ECONOMIC ACTIVITY OR PUBLIC ORDER LIMITATIONS:

THE INTERPLAY OF THE REGULATION OF PROSTITUTION BETWEEN NATIONAL LAW, EU LAW AND EFFORTS TO COMBAT HUMAN TRAFFICKING

Abertay University

A thesis submitted for the degree of Doctor of Philosophy (PhD)

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Declaration

Candidate's declarations:

I, Alicia Danielsson, hereby certify that this thesis submitted in partial fulfilment of the requirements for the award of Doctor of Philosophy (PhD), Abertay University, is wholly my own work unless otherwise referenced or acknowledged. This work has not been submitted for any other qualification at any other academic institution.

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Supervisor's declaration:

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Certificate of Approval

I certify that this is a true and accurate version of the thesis approved by the examiners, and that all relevant ordinance regulations have been fulfilled.

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Dedication

This thesis is dedicated to the memory of my sister, Marie Danielsson.
Although she was one of the first to believe in my ability to succeed in law,
she was unable to see my graduation.
This is for her.

“The applause of a sister means more than that of the crowd. For she sees all that led up to your achievement.”
— Pam Brown

Glossary

Abolitionist Approach (to prostitution) - Approaches seeking to categorically criminalise one side of a prostitution interaction, often the procurement, in order to achieve the elimination of the entire transaction.

Approximation of laws - A unique obligation of European Union membership according to which countries seeking to join the EU must align their national laws to give effect to EU law contained in the *acquis communautaire*. It can also mean the progressive aligning process of laws to become more similar.

Area of Freedom, Security and Justice (AFSJ) - Article 3(2) TEU reads as follows: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

Black-Letterism – Another term for the doctrinal legal research method

Border Controls - Measures taken by a countries or blocs of countries in order to monitor their geographical borders for the purpose of regulating the movement of people, goods or animals.

Clients – See Commercial Sex User

Commercial Sex Provider (CSP) - An adult providing sex acts for remuneration

Commercial Sex Providers - Adults providing sex acts for remuneration.

Commercial Sex Purchaser (CSPu) – An adult who purchases sex acts for remuneration for a commercial sex user (CSU) with or without their knowledge.

Commercial Sex User (CSU) – Adults using the service of provided sex acts for remuneration.

Common Market - A free trade area with a degree of free movement of goods, capital and services.

Common prostitute - "Common prostitute" is a term historically used within the in law in England and Wales in reference to prostitution. It was first used within the Vagrancy Act 1824. Today the term is viewed

as archaic, offensive and stigmatising. Thus, in 2007 the UK government stated that it would be introducing new legislation and seek to eliminate the use of this term.

Consequentialism – (in relation to research ethics) involves making any decisions in relation to research methods with the anticipation of particular outcomes.[1] In particular, this includes balancing any risks with the potential benefits of research, while simultaneously avoiding any harm.

(in relation to jurisprudence) – Theoretical doctrine holding that whether an action is morally wrong is dependent on the way the action's consequences compare to the consequences of other alternative actions.

Countries of destination (for THB) – Countries into which victims of THB are trafficked.

Countries of origin (for THB) – Countries from which the victims of THB originate.

Criminal – Prohibited under criminal laws.

Criminalisation - The action of turning an activity into a criminal offence by making it criminal.

Cross-Border Crime - Any serious crime with a cross-border dimension committed at or along, or which is related to, the external borders.[2]

Decriminalisation - The action or process of ceasing to treat something as illegal or as a criminal offence.

Deterrence - The action of discouraging an action or event via the instilling of doubt or fear of resulting consequences.

Dialectic approach - Also known as the dialectical method, is at its base a discourse between two or more people holding different points of view about a subject but wishing to establish the truth through reasoned arguments.

Dialectics - the art of investigating or discussing the truth of opinions.

Direct Effect - Refers to the ability of EU member state nationals to enforce rights derived from EU legislation directly in national courts.

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[1] Gretchen B Rossman and Sharon F Rallis, *Everyday Ethics* (Routledge 2014) 5; Helen Kara, *Creative Research Methods in the Social Sciences* (Policy Press 2015) 37 – 38.

[2] 'Cross-Border Crime' (Frontex.europa.eu, 2020) <https://frontex.europa.eu/intelligence/cross-border-crime/> accessed 26 October 2020.

Doctrinal research - Doctrinal research is concerned with legal preposition and doctrines. It is research into the law and legal concepts.

Duty-Based Ethics - focus on the obligations researchers owe to others, this will not only involve ensuring any entitlements derived from the rights-based approach are safeguarded, but also entail other obligations towards the wider society, such as being truthful, respectful, and protecting innocent people

EU Common Market - Refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services.

Eurostat - the statistical office of the European Union

Forced Prostitution – Sex acts undertaken under coercion, violence or threat from a third party for remuneration. It is often understood to be a form of exploitation within human trafficking, which constitutes a gross human rights violation.

Forestructure of meaning -"meaning and a possibility that one brings into play and puts [the text] at risk."[3]

Fundamental freedoms - The "Four Freedoms" of the single market are: Free movement of goods; Free movement of capital; Freedom to establish and provide services.

Gender – A term describing the range of characteristics relating to, and differentiating between, masculinity and femininity. Depending on context, these characteristics can include biological sex, sex-based social structures, or gender identity.

Gender binary – The labelling system that labels people either as male or female

Gender identity - “one’s own personal experience with gender role and the persistence of one’s individuality as male, female, or androgynous.”[4]

Gender labelling systems – System whereby people are labelled in accordance with certain gender specific characteristics.

Gendered pronouns - Gender-specific personal pronouns, most commonly for the third-person singular within a language. In English the masculine pronoun is he (with objective derived forms constituting him, his and himself) and the feminine pronoun is she (with the objective derived forms being her, hers and herself). In English the

[3] Hans-Georg Gadamer, Truth and Method (Sheed & Ward 1975) 350.
[4] Mary Crawford, Transformations: Women, Gender & Psychology, 2Nd Ed (2nd edn, Content Technologies 2012) Chapter 5.

neuter pronoun is it (with the objective derived forms being its and itself).

Gross Domestic Product - A monetary measure used to describe the market value of all the final goods and services produced in a specific period of time.

Harmonisation - In relation to the European Union, harmonisation of law (or simply harmonisation) is the process of creating common standards across the internal market.

Hermeneutics - A branch of knowledge that looks into ideas of interpretation, especially of literary texts.

Human Development Index (HDI) - a tool based on the notion that the ultimate assessment criteria of a country's human development should factor in the people and their capabilities rather than merely economic growth factors

Human Trafficking – See **Trafficking in Human Beings**

Illegal – The state of something falling outwith the scope of legal regulation within a jurisdiction and, thus, not being covered by the laws of that specific jurisdiction.

Incapacitation - The response used when a person has been convicted of a crime. Via incapacitation of a convicted offender, the individual is prevented from committing future crimes due to their removal from society.

Individuals involved in prostitution – Term preferred by the Scottish government to describe CSPs

Internal market - The internal market of the European Union (EU) is a single market in which the free movement of goods, services, capital and persons is assured.

Intersexual individuals - Individuals born with any of several variations in sex characteristics including chromosomes, gonads, sex hormones or genitals that, according to the UN Office of the High Commissioner for Human Rights, "do not fit the typical binary notions of male or female bodies."[5]

Legal theory - Legal Theory, or Jurisprudence refers to the theoretical study of law

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[5] United Nations Human Rights Office of the High Commissioner, 'Fact Sheet Intersex' (OHCHR 2016) 1.

Legalisation - Usually refers to the process of making something previously deemed illegal, legal under the laws of a particular jurisdiction

Mental capacity - Requires a consenting agent to be in a physical and mental position to understand the matter being consented to

Nature paradigm - Disregard the cultural influences on the regulation

Procurement - The process of finding and agreeing to terms, and acquiring goods, services, or works from an external source, often via a tendering or competitive bidding process.

Prohibitionist Approach (to prostitution) – Approaches in which criminal laws are mostly utilised within the regulation of prostitution. This is based on the prevailing rationale that society constitutes the victim of prostitution and thus aims at the protection of public order, society, and public morals as its main objective.

Prostitute – see Commercial Sex Provider

Prostitution - Provision of sex acts for remuneration

Public interest - The welfare or well-being of the general public and society.

Public morality - Public morality refers to moral and ethical standards enforced in a society. This can be via law or police work or social pressure, and may be applied to areas such as public life, the media, and behaviour in public places.

Pull factors (towards Trafficking in Human Beings) - The motivations and reasons which attract people into THB

Punters - See Commercial Sex User

Push factors (into Trafficking in Human Beings) - A term used to describe the determining factors which direct people away from their previous circumstances, towards a life of exploitation and victimization through THB

Radical feminism - A perspective within feminism that calls for a radical reordering of society in which male supremacy is eliminated in all social and economic contexts.

Regulationist Approach (to prostitution) – An approach which will decriminalise and legalise the activity of selling and buying sex acts itself, however, while imposing certain restrictions, which differentiate prostitution from other transactions or businesses. Restrictions in this sense can involve, for instance, imposing age restrictions or introducing targeted health regulations.

Regulatory Approach – Legal directions taken by governments to restrict or direct activities of regulated parties via statutory and regulatory instruments, licenses, operating permits, codes of practice or approvals. These can be directed at an entire sector or individual industrial processes or across several sectors.

Rights-Based Ethics - posits that people have certain rights, which need to be respected and protected within research conduct

Sex Acts – Physical acts undertaken for the purpose of sexual stimulation.

Sex industry - An industry covering businesses that either directly or indirectly provide products or services related to sex or other related forms of adult entertainment.

Sex Services Sector – The economic sector within which prostitution services are provided and purchased. Primarily the services will involve prostitution, however, other related services aimed at sexual stimulation may also fall within this economic sector, such as erotic dancing, pornography or telephone sex services.

Sex Worker – See Commercial Sex Provider

Sexual Exploitation - The actual or attempted abuse of factors such as vulnerability, differential power dynamics or trust, for sexual purposes.

Sexual Services – Sex acts offered as a service to be provided in return for a form of remuneration.

Socio-Economic Research – Research within the social sciences which focus on the way economic activities affect and are affected by social processes.

Stereotyping – The act of generalising a group of people on the basis of set ideas that are held within society about the way people belonging to said group are thought to be like, regardless of whether this is factually the case.

Stigma – A form of societal lack of respect or bad opinion of a person or a group of people due to their actions or behaviours, which are not approved of by society.

Stigmatisation - The action of describing or regarding someone or something as worthy of disgrace or great disapproval.

Stockholm Programme - A working programme in which the key issues for the Area of Freedom, Security and Justice (AFSJ) aspects of EU legislation were stipulated for the period 2010–2014.

Street Prostitution - A form of sex work in which a CSP (see above) solicits CSUs (see above) from a public place, most commonly a street.

Supranationalism - A large amount of power given to an authority which in theory is placed higher than the state (in our case this authority is the European Union).

Supranationalization – The process of a system becoming supranational of laws

Supremacy of EU law - The primacy of European Union law (sometimes referred to as supremacy) is an EU law principle that when there is conflict between European law and the law of member states, European law prevails; the norms of national law have to be set aside.

Svea Court – Court of Appeal for Skåne and Blekinge, in Sweden

Third country nationals – Nationals of countries outside of the European Union

Trafficking in Human Beings - According to Annex I and II of Art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is attached to the UN Convention Against Transnational Organised Crime, "trafficking" is defined as:

> the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Universalism - Universalism is the philosophical and theological concept that some ideas have universal application or applicability.

Voluntary Prostitution – Prostitution carried out by people over the age of 18 who have chosen prostitution in the absence of threat or coercion as a method to gain remuneration of their own accord.

Abstract

This thesis examines the legal tensions that arise when different national regulatory models for prostitution and opposing views on their connection to or separation from Trafficking in Human Beings (THB) for the purpose of sexual exploitation are placed under a supranational legal framework, such as that of the European Union (EU).

Before investigating the legal dynamics in practice, the thesis explores the causes of the current diversity in regulatory approaches to prostitution across EU member states by setting out a philosophical roadmap to assist in the placing of views on prostitution that underpin the three main regulatory approaches, which here refer to regulationism, abolitionism and prohibitionism.

The findings are that minor philosophical discrepancies pertaining to individual elements of the understanding of prostitution, such as morality, harm or the preference for either autonomy or paternalism, can result in the adoption of opposing regulatory approaches in practice, which are based on the conceptual understanding of prostitution constituting an economic activity, a social harm or a public nuisance. Rawls' public reason theory is utilised as a tool to analyse the way moral views of the general public of each jurisdiction influence the regulatory approach adopted.

A comparative legal examination of the jurisdictions in three sample EU member states, Germany, Sweden and the UK, in respect to their national approaches to regulating prostitution and THB for the purpose of sexual exploitation is undertaken. Variations in the level of applicability of EU law are found to result from the differing underlying philosophical stances in each member state and the fact that the EU has openly supported the view that prostitution is an economic activity. It is further argued that opposing positions on the conceptual conflation or strict separation of prostitution and THB jeopardise the effectiveness of the individual national laws.

The thesis concludes that the neglect by legislators to consider the wider structures into which laws are placed, such as supranational or international legal frameworks, other areas of national law, philosophical foundations or societal understandings of terminology, can result in significant harm to Commercial Sex Providers or potential victims of THB for the purpose of sexual exploitation.

