organized, with multiple participants, social differentiation, and inequality of power, to individual workers operating independently in the informal sector. Sex work may be arranged through direct personal contact (involving the sex worker or a go-between) or via telephone, Internet, or other modes of solicitation or advertisement. The persons involved in sex work can be male, female or transgender and may range in age.\textsuperscript{861}

This extensive variation in the people, places and practices which constitute ‘sex work’ has tremendous implications for health and rights-based policy interventions. Unequal and vastly different vulnerabilities and capacities of people in sex work defy any single characterization. Moreover, a health and rights-based evaluation also reveals that the participation of people in sex work is essential to devising interventions that respond to their needs. The dominance of criminalization as the legal response to sex work impedes cooperative and participatory measures.

Under conditions of criminalization, many people in sex work face steep barriers to realizing their fundamental rights, such as rights to health, equality, privacy, association, family life, housing and education, and participation in the cultural life of the community. Under regimes in which some forms of prostitution are legal, sex workers may continue to face social and practical exclusions because of the continued weight of stigma, or because the laws differentiating what is legal and what is criminal in regard to selling sex maintain surveillance over sex workers which render even legal sex workers vulnerable to both state and non-state abuse. Persons in systems that permit some forms of sex work, however, may have better opportunities to organize, share information, and to seek public redress for abuse and discrimination.

In many cases, the state and its agents are the primary abusers of persons in sex work. Arbitrary detention, irregular deportation, forced evictions and removal of children without due process are often committed under the claimed authority of law, but without formal warrant, arrest or other due process protection. Transgender sex workers, migrant sex workers and sex workers of minority racial or ethnic groups can be particularly vulnerable to abuse by law enforcement operating under the cover of the law. The precarious situation of undocumented migrant sex workers in European countries where sex work is otherwise legal will be highlighted below.

The use of raids, and exemptions from the need for independent review of warrants for entering premises or arrest, are common in legal regimes regarding prostitution, demonstrating high levels of state disregard for people in sex work. Extralegal abuses by state agents, including rape, assault, murder, theft, and extortion, are committed with impunity. Revolving door arrests and mass arrests coupled with a high degree of state-generated sensational publicity reveal the extent to which the spectacle of ‘punishing the prostitute’ continues to serve an interest of the state in controlling sexual behaviour through the production of the ‘prostitute’ as moral scapegoat. Often, these public arrests are tied to claims of state action on behalf of public health or public morals.

Health services, provided by both state and non-state actors, have historically not been a site of rights promotion for people in sex work. State health controls, through measures purportedly serving a public health purpose, are a frequent source of violations of sex workers’ rights: mandatory testing for STIs and HIV; routine infringements of confidentiality regarding HIV test results and other medical information; and mandatory health identity cards, which must be displayed to authorities on demand, thus violating the right to privacy. Furthermore, the tendency of health programmes designed for people in sex work to focus exclusively or disproportionately on STI and HIV prevention is a constraint on the right to health and violates rights to equal treatment, as sex workers need comprehensive health services for everything from contraception and pre-and post natal care, to dental care and overall care for physical and mental health.

The health status of many people in sex work can be quite variable: it is often relatively bad, in part related to insecurity of income, food and housing for the most vulnerable persons in sex work, and because of the difficulty of accessing appropriate and respectful health services for prevention or treatment. The barriers to care and accurate information are proportionate to socially discriminatory attitudes and legal barriers. That said, people in sex work with higher socio-economic status may enjoy relatively good health status, especially if they have access to adequate services – although they remain in jeopardy through police abuse and risk of incarceration.

Having multiple sex partners under conditions of unsafe sex increases the risk of sexually transmitted infections, yet prevention efforts directed at sex workers for STIs and HIV are often demeaning, discriminatory, substandard, and ineffective. Effective prevention programmes are often stymied by police practices under criminalization regimes. For example, while condom promotion is essential to

\textsuperscript{861} While persons under 18 years of age may be involved in sex work, under international standards their involvement is deemed abuse or exploitation [see UN Palermo Protocol]. Thus, persons less than 18 years involved in sex work should – under no circumstances – be treated as criminal offenders.
Many people in sex work have little recourse to law to vindicate their rights, whether to custody of their children, rights to their wages, or prosecutions of perpetrators of violence. Often, police and other authorities will not register their complaints, and many sex workers come to believe that they do not enjoy the same status as other members of their community. Few legal defenses are mounted to challenge the arbitrary detentions or deportations of (alleged) sex workers or to investigate crimes committed against sex workers by law enforcement.