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Section A: Introductory Elements of the Study

Chapter 1

1 Introduction

Prostitution is often referred to as the “world’s oldest profession.”[1] Examples of this can be demonstrated by looking through recorded history. In ancient Babylonia women offered sexual services to strangers in worship ceremonies, in ancient Cyprus prostitution of women was a prerequisite for marriage and amongst ancient Jews, prostitution was accepted to be “without any moral condemnation.”[2]

Accordingly, prostitution is a phenomenon which has existed for thousands of years and it can be expected to continue to exist in the future. Even though prostitution is by no means a new phenomenon, it is still a subject matter which is highly debated with respect to the way it should be dealt with in society.[3] The core reasons stated within these debates include the close links prostitution has with organised crime, the exploitation of individuals including children, health and public safety issues, as well as issues related to gender inequality and human rights violations.[4] These debates,

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[1] R. B. Flowers, The Prostitution of Women and Girls (Jefferson, NC.: McFarland, 1998) 5.
[2] Ibid.
[3] Discussed in more detail in Chapter 4; Apart from this, see for example: Chrisje Brants, 'The Fine Art of Regulated Tolerance: Prostitution in Amsterdam' (1998) 25 Journal of Law and Society; Jane Scoular, 'What's Law Got to do with it? How and Why Law Matters in the Regulation of Sex Work' (2010) 37 Journal of Law and Society; Richard J. Evans, 'Postitution, State and Society in Imperial Germany' (1976) 70 Past and Present; Bebe Loff, Beth Gaze and Christopher Fairley, 'Prostitution, Public Health, and Human-Rights Law' (2000) 356 The Lancet.
[4] Sharanappa Talawar, 'Prostitution as an Organised Crime' (2012) 3 International Journal of Scientific Research; Tom Obokata, 'Combating Transnational Organised Crime through International Human Rights Law' (2019) 8 International Human Rights Law Review; Phil Hubbard, Teela Sanders and Jane Scoular, 'Prostitution Policy, Morality and the Precautionary Principle' (2016) 16 Drugs and Alcohol Today; Barbara G. Brents, 'Neoliberalism’S Market Morality and Heteroflexibility: Protectionist and Free Market Discourses in Debates for Legal Prostitution' (2016) 13 Sexuality Research and Social Policy; J. Swanson, 'Sexual Liberation or Violence against Women? The Debate on the Legalization of Prostitution and the Relationship to Human Trafficking' (2016) 19 New Criminal Law Review: An International and Interdisciplinary Journal; Department of Justice and Equality (Ireland), Discussion Document on Future Direction of Prostitution Legislation, 2012, p.4, available online: http://www.inis.gov.ie/en/JELR/Discussion%20Document%20on%20Future%20Direction%20of%20Prostitution%20Legislation.pdf/Files/Discussion%20Document%20on%20Future%20Direction%20of%20Prostitution%20Legislation.pdf, accessed: 17th September 2014; 'House of Commons - Prostitution - Home Affairs Committee' (*Publications.parliament.uk*, 2020)

in turn, contribute to further significant disagreement, for instance in relation to the understanding of sexual exploitation, and whether this is present when the acts of prostitution have been provided voluntarily.[5]

It is important to highlight that there is a significant distinction between voluntary and forced prostitution. On the one hand, voluntary prostitution is often understood to encompass the offer of sexual services by adult individuals in exchange for money.[6]

In relation to individuals below the age of 18 years, there is international agreement that prostitution involving these individuals is considered to be sexual exploitation regardless whether the sex acts were offered voluntarily or not due to the inability to consent to this.[7] On the other hand, forced prostitution is often understood to be a form of exploitation within requirements of the crime of trafficking in human beings (THB), which constitutes a gross human rights violation involving coercion, violence or threat.[8]

Without disregarding the fact that THB can also take place within national boundaries, it is often considered a serious cross-border crime. Thus, the European Union (EU) strives to prevent the misuse of the fundamental rights and freedoms provided by the EU and the Council of Europe in this manner. Strategies have been developed, which use practical and legal tools for fighting organised crime such as THB.[9] For instance, the EU's Directive 2011/36/EU on preventing and combating

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<https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/2607.htm> accessed 3 January 2020.

[5] See for example: Kathleen Barry, *The Prostitution of Sexuality* (New York University Press 1995) 277; Janice G Raymond, *Not a Choice, Not a Job: Exposing the Myths about Prostitution and the Global Sex Trade* (1st edn, Potomac Books 2013) xlii, xliii; European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Sexual exploitation and prostitution and its impact on gender equality, PE 493.040, Brussels 2014, chapter 1, available at: http://www.europarl.europa PE 493.040.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf, accessed: 17th September 2014.

[6] J. Westeson, Sexual Health and Human Rights in the European Region, International Council on Human Rights Policy (ICHRP), 2012, p. 194.

[7] International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182, 17 June 1999, C182, available at: http://www.refworld.org/docid/3ddb6e0c4.html [accessed 17 September 2014]; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 2 and Article 34; See also a more in-depth discussion of the role of consent in chapter 9.

[8] Westeson (n 6) 192.

[9] S. Body-Gendrot, M. Hough, K. Kerezsi, et al. (ed.), The Routledge Handbook of European Criminology (London: Routledge, 2013) 66.

THB and protecting its victims,[10] reiterates the need for a comprehensive approach by the EU, that brings together internal EU strategies and actions, as well as external dimensions which view THB as a global issue, thereby reaching out to third countries for action to combat THB on a global scale.[11]

From the perspective of international law, one of the more prominent documents is the Council of Europe Convention on Action Against Trafficking in Human Beings.[12] This regional human rights treaty seeks to

> […] prevent and combat trafficking in human beings, while guaranteeing gender equality [,] protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution [as well as] to promote international cooperation on action against trafficking in human beings.[13]

Arguably one of the most influential actions arising from the Convention is the monitoring mechanism it established, known as the Group of Experts on Action against Trafficking in Human Beings (GRETA), which consists of 10 to 15 members who are elected by the state parties.[14]

The Parliamentary Assembly of the Council of Europe has openly condemned trafficking, forced prostitution, and child prostitution. Thus, in its Resolution 1579 (2007) it recommends that "all necessary measures be taken to combat forced prostitution and trafficking in human beings."[15] This resolution is significant for this research project, as it highlights the links between forced prostitution and the regulation of voluntary prostitution and states that Council of Europe member states should "formulate an explicit policy on prostitution" which avoids "double standards

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[10] European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU.
[11] Ibid, para. 1-5.
[12] Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, CETS 197.
[13] Ibid, Article 1.
[14] The Council of Europe, 'GRETA' (*Action against Trafficking in Human Beings*, 2020) <https://www.coe.int/en/web/anti-human-trafficking/greta> accessed 18 August 2020.
[15] Council of Europe, Parliamentary Assembly, Resolution 1579 (2007) Prostitution – Which stance to take?, Assembly debate on 4 October 2007 (35th Sitting), s. 11.1.

and policies which force prostitutes underground or under the influence of pimps, which only make prostitutes more vulnerable."[16]

As will be demonstrated throughout this thesis, the regulation of voluntary prostitution sits uncomfortably between competences delegated to the national parliaments in accordance with the principle of subsidiarity,[17] and the inability of the EU to interfere in the national responsibilities of member states relating to the maintenance of law and order and the safeguarding of internal security, as per article 72 TFEU. The consequence is that there are no common provisions regarding prostitution at EU level. However, as will be discussed in chapter 8, there have been a few occasions in which the European Court of Justice (now the Court of Justice of the European Union (CJEU)) has given judgment on issues concerning voluntary prostitution. In the joined cases *Adoui and Cornuaille* v *Belgian State*[18] the court examined prostitution in relation to free movement and equal treatment provisions within the EU and whether prostitution would allow for the exception to the rule of free movement of persons on the basis of "public policy, public safety and public health."[19] Although the Court did not make a statement regarding the regulation and/or characterisation of prostitution *per se*, it is noteworthy that the Court treated the women as if they were workers.[20] In *Aldona Malgorzata Jany and Others* v *Staatssecretaris van Justitie*[21] it was 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."[22] Accordingly, prostitution was said to constitute an economic activity within the meaning of the Treaty and the relevant

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[16] Ibid, s. 11.3.
[17] European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, Article 5; European Union, Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ C 115, 9.5.2008, p. 206–209; European Parliament, Directorate General for Internal Policies (n 5) 7.
[18]Cases C-115 and C-116/81, *Adoui v Belgium and City of Liege Cournuaille v Belgium*, 18 May 1982: [1982] E.C.R. 1665, [1982] 3 C.M.L.R. 631.
[19] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, preamble at para. 22.
[20] Adoui and Cornuaille (n 18) 6-8.
[21] Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615.
[22] Ibid.

Association Agreements between the Czech Republic and Poland at the time.[23] Finally, in addition to this judgement, the question of the status of voluntary prostitution was not considered an issue in *Lili Georgieva Panayotova and Others* v *Minister voor Vreemdelingenzaken en Integratie*.[24] Here it was accepted without further elaboration that the sex services involved constituted "work […] in a self-employed capacity",[25] and "with a view to establishment [in the Netherlands] as [...] self-employed person[s]."[26]

The three mentioned cases highlight one of the key issues in the regulation of prostitution from an EU law perspective. On the one hand, voluntary prostitution is considered a subject matter which falls within the scope of national parliaments to regulate in accordance with articles 5 TEU and 72 TFEU. However, on the other hand, from an EU law perspective, it is a subject matter which can fall within the scope of free movement provisions within the common European market.[27] The Council of Europe Resolution 1579 (2007) acknowledges that the approaches adopted in the 47 member states of the Council of Europe (CoE) vary widely.[28] It is noted that three predominant approaches can be defined as: prohibitionist,

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[23] European Communities, Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part - Protocol 1 on textile and clothing products - Protocol 2 on ECSC products - Protocol 3 on trade between the Czech Republic and the Community in processed agricultural products not covered by Annex II to the EEC Treaty - Protocol 4 concerning the definition of the concept of originating products and methods of administrative cooperation - Protocol 5 on specific provisions relating to trade between the Czech Republic, of the one part, and Spain and Portugal, of the other part - Protocol 6 on mutual assistance in customs matters - Protocol 7 on concessions with annual limits - Protocol 8 on the succession of the Czech Republic in respect of the exchanges of letters between the European Economic Community (Community) and the Czech and Slovak Federal Republic concerning transit and land transport infrastructure - Final Act - Joint Declarations
OJ L 360, 31.12.1994, p. 2–210 (ES, DA, DE, EL, EN, FR, IT, NL, PT) Article 46 (4); European Communities, Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part - Protocol 1 on textile and clothing products - Protocol 2 on ECSC products - Protocol 3 on trade between Poland and the Community in processed agricultural products not covered by Annex II to the EEC Treaty - Protocol 4 concerning the definition of the concept of originating products and methods of administrative cooperation - Protocol 5 on specific provisions relating to trade between Poland, of the one part, and Spain and Portugal, of the other part - Protocol 6 on mutual assistance in customs matters - Final Act - Joint Declarations, Article 44.
[24] C-327/02 Lili Georgieva Panayotova and others v Minister voor Vreemdelingenzaken en Integratie [2004] ECR I-11055.
[25] Ibid, para 2 and 9.
[26] Ibid, para 17.
[27] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, *OJ C 326, 26.10.2012, p. 47–390,* articles 26, 45, 49-55.
[28] Council of Europe (n 15) s4.

regulationist and abolitionist, with Sweden being specifically mentioned in the document for having developed a new approach which is generally defined as neo-abolitionist.[29] At a Europe wide level, for example, the CoE had established that approximately one third of the Council's member states follow a prohibitionist approach,[30] which prohibits prostitution and penalises prostitutes and pimps alike. Moreover, a minority of CoE member states have implemented a regulationist approach, which aims to regulate instead of prohibiting or abolishing prostitution. Finally, the majority of the CoE member states take an abolitionist approach, which penalises procurers and pimps rather than prostitutes.[31] The previously mentioned neo-abolitionist approach takes the abolitionist logic one step further and penalises the clients of prostitution.[32]

Despite significant variations between the approaches to the regulation of voluntary prostitution, and with that the underlying jurisprudence, in EU member states, there are nonetheless commonalities. In this sense, it needs to be highlighted, that the ultimate intention, to fight sexual exploitation and to protect public morality and society as well as individual human rights, appears to be uniform across the various jurisdictions.[33] Nevertheless, the fact that prostitution can fall under the free movement provisions of the EU brings with it other challenges. Thus, for example, EU citizens could provide commercial sex services in any member state in which this is legal, while any EU citizens could purchase and use these commercial sex services within these same member states.[34] An example of this can be found in the developments of Germany's commercial sex industry following the move to regulationism in 2002. Here, the sex industry expanded significantly, due to an increase in both service providers as well as consumers from neighbouring EU

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[29] Council of Europe, (n 15) s. 4 et seq.
[30] Ibid.
[31] Ibid s. 5.
[32] Ibid.
[33] See Chapter 5.
[34] EU citizens have been used here as an example due to their unrestricted entitlement to free-movement and employment within the EU territory in accordance with the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. However, this is not to say that the same may not apply to regular migrants with the necessary working permits, however, this would constitute too much detail at this point within the thesis.

member states. Since the introduction of the German Prostitution Code (*Prostitutionsgesetz* – ProstG) in 2002 between 60 and 80 percent of individuals working within the commercial sex industry in Germany are estimated to be foreigners, predominantly from Eastern Europe.[35] This can be seen as a direct result of market forces such as supply and demand, within the European common market.

The free movement of workers allows commercial sex providers from EU member states in which prostitution is illegal, to work in other EU member states in which prostitution is legal. For the individual commercial sex provider (CSP) in this scenario, who has most likely moved from a country where prostitution is criminal, this may mean an increase in working standards and protections. However, for the collective of all the CSPs within the destination member state the situation may worsen. In this sense, it may be the case that the influx of CSPs within the sector increases the supply and, thus, results in price reductions and decreases the working standards of all the individual CSPs within this member state.[36] In light of these indications, it becomes apparent, that the regulation of prostitution within the EU cannot be viewed in isolation, as a self-contained legal matter, as there are numerous areas of the law, such as the free movement provisions, as well as other aspects of the EU's common market, which may link the EU member states in more ways than may initially be expected.

This is where this following research project finds its beginning. Accordingly, the following study will examine different forms of regulation of prostitution in specifically selected EU member states,[37] and the way these are affected by the supremacy of EU law as well as the areas of law in which the EU has no regulatory competence. Accordingly, the following will present the legal situation pertaining to Germany, Sweden and the United Kingdom over the period between January 2015 and December 2019 as case studies. This involved a close comparative examination of

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[35] Poland, Hungary, Ukraine, Czech Republic, Romania and Bulgaria; European Parliament, Directorate-General for Research, Working Paper, Trafficking in Women, Civil Liberties Series LIBE 109 EN, 2000, p. 5, available online: http://www.europarl.europa.eu/workingpapers/libe/pdf/109_en.pdf, accessed: 17th September 2014.

[36] A. Bähr, Richtlinie 2011/36/EU, Zur Situation der Prostitution in Deutschland, Zeitzeichen, February 2014, available online: http://zeitzeichen.net/geschichte-politik-gesellschaft/prostitution-in-deutschland/, accessed: 18th September 2014; see chapter 4.

[37] Germany, Sweden and the United Kingdom: More detail about the reasons behind this selection are discussed in section 2.5.1.

the legal frameworks regarding prostitution in Sweden, as the most radical example of an abolitionist approach; Germany, as a country supporting the regularisation of prostitution; and the UK, specifically the three jurisdictions of England and Wales, Scotland and Northern Ireland, of which the first two, due to the effects of certain provisions, could be categorised as following a prohibitionist approach to regulating prostitution.[38] The situation in Northern Ireland has proved an interesting and valuable contribution to the research project, as during the research period, their jurisdiction changed from following a prohibitionist approach to adopting the Swedish abolitionist model.[39]

According to Article 2 of the Treaty on European Union (TEU), the EU is founded on a number of common values, such as the respect for human dignity, democracy, freedom, the rule of law, equality, and the respect for human rights. The article also explains that these values are shared by all the member states within a society in which "pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[40] In light of the apparent differences between the regulations of prostitution in each of the member states of the EU, this seems surprising in the context of the subject matter of this thesis. On the one hand, the member states are said to share the same values, yet on the other hand, these supposed shared values have resulted in very different approaches to the regulation of prostitution. Although it is clear that the common values being referred to by the EU in this instance do not extend to criminal law provisions, as may be the case for prostitution regulation in some member states, it still raises the question how member states can expressly share common values in accordance with Article 2 TFEU, while following opposing values in the area of prostitution regulation. Thus, in order to gain a more in-depth understanding of the normative factors that are influential in determining which regulatory approach is taken to regulate prostitution within a jurisdiction, an in-depth exploration of the most relevant jurisprudence regarding prostitution will be undertaken.

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[38] European Parliament, Directorate General for Internal Policies, Policy Department C (n 5) 31.
[39] See chapter 7.
[40] European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, Article 2.

The intention behind this comparative study is to investigate some of the different approaches to prostitution regulation within the EU in order to examine the impact of the EU legal provisions being overlayed on member states with widely differing provisions surrounding prostitution and THB. Furthermore, a vital aim is to uncover key similarities as well as the major distinctions between the various regulatory approaches to prostitution to uncover where the main issues lie in cross-border situations. A necessary consideration is the fact that all three countries were member states within the EU during the time periods being examined[41] and thus, operate within a common market and a common area of freedom, security and justice without border controls.[42] Hence, the intention is to demonstrate those areas of the different approaches, which operate effectively together, and those in which the discrepancies between the various national approaches result in ineffectiveness in combatting the multitude of problems prostitution brings with it. This will not only increase the understanding of the effect of the overlaying of one area of law over another, but will also contribute to the development of new knowledge, which will be transferrable to other countries or other contexts in the future. A crucial element of the comparative examination is the focus on the perspective of the EU. Subsequently, the analysis specifically focusses on the impact the overlaying supranational laws of the EU have on the multitude of approaches regarding voluntary prostitution.

1.1 Significant ethical considerations within literature-based research

Within literature-based research, particularly in law, the general perception is that there are no serious ethical issues which require consideration, as laws are not considered sensitive materials.[43] However, when conducting research within the area of prostitution, which as a subject matter deals with controversial perceptions of potentially vulnerable people, the question of research ethics may not be as clear. Thus, it is vital to be aware of the fact that law in itself can be understood as a form

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[41] 1st January 2015 to 31st December 2019.

[42] It needs to be noted, that due to the examination time period, the fact that the United Kingdom has decided to leave the European Union and the consequences thereof have not been taken into consideration for the purpose of this research project.

[43] See Abertay University Ethical Approval Document in Appendix 1.

of ethics application.[44] Traditionally, the black-letter law understanding of legal interpretation, which focusses predominantly on doctrinal study of law and is based on the assumption that "legal doctrine possesses logical coherence" resulted in the conception that ethical considerations in research were of little relevance.[45] However, a more normative, socio-legal perspective of the law as a form of ethics application means that one could argue that the study of law in itself will involve the portrayal and understanding of the particular laws from some political and ethical foundation.[46]

Legal scholarship, including research projects such as this one, will also form part of the available information on the topic of prostitution, and, thus, has the potential to influence the way laws are interpreted. As Hutchinson[47] puts it "ethics is contextual in the sense that involves particular people in particular situations making difficult decisions with particular time constraints with imperfect information and with particular consequences for particular people."[48] Thus, it needs to be understood that this research project, and the way it is disseminated, will contribute to the future context in which ethics and morality are understood in relation to the subject matter at hand, in particular prostitution and human trafficking.

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[44] Allan C. Hutchinson, 'Beyond Black-Letterism: Ethics in Law and Legal Education' (1999) 33 The Law Teacher.
[45] Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson Educación 2007) 68.
[46] Hutchinson (n 44) 301.
[47] Ibid.
[48] Ibid 304.

1.2 Upholding scientific standards

In relation to upholding scientific standards, it is necessary as a researcher to consider any relevant evidence without deception, misrepresentation or omission.[49] It also requires any research questions to be set in a fashion in which an outcome is not predeterminable, or which exclude certain findings from the beginning.

In relation to the presentation of any findings as well as the dissemination thereof, it is crucial that any misinterpretation or misunderstandings thereof are avoided. This requires results to be formulated in clear language.[50] In particular, in the subject matter at hand, namely, prostitution and trafficking in human beings (THB), there are a number of terms that require clarification due to many differences in the use of terms related to the subject matter. Thus, in order to ensure a clear and concise understanding of any findings, key terms in relation to the research are either defined within the relevant chapters or in the Glossary.[51] Furthermore, certain words are not able to be literally translated without the meaning changing as well. In order to counter this, certain translations may require either a combination of several translations. In other cases, it may make more sense to leave the foreign word, and instead seek to define the meaning of the term to prevent the English understanding from overshadowing the purpose of the initial term within its language of origin. The foreign languages concerned within this project are German and Swedish. The researcher will be responsible for making the judgement calls in relation to the way each foreign term is used within the context of this project.

Despite the need for objectivity, it is never entirely possible to avoid any preconceptions from the researcher, as research projects are generally influenced to some extent by the approaches taken by researchers, this project has been carried out with a reflexive consciousness of any impact the researcher’s personal values may have on the research. Furthermore, the supervisory team of this project,

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[49] The Institute for Employment Studies (IES), 'RESPECT Code of Practice for Socio-Economic Research' (RESPECT project 2004) 1, <http://www.respectproject.org/code> accessed 3 October 2017.
[50] Ibid.
[51] See page v.

consisting of 3 experts in related, yet, different areas of the law, ensure that any research bias is kept at a minimum.

1.3 Gender and language within this study

The first point, which needs to be addressed in relation to research in the area of prostitution and trafficking is the potential harm that can be caused on the basis of gender bias. This thesis is written with the awareness of the existence of different gender labelling systems. The most prevalent labelling system is known as the gender binary, which labels people either as male or female.[52] However, considering that there are people who do not identify within this binary, this will also be acknowledged in order to ensure all people are included and to prevent the stigmatisation of intersexual individuals. Considering the personal nature of gender, wherever possible, the determining factor will be gender identity, which is "one's own personal experience with gender role and the persistence of one's individuality as male, female, or androgynous."[53]

Considering that this is a law thesis, the first step in relation to determining how to use language in this area would be to look at the way this is dealt with within the law. As this project specifically investigates the laws in Germany, Sweden and the three main jurisdictions within the UK (England and Wales, Northern Ireland and Scotland), all of these countries were examined in relation to the way pronouns are used in legislation dealing with prostitution. In Germany, gendered pronouns have been avoided altogether. Instead, sentences in legal text are either written in a passive form, or the word "person" is used.[54] In Sweden, despite the legislation

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[52] Susan Stryker and Stephen Whittle, The Transgender Studies Reader (Taylor and Francis 2013) 301; Sonja K Foss, Karen A Foss and Mary E Domenico, Gender Stories (Waveland Press) 56; Laura Erickson-Schroth, Trans Bodies, Trans Selves (Oxford Univ Press 2014) 13.
[53] Mary Crawford, *Transformations: Women, Gender & Psychology, 2Nd Ed* (2nd edn, Content Technologies 2012) Chapter 5.
[54] See for example: – § 1 Prostitutionsgesetz (ProstG) (German Prostitution Code): „Sind sexuelle Handlungen gegen ein vorher vereinbartes Entgelt vorgenommen worden, so begründet diese Vereinbarung eine rechtswirksame Forderung. Das Gleiche gilt, wenn sich eine Person, insbesondere im Rahmen eines Beschäftigungsverhältnisses, für die Erbringung derartiger Handlungen gegen ein vorher vereinbartes Entgelt für eine bestimmte Zeitdauer bereithält." Translation: "If sexual acts have been carried out for a previously agreed upon remuneration, then this agreement creates a legally binding demand. The same applies, if a person, in particular within an employment relationship, has

dealing with prostitution having been enacted through the "*Kvinnofrid*" law, which translates to "violence against women" act, which is highly gendered, the legislation itself is, similar to the German legislation, gender neutral. This is done using words, such as "those" or "whoever," "of whom," or "anyone," etc.[55] In the three main jurisdictions of the UK, however, the situation is slightly different, which is particularly problematic considering that the primary language of this thesis is English. In December 2013, the House of Lords discussed the issue of gender-neutral language within legislation. Here, it was recognised that

> […] related to the use in the drafting of legislation of male pronouns—he, his and him—in context where the individual referred to might change from time to time and might be either a woman or a man […] Many believe that this practice […] tends to reinforce historic gender stereotypes.[56]

Where this may generally be true within the law, it needs to be highlighted here, that in the area of prostitution, the opposite would be the case, as the general stereotype would involve the service provider generally to be female. The debate in the House of Lords also looked into different examples within English legislation. One example involved the use of "his or her."[57] The issue, however, again, in relation to this research is that this still excludes people who do not identify their gender within the binary of male and female. Another option involves using the plural form of "their," yet with singular verb tenses.[58] This, however, is also problematic, because, as Lord Scott of Foscote explains "[s]tatutes and statutory instruments ought not only to be

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held oneself prepared to conduct these acts over a specific time period for a previously agreed remuneration."

[55]See for example: Lag (1998:408) om förbud mot köp av sexuella tjänster: "Den som mot ersättning skaffar sig en tillfällig sexuell förbindelse, döms - om inte gärningen är belagd med straff enligt brottsbalken - för köp av sexuella tjänster till böter eller fängelse i högst sex månader." Translation: Anyone who receives an interim sexual connection (act) is convicted - unless the case is punishable by an offence within the criminal code - for the purchase of sexual services by fines or imprisonment for a maximum of six months."

[56] House of Commons, 'Legislation: Gender-Neutral Language Question for Short Debate' (Daily Hansard, 12 December 2013 8/3/07; col 146WS 2013) column 1004.

[57] Ibid column 1005.

[58] For example: Statutory Instrument 2013 No. 2828, Social Security, The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013, Regulation 2(2)(b): refers to a child who "by virtue of his or her disability" cannot be expected to share a bedroom. within regulation 3(2)(b), this reference to "his or her disability" is repeated. However, the Explanatory Notes to this statutory instrument uses the term "their disability" instead. Here, the singular form "is" has been used following the plural pronoun. See also section 4 of the Universal Credit Regulations 2013 No. 376 in regulation 12(1) which uses the singular term "[a] renter" with the singular form of the verb "is", however, with the plural pronoun "they."

clear and free of ambiguity, but surely ought also to stand as models for the correct use of the English language."[59]

The issue, as explained by Lord Quirk is that the English language does not have an epicene third person pronoun, which is able to have anaphoric reference to ungendered antecedents.[60] In relation to the subject matter of prostitution, further issues come to play, namely, that in contrast to most other areas of the law, the stereotypical pronoun would be female rather than male. This can be taken, for instance from the (English and Welsh) Sexual Offences Act 1956,[61] in which it is particularly noticeable that the female pronouns are used for prostitution related offences, when reference is made to the service provider.[62] However, within the same legislation, pronouns used in relation to pimping, for instance, use the male pronoun.[63] In relation to the term "prostitute" this form of gender-stereotyping within the English language is demonstrated more significantly in *DPP v Bull*,[64] in which the House of Lords found that the phrase "common prostitute" could not refer to male sex workers, as it was the intention of the Parliament in 1959 to limit female prostitution with the Street Offences Act.[65]

Today, the use of language in English and Welsh legislation has improved somewhat, in the sense that the (English and Welsh) Policing and Crime Act 2009 now uses the term "person" for service providers.[66] However, in relation to service users or persons involved in exploitative practices, the legislation still uses male pronouns.[67] Moreover, despite these improvements, in particular changes that have

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[59] House of Commons (n 56) column 1007.
[60] Ibid column 1008.
[61] Sexual Offences Act 1956, c. 69 (Regnal. 4_and_5_Eliz_2).
[62] See for example: Sexual Offences Act 1956, c. 69 (Regnal. 4_and_5_Eliz_2) s. 22. "Causing prostitution of women," s. 23. "Procuration of girl under twenty-one," s. 24. "Detention of woman in brothel or other premises," s. 25. "Permitting girl under thirteen to use premises for intercourse," s. 26. "Permitting girl between thirteen and sixteen to use premises for intercourse," s. 27. "Permitting defective to use premises for intercourse," s. 28. "Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl under sixteen," s. 29. "Causing or encouraging prostitution of defective."; s. 31. Woman exercising control over prostitute.
[63] See for example Sexual Offences Act 1956, c. 69 (Regnal. 4_and_5_Eliz_2), s. 30: "Man living on earnings of prostitution."
[64] *DPP v Bull* [1995] QB 88.
[65] *Ibid* at 90-91; referring to the Street Offences Act 1959, c. 57 (Regnal. 7_and_8_Eliz_2).
[66] Policing and Crime Act 2009 c. 26, s. 14.
[67] See for example: Policing and Crime Act 2009 (c. 26) Schedule 1 — Schedule to the Street Offences Act 1959, Part 4 Supplementary, Detention and remand of arrested offender: "9 (1) This paragraph applies where the offender is arrested in pursuance of a warrant under this Schedule and

sought to add the missing male or female pronoun, the contemporary legislation in England and Wales still indicates a gender binary, which excludes persons who do not identify as either male or female.[68] Similarly, an examination of the legislation regarding prostitution in Northern Ireland revealed a move towards a more gender-neutral use of language, such as the use of the term “person” or references to “A” or “B.”[69] However, the legislation in Northern Ireland also still uses gender-binary pronouns, such as “he or she,” as well as occasionally merely referring to the male pronoun in relation to offenders.[70] Scotland appears to be the only UK jurisdiction, which has legislated with entirely gender-neutral language.[71] A publication from the Office of the Scottish Parliamentary Counsel on the use of language in legislation in 2006 specifically addressed the topic of gender-neutral drafting in relation to the use of plain language, by also making reference to systems in other countries.[72] This included recommending the use of passive forms in order to avoid gender-specific

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cannot be brought immediately before the court before which the warrant directs him to be brought (“the appropriate court”)”; 10 (2) “The alternative court may direct that the offender is to be released forthwith or remand him to appear before the appropriate court.”

[68] Street Offences Act 1959, 1959 c. 57 (Regnal. 7_and_8_Eliz_2) Section 1: “Loitering or soliciting for purposes of prostitution. (1) It shall be an offence for a [F1person] [F2 aged 18 or over] [F3 (whether male or female)] [F4 persistently] to loiter or solicit in a street or public place for the purpose of prostitution”; Modern Slavery Act 2015 c. 30, s. 53 (4): Overseas domestic workers “[…] be a victim of slavery or human trafficking if a public authority has determined that he or she is such a victim.”

[69] The Sexual Offences (Northern Ireland) Order 2008, 2008 No. 1769 (N.I. 2), part 5 Prostitution and Paying for Sexual Services of a Person, s. 58 (2): '“Prostitute” means a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to A or a third person; and “prostitution” is to be interpreted accordingly;' s. 60 (1): “It is an offence for a person in a street or public place to solicit another (B) for the purpose of obtaining B's sexual services as a prostitute.”