Much of what is termed ‘prostitution law’ (law directly prohibiting prostitution) is criminal law. However, many other laws (loitering, vagrancy, ‘riotous behaviour’ laws, zoning and housing laws, health codes, bar or cabaret licensing laws, public indecency laws, etc.) also have a direct effect on the practice of sex work. The criminal laws on prostitution vary widely: in order to analyze the specific effects of law, it is critical to identify with great specificity what particular acts are prohibited. Inquiry into law must ask: is the actual exchange of sex for money or goods a crime? Are other activities (by the sex workers themselves or others) criminalized, for example, solicitation (the public attempt to seek clients or make an offer for a sex/ money exchange), pandering (to act as a go-between in facilitating the sexual exchange), living off the earnings of a prostitute, managing or renting premises for the purposes of prostitution, etc.? Systems which permit sex work under regulatory codes vary widely in their impact on sexual health and rights. Some systems are rights and health violating, such as those which mandate health cards (as described above, for example), or which restrict the abilities of people registered as sex workers to choose their own housing or live with their families, or which condition limited health care services on registration. These systems transgress norms of equal protection of the law, as well as constrain underlying rights of privacy, family life, and rights to housing and health. Many legal regimes also severely constrict freedom of movement (through regimes of zoning and registration, or provisions barring workers from living together, or confining sex work to isolated areas), rendering persons in sex work more vulnerable to violence and other forms of abuse.

Other legal regimes are more rights and health promoting, particularly as they move toward greater integration with general labour regimes, so that the system ensures access to insurance and other social benefits, and ensures health and safety conditions akin to those found in other service sectors. Other key aspects of health and rights-promoting legal regimes for sex work are ensuring access to health services for a full range of mental and physical health concerns (and not solely for sexually transmitted diseases), and guaranteeing rights to organize and access to the courts to vindicate a full range of rights.

The historical usage of the word ‘trafficking’ to mean all prostitution has produced a great deal of confusion in the analysis of the relationship between law, human rights, health and sex work. The 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others equated all movement into prostitution with the international crime of trafficking. As noted, however, this Convention has been supplanted in practice by the 2000 Palermo Protocol, which focuses on trafficking as a crime defined by its use of force, fraud and coercion into a range of labour sectors, including but not limited to prostitution. (For persons under 18, however, movement into prostitution is deemed ‘trafficking’ even absent any force, fraud or coercion.) Trafficking as defined in the Protocol is a serious human rights violation, and it has serious effects on health. When the circumstances of persons in sex work fit the crime described in the Protocol, it is critical that authorities respond as they would to any other trafficked person: with full regard for their rights and with concern for the abuses they have suffered, including health consequences. Trafficked persons, including persons trafficked into prostitution, may face extreme abuse in their working conditions, lack of pay, inability to leave, and threats to selves and family members. Trafficked persons in sex work, therefore, are rarely able to organize, employ health promotion and disease prevention measures, and make decisions about clients, which lie at the core of successful sex worker-led health and rights based efforts.
That said, for the purposes of the present study, it is critical to distinguish sex work/prostitution – where adult individuals offer sexual services in exchange for money and, in this process, may or may not be subjected to difficult working conditions, discrimination, or abuse – from sexual trafficking – which is a gross human rights violation involving coercion, violence or threat. Merging the two terms not only denies sex workers their right to self-determination and agency, ignores their realities, and endangers those engaged in it, but also risks making types of trafficking (other than sexual) invisible and thus leaves victims of non-sexual trafficking without proper protection. Such confusion also produces ineffective legal and health interventions such as ‘raid and rescue’ of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.

As noted, there is agreement that persons under 18 should not engage in sex work. More difficult to formulate, however, are the legal and policy responses that constructively engage with teenagers engaged in survival sex or other forms of regular or irregular sex work, not infrequently occasioned by ejection from their natal homes or attempts to escape abuse. At minimum, they need access to services to help them protect their health, as well as education, housing and support that allows for rapid exit from sex work. Many health programmes which target young persons aged 14–24 fail to offer services to address the needs and contexts of the diversity of young people in sex work, including transgender or homosexual youth who may have escaped violence in their homes or communities.

2. Council of Europe

Non-binding Council of Europe documents

As discussed in Chapter 5, the Council of Europe has expressed itself strongly against forced prostitution and trafficking. In contrast, it has issued few statements on sex work in general. The most substantive existing document, while only a recommendation and therefore of weak legal authority, is worth exploring in some detail given that regional standards are otherwise lacking.

In its Resolution 1579 (2007), Prostitution – Which stance to take?, the Assembly condemns trafficking, forced prostitution, and child prostitution. It notes that approaches to adult prostitution vary widely in the region, with different variations of what this document calls ‘prohibitionist,’ ‘regulationist,’ and ‘abolitionist’ approaches. It defines ‘prohibitionist’ as countries that prohibit prostitution and penalize prostitutes and pimps alike, ‘regulationist’ as countries that seek to regulate rather than abolish prostitution, and ‘abolitionist’ – the majority of countries in the region – as states that seek to abolish prostitution by penalizing procurers and pimps rather than the prostitutes themselves. Countries that attempt to reduce the demand for prostitution by penalizing the client, with Sweden leading the way, are called ‘neo-abolitionist.’

The Recommendation notes that in many prohibitionist and abolitionist countries, prostitution is forced underground. This leads to a greater risk that organized crime will become involved, and that prostitutes will be more vulnerable, not least from a public health perspective. The document highlights the advantages of the regulationist approach, since it will grant prostitutes labour rights, access to medical care, etc, thus making prostitutes less dependant on pimps and criminal networks. The document also recognizes that not all prostitutes will have real access to these rights, and that there tends to be a gap between theory and practice in regulationist countries. It suggests that with regard to the recognition of personal vulnerabilities that may have led individuals to prostitution, the neo-abolitionist approach (penalizing the client, not the prostitute) has advantages.