[70] See for example: Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, c. 2, Part 2, Amendments Relating to Slavery and Trafficking Reparation Orders: The Criminal Justice (Northern Ireland) Order 1994 (NI 15) “In Article 16(a) (review of compensation orders) for the words from “a confiscation order” to the end substitute “either or both of the following made against him in the same proceedings;” The Sexual Offences (Northern Ireland) Order 2008, 2008 No. 1769 (N.I. 2), Part 5, Prostitution and Paying for Sexual Services of A Person, s. 62 (1): “A person commits an offence if— (a)he intentionally causes or incites another person to become a prostitute in any part of the world, and (b)he does so for or in the expectation of gain for himself or a third person” ; Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, c. 2, S. 3(6) “Another person uses or attempts to use the person for a purpose within paragraph (a), (b) or (c) of subsection (5), having chosen him or her for that purpose […].”

[71] See for example: Human Trafficking and Exploitation (Scotland) Act 2015 asp 12; Sexual Offences (Scotland) Act 2009, 2009 asp 9.

[72] In particular, reference was made to language used in legislation in Ireland, Jersey, New Zealand, Australia, Canada, Sweden and the European Union; 'Plain Language and Legislation' (Gov.scot, 2006) <http://www.gov.scot/Publications/2006/02/17093804/3> accessed 4 October 2017.

reflexive pronouns and repeating subjects despite this being less elegant, as well as acknowledging that gender neutral drafting is desirable.[73]

Accordingly, this thesis will aim to use gender neutral language whenever possible, by utilising various techniques, such as using plural forms of nouns, passive tenses, referring to "person," and naming nouns repeatedly if necessary.

1.4 Terminology

Research looking into prostitution often favours the term "sex worker" to describe people working within prostitution as service providers, rather than the term "prostitute." Often, this is based on the perception that the term "sex worker" is less derogative.[74] Moreover, Barret,[75] for example, has added that the term "sex worker" also carries the acknowledgement that offering services in prostitution may constitute a type of work and, thus, "serves to link prostitutes politically with workers in other parts of the sex industry."[76] However, as the research by scholars, such as Escoffier,[77] Hubbard[78] and Dank[79] demonstrates, the term can be understood to encompass a number of other activities than the provision of sex for remuneration, such as erotic dancing or telephone sex. Thus, although the term "sex worker" may be considered less derogatory and inclusive of the notion of prostitution being a form of work, it is much broader than the term "prostitute," which may make the term unsuitable for the purposes of this project.

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[73] 'Plain Language and Legislation' (Gov.scot, 2006) <http://www.gov.scot/Publications/2006/02/17093804/3> accessed 4 October 2017.
[74] David Barrett, *Child Prostitution in Britain* (Children's Society 1997); Margaret Melrose, 'Labour Pains: Some Considerations on the Difficulties of Researching Juvenile Prostitution' (2002) 5 International Journal of Social Research Methodology.
[75] Barrett (n 74) 6.
[76] Ibid; Melrose (n 74).
[77] Jeffrey Escoffier, 'Porn Star/Stripper/Escort: Economic and Sexual Dynamics in a Sex Work Career' (2007) 53 Journal of Homosexuality.
[78] Phil Hubbard, 'Opposing Striptopia: The Embattled Spaces of Adult Entertainment' (2009) 12 Sexualities.
[79] Barry M Dank, *Sex Work & Sex Workers* (Transaction Publishers 1999).

Another option can be found within the terminology used by the Scottish Government, who prefer the term "individuals involved in prostitution.[80] However, this term also appears too wide, as there are ways people could be involved in prostitution other than providing sex acts for remuneration, such as individuals who are purchasing the services, brothel managers, or even if following a wide interpretation, charity workers or police officers. The issue with the matter of prostitution research is, similarly to the situation found in public debates surrounding the subject matter of prostitution, that terminology within academic research is subject to both political as well as moral positions.[81] Thus, finding terms which are neutral or universally applicable is not a simple task.

In order to ensure clarity in relation to the meaning of the terms used, as well as seeking to avoid any derogatory understandings, this thesis will use the term "Commercial Sex Provider" (CSP) to describe adults providing sex acts for remuneration, which seems to be a term occasionally used in contemporary research within the area of THB.[82] This can be legal or illegal activity depending on the approach of a particular legal jurisdiction. Accordingly, the term "prostitution" will be defined in accordance with the majority of the jurisdictions being investigated within this project, namely, as "the provision of sexual services for payment or promise of payment."[83] "Payment," in the sense of this definition will involve any financial advantage, for example cash payments, any expulsion of payment obligations or provisions of other forms of goods or services without further payment or with discounts. In situations in which a wider term is necessary in order to include other services, such as erotic dancing, pornography or telephone sex services, the wider term sexual services will be used. However, the main focus within this thesis lies on the provision of commercial sex services, more specifically the provision of

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[80] Scottish Government, Exploring Available Knowledge and Evidence on Prostitution in Scotland via Practitioner-Based Interviews, February 24, 2017, page 20, available online at: http://www.gov.scot/Publications/2017/02/6562 [accessed 2nd October, 2017].
[81] Jonathan Grix, 'Introducing Students to the Generic Terminology of Social Research' (2002) 22 Politics.
[82] See for example Miquel Martín Casals and Diego M Papayannis, *Uncertain Causation in Tort Law* (Cambridge University Press 2016) 117; Tsachi Keren-Paz, *Sex Trafficking* (Taylor & Francis 2013) 1.1.
[83] See for example Sexual Offences Act 2003, c. 42, Section 51; the Sexual Offences (Northern Ireland) Order 2008, 2008 No. 1769 (N.I. 2) PART 5, see also: Chapter 7.

sex acts, which involve physical body-to-body contact between the CSP and the service user.

The term “Commercial Sex User” will be used for people who are at the receiving end of the service transaction. Although the majority of research generally refers to sex service users as “clients”[84] or “punters,”[85] it is thought that these terms may come with other insinuations in relation to the moral and legal status of the service users. However, as this research examines various jurisdictions which support a wide range of understandings of service users, it can be argued that the term “Commercial Sex User” (hereinafter CSU) constitutes a more neutral description for the purpose of this thesis. The term also compliments the term “Commercial Sex Provider” (hereinafter CSP), by highlighting that CSPs and CSUs form two parties of a transaction.

The term “Commercial Sex Purchaser” (CSPu) may also be used at times, in particular, when it is important to signify the provision of remuneration rather than the actual use of the service. This may be necessary in situations in which the person making the payment is not the same person as the person using the service, for instance when someone has purchased the service for someone else. Finally, the term “Commercial Sex Controller” (CSC) will be used for people who control the activities of CSPs, such as arranging CSUs and determining working conditions, usually for a percentage of the CSPs’ earnings. Often the term “pimp” is used for this within the literature.[86] However, as this term may also be linked to pre-existing stereotypes, the use of CSC is thought to ensure more neutrality. Although these terms will be generally applicable throughout the thesis, making reference to a

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[84] See for example Belinda Brooks-Gordon and Loraine Gelsthorpe, 'Prostitutes' Clients, Ken Livingstone and a New Trojan Horse' (2003) 42 the Howard Journal of Criminal Justice; Catherine Benson and Roger Matthews, 'Street Prostitution: Ten Facts in Search of a Policy' (1995) 23 International Journal of the Sociology of Law.

[85] See for example: Teela Sanders, 'The Risks of Street Prostitution: Punters, Police and Protesters' (2004) 41 Urban Studies; Karen Sharpe, *Red Light, Blue Light: Prostitutes, Punters and the Police* (Routledge 2017).

[86] See for example: Julie Bindel, *The Pimping of Prostitution* (Palgrave Macmillan 2017) chapter 1; Kristine Hickle and Dominique Roe-Sepowitz, '“Curiosity and a Pimp”: Exploring Sex Trafficking Victimization in Experiences of Entering Sex Trade Industry Work among Participants in a Prostitution Diversion Program' (2016) 27 Women & Criminal Justice, 122; Maureen O’Hara, 'Making Pimps and Sex Buyers Visible: Recognising the Commercial Nexus in ‘Child Sexual Exploitation’' (2018) 39 Critical Social Policy, 108.

number of different sources may necessitate deviations from this terminology. These will be adequately signposted wherever necessary.

1.5 Outline of the thesis and original contribution to knowledge

The legal subject matter being researched is complex. In this sense it brings together theoretical components with practical ones, it examines a variety of areas of criminal and civil law, not only in different national jurisdictions, but also involves placing these within transnational and supranational legal umbrella organisations. Moreover, the interaction of all of these separate, yet intertwined components touch upon the subject matters of prostitution and THB for the purpose of sexual exploitation, which can be both closely linked and entirely separate legal domains. Thus, this thesis has been divided into 11 separate chapters, to ensure a clear distinction between individual components of the study. Whilst it is acknowledged that this approach results in the thesis seeming somewhat fragmented, the nature of this study, which involved synthesising a substantial body of information into a coherent and logical format has made this necessary. However, at the same time, these chapters have been grouped into five overall sections relating to the placing of these components within the bigger picture of the examined issues.

Section A contains the introductory elements of the study, including the introduction chapter in which it is explained where this research project can be placed within the current legal realm concerning prostitution and THB for sexual exploitation in Europe. Account is also given here to the most significant ethical considerations. In the second chapter grouped within section A, the individual components of the comparative methodology of the dissertation are illustrated and justified, while also taking into account and mitigating any potential limitations of the study.

Section B explores the theoretical diversity found to underpin prostitution regulation in Europe. This section begins with chapter 3, which sets out a road-map to understanding the relevant legal theories in relation to prostitution. This road-map later serves as a tool, through which legal provisions, concepts and commentaries are placed within the theoretical and philosophical sphere, in order to assist in

generating a deeper understanding and to add context to any regulatory approaches taken in practice in the jurisdictions under investigation. Hereafter chapter 4 examines the relevant theoretical models of prostitution regulation, which are necessary for the later categorisation of the examined jurisdictions. In particular, this section is vital in relation to the classification of prostitution into three key understandings which underpin the regulation thereof: As an economic activity, a social harm or a public nuisance.

Section C undertakes a conceptual examination of inter-EU cross-border interactions of the regulatory approaches to prostitution by examining the legal situations in selected jurisdictions in practice. This includes in-depth examinations of the legal situations in Germany, Sweden and the UK in separate chapters, as representatives of legal approaches which have each been based on one of the three underpinning understandings of prostitution as uncovered in section B. Hereafter, chapter 8 reviews the legal competencies of the EU in light of their understanding of prostitution as an economic activity as well as limits to the applicability of EU law due to public order notions and the inability of the EU to interfere in internal security matters of individual member states. Together, the chapters within section C illustrate the legal difficulties that could hypothetically arise in cross-border situations between member states with opposing approaches to prostitution.

Section D follows a similar analysis structure to the previous two sections in order to examine the impact of the conceptual diversity of prostitution regulation within the EU on the various national legal frameworks seeking to tackle THB for the purpose of sexual exploitation. Accordingly, this section is divided into two chapters. Chapter 9 reviews some of the key theoretical themes within laws seeking to tackle THB. Hereafter, chapter 10 examines the EU's legal framework and explores the effects of national prostitution regulation on legislation seeking to combat trafficking in human beings for the purpose of sexual exploitation in practice in the five sample jurisdictions, Germany, Sweden and the United Kingdom. In particular, the chapter focusses on the impact of EU law on national laws, variations pertaining to nationally implemented definitions related to the subject matter, as well as the different views of the relationship between THB for the purpose of sexual exploitation and prostitution.

Section E merely includes the concluding chapter, which due to its concluding nature could not be grouped together with other sections, as this chapter summarizes and brings together the thesis which was advanced over the course of this dissertation. This also involves a critical review of the main aspects of the work as well as a description of the original contribution to knowledge made within the dissertation, and suggestions of areas suitable for further study arising from the work.

Most significantly, this thesis provides an original contribution to knowledge in three key ways. Firstly, it examines the issue of prostitution regulation from the perspective of the European Union. Although the judgements *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie,*[87] *Adoui and Cornuaille v Belgian State,*[88] and *Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie*[89] clarified the EU's understanding of prostitution to be an economic activity, the CJEU did not lay out the specifics on how EU law applies to prostitution as a consequence of this. Thus, this research examines the legal specifics of the applicability of EU law in the area of prostitution regulation within the national jurisdictions of the member states. A specific focus here is on the effects this could have in cross-border situations involving commercial sex in light of the variations of national understandings of prostitution. The findings form vital contributions to knowledge in the areas of EU law, prostitution regulation and laws seeking to combat THB, most significantly, as they demonstrate how the neglect by legislators to consider the wider structures into which laws are placed, such as supranational or international legal frameworks, other areas of national law, philosophical foundations or even societal understandings of terminology, can result in significant harm.

Secondly, this research shows the interconnectedness between regulatory areas often assumed to exist in isolation. In particular, links are examined between the laws relating to THB for the purpose of sexual exploitation and prostitution in theory

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[87] Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615.

[88] Cases C-115 and C-116/81, *Adoui v Belgium and City of Liege Cournuaille v Belgium*, 18 May 1982: [1982] E.C.R. 1665, [1982] 3 C.M.L.R. 631.

[89] C-327/02 Lili Georgieva Panayotova and others v Minister voor Vreemdelingenzaken en Integratie [2004] ECR I-11055.

and practice, as well as laws on prostitution and other areas of civil and criminal law, and between different jurisdictions.

Finally, a vital original contribution to knowledge is the refocussing of the subject matter in the areas of terminology, theory and practice, in absence of political or moral agendas. As will be seen most notably in section B, academic scholarship has become strongly infiltrated by moral crusades and political agendas, which have contributed to flawed terminology and often questionable validity of findings spreading, which has the potential to cause significant harm in practice. Thus, this project contributes to disentangling some of the most prominent themes within academic scholarship on prostitution and THB for the purpose of sexual exploitation thereby restoring some much-needed order and neutrality within the subject area.

Chapter 2

2. Setting the right paradigms for the research project: Perspectives, Methods and other Considerations

2.1 Finding the research paradigm

In order to conduct an effective and well-designed research project, which is capable of answering the research question at hand, it is crucial to determine the appropriate research paradigm. This research seeks to examine the conflicts between the different regulatory approaches to prostitution, as an area outwith the scope of EU legal harmonisation in accordance with article 72 TFEU, while simultaneously being understood as an economic activity by the EU, thereby rendering EU law applicable in some areas in accordance with article 4 TEU, and the impact this may have on the laws seeking to tackle THB for the purpose of sexual exploitation. Thus, it is crucial to find a research paradigm that acknowledges the multi-level character of this research project. This hierarchy of laws between the EU and the provisions in its member states creates a number of issues, which need to be addressed in relation to establishing a coherent and effective research paradigm.

According to Kuhn,[1] the term "paradigm" in relation to research is commonly used in two different ways. There is the meaning, which merely refers to "the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science."[2] However, this is not the meaning that is meant at this stage of the thesis. Thus, this meaning will be addressed in more detail in chapters 3 and 9. Then there is the meaning that is currently being referred to, namely, the "entire constellation of beliefs, values, techniques" of scientific research.[3] Guba puts this in concrete terms by explaining that paradigms are characterised by certain key elements, including their ontology, which determines the underpinning view of reality, their epistemology, which determines how knowledge is formed, as well as methodology, which lays out how

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[1] Thomas S Kuhn, *The Structure of Scientific Revolutions* (2nd edn, The University of Chicago Press 1970).
[2] Ibid 175.
[3] Ibid.

knowledge will be generated.[4] The synergy of these elements then forms the overall notion of knowledge and knowledge generation within research. Before presenting the key elements of this study's paradigm, it is important to understand what the aims and objectives are.