The Assembly recommends Council of Europe member states to formulate an explicit policy on adult prostitution, avoiding double standards and policies that force prostitutes underground or under the influence of pimps. Instead, member states shall seek to “empower” prostitutes (para 11.3). This will happen in particular by the following means:

- refraining from criminalizing and penalizing prostitutes and developing programs to help prostitutes leave the profession if they want to;
- addressing personal vulnerabilities of prostitutes (such as drug abuse, mental health problems, low self-esteem and history of child neglect or abuse);
- addressing structural problems seen as leading to prostitution (such as poverty, political instability, gender inequality, etc), including in prostitutes’ home countries;
- ensuring that prostitutes have access to safe sexual practices and enough independence to impose these on their clients;

865 See, CRC, and First OP, ILO worst forms of child labour etc.
866 Adopted on 4 October, 2007.
▪ respecting the right of prostitutes who freely choose their profession to have a say in policies that concern them;
▪ ending the abuse of power by the police and other authorities towards prostitutes, by designing special training programs for these authorities.

3. European Union

**European Court of Justice judgments**

In a few cases, the European Court of Justice has addressed discrimination on the basis of the nationality of sex workers, and whether sex work should be perceived as a legitimate economic activity under EU law. While these issues, strictly speaking, are economic rather than health- or rights-focused matters, it is relevant to briefly examine these cases here, since non-discrimination and recognition of sex work as legitimate work often imply the right to social security, health insurance, and police protection.

In the joined cases *Adoui and Cornuaille v. Belgian State*\(^\text{867}\) the Court examined whether sex workers could be legally expelled under EC law from the territory of a member state because of their past work in prostitution. Two French women who had engaged in prostitution had been denied residence permits in Belgium on the grounds that their conduct was considered contrary to public policy. The issue before the Court was whether they could be legally expelled on the grounds of personal conduct under the EC Treaty. In Belgium, prostitution as such was (and is) not prohibited, though certain activities linked with prostitution were illegal.

The Treaty allows for the exception to the rule of free movement of persons on the basis of “public policy, public safety and public health” (former Art 46, now Art 56). The Court stated that Community law does not impose on member states a “uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy” (para 8). However, it found the Belgian expulsion illegal on discrimination grounds: when a state does not adopt repressive or otherwise genuine and effective measures to combat a certain conduct on part of its own nationals, it cannot restrict the admission on other nationals on the ground of that same conduct.

The Court also examined whether individuals engaged in prostitution could be expelled because they “could promote criminal activities” without evidence that the person in question had any “contacts with the under-world.” With reference to Directive 64/221/EEC on freedom of movement, the Court reiterated that measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. Thus, “guilt by association,” in this case systematic expulsion on the assumption that prostitution may or will be linked to criminal activity, cannot be accepted (para 11).

It is noteworthy that the Court did not state that sex work should be legal, nor did it explicitly characterize it as ‘work’ or rule that sex work should not be considered as against public policy. The issue was primarily that of the right to equal treatment for nationals of other member states as for nationals of the host state – a typical EU topic. However, it is relevant that the Court treated the two women as if they were workers, for example, using the term ‘seeking employment’ when discussing the procedure by which the two plaintiffs could be re-admitted to Belgian territory.

In *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*\(^\text{868}\) the plaintiffs were two Polish and four Czech nationals, all of whom wished to establish themselves in the Netherlands as window prostitutes. They had been denied residence permits by the Dutch Secretary of State on grounds of public interest. Poland and the Czech Republic had Association Agreements with the EC at the time, providing for the right to freedom of movement for workers and freedom of establishments in the EC for nationals of those countries.

The first relevant issue was whether prostitution was to be seen as an economic activity pursued in a self-employed capacity within the meaning of EC law and the relevant Association Agreements. The second relevant issue was whether the Netherlands could exclude prostitution from the notion of economic activity for reasons of, *inter alia*, public morality.

The Court noted that in the relevant Association Agreements, the list of economic activities was non-exhaustive, and held that prostitution is an “activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods.” Thus, prostitution was to be seen as an economic activity in the meaning of the Treaty and the Agreements.

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\(^{867}\) C-115 and 116/81, decided on 18 May 1982.

\(^{868}\) Case C-268/99, decided on 20 November 2001.
As regards the second issue, the Court reiterated its finding from Adoui and Cornualle, that the host state cannot deny residence permits on public policy grounds if it has not adopted effective measures to combat activities of the same nature when pursued by its own nationals. In conclusion, since prostitution was an accepted activity for nationals of the Netherlands, it could not be regarded as constituting a genuine threat to public order within the context of the relevant Agreements.

Finally, in Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie, the main issue was whether Dutch authorities could deny a permanent residence permit to non-nationals who wished to work in a self-employed capacity in the Netherlands, when they had not previously had temporary residence permits. The plaintiffs were six women from Bulgaria, Poland, and Slovakia who wished to work as prostitutes; a fact only known from the opinion of the Advocate General. Thus, the nature of the activity in which they wanted to engage – sex work – is not discussed by the Court. Rather, the Court accepts without hesitation that the six women wished to “work […] in a self-employed capacity” (para 2 and 9), and “with a view to establishment [in the Netherlands] as […] self-employed person[s]” (para 17). This demonstrates that the Court has incorporated and expanded its ruling from Jany. Partially, this can be explained by the fact that the type of work involved was not discussed by the referring Dutch court, which in itself indicates that the Dutch court has accepted previous findings of the Court in terms of how to perceive sex work.

4. Domestic legislation and case law

In the Netherlands, regulations on sex work aim at drawing a sharp line between involuntary prostitution, on one hand, and voluntary, adult sex work, on the other. Street prostitution and self-employed prostitution have never been illegal. Brothels were banned, but since the 1970s, prostitution businesses, like the famous shop windows of Amsterdam's Red Light District, sex clubs, and other forms of indoor prostitution were tolerated by the authorities as long as they were not linked to other criminal activities. There was also no strict control over migrant sex workers, who could operate fairly freely, even when they lacked documentation. However, sex workers could not enjoy labour rights available to other Dutch workers.

On 1 October 2000, the Dutch Criminal Code was amended in the sense that the formal ban on brothels was lifted and the prohibition of pimping was repealed. Thus, the new legislation made it legal to run a brothel and to solicit clients for a prostitute. Among the objectives of this legal reform were to control and regulate the employment of prostitutes through a municipal licensing system; to protect minors from sexual abuse; to protect the position of the prostitutes; and to reduce prostitution by foreign nationals residing illegally in the Netherlands. Legally, the term ‘making oneself available to perform sexual acts with a third party in return for payment’ is used to describe sex work in the Dutch context, but official sources use the term ‘prostitution’ for short. While formally legalizing voluntary exchange of sexual services for money, the reform simultaneously sharpened legal provisions against sexual exploitation and trafficking. The new Article 250a of the Criminal Code prohibited the exploitation of prostitutes and other forms of sexual exploitation, including inducing minors to engage in prostitution. Article 250a has since been replaced by the wider Article 273f, which includes all forms of trafficking of persons and incorporates Dutch obligations under the Palermo Protocol.

The new regime means that the Working Conditions Act and most other legislation that applies to the

869 Case C-327/02, decided on 16 November 2004.
871 This chapter draws its information primarily from secondary sources. This is due partly to language difficulties, as few of the Dutch regulations are available in other languages than Dutch, and partly to the fact that most provisions in this field are passed on local level. Thus, national legislation is to a large extent lacking, see further below.
877 In current version valid from 1 July 2009. Available in unofficial translation.
business sector in general now cover prostitution as well. Operating a brothel is now a legal trade requiring a license and sex work is a profession with all rights (social insurance) and obligations (paying taxes) connected to legal work. Sex workers and brothel owners are supposed to negotiate working conditions and labour regulations.878

The legal reform made sexual exploitation and trafficking a matter of criminal law, primarily through the application of Article 250a/273f of the Criminal Code, while regulation of voluntary prostitution became an administrative matter, primarily carried out on the local level. No national legislation was passed to regulate prostitution; the central government has only a guiding function and sets the framework in the fields of criminal law, immigration law, and public health. Instead, zoning policies and regulation of brothels are all adopted on municipal levels.879 To enable municipalities to do so, a new article was introduced in the Local Authorities Act (Article 151a). This provision creates the possibility for the municipal council to adopt a local by-law, regulating businesses that provide the opportunity to have sexual relations with a third party in return for payment.880 This means in practice laying down conditions for the licensing of brothels, which includes both regulations on law and order – including fire and hygiene provisions, etc. – and provisions to improve working conditions for prostitutes. Almost all municipalities have introduced a licensing obligation.881 To support the municipalities, the Ministry of Justice and the Association of Dutch Municipalities (VNG) created a model by-law for municipal licensing; however, local governments are not obliged to adopt this model. According to an early study, 94% of the municipalities have adopted provisions from this model by-law more or less unchanged.882 The Dutch Minister of Justice stated at the time of the reform that the decentralized nature of the regime does not intend to give municipalities the freedom to bar prostitution on moral grounds; complete banning of prostitution could in the opinion of the Minister conflict with the right to free choice of work, as guaranteed by the Dutch Constitution.883

In 2009, a bill was elaborated by the Dutch government, proposing that a national law would replace the municipal by-laws and impose national standards for licensing of sex establishments. It would also make registration of prostitutes mandatory, possibly with the consequence that it would be a punishable offense to work without a registration number.884 As of late October 2009, the bill had not yet been presented to the Dutch Parliament.

So far, local authorities are responsible for ensuring that prostitutes have easy access to health care, while employers and the prostitutes themselves are responsible more concretely for health and working conditions. Employers’ responsibilities include pursuing a safe sex policy and encouraging prostitutes to undergo regular check-ups for STIs. There are no mandatory medical check-ups imposed on sex workers.885

A great number of enforcement mechanisms are in place to monitor the compliance with the rules on prostitution. These include the police and the Public Prosecution Service, the Labour Inspectorate and the Social Information and Investigation Service to control and enforce national legislation, but also special municipal enforcement bodies such as the Municipal Medical and Health Service and municipal building and housing inspectorate departments.886 The model local by-law contains the requirement that in order for the establishment to be granted license, no illegal migrant may work there; consequently, immigration authorities also play a key role in monitoring compliance with the regulations.887