2.2 The aims and objectives of the research project

As explained in Chapter 1, there is an apparent gap within the literature pertaining to the legal dynamics of certain inter-EU cross-border situations. In particular, situations involving matters, such as prostitution, in which there is tension relating to the competences of the EU and the member states, due to significant differences in national regulatory approaches and the resulting impossibility of legal harmonisation. In particular, the subject matter of prostitution regulation has not been researched from the perspective that the participation in the EU's common market has an impact on domestic regulation. As will be shown in chapters 3 and 4, there is a lack of conceptual, theoretical and philosophical consensus throughout the EU member states in relation to the regulation of prostitution, as well as in relation to the ideas of morality, sexuality, paternalism and autonomy. Article 2 TEU makes the grand statement that the EU was established on the underlying assumption of the member states sharing common values.[5] Although this was drafted with mostly commercial matters in mind, it still raises the question how questions of morality, sexuality, paternalism and autonomy, which shape national prostitution regulation, can nevertheless differ to such a significant extent amongst the EU member states. In particular, an issue which filters through these discrepancies, is the conceptual distinction between voluntary and forced prostitution, which blurs the lines between articles 4 TEU, 83(2) and 72 TFEU. Accordingly, article 83(2) TFEU states that in situations in which the approximation of criminal laws and regulations within the member states is necessary to implement EU policies under harmonisation measures, minimum standards can be set for criminal offences and sanctions. In

[4] Egon G Guba, *The Paradigm Dialog* (Sage 1990) 18.
[5] Article 2, European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

contrast, article 72 TFEU prohibits the EU to interfere within the areas of maintenance of law and order and the safeguarding of internal security within the member states.

Accordingly, the overarching research question within this thesis is:

> How does the diversity of national regulatory approaches to prostitution in EU member states impact the regulation of prostitution and the laws seeking to combat trafficking in human beings when operating under article 4 TFEU and the supremacy of EU law?

By following a mixed legal methodology, this research has taken a close comparative examination of the legal frameworks for the regulation of prostitution in Germany, Sweden, and the three main jurisdictions of the UK. Although the actual classification of these regulatory approaches is only determinable after the analysis of the individual jurisdictions,[6] it has been indicated within the examined literature, that each of these domestic frameworks are representative of one of the three main theoretical regulatory approaches to prostitution, namely, regulationism, abolitionism and prohibitionism.[7]

In particular, the intention behind this comparative examination was to uncover key similarities as well as the major distinctions between the various approaches in domestic practice in order to see how these interact with the common market provisions of the EU, in particular, the fundamental freedoms. Moreover, a comparative examination of the impact national prostitution regulation has on the different implementations of the EU regulations on THB for the purpose of sexual exploitation within the selected jurisdictions is carried out.

The aim of the chosen method is not to seek to fix one jurisdiction on the basis of the experiences of another, as is the most common function of comparative legal method,[8] but rather to examine the key differences and similarities in order to understand how these systems can interact in light of the supremacy of EU law in

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[6] See chapters 4-7, in particular, sections 4.1, 5.1, 6.1, 7.1 and 7.3.
[7] See chapter 1.
[8] Basil Markesinis, 'Comparative Law - A Subject in Search of an Audience' (1990) 53 The Modern Law Review.

certain areas. In particular, the aim is to discover possible areas of legal conflict, potential areas of legal harmonisation, or trends that suggest ongoing or presumable future approximations of laws in this area.

In the process of effectively answering the set research question, a series of sub-questions have been posed:

1) What are the underlying conceptual and philosophical differences in the approaches to prostitution regulation in Europe?
2) How is the national regulation of prostitution affected by EU law?
3) Are there certain differences in the implementation of the EU provisions tackling THB for the purpose of sexual exploitation which have an impact on the way prostitution is regulated in the selected domestic jurisdictions?
4) Does the diversity of national approaches to prostitution regulation affect the EU's ability to tackle THB effectively?

In order to answer these questions, the following will now present and explain the main elements of the chosen research paradigm, including the ontology, epistemology and methodology.

2.3 Ontology underpinning the research

As explained in section 2.1, the ontology determines the underpinning view of reality the research is based upon. Although there are many different ontologies, the two most common ones, which are often presented as forming two ends of a spectrum involve realism and relativism.[9] On the one hand, the realist ontologies view reality as something that is fixed and needs to be uncovered,[10] similar to the views

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[9] James D. Proctor, 'The Social Construction of Nature: Relativist Accusations, Pragmatist and Critical Realist Responses' (1998) 88 Annals of the Association of American Geographers; Greg Richards and Wil Munsters, *Cultural Tourism Research Methods* (CABI 2012) 131; Richard A Posner, *The Problematics of Moral and Legal Theory* (The Belknap Press of Harvard University Press 2014) 17; Phillip Karber, '"Constructivism" as a Method in International Law' (2000) 94 Proceedings of the ASIL Annual Meeting; Richard Rorty, *Philosophical Papers* (Cambridge University Press 2008) 22 - 35.
[10] Paul R DeHart, *Uncovering the Constitution's Moral Design* (University of Missouri Press 2007) 136; Peter Stokes, *Key Concepts in Business and Management Research Methods* (Palgrave Macmillan 2011) 91.

examined in chapter 3 in relation to Natural Law theories.[11] Relativism, on the other hand, constitutes an ontology that the knowledge sought through research is merely a social reality, which is subjective and value laden, which means that it can only be found by means of individual interpretation.[12] In relation to the ontological underpinnings of this research, it needs to be explained, that the ontologies being referred to are not the underlying ontologies of the subject matter to be examined, as this, as demonstrated in chapter 3, would entail such a broad range of different ontologies that could not reasonably be summarised into one underpinning ontology. Instead, what is meant by ontology in this context, is the ontology directly underpinning the function of the research undertaken rather than the content of the research. As such, the ontology is the way the examined legal frameworks and provisions are understood to represent reality, and how the uncovered knowledge is to be placed within this idea of reality.

Accordingly, as the laws and regulatory approaches within the jurisdictions to be examined are fixed and do not change merely due to the fact that they are being researched, there is a tendency to assume that the ontology would be purely based on realism. In particular, another aspect of this research, which substantiates this notion is the fact that the research is literature based. At least in relation to the doctrinal legal comparative elements, which will be discussed in 2.5.1.1., it is clear that the ontology would be based on realism. Considering that a mixed-method approach was taken, which also involved other comparative legal methods such as structuralism, hermeneutics and law in context,[13] it is clear that the more realistic understanding of the ontology of this study can be classified as either critical realist or pragmatist. Accordingly, the research is carried out on the basis of the understanding that although, the reality being uncovered within this research is essentially existing without the research, the presence of the researcher cannot be

[11] See section 3.4.
[12] Steven Eric Krauss, 'Research Paradigms and Meaning Making: A Prime' (2005) 10 The qualitative report; James Scotland, 'Exploring the Philosophical Underpinnings of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, Interpretive, and Critical Research Paradigms' (2012) 5 English Language Teaching; Aleksander Peczenik and Jaap Hage, 'Legal Knowledge About What?' (2000) 13 Ratio Juris; Michael S. Moore, 'Legal Reality: A Naturalist Approach to Legal Ontology' (2002) 21 Law and Philosophy.
[13] See sections 2.5.1.2, 2.5.1.3 and 2.5.2.

disregarded.[14] The reason for this is that the measuring and evaluation of the findings will be influenced by this through renegotiations, debates and interpretations,[15] and, thus, the choice of a method should primarily be based on the best way to answer the questions at hand.[16]

The previous notion follows the ideas of Gadamer, whose dialectics of questions and answers constitute an unreserved framework for all human experiences.[17] In relation to the interpretation of texts, he describes this process as a *Gespräch*, meaning a dialogue, through which texts speak in a reciprocal dynamic with the reader. Gadamer explains that the reader is not able to formulate questions to ask of the text before the text engages with the reader's "forestructure of meaning,"[18] which, in other words is a "meaning and a possibility that one brings into play and puts [the text] at risk."[19] The process of reading the literature, thus, constitutes a process during which the indeterminate horizons of both the text and the reader's forestructure of meaning are fused in a process referred to as *Horizontverschmelzung.* This allows for "the realisation of conversation, in which something is expressed that is not only mine or my author's, but common,"[20] which ultimately is the meaning of a text, which could not only involve secondary literature, but due to the written nature of law, sources such as case reports or even primary sources of law.[21] Hence, the above assumption of law to purely fall within the scope of ontological realism would be, in Gadamer's words, a "legally untenable fiction."[22] Moreover, he explains that there is no unbiased observer to determine what the

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[14] Joseph A Maxwell and Kavita Mittapalli, 'Realism as a Stance for Mixed Methods Research', *SAGE Handbook of Mixed Methods in Social & Behavioral Research* (2nd edn, Sage Publications 2010) 145-168; Jesper Aastrup and Árni Halldórsson, 'Epistemological Role of Case Studies in Logistics' (2008) 38 International Journal of Physical Distribution & Logistics Management; Joseph Maxwell, 'Understanding and Validity in Qualitative Research' (1992) 62 Harvard Educational Review.
[15] Ilkka Niiniluoto, 'Realism, Relativism, and Constructivism' (1991) 89 Synthese; C. Oliver, 'Critical Realist Grounded Theory: A New Approach for Social Work Research' (2011) 42 British Journal of Social Work; Heikki Patomäki, '"Concepts of "Action", "Structure" and "Power" in "Critical Social Realism": A Positive and Reconstructive Critique' (1991) 21 Journal for the Theory of Social Behaviour.
[16] Thomas C. Grey, 'Holmes and Legal Pragmatism' (1989) 41 Stanford Law Review; Francis J Mootz III, 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry based on the Work of Gadamer, Habermas, and Ricoeur., 68, 523.' (1988) 68 BUL Rev.
[17] Hans-Georg Gadamer, *Truth and Method* (Sheed & Ward 1975) 325.
[18] Ibid 340.
[19] Ibid 350.
[20] Ibid.
[21] Mootz III (n 16).
[22] Gadamer (n 17) 291.

original intent of an author of any form of text was, which means that the reader will need to uncover the legal idea of a legal text by interpreting the written content by “linking it to the present.”[23] Fiss expresses a similar notion by stating that "adjudication is interpretation” that "is neither a wholly discretionary nor a wholly mechanical activity. It is a dynamic interaction between reader and text, and meaning."[24]

2.4 Epistemology considerations in relation to the legal research on the project

As explained in the beginning of this chapter, the epistemology underlying a research project is the understanding of the relationship a researcher has with the knowledge sought to be uncovered. From this a clear link between the ontology and the epistemology becomes apparent, as it is the epistemological ideas, which have influenced the way the ontology has been set, and vice versa.

Despite the mixed methods used, which will be set out in the next section in more detail, the main influence of the epistemology of this project will be based on the comparative legal methods used. Accordingly, the epistemology will influence the way this is undertaken by answering the key questions of what the purpose of the legal comparison is within this study, that will be compared, and also how law has been defined as the subject of the comparison.[25]

[23] Ibid 292 - 293.
[24] Owen M. Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford Law Review, 739.
[25] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method (European Academy of Legal Theory Monograph Series)* (Bloomsbury Publishing 2014) 23.

2.5 Methodology: A legal pragmatic mixed-method approach

2.5.1 Elements of a dialectic approach: Comparative legal methods

There are a number of different ways to approach comparative law, such as through formalism, structuralism or law in context. However, before knowing which comparative method to use, it is important to know what a comparative legal method is. In essence, comparative law as a method, in contrast to a subject, concerns, "a way of looking at legal problems, legal institutions, and entire legal systems [for] a wide variety of practical or scholarly purposes."[26] However, in order to understand the philosophical nature and understanding of this kind of legal research method for the purpose of this study, the following will look at it under the ideas of dialectics. This concept stems from the area of philosophy and refers to the method of forming arguments through a process of contradictions between opposing views. Plato, for instance described this method on the example of the way Socrates opposed and challenged concepts and views of others.[27]

A more in-depth understanding of this notion in relation to research methods can be found in Hegel's understanding of dialectic method.[28] In essence, Hegel divides the formation of logic into three stages: first, the moment of understanding,[29] second, the dialectical moment,[30] and third, the speculative or positive rational moment.[31]

The first stage, according to Hegel, involves the initial understanding of a concept, which at this point is understood to be fixed and unchangeable, in accordance with the ontological ideas of realism described above. Applying this idea to comparative law as a research method, this would involve the stage in which the laws of different jurisdictions are initially found and understood.

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[26] Rudolf Schlesinger, *Comparative Law* (Foundation Press 1998) 2.
[27]Marina McCoy, *Plato on the Rhetoric of Philosophers and Sophists* (Cambridge University Press 2011) 14; Michael Carter, *Where Writing Begins: A Postmodern Reconstruction* (Southern Illinois University Press 2003) 63; C. C. W Taylor, *Routledge History of Philosophy: Volume I: from the Beginning to Plato* (Routledge 2003) 227.
[28] Georg Wilhelm Friedrich Hegel and others, *The Encyclopaedia Logic, with the Zusatze* (Hackett 1991).
[29] Ibid para 80.
[30] Ibid para 81.
[31] Ibid para 82.

The second stage of Hegel's dialectic method is characterised by instability. It is in this moment that the former fixed notion is transferred into this instable state through a process of *aufheben* (self-sublation), which is a result of the one-sided nature of a fixed idea when exposed to an opposing concept.[32] By choosing the German word *aufheben*, Hegel was able to describe this process in a linguistic way that captured both the process of cancellation of the initial fixed understanding as well as the preservation of the initial idea.[33] Essentially, this stage involves the process of challenging different views or concepts by viewing them in opposition to one another. In comparative legal method, this would constitute the stage in which the different laws are compared.

The third stage according to Hegel's dialectic approach refers to the stage in which the dissolution or transition of the specific determinants results in a new form of unity of the concepts. In relation to comparative legal method, this can be applied to the purpose of this method. In essence, when the laws of different jurisdictions are compared, they will challenge and evaluate the key differences which will either expose better practices, or weaknesses in at least one of the systems, which will ultimately result in a form of harmonisation of legal concepts through an evolutionary process, similarly to the Darwinist ideas of "Survival of the Fittest."[34]

However, in relation to Hegel's chosen term "*aufheben*," the preservation element entails the idea that despite this evolutionary process of the contrasting determinants, the cancelled notions will not vanish entirely, but will continue to be present within the newly developed determinations. The applicability of this notion to legal philosophical thoughts, for instance, will be confirmed through the findings of chapter 3, which will demonstrate, that despite the evolutionary developments of theoretical understandings of morality, sexuality and the law, the underpinning ideas were all preserved in some form within later theories.