Commentators have pointed to problematic aspects and unintended side effects of Dutch regulations on sex work. One such problem regards undocumented migrant sex workers: since the reform resulted in stricter migration controls, many undocumented sex workers have gone underground. Needless to say, a movement underground will lead to extreme vulnerability of this group, with potentially serious

879 As explained by the National Rapporteur (2002). For this reason, the Dutch situation can only be described in general terms in this report; since policies vary between the municipalities focus has been placed on the national framework and some commonalities between the municipal regulations as described in reports.
880 As explained by the National Rapporteur (2002), p. 19.
882 Ibid, p. 20.
887 Ibid.
health effects. Furthermore, the municipal by-laws have been criticized for the onerous requirements small businesses must meet in order to be granted licenses; this, according to commentators, has made it impossible for many self-employed sex workers or small-scale brothels to operate legally.\textsuperscript{888} Some commentators express concern that the regulations have created a two-tiered system, where working conditions have improved in the licensed brothels, but where sex workers in illegal brothels, including many migrant sex workers, are considerably more vulnerable to abuse, violence and labour exploitation than before.\textsuperscript{889} The proposed mandatory registration of sex workers also raises concern from a privacy point of view and may lead to a growing number of sex workers going underground.

In Germany prostitution is not only decriminalized but also regulated in a federal law, the \textit{Act Regulating the Legal Situation of Prostitutes (Prostitution Act)}.\textsuperscript{890} Before 2002, providing sexual services in exchange for payment as such was not illegal, but the activity was heavily restricted by several different legal regulations on activities surrounding prostitution.

The Prostitution Act is a contract law, with merely three articles regulating the contractual relationship between the prostitute and her or his client, on one hand, and the contractual relationship between the prostitute and the pimp/brothel owner, on the other. Its political aims were wide, however, and had a clear rights-focus. According to the explanatory Memorandum to the Act, the “goals and expectations” were to improve the legal status of prostitutes; to abolish social discrimination against prostitutes; to abolish poor working conditions in the sex industry; to eliminate the basis for criminal activities that often surround prostitution; and to make it easier to exit prostitution for those who wish to do so.\textsuperscript{891}

According to Article 1, when sexual activities have been undertaken in return for a previously established remuneration, this creates an enforceable right to payment. This means in practice that the ‘immorality clause’ – that previously made such agreements legally invalid and thereby unenforceable – has been abolished. Now agreements between a prostitute and a client, on one hand, and between a prostitute and her pimp, on the other, have legal validity. According to commentators, this removal of the ‘immorality label’ is the main change that came with the law – and it was the expectation of the legislature that by stating that prostitution was no longer to be deemed immoral from the point of view of contract law, this would lead to prostitution no longer being judged immoral in other areas of the law.\textsuperscript{892} In practice, after rendering a sexual service the prostitute can claim payment from her client (a right that can be enforced in law) (Article 1, 1st sentence); similarly, the prostitute can claim payment of a previously agreed remuneration from the brothel operator if she was present in the establishment and available for performance of sexual acts for a specific period of time (2nd sentence). Importantly, clients and brothel owners/managers do not have the right to demand that a (specific) sexual service be performed. This is intended to protect the sexual self-determination of prostitutes.\textsuperscript{893}

Article 2 stipulates that only prostitutes themselves have the right to take action against clients to enforce payment. Thus, the right to payment cannot be transferred to third parties. This is intended to prevent prostitutes from becoming dependent on brothel owners/managers or pimps. Article 3 sets forth that prostitutes and brothel operators can agree on an employer/employee relationship; in this way prostitutes can access the statutory social insurance scheme which gives them rights to health insurance and pension funds. However, the same Article implies that even when they are in an employment situation, prostitutes should retain a high degree of autonomy (\textit{inter alia} with regard to choice of client and type of sexual service).\textsuperscript{894}

With the passing of the Act followed amendments made to the Criminal Code, decriminalizing the action called ‘promoting prostitution.’ Pimping is now a criminal offence only if it includes exploitation, or if it in any way impairs the prostitute’s personal or economic independence, in accordance with Article 181a of the Criminal Code.

\textsuperscript{888} Ibid.


\textsuperscript{890} BGBl. I S. 3983, passed on 20 December 2001, in force since 1 January 2002. Only available in German.


\textsuperscript{892} Ibid, p. 11.

\textsuperscript{893} As implicit in Article 1, according to Kavemann and Rabe (2007), p. 11.