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[32] Ibid 81.

[33] Robert C Solomon, *In the Spirit of Hegel* (Oxford University Press 1986) 275; Hegel and others (n 28) Addition to §95: "aufheben" has two meanings in German. The first meaning is to rescind or revoke something, whereas the second meaning can be translated as to preserve soothing or to put something aside for somebody (author's own translation).

[34] Charles Darwin, *On Natural Selection* (University of Simon Fraser Library 2004); Charles Darwin, *The Origin of Species by Means of Natural Selection* (J Murray 1906) 77.

Hegel understood this dialectic approach as a continuous approach, whereby fixed determinants would be challenged and changed into new fixed determinants, which would repeatedly undergo these processes until there was ultimately unity.[35] When applying this to comparative legal methods, this demonstrates the way comparative law, as a method works towards harmonisation of laws and ultimately the uncovering of absolute unified legal concepts.

In light of the overall research question and the sub-questions this study seeks to answer, this demonstrates and justifies the suitability of a comparative legal method for this purpose. However, as indicated above, comparative legal methods are not one form of legal research, but rather an overarching term that encompasses a multitude of different comparative methods. This is the reason why the overall methodology within this research has been classified as a mixed-method approach, despite the research being entirely literature based. According to Legrand,[36] comparative law is by nature interdisciplinary,[37] as its subject of analysis, the law, "does not exist in a vacuum; it is a social phenomenon if only because, at the minimum, it operates within society."[38] Law has to be viewed in relation to other influential aspects of society, such as religion or culture.[39]

Riles,[40] for example questions the divide between disciplinary and interdisciplinary within the subject area of law. Accordingly, she argues that law should be understood as an active part within societies "by providing cognitive frames through which social actors, including legal and social scientific observers, apprehend social realities."[41] Thus, she explains that legal methods should be understood as "generative of certain kinds of social, political, and epistemological realities."[42]

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[35] Hegel and others (n 28) para. 86 – 98.
[36] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies.
[37] Ibid.
[38] Ibid 238.
[39] Ibid.
[40] Annelise Riles, 'Comparative Law and Socio-Legal Studies', *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 808.
[41] Ibid.
[42] Ibid.

On the basis of this understanding of comparative law, the following will set out the relevant methods of comparative law in relation to their specific relevance for the purpose of this research study.

2.5.1.1 Functional method

The functional method of comparative law forms the more traditional form of doctrinal legal comparative research. Doctrinal legal research involves formulating legal doctrines by analysing legal rules on the basis of other systematic formulations of the law.[43] Accordingly, this form of research seeks to clarify legal ambiguities within laws and to create logical and coherent structures as well as describe relationships between rules.[44] This form of research is often described as "black-letter-law"[45] due to its focus on the written text of the law.[46] In the area of comparative legal methods, a doctrinal method can be seen in the functional approach which "focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events [as a] a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations."[47]

In relation to the set research objectives, elements of the functional comparative method are particularly useful as this method, "works in law when different legal systems actually do confront the same problems."[48] As the research is specifically

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[43] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 International and Comparative Law Quarterly; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review.
[44] Andrew Knight and Leslie Ruddock, *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29.
[45] See for example: Joseph Hinsey, 'Business Judgment and the American Law Institute's Corporate Governance Project: The Rule the Doctrine and the Reality' (1983) 52 Geo. Wash. L. Rev.; Marianne Constable, 'Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law' (1994) 19 Law & Social Inquiry; Peter Fitzpatrick and Alan Hunt, 'Critical Legal Studies: Introduction' (1987) 14 Journal of Law and Society; Allan C. Hutchinson, 'Beyond Black-Letterism: Ethics in Law and Legal Education' (1999) 33 The Law Teacher.
[46] Sue Chaplin, '"Written in the Black Letter": The Gothic and/in the Rule of Law' (2005) 17 Law and Literature; Bo Carlsson and Mattias Baier, 'A Visual Self-Image of Legal Authority: 'The Temple of Law'' (2002) 11 Social & Legal Studies.
[47] Ralf Michaels, 'The Functional Method of Comparative Law', *The Oxford Handbook of Comparative Law* (Oxford University Press 2007) 339.
[48] P. G Monateri, *Methods of Comparative Law* (Edward Elgar Publishing 2012) 119.

looking at the different ways specific EU member states regulate prostitution and THB for the purpose of sexual exploitation, while simultaneously needing to apply and operate under the provisions of the EU, this becomes evident, as the selected jurisdictions (in this case Germany, Sweden and the three main UK jurisdictions) are all confronted with similar obstacles in the way domestic prostitution laws and provisions of the EU directive on THB interact.

A particularly significant sub-category of the functional comparative legal method, is the common-core method, which is usually considered to have been built on the traditional functional method, yet with some influences from the law-in-context method.[49] The law-in-context method itself will not be considered a suitable comparative method for this study, as it essentially involves empirical research, which this project does not entail. However, the essence of placing a legal system or specific laws into a wider context is particularly beneficial, when conducting comparative legal research with a connection to the EU. The common-core method specifically seeks to uncover common cores with the intention of potential legal harmonisation of certain areas of law.[50] In relation to the evolutionary developments of laws within the EU, this method is based on the idea that these constitute a dynamic process, which involves both trickle-down dynamics of law via EU provisions and judicial rulings, as well as bottom-up dynamics via legal scholarship and education.[51]

In light of the functional method foundation of the common-core method, the aim is to explore commonalities as well as differences between the jurisdictions being compared with the objective of revealing the extent of possible legal harmonisation on, in relation to EU law, how certain provisions are best interpreted to ensure the best suitability of the law for the wide range of domestic legal traditions.

However, in light of the findings in chapter 3, and the wide-ranging differences in philosophical and moral conceptions of sexuality and prostitution, it is understood that a mere functional method will not suffice to address potential underlying cultural or structural differences underlying the different legal approaches. Thus, it is

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[49] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method, 19 – 21.
[50] Ibid.
[51] Ibid.

understood that this element of comparative legal method will need to be supplemented with other elements.

2.5.1.2 Structural method

As mentioned in the previous section, one of the weaknesses of the functional comparative legal method is its failure to factor in the way jurisdictions are structured and the way laws are classified within these structures.[52] For instance, in relation to this research study it needs to be acknowledged that the chosen jurisdictions operate in significantly different manners, as two of the systems, Germany and Sweden, are based on the civil law tradition,[53] whereas the UK's legal system is predominantly based on common law.[54] Thus, in order to adequately address these structural differences, it is necessary to include aspects of a structural comparative legal method.

In relation to the majority of the so-called continental EU member states, the underlying civil law based legal system is one of the more significant structures which need to be factored into this comparative study. This form of legal system originated from Roman law, which, as Watson explains, primarily involves a type of legal reasoning or thought rather than the particular Roman legal provisions that have influenced these jurisdictions.[55] In particular the legal institutions within Justinian's legal textbook contributed significantly to the distribution of Roman law and the development of law as a science across Europe from the 6th century AD, including the common law countries.[56] Here, this took place via the teachings of Blackstone in his Commentaries on the Law of England.[57] The consequence is that any structural comparative examination of laws needs to take this epistemological

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[52] Ibid.
[53] Paul G. Mahoney, 'The Common Law and Economic Growth: Hayek Might be Right' (2001) 30 The Journal of Legal Studies; Thomas Lundmark, *Charting the Divide between Common and Civil Law* (Oxford University Press 2012) 150, 159; Kerry O'Halloran, *The Politics of Adoption* (Springer Netherlands 2009) 321; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press 1998) 132, 276.
[54] Zweigert and Kötz (n 53) 180; Geoffrey Samuel, *A Short Introduction to the Common Law* (Edward Elgar 2013) 1, 74.
[55] Alan Watson, 'The Importance of "Nutshells"' (1994) 42 The American Journal of Comparative Law.
[56] P. G Stein, *Legal Institutions* (Butterworths 1984) 125–29.
[57] Samuel (n 25) 114 – 115; Alan Watson, 'The Structure of Blackstone's Commentaries' (1988) 97 The Yale Law Journal.

foundation into account in relation to any classification schemes within European legal systems.[58]

The most significant classification within this institutional system was presented by Gaius who sought to divide all law within three categories which relate to one of three specific areas, namely persons (*personae*), things (*res*) or actions (*actiones*).[59] Without going into much detail on the subject matter, as this would misdirect the focus of this chapter, the most crucial point of this is to explain that all three jurisdictions are structurally based on this tripartite classification system, which formed the basis of the classification of laws into property and obligations, which each are subsequently divided further into the categories of either ownership, possession and rights in property or contracts and delicts.[60]

In light of this, it has been briefly explained, that a structuralist method will be able to consider similarities as well as differences within a legal system, based on the technical legal structures found within them. In this research project, the fact that the jurisdictions in question all operate within the EU can in some respects be interpreted in a way that classifies all the jurisdictions into a single legal family. However, as indicated above, this is unwise for a number of reasons. In particular in light of certain divisions, such as between the Anglo-Saxon common law based system found in the UK,[61] and the Romano-Germanic systems found in Germany and Sweden.[62] Other differences include Germany as a Federal Republic,[63] or Sweden as a unitary state,[64] and the UK as a quasi-federal parliamentary constitutional monarchy.[65] Despite existing common legal histories, these differences

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[58] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System.' (1991) 13 Cardozo L. Rev.; Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45 International and Comparative Law Quarterly.

[59] Gaius, Iustinianus and Thomas Lambert Mears, *The Institutes of Gaius and Justinian, The Twelve Tables, and the Cxviiith and Cxxviith Novels* (Lawbook Exchange 2004) para. 8; Harold Berman and Charles Reid Jr., 'Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century' (1994) 20 Syracuse J. Int'l L. & Com, 1.

[60] Roscoe Pound, 'Classification of Law' (1924) 37 Harvard Law Review.

[61] María José Falcón y Tella and Stephen Churnin, *Case Law in Roman, Anglosaxon and Continental Law* (Martinus Nijhoff Publishers 2011) 22.

[62] Mahoney (n 53); Lundmark (n 53) 150, 159; O'Halloran (n 53) 321; Zweigert and Kötz (n 53) 132, 276.

[63] Donald P Kommers, Russell A Miller and Ruth Bader Ginsburg, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 2012) 1.

[64] M. Donald Hancock, *Politics in Europe* (CQ Press 2014) xxix.

[65] Ibid xxix.

between the jurisdictions mean that any generalisations of legal structures need to be avoided.

Although the structuralist method adds another layer to the functional method of comparative legal methods, it needs to be noted that both these systems focus predominantly on positive rules and structures. However, as already noted in the previous section, this fails to create an understanding of differences, which may be routed within different societal aspects of the given jurisdictions, such as culture, religion, morality or other social phenomena which may influence the regulation of prostitution within the selected jurisdictions. Thus, the following section will explain how elements of hermeneutical comparative methods will ensure that the more normative influences underpinning the different legal systems in relation to the regulation of prostitution will be considered.

2.5.1.3 Hermeneutical method

Hermeneutics, usually forms the counter-opposite of the positive comparative legal methods of functionalism and structuralism. In particular, when comparing legal systems within both civil law and common law traditions, Legrand, for instance, explains that the positive comparative legal methods do not suffice, as these place too great an emphasis on positive legal rules, which bears the risk of misunderstanding the common law mentality.[66] Thus, hermeneutics assist comparatists to avoid these technical legal transplantations by adding a comparison of culture and mentality in which legal rules are situated to any textual comparison of laws and legal categories. Thus, textual rules should merely be understood as signifiers which require a form of *interprétation découvrante*.[67]

In line with the dialectic ideas of Hegel, Legrand understands hermeneutics to go through similar processes of interaction between the “situated character“ of the

[66] Pierre Legrand, 'Le Droit Comparé' [2009] Presses Universitaires de France, referred to in Samuel (n 25) 128.
[67] Translates to “discovery interpretation” and refers to the process of discovering the culture and mentality within which foreign laws are situation; Pierre Legrand, 'Le Droit Comparé' [2009] Presses Universitaires de France, at 62, referred to in Samuel (n 25) 128.

researcher and the “situated character” of the text.[68] Thus, the hermeneutical methodological approach is based on the assumption that it is not possible to conduct objective interpretation.[69] As suggested by the ideas of Hegel laid out in section 2.5.1, it is understood, that any interpretation of text will involve an element of situatedness due to the existence of pre-understandings of the researcher. A legal researcher will base many assumptions of understanding on their previous experiences in legal education.[70] Other assumptions of understanding may be based on additional factors, such as language and culture.[71] In relation to this research project these points will be addressed in the limitations section in 2.5.4. These limitations are more present within positive research methodologies, which is why an element of hermeneutics is necessary within this study in order to counter these limitations.

The hermeneutic comparative legal approach extends the horizon of research to include the element of meaning, rather than purely the cause. A culture will not form the cause of legal provisions, but rather, legal provisions need to be understood as a creation by a culture.[72] Thus, in order to sufficiently recognise these dynamics within the context of this study, certain interdisciplinary methods are required, yet without the involvement of critical approaches.[73] This is not to say that the systems being compared cannot be critiqued, but rather that evaluative statements such as one system being “better” than another should be avoided, in order to respect foreign legal rationality, which may be difficult to comprehend by a researcher from a different cultural and legal system.[74] Hermeneutical elements within this chosen method will involve a sensitivity for non-transferability of legal concepts and ideas, as well as the inclusion of potential cultural, linguistic and moral influences on the laws under investigation. In particular, the guidance provided by the literature review will

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[68] Pierre Legrand, 'The Impossibility of ‘Legal Transplants’' (1997) 4 Maastricht Journal of European and Comparative Law.
[69] Pierre Legrand, 'Le Droit Comparé' [2009] Presses Universitaires de France, at 62, referred to in Samuel (n 25) 129.
[70] Ibid 128.
[71] Gunter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law.' (1985) 26 Harv. Int'l. LJ; Hamid Yeganeh, Su Zhan and Elie Virgile M. Chrysostome, 'A Critical Review of Epistemological and Methodological issues in Cross-Cultural Research.' (2004) 8 Journal of Comparative International Management.
[72] Michaels (n 47) 339-382.
[73] Ibid 364-380.
[74] Ibid; Van Hoecke, (n 49) 9.

assist in the understanding of different countries' approaches and underlying philosophies.

2.5.1.4 The significance of macro and micro levels of comparative legal method

A significant distinction to mention in relation to the comparative legal methods of this research study is the one between macro and micro levels of legal comparisons, i.e., the comparison of legal systems in contrast to the comparison of concrete provisions and regulations of specific issues within different jurisdictions or societies.[75]

This distinction becomes particularly significant when seeking to compare EU laws with national provisions within member states, in particular as the structures are interlinked yet substantially different in relation to underpinning objectives, which impact the methods used for comparison. Moreover, the previously mentioned interdependence of the legal system of the EU, and the individual domestic legal systems within the EU, hamper any comparative methods which would consider the systems as independent and separate.[76] Similarly, comparing individual members states' laws in areas which are influenced by EU harmonisation also needs to consider certain interdependencies and links due to the connectedness of the systems via EU law. Thus, Dehousse argues that cross-level comparisons

> should be explicitly concerned with their interaction, and try to encompass the two levels within one single analysis [and] the exercise is indispensable: in a complex situation, the analyst cannot simply assume a degree of simplicity that no longer exists.[77]

As a consequence, a conjunction of different comparative legal methods will allow for a more flexible approach to cross-level comparisons.