\textsuperscript{894} According to the explanatory Memorandum accompanying the Act; as explained by Kavemann and Rabe (2007), p. 12.
Germany's Prostitution Act, then, is limited in scope and does not entail any provisions on licensing, registering, or health requirements. This is because it is a federal law; many legal matters related to prostitution are under the jurisdiction of Germany's federal states. For example, protection of public safety and order is a state matter, such that each German Land (state) has its own police law. Even local authorities have influence over the regulation of prostitution; all zoning decisions will be taken locally through by-laws drawn up by municipalities or local authorities.895

Commentators have noted that the German law has failed to solve some of the contentious issues that arise in relation to sex work and that have impact on the health and rights of sex workers. Many of these are similar to the problems encountered in the Netherlands. According to one commentator, the Act only considers documented migrant sex workers, thus leaving undocumented migrant sex workers as vulnerable as previously.896 Regardless of whether this is made explicit in the legislative history of the Act, it is hard to imagine that an undocumented sex worker would bring a claim against a client or brothel operator, thereby making herself known to the authorities. Obtaining an entry visa for the purpose of working as a sex worker is not possible.897 Furthermore, many prostitutes and brothel operators prefer not to conclude an employment contract (which, as described above, is a precondition for access to social insurance). The reasons are preserving anonymity and the fear of losing sexual autonomy (on the side of prostitutes), restricted right to give instructions to employees (on the side of brothel owners), and financial losses (on both sides).898 Finally, the expectation on part of the government that other legal changes would follow on the state level in accordance with the principles that underpin the Prostitution Act has not fully materialized. Correlating legislation in the fields of tax law, trading law, building and planning law, migration law, and zoning by-laws have yet to be passed in many states; similarly, the ‘immorality’ label on prostitution persists in case law and state legislation.899

As seen, Germany recognizes prostitution as a valid economic transaction. A similar view, though playing out in the field of criminal law, was recently illustrated by a court case in Italy, where prostitution is unregulated (that is, selling and buying sexual services is not prohibited but also not regulated). Italy's Supreme Court established in its decision No. 8286/2010900 in March 2010 that having sexual intercourse with a prostitute and refusing to pay her is to be equated with sexual violence. The Court upheld a decision from the Court of Appeal in Genova in which a man had been convicted for sexual violence for having refused to pay a prostitute after the sexual act was concluded. The Court held that the man was fully aware of the abuse he was committing, because it was proven that the woman had consented to the act on the condition that she would be awarded payment of an established amount. The consent of the sex worker was made invalid by the fact that the man did not honour his commitment. The act thus retroactively became non-consensual sex, and so was classed as sexual violence.

In Hungary, some versions of sex work are legal, but surrounded by a wide array of restrictions that raise concerns with regard to the health and rights of sex workers. Self-employed sex workers were legalized in 1993, and Section 204 of the Hungarian Criminal Code penalizing prostitution was repealed accordingly. Promoting or exploiting prostitution remains a crime (by **inter alia** running a brothel or promoting prostitution in other ways; living on earnings of a prostitute; and pandering, through soliciting another person for sexual acts in order to make a profit).902 Previously prostitution was also considered an administrative offense; this offense was abolished in 1999 in Act LXXV of 1999 on Organized Crime.903 According to this law, a prostitute is a “person who offers sexual services in exchange for remuneration, regardless of source and timing of such remuneration” (Section 4E). She or he is permitted to offer sexual services to, and accept such offers from, persons over 18 years (Section 9(1)). Nevertheless, the Act LIX of 1999 on Violation of Administrative Rules still makes certain acts related to prostitution administrative offenses; these include cases in which “the invitation to engage in an act of prostitution is offensive” or when the prostitute lacks a medical certificate.904

897 Ibid.
899 Ibid, p. 27, p. 31, and Service4Sexworkers.
900 Supreme Court, Decision no. 8286/2010, 3 March 2010. Available in Italian only; content explained by Stefano Fabeni.
901 Excerpts of the Criminal Code relating to prostitution available in unofficial English translation.
902 Sections 205–207, Hungarian Criminal Code.
903 Section 4E and 9. Only available in Hungarian, translation by Hungarian lawyer and researcher Adrienn Esztervari.
904 Section 143. Excerpts available in unofficial English translation.
Violating these provisions may result in a fine or, when relevant, expulsion. The Decree 41/1999 (IX.8.) of the Minister of Health specifies health requirements for prostitutes, making it mandatory to undergo health checkups every three months for the detection of sexually transmitted infections. The regular checkups entitle the prostitute to the corresponding health certificate, which is a requirement for legally engaging in sex work. A recent survey indicates that most sex workers lack the medical certificate, primarily due to the fact that the mandatory screenings are sparsely available and costly for those who are not covered by national health insurance, and thus not available to most migrant and undocumented sex workers.

Tax legislation requires that prostitutes work on a self-employed basis, pay taxes and make regular contributions to pension funds and the national healthcare system. In order to obtain a license for a sex business activity, the prostitute must provide proof that he or she has no criminal record; a current lease for a flat; written approval from the local government; a formal school report; and a birth certificate. When the prostitute has an entrepreneur license, this gives access to national health care services, sickness allowance, pension, home loan, etc. The entrepreneur license does not indicate the type of business activity performed; from this can be concluded that there is no official registration of sex workers in Hungary.

Zoning laws are determined by local governments. So-called tolerance zones, where prostitution can be practiced, have to be at a certain distance from parliamentary buildings, public administration, judicial bodies, prosecution services, diplomatic and consular missions, schools, churches, cemeteries, and transport terminals. There is strong police control over street-prostitution in order to ensure that sex workers are following the rules that govern their activity, regardless of whether practiced by migrant or non-migrant sex workers. In practice, many local authorities have simply failed to designate the tolerance zones; therefore, many sex workers effectively work illegally.