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[75] Mary Ann Glendon, Paolo G Carozza and Colin Picker, *Comparative Legal Traditions in a Nutshell* (West Academic 2008) 13.
[76] Van Hoecke (n 49).
[77] Renaud Dehousse, 'Comparing National and EU Law: The Problem of the Level of Analysis' (1994) 42 The American Journal of Comparative Law, 772.

2.5.1.5 Justifying and explaining the choice of sample jurisdictions: Germany Sweden and the three main jurisdictions in the UK

In light of the aim of this research project, namely, to examine the effects of inter-EU legal diversity of prostitution regulation, a significant method sought to answer this question is to undertake a comparative legal study. Germany, Sweden and the three main UK jurisdictions were chosen as a sample of case studies. The intention is to demonstrate the areas in which the different systems are unaffected by each other or even complement each other, and to uncover areas, in which the discrepancies between the various national approaches result in ineffectiveness in combatting the multitude of problems prostitution brings with it. A particular focus will be on the issues caused by the fact that all three countries are EU member states and with that all operate within a common market and a common area of freedom, security and justice. A crucial element of the comparative examination will be the focus on the perspective of the EU. It is the intention within the thesis to analyse how regulatory approaches to prostitution and the national laws combatting THB are affected by EU law, in particular in cross-border situations. In the following, the reasons for the selection of legal systems to be compared will be explained.

2.5.1.6 Choice of countries

The selection of countries to be compared in this study are Germany, Sweden and the three main UK jurisdictions, England and Wales, Northern Ireland and Scotland.[78] This choice has been predominantly based on scholarly arguments. In light of the aims and objectives of this study, an in-depth examination of the chosen countries is necessary, in order to uncover potential underlying causes of the diversity between the national systems within the EU. Thus, a small number of countries is more suitable, as this allows for a deeper analysis.[79] Moreover, as there are three theoretical approaches to the regulation of prostitution within the domestic

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[78] Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press 2001) 235.
[79] Arend Lijphart, 'II. The Comparable-Cases Strategy in Comparative Research' (1975) 8 Comparative Political Studies.

legal systems of EU member states, the sample size of three countries is the smallest possible option, provided that each theoretical approach is mapped on to at least one sample. Any smaller sample size would result in the exclusion of one of these theoretical approaches.

An issue often found within small case study numbers is generalisability. A remedy that counters this issue of small case sample sizes is to choose countries with maximized similarities, apart from the specific phenomena which is sought to be explained through the comparison.[80] Przeworski and Tuene have labelled this approach as the "most similar" system design which according to them is “based on a belief that a number of theoretically significant differences will be found among similar systems and that these differences can be used in explanation.”[81]

Thus, in light of the above and the research aims and objectives, the selection of countries to be included within this study was based on five main considerations:

1) The selection of countries was to include a representation of one of each of the regulatory approaches, as defined by the Council of Europe, as well as other organisations. This will enable the examination of the interactions and effects of the interactions of the different regulatory theoretical models in practice.
2) The countries should all be EU member states. This is necessary, as the overall aim is to examine the dynamics within the EU.
3) All countries should have good evaluation scores in relation to their implementation of international and transnational law on THB. This criterion has been included, to ensure that any found differences cannot be challenged merely on the basis of non-compliance, which would affect the validity of the study.
4) In order to exclude certain political and economic differences, which may skew the findings, all selected countries should have comparable economic strength and social security expenditures, as well as other comparable HDI

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[80] Malcolm L. Goggin, 'The "Too Few Cases/Too Many Variables" Problem in Implementation Research' (1986) 39 Political Research Quarterly, 333-34.
[81] Henry Teune and Adam Przeworski, *The Logic of Comparative Social Inquiry* (Wiley-Interscience 1970) 39.

scores. This criterion is thought to exclude any other economic and social issues, which may distort the findings in relation to the applicability of the law, and the role of morality and public reason in relation to choice of regulatory approaches, thereby, minimising further validity concerns.

5) In relation to the examination of the provisions relating to THB for the purpose of sexual exploitation, the countries should all form countries of destination, rather than origin, as this ensures comparable aims and objectives, which correlate with the objectives of the EU. This criterion also ensures that the countries being compared have similar intentions with their approaches taken, which strengthens the effectiveness of the functional method used within this comparative study.

As will be discussed in chapter 3, the majority of available literature, as well as the ideas of the Council of Europe and other organisations, have classified Germany as a country taking a regulatory approach, Sweden an abolitionist or neo-abolitionist approach, and the UK jurisdictions a prohibitionist approach.[82] This has contributed to the initial selection process, despite the classification of the approach requiring confirmation following the analysis of the findings of this study. Furthermore, all three countries are EU member states. Germany, as one of the original founding member states,[83] joined the EU, at least in part, in 1957,[84] with the former German Democratic Republic (GDR) being absorbed within the reunified Germany and the

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[82] Council of Europe, Parliamentary Assembly, Resolution 1579 (2007) Prostitution – Which stance to take?, Assembly debate on 4 October 2007 (35th Sitting), s. 4 et seq.; Janice G. Raymond, 'Prostitution as Violence against Women: NGO Stonewalling in Beijing and Elsewhere.' (1998) 21 Women's Studies International Forum; Phil Hubbard, Roger Matthews and Jane Scoular, 'Regulating Sex Work in the EU: Prostitute Women and the new Spaces of Exclusion' (2008) 15 Gender, Place & Culture; Rutvica Andrijasevic, 'Sex Workers and Migration, Europe', *The Encyclopedia of Global Human Migration* (Blackwell Publishing Ltd 2013).
[83] Only West Germany joined at the time.
[84] Neill Nugent, *The Government and Politics of the European Union* (8th edn, Palgrave and Macmillan 2017) 36.

West German EU membership in 1990.[85] The UK joined the EU in 1973[86] and Sweden joined in 1995.[87]

Moreover, all three countries have been ranked as tier 1 countries by the US Department of State in their Trafficking in Persons Report 2017, which forms one of the most comprehensive evaluations of the implementation of the Palermo Protocol across the world.[88] A tier 1 classification within this report is given to countries in which the governments are thought to fully comply with the minimum standards for the elimination of trafficking of the Trafficking Victims Protection Act's (TVPA).[89] Moreover, from an EU perspective, all three countries are thought to comply with the EU anti-trafficking provisions.[90] Significantly, all three countries comply with the fifth requirement, which is that they all are countries of destination for THB, rather than origin.[91]

In relation to economic strength, all three countries have high GDP (Gross Domestic Product) per capita[92] which rank in the top ten countries for GDP per capita within the EU. Moreover, based in the 2014 Eurostat figures,[93] both Germany and Sweden were amongst the top 10 countries in the EU in relation to their expenditure on social

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[85] Jochen Abr. Frowein, 'The Reunification of Germany' (1992) 86 The American Journal of International Law.
[86] European Union, 'A Growing Community – The First Enlargement - European Union - European Commission' (*European Union*, 2017) <https://europa.eu/european-union/about-eu/history/1970-1979_en> accessed 11 December 2017.
[87] European Parliament, 'The 1995 Enlargement of the European Union the Accession of Finland and Sweden' (European Parliamentary Research Service: Historical Archives Unit 2015).
[88] *Human Development Report 2016* (United Nations Development Programme 2016) <http://hdr.undp.org/sites/default/files/HDR2016_EN_Overview_Web.pdf> accessed 9 December 2017.
[89] *Ibid.*
[90] Report from the Commission to the European Parliament and the Council assessing the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, in accordance with Article 23 (2) of the Directive 2011/36/EU, COM/2016/0719 final.
[91] Europol, 'Situation Report Trafficking in Human Beings in the EU' (European Law enforcement Agency 2016) <http://www.europol.europa.eu> accessed 9 December 2017.
[92] Germany 41,936.06 USD (2016); Sweden 51, 599.87 USD; 39,899.39; 'GDP Per Capita (Current US$) | Data' (*Data.worldbank.org*, 2017). <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=PL-GR-PT-DE-EU> accessed 9 December 2017.
[93] Eurostat, 'Expenditure on Social Protection Per Inhabitant, 2014' (Eurostat 2017) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Social_protection_statistics#Main_tables> accessed 9 December 2017

protection per capita, with expenditures of 10,325 PPS and 9,799 PPS respectively, with the UK ranking 11th in the EU with an expenditure of 7,804 PPS.[94]

Finally, all three countries score similarly in relation to their Human Development Index (HDI). The HDI is a tool based on the notion that the ultimate assessment criteria of a country's human development should factor in the people and their capabilities rather than merely economic growth factors.[95] Accordingly, the HDI represents a summary measure of a country's achievements within three specific dimensions, namely "a long and healthy life, access to knowledge and a decent standard of living."[96] Germany ranked 4th in the world in the 2015 HDI with a value of 0.926, Sweden ranked 14th with a value of 0.913 and the UK ranked 16th with a value of 0.909. Accordingly, all values are above 0.9 (out of 1), which indicates close enough HDI scores to ensure comparability in this area.[97]

Finally, an added advantage in the choice of legal systems relates to the national languages used within them. Van Hoecke explains that "for a thorough comparative research a good reading knowledge of the local language is an absolute requirement."[98] As the researcher undertaking the comparative study complies with this requirement in relation to the national languages within these three countries, the scientific value of the study is enhanced. Although most countries now provide translations of their key legislation in English, these are not regularly updated, and there are few resources available in terms of supplementary or secondary sources.[99] Moreover, in relation to the underlying concepts of hermeneutics laid out above, the fact that the researcher has an educational background in both common law and civil law legal education, as well as concrete experiences by having studied in three out of the five jurisdictions, the risk of imposing ideas from one legal traditional into the concepts within another is significantly reduced.

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[94] Ibid.
[95] *Human Development Report 2016 Human Development for Everyone - Technical Notes* (United Nations Development Programme 2016) p.2, <http://hdr.undp.org/sites/default/files/hdr2016_technical_notes.pdf> accessed 9 December 2017.
[96] *Ibid.*
[97] *Ibid 22.*
[98] Van Hoecke (n 49) 4.
[99] Ibid.

2.5.2 Elements of an Ideological Framework: The role of legal theory within the analysis

Following an in-depth outline of the various elements of the chosen comparative legal method applied within this project, the focus must be drawn towards the role of legal theory. The fact that the literature has revealed a broad diversity in terms of theoretical ideas in relation to prostitution, morality, sexuality and consent, already demonstrates harmonisation issues from an ideological standpoint. However, when reflecting on the diversity in regulatory approaches to prostitution and the way this filters through into the national laws combatting THB for the purpose of sexual exploitation, the comprehensive theoretical notions may assist in the process of understanding ideological differences, which may be rooted deeper beneath a country's choice of regulatory approaches.

In order to understand how the theories will apply as analysis tools, they first need to be distinguished from models. Accordingly, models, on the one hand, are structural combinations of elements which have been designed to be applied in practice to solve problems.[100] Theories, on the other hand, are forms of discourse, which seek to identify the significant elements linked to certain situations in order to provide a deeper understanding thereof and to learn from them.[101] Legal theory is essential to not only aid one's understanding of one's native jurisdiction, but also to enhance the understanding and analysis of other jurisdictions, as theories are vital in accessing legal mentalities.[102]

Section B sets out a road-map to understanding the relevant legal theories in relation to prostitution.[103] This can be regarded as a convenient tool, through which legal provisions, concepts and commentaries can be placed within the available theoretical and philosophical sphere, which will assist the generation of a deeper understanding as well as add context to approaches in practice. Moreover, the use of theories within the analysis will minimise the validity issues relating to legal

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[100] Samuel (n 25) 23.
[101] M. E Hawkesworth and Maurice Kogan, *Encyclopedia of Government and Politics, Volume II* (Routledge 2004) 839.
[102] Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 The Modern Law Review.
[103] See Chapter 3.

imperialism, which is where legal concepts and ideas from one legal system are conceptually imposed onto other legal systems. This means that the laws in one system, with which the researcher may be more familiar, may not serve as the norm for other systems within the comparison. The use of theory, as well as the inclusion of relevant legal history elements must, thus, be included to ensure any potential bias is eliminated.

2.5.3 Paradigm orientation: Situating order, universalising theory and the cultural paradigm

After having determined the research aims, objectives, methods and underlying concepts, which are all necessary to establish the intelligibility of the project, the final methodology element required is the establishment of intelligibility functions. In light of the findings in chapter 3, it is clear that a cultural paradigm cannot be denied within this examination,[104] due to the clear links between morality and the regulation of prostitution. The opposing paradigm to this would be a nature paradigm,[105] which would disregard the cultural influences on the regulation. Given the diversity in regulatory approaches, as well as the significant differences in the way prostitution is understood, it is clear that this would be difficult to apply within the context of the subject matter at hand. This means, that the national cultures, and the opinions of the general population as well as the way these filter through the law-making processes cannot be disregarded within the comparative legal examination. The result is a multi-levelled, multi-dimensional legal comparison, which accounts for the supranationalism and supremacy of EU law and the sovereignty of the individual member states in matters of internal security. It also accounts for the different concepts of law, morality, sexuality, harm and prostitution within the domestic regulatory approaches, as well as the interconnectedness of the legal systems due to the harmonisation in areas pertaining to the EU common market and the common transnational fight to combat THB for the purpose of sexual exploitation. Thus, different methods, will need to be utilised for different purposes.

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[104] Samuel (n 25) 189.
[105] Ibid 177.

2.5.4 Limitations

In relation to the limitations of this study, it needs to be noted that the main limitation, namely the validity concerns in relation to the majority of available data in relation to THB for the purpose of sexual exploitation, was already discussed in the introduction. However, there are a few other limitations, which need to be pointed out in this section.

In relation to the hermeneutical elements of the chosen mixed comparative legal method, the researcher has only studied law in three of the five jurisdictions. In light of the researcher's language skills and the fact that the 2 jurisdictions the researcher has not studied law in, namely Sweden and Northern Ireland, fall into similar legal traditions as the other three, this limitation is presumed to be minor.

Another limitation relates to the requirement of comparability in relation to social security provision within the countries to be examined. Despite the expenditure in these areas being comparable, all three countries follow different traditions in this area. Thus, a brief acknowledgement of this is required, to ensure this is not overlooked in relation to the examination and analysis of the findings.