In Turkey the legal situation for prostitution is in some perspectives the opposite to that of Hungary; in Turkey, street-prostitution is illegal while licensed brothels are legal. The Turkish General Hygiene Law provides that licensed prostitutes may operate in approved buildings known as “General Houses.” The Government decree General regulations on prostitutes and brothels in order to fight against sexually transmitted diseases contains licensing requirements and licensing processes for brothels, as well as rules for issuing identity cards for prostitutes. Such identity cards give them the right to some free medical care. According to the Social Insurance Act (506/1964), prostitutes covered under the General Hygiene Law have the right to social security and those persons who employ them are considered employers.

According to the above-mentioned government decree, in order to receive a license the prostitute must be a Turkish citizen, over 21 years old, unmarried, have at least graduated from primary school, and have the ability to freely make a decision (Art 21). Prostitutes working in official brothels must register with the municipality and acquire an ID-card that indicates the dates of their health checks (Art 22). It is mandatory for registered prostitutes to undergo bi-weekly health checks for STIs (Art 25). The police are authorized to check the documents of registered prostitutes to determine whether they are practicing in Turkey.
have been examined properly and, if not, to ensure that they see the health authorities. According to Article 129 of the General Hygiene Law, if a prostitute is diagnosed with an STI, she will be prevented from working and treated, if necessary with force.

Incitement to prostitution and sexual exploitation are criminalized. Article 227 of the Turkish Penal Code penalizes activities surrounding prostitution, such as encouraging another to become a prostitute, facilitating prostitution, or sheltering a person for this purpose. Any act aimed at benefiting from the income of a person engaged in prostitution, totally or partially, is considered encouragement of prostitution. According to Section 227(8), a person who “acts as a prostitute” shall be subjected to treatment or psychological therapy. It is unknown to the author if such treatment is mandatory or if it simply should be made available.

Sweden was the first country in the world to penalize only the purchase of sexual services, thus criminalizing the client instead of the sex worker. The Act (1998:408) that Prohibits the Purchase of Sexual Services entered into force on 1 January, 1999, and was part of a larger package of laws on violence against women. In 2005, this law was repealed and the same provision was instead transferred to the general Penal Code, in the chapter named “On sexual crimes.” The provision now reads:

A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months.

The provision of the first paragraph also applies if the payment was promised or given by another person. (Chapter 6 §11, emphasis in original)

Attempt is criminalized in accordance with general legal principles. Procuring sexual services is also penalized, defined as “promot[ing] or improperly financially exploit[ing] a person’s engagement in casual sexual relations in return for payment” and may result in up to four years imprisonment (Chapter 6 § 12, 1–2 sentence). Gross procuring, punishable with up to eight years in prison, involves large-scale activity, significant financial gain, or “ruthless exploitation of another person” (Chapter 6 § 12, 3 sentence).

According to the legislative history of the Swedish law, the objective of the law penalizing the customer only was twofold: on one hand to be norm-setting, and on the other to clarify that prostitution is not socially acceptable. The purpose was not to punish the (female) prostitute. For potential clients the law should have a deterrent effect, but would also serve as a means to deter women from engaging in prostitution. The reason to criminalize solely purchase was explained as follows:

Even though prostitution as such is not a desirable societal phenomenon it is not reasonable to also criminalize [the woman] who, at least in most cases, is the weaker party who is exploited by others wanting to satisfy their sexual drive. It is also important to motivate prostitutes to seek help to get away from prostitution, so that they do not feel that they risk any kind of punishment for having been active as prostitutes.

The wording of the law is gender-neutral (penalizing both women and men clients, buying sex from male and female prostitutes) but is placed within a legal and philosophical framework of male violence against women and rests on assumptions of male dominance and female subordination.

915 Private translation.
917 Turkish Penal Code, Law No. 5237, passed on 26 September 2004.
918 Only available in Swedish; no longer in force (see below).
921 Legislative history to the 1999 law, Proposition 1997/98:55, p. 100, only available in Swedish.
922 Ibid., p. 104. Author’s translation.
relation’ in the meaning of the law refers primarily to sexual intercourse, but other forms of sexual interaction are also included in the scope of the law. ‘Payment’ includes both economic reward and other kinds of rewards, such as narcotics or alcohol.\[^924\] Normal criminal law principles on aiding and abetting do not apply to the prostitute; thus, she cannot be found an accomplice to the criminal offense committed by the client.\[^925\]

On January 1, 2009, a law very similar to the Swedish law was introduced in Norway. The Norwegian law goes one step further than its Swedish equivalent in that it also criminalizes sexual services purchased by Norwegians abroad.\[^926\] Iceland followed suit in April 2009, making purchase of sexual services punishable with up to one year’s imprisonment.\[^927\]

5. Concluding remarks

European provisions on sex work vary extensively. They go from absolute prohibition, such as in Albania, Lithuania, Romania, and Serbia, to regulation, including in Germany, Hungary and Turkey and the Netherlands, to semi-abolition, such as in Sweden, Norway and Iceland. In many European countries, among them the United Kingdom, Ireland, France, Spain and Portugal, the exchange of sex for money is not prohibited, but organized activities surrounding such exchange are illegal and prostitution is not regulated.

Sex work brings to the fore a multitude of issues related to sexual health and human rights. Several of these issues are addressed in the Council of Europe Resolution 1579(2007). This document focuses on the empowerment and right to self-determination of sex workers, and is pragmatic in terms of what approaches to use in order for their rights to be best respected. The document highlights health aspects of sex work, and stresses that ‘prohibitionist’ and ‘abolitionist’ models may increase health risks for sex workers both with regard to violence (when sex work is forced underground and sex workers become more dependent on pimps and unsafe work conditions) and with regard to STIs (as sex workers will have less leverage concerning safe sexual practices if not allowed to operate openly.

Examining the three cases from the European Court of Justice, it is interesting to follow the development of the Court’s understanding of the nature of sex work. Its case law illustrates that it has increasingly accepted that sex work is an activity protected under EU regulations. These decisions are important in that they contribute to the normalization of sex work and thereby to the acknowledgment that those engaged in it merit the same level of protection and rights as others providing services for money.

The countries that have regulated sex work also show important differences. Laws vary both in detail and hierarchical level of regulation, and in relation to underlying principles of state involvement with the activity. The Netherlands and Germany both begin from a perspective that emphasizes the sexual self-determination of the sex worker. This perspective brings the logical conclusion that the sex worker has a right to provide sexual services, to work in organized establishments, and to be a part of the formal economy, but also to be protected from violence and abuse and to be able to exercise influence over what kind of services to offer and to whom. This perspective has many advantages, not the least with regard to health: the recognition of sex work as a legal activity helps protect sex workers from the worst kinds of exploitation and violence, and their inclusion in the formal economy gives them access to health care and preventative measures against STIs. However, the Dutch example also shows that over-regulation can be a problem for the rights of sex workers, not least in relation to the rights of undocumented migrants, and with regard to the autonomy and right to anonymity of the sex workers more broadly. While the German legislature made an explicit attempt to erase the label of ‘immorality’ from economic transactions around sex, commentators note that the activity is still largely perceived as immoral by the public, and is defined as such in much of surrounding law. This social stigma, in combination with the strong culture of illegality and criminal activities that tends to surround sex work, makes legal reform, taken by itself, an insufficient tool to achieve real change for sex workers’ rights.

The Turkish and, to some extent, the Hungarian examples, on the other hand, offer a model which is less based on sexual self-determination and more on a notion of prostitution as an undesired but unavoidable social phenomenon. Provisions from these two countries illustrate a level of regulation


\[^925\] Ibid.


\[^927\] According to information from Icelandic Centre for Gender Equality, at http://www.jafnretti.is/jafnretti/?D10cID=ReadNews&id=523. Last visited on 12 April 2010.
so high as to raise concern from a privacy point of view and to have many negative repercussions for the rights of sex workers. Particularly troubling are mandatory health check-ups that can be highly intrusive and humiliating. Their mandatory and imposed nature has the consequence that many sex workers will try to avoid them which, as the Hungarian example shows, often has the consequence that sex workers end up working illegally and therefore outside of any social security and health protection networks. The Turkish provision giving the police the power to force sex workers to undergo health check-ups is especially worrying. Such a provision creates opportunities for corruption, blackmauling and other serious abuses of police powers, such as sexual abuse and harassment.

Provisions that impose health screening illustrate a wider trend, which is to perceive sex workers (but not clients) as carriers of disease and thereby ‘dirty’ in the eyes of society. This by itself may have a heavily stigmatizing effect. On the other hand, administrative rules in many countries impose health screening on other workers too (inter alia on those handling food). The questions are which authority will grant the sex worker’s health certificate and monitor its accuracy, and by what process will it be issued. If health authorities are responsible and the process is the same as for other workers, a mandatory health certificate may be acceptable. However, if the police, as in Turkey, have powers over this issue, the risk for abuse and continued stigmatization is imminent.

As far as the Swedish, Norwegian and Icelandic laws are concerned, these raise both different and similar concerns. The laws that ban the purchase of sexual services have a very different justification from laws that penalize the sex worker, instead shifting the focus to the customer as the wrongdoer. However, the effect of the laws tends to be very similar; stigmatizing persons in sex work and forcing the activity underground. If one assumes that sex workers (like other adults) have a certain degree of agency, it is troubling to treat all (women) sex workers as victims. If a person has chosen to sell sexual services or, at least, has determined that this is one possible way to make a living, then penalizing customers will have an indirect effect on her/his choice and ability to support her- or himself. Even though only one party to the transaction is under threat of prosecution, this threat will have the consequence that sex work will be a less visible and more stigmatized activity – thereby affecting the self-determination, sexual and otherwise, of the sex workers themselves. Furthermore, the regulation will force sex workers to operate more secretly in order to find clients. Many fear that this type of regulation will make sex workers more exposed to exploitation, less likely to report violence or threats, and more dependent on pimps or criminal networks in order to be able to continue making a living. Studies have shown that sex workers feel hunted by the police and dare not report abusive customers. In addition, the Swedish model – while in theory part of an official effort to strengthen women against male violence and dominance – bars sex workers from the enjoyment of social security benefits, union organizing, and a position in society from which they can express their needs and claim their rights. Social workers have found it more difficult to contact and help sex workers. Finally, the prohibition of sexual procurement makes it difficult for sex workers to work together, which increases their vulnerability to violence and abuse.  