Sweden follows a Nordic model of social welfare, which is largely based on "egalitarianism" as a fundamental principle.[106] Thus, the idea behind this system is that social benefits should be distributed amongst all members of society through means of equality. The key characteristics of this model are said to be universalism, service richness (already being a social investment element), following a dual earner model, which sees high rates of female employment and gender equality, limited, yet strong, safety nets, low rates of poverty as well as high inclusion rates.[107]

In contrast, the Anglo-Saxon system, which is found in the United Kingdom is characterised by provisions of social benefits to anyone in need via their states'

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[106] Yelena Popova and Marina Kozhevnikova, 'Interdependence of HDI and Budget Redistribution within the Scandinavian and European Social Models' (2013) 18 Economics and Management.
[107] Maurizio Ferrera, 'From Protection to Investment? New Frontiers for the European Social Model(S)', *6th EU-India Joint Seminar on Employment and Social Policy* (European Commission 2013) 8, <http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=853&moreDocuments=yes&tableName=events&typeId=92> accessed 11 December 2017.

welfare systems, whereas the social funds are predominantly accrued by the citizens.[108] Ferrera explains that the main attributes of this model involve a Beveridgean “encompassing” schemes with weak universalism, occupational and fiscal welfare for the middle classes, means-tested benefits which apply to people with insufficient financial means (including working poor), with high rates of poverty and exclusion. [109] This model is based on liberal ideas and the predominant notion of social assistance of last resort.[110]

Although the Anglo-Saxon model appears to coincide with employment rates that are higher than the EU average, there is no significant difference between the rates in the other two models at hand,[111] with the unemployment rate in Germany amounting to 3.6%, in Sweden 6.7% and in the UK 4.2%. A downside of this system, which may influence the findings in this study, is a higher income dispersion as well as high numbers of low-wage employments that hint at non-negligible probabilities of resulting poverty.[112]

The third model, known as the continental welfare social model, also known as the Bismarck model, which is applied in Germany, is based on the assumption that social support is provided to people who have been represented within the labour market. This system depends entirely on the social accumulation of a person.[113] The key characteristics of this model are Bismarckian insurance schemes, which follow an insider/outsider divide, a focus on transfer rather than services and a basis on a so-called “male breadwinner model” which has been described as a “middle ground between the Nordic and the Anglo-Saxon model.”[114] The foundation of this model is found in the principle of security, which focusses primarily on employment protection and industry regulation. This model offers generous unemployment benefits, which

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[108] Popova and Kozhevnikova (n 106).
[109] Ferrera (n 107) 8.
[110] European Association of Service Providers for Persons with Disabilities, 'Social Welfare Systems Across Europe' (*Easpd.eu*, 2014) <http://www.easpd.eu/sites/default/files/sites/default/files/SensAge/d4-social_welfare_systems_across_europe.pdf> accessed 11 December 2017.
[111] Statista, 'EU: Unemployment Rate 2017 by Country' (*Statista.com*, 2017) <https://www.statista.com/statistics/268830/unemployment-rate-in-eu-countries/> accessed 11 December 2017.
[112] European Association of Service Providers for Persons with Disabilities (n 110).
[113] Popova and Kozhevnikova (n 106).
[114] European Association of Service Providers for Persons with Disabilities (n 110).

contributes to a reduction in poverty. A downside, however, is that the conditions of the allowances create barriers to employment of vulnerable people, such as people with disabilities.[115]

[115] Ibid; OECD, 'Health at a Glance 2017 - OECD Indicators' (*Oecd.org*, 2017) <http://www.oecd.org/health/health-systems/health-at-a-glance-19991312.htm> accessed 11 December 2017.

Section B: A Theoretical Examination of the Diversity of Regulatory Approaches to Prostitution

Chapter 3

3. Legal theories and philosophies surrounding prostitution and its regulation

Despite the terminology for this specific research project having been determined within Chapter 1, an area in need of exploration is the way prostitution is understood within the literature. The predominant reason for this, is that when researching prostitution in the literature, it becomes apparent, that there is very little consensus in any area pertaining to the subject matter.[1] In particular, various conceptions of prostitution may be tied to the many different attitudes. Thus, the following section will seek to explore a number of understandings of prostitution in order to establish a knowledge base for the following discussions on regulatory approaches as well as the philosophical underpinnings thereof.

3.1 Where does prostitution take place?

Much of the available literature focusses in particular on street prostitution. Moreover, there is a common confusion in the general understanding of prostitution that appears to equate prostitution generally with street prostitution. Although it is unclear if the focus in the literature causes the general confusion, or vice versa, it can be assumed that these two phenomena each contribute to the other in a reciprocal manner. Although the

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[1] See for example: Melissa Farley, '"Bad for the Body, Bad for the Heart": Prostitution Harms Women Even If Legalized or Decriminalized' (2004) 10 Violence against Women; Ronald Weitzer, 'Flawed Theory and Method in Studies of Prostitution' (2005) 11 Violence against Women; Alicia Danielsson, 'Legal Philosophical Considerations of Prostitution: A Roadmap to Understanding Diverse Legal Approaches to Prostitution in Europe' (2017) 3 Strathclyde Law Review, 24 - 26.

majority of debates on the regulation of prostitution predominantly focus on street prostitution as the most visible form,[2] it needs to be noted that prostitution may occur in many settings. Accordingly, Farley, Matthews, Deer, Lopez, Stark and Hudon, for instance, created a non-exhaustive list of different forms of prostitution activities in their research that examined human trafficking and prostitution in relation to native American women in Minnesota. Here they found prostitution to be occurring not only as street prostitution, but also in brothels, massage brothels, through escort services, outcall services, as well as within certain entertainment establishments, such as strip clubs or lap dancing establishments.[3] Moreover, they found that prostitution could also take place in related businesses within the sex industry, such as within telephone sex companies and within the field of pornography. However, the study also explained that these were not the only areas, and that there were also a number of niche areas in which CSPs had reported to have provided sex for remuneration, for example, in private residences, hotels, private parties, bars, hotels, casinos, farms, saunas, churches and within cults.[4] A number of other empirical studies in different EU member states have found similar results,[5] which indicates that the places in which prostitution takes place are wide-ranging regardless of the country. Considering the definition of prostitution as being the provision of sex for remuneration, these findings are not surprising. The only concern that comes about, is why such a diverse activity is commonly reduced to being understood as only constituting street prostitution.

Similarly to the issue of the localities of prostitution, it also needs to be highlighted, that the characteristics of people involved in prostitution, such as CSPs and CSPus are also diverse. The general perception of CSPs often involve stereotypical generalisations,

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[2] See for example: Phil Hubbard, Roger Matthews and Jane Scoular, 'Regulating Sex Work in the EU: Prostitute Women and the New Spaces of Exclusion' (2008) 15 Gender, Place & Culture; Elizabeth Berstein, 'What's Wrong with Prostitution--What's Right with Sex Work--Comparing Markets in Female Sexual Labor.' (1999) 10 Hastings Women's LJ; Michael S Scott and Kelly Dedel, *Street Prostitution* (US Dept of Justice, Office of Community Oriented Policing Services 2006).
[3] Farley, 'The Prostitution and Trafficking of American Indian/Alaska Native Women in Minnesota' (2016) 23 American Indian and Alaska Native Mental Health Research, 74.
[4] Ibid.
[5] Jody Raphael and Deborah L. Shapiro, 'Violence in Indoor and Outdoor Prostitution Venues' (2004) 10 Violence against Women.

such as CSPs constituting foreign vulnerable women,[6] and CSPus predominantly being predatory evil men. However, as will be discussed in more detail in chapter 4, in relation to the different paradigms of understanding prostitution and the people involved within prostitution, it is apparent that the people involved in prostitution are diverse, as is prostitution itself, which not only refers to characteristics, such as sex, gender and sexual orientation,[7] but also in relation to any other traits or histories these people have.[8]

3.2 The wide-ranging contextual ideas relating to prostitution

In line with the terminology used within this thesis, the simplest understanding of prostitution is the provision of sex for remuneration. Despite many referring to it as "selling one's body" for sex, a more accurate definition which still uses the terminology of utilising one's body within a commercial transaction, can, for instance be found in Lazarević,[9] who describes prostitution as lending one's body for remuneration of some form to other persons in order for them to be able to satisfy sexual needs.[10] According to Tiosavljević, Djukić-Dejanović, Turza, Jovanović and Jeremić,[11] the definitions of

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[6] See for example: Isabel Crowhurst, 'Caught in the Victim/Criminal Paradigm: Female Migrant Prostitution in Contemporary Italy' (2012) 17 Modern Italy; Yoko Sellek, 'Female Foreign Migrant Workers in Japan: Working for the Yen' (1996) 8 Japan Forum; Lilian Mathieu, 'Neighbors' Anxieties against Prostitutes' Fears: Ambivalence and Repression in the Policing of Street Prostitution in France' (2011) 4 Emotion, Space and Society.

[7] See for example: Peter Aggleton, *Men Who Sell Sex* (UCL Press 1999); Eli Coleman, 'The Development of Male Prostitution Activity among Gay and Bisexual Adolescents' (1989) 17 Journal of Homosexuality; Debra Boyer, 'Male Prostitution and Homosexual Identity' (1989) 17 Journal of Homosexuality; Ritch C. Savin-Williams, 'Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide.' (1994) 62 Journal of Consulting and Clinical Psychology; Lena Edlund and Evelyn Korn, 'A Theory of Prostitution' (2002) 110 Journal of Political Economy; Ronald Weitzer, 'New Directions in Research on Prostitution' (2005) 43 Crime, Law and Social Change; Megan Lowthers and others, 'A Sex Work Research Symposium: Examining Positionality in Documenting Sex Work and Sex Workers' Rights' (2017) 6 Social Sciences.

[8] See section 2.4.

[9] Lj Lazarević Lj, Criminal Law (Belgrad: Savremena administracija, 2000) referred to in Danijela Tiosavljević, Slavica Djukić-Dejanović, Karel Turza, Aleksandar Jovanović and Vida Jeremić, 'Prostitution as a Pychiatric Situation: Ethical Aspects' (2016) 28 Psychiatria Danubina.

[10] Ibid.

[11] Danijela Tiosavljević, Slavica Djukić-Dejanović, Karel Turza, Aleksandar Jovanović and Vida Jeremić, 'Prostitution as a Pychiatric Situation: Ethical Aspects' (2016) 28 Psychiatria Danubina, 349-353.

prostitution have come about, developed and transformed concurrently with changes experienced within the societies in which they are found. As such, the definitions of prostitution are formed in line with the perceptions of certain requirements established by societies and their governing individuals or groups of people. Thus, it is not surprising, that prostitution is often understood to have a social origin, and with that comes a number of social characteristics.[12]

Accordingly, many scholars argue, that prostitution is a result of class-based societies, which are built on a foundation of the notion of private property and the inequalities that come with such systems.[13] The concept of prostitution was not spared in the conflicting ideas of socialism and the capitalist understanding of freedom. To illustrate this, Konstantinović,[14] for example argues in the 1930s that prostitution was a result of capitalist societies. Accordingly, he argued that societies in which commodity production and market exchanges were not present, were unable to have actual prostitution, but merely activities which may resemble prostitution.[15] The focus of his research into prostitution understood prostitution as a social phenomenon, and, thus, saw the solution to abolishing prostitution to be found within social measures, rather than via legal regulation within the legal system of a specific country.[16] Some of these ideas are still reflected within research into prostitution today, where prostitution and the experiences of CSPs are linked to capitalist dynamics in societies.[17] Ericsson,[18] opposed this view,

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[12] Bogoljub Konstantinović, *Prostitucija I Društvo* (Knjiž F Baha 1930); Ine Vanwesenbeeck, 'Another Decade of Social Scientific Work on Sex Work: A Review of Research 1990–2000' (2001) 12 Annual review of sex research; Lin Lean Lim, the *Sex Sector* (International Labour Office 1998) 1-3; Christine Overall, 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) 17 Signs: Journal of Women in Culture and Society.
[13]See for example: Joan Kelly-Gadol, 'The Social Relation of the Sexes: Methodological Implications of Women's History' (1976) 1 Signs: Journal of Women in Culture and Society; Lars O. Ericsson, 'Charges against Prostitution: An Attempt at a Philosophical Assessment' (1980) 90 Ethics; Ellen Lewin, *Feminist Anthropology* (Blackwell Pub 2005) Chapter 4; Zillah Eisenstein, 'Constructing a Theory of Capitalist Patriarchy and Socialist Feminism' (1977) 7 Insurgent Sociologist; Asoka Bandarage, 'Women in Development: Liberalism, Marxism and Marxist-Feminism' (1984) 15 Development and Change.
[14] Konstantinović (n 12) referred to in Tanja Zimmermann, 'Radomir Konstantinović's Philosophy of the Province and the Yugoslav „Third Path' (2012) 3 Serbian Studies Research; Konstantinović (n 12); Vanwesenbeeck (n 12).
[15] Ibid.
[16] Ibid.
[17] See for example: Teela Sanders, Maggie O'Neill and Jane Pitcher, *Prostitution: Sex Work, Policy & Politics* (Sage 2017) 150 – 152.
[18] Ericsson (n 13).

and instead argued that these views were entirely utopian. He also argued, that prostitution was not *per se* ultimately undesirable.[19] He argues that the undesirability of prostitution is situational. However, both Ericsson and Konstantinović's views are similar in the sense that they both believed that in an ideal society, there would not be the need for prostitution. With the progress of time and the advancement of technology, increases in overall wellbeing and a stronger focus on economic issues aside from social ones, prostitution today is often recognised as a form of industry. Mijalković[20] refers to it has a novel branch of the industry of the twentieth century developed world. As will be demonstrated within this chapter, the views on prostitution, sexuality and morality range across a spectrum from feminist antagonism which views it as profoundly offensive,[21] or as an element of male aggression directed at women and, as such a version of violence which needs to be fought,[22] to significantly contrasting ideas of prostitution being a reasonable profession[23] or even a sign of female liberalisation,[24] which often depend on the time period and location in which these views have been formed.[25] However, despite these wide ranging views and understandings of prostitution, a commonality is

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[19] Ibid.
[20] Mijalković, Saša. "Human trafficking as a form of organized crime: Main phenomenological features." *Nauka, bezbednost, policija* 11.1 (2006): 109-130; see also: Nikolic-Ristanovic, Vesna. "Human trafficking between profit and survival." *Crime and transition in Central and Eastern Europe* (2012): 205-227.
[21] See for example: Jeffreys, Sheila. "Prostitution as a harmful cultural practice." *Not for sale: Feminists resisting prostitution and pornography* (2004): 386-99; Natasha Walter, *Living dolls: The return of sexism* (Hachette UK, 2011); Wendy McElroy, *Sexual correctness: The gender-feminist attack on women* (McFarland, 2001) 119 - 128.
[22] See for example: Julia O'Connell Davidson, *Prostitution, Power, and Freedom* (University of Michigan Press 1998); Farley (n 1) 1087-1125; Raymond, Janice G. "Prostitution as violence against women: NGO stonewalling in Beijing and elsewhere." *Women's Studies International Forum*. Vol. 21. No. 1. Pergamon, 1998.
[23] Barbara Milman, New rules for the oldest profession: Should we change our prostitution laws [1980] Harv*. Women's LJ* 3, 1; Silke Ruth Laskowski, New German Prostitution Act-An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law [2002] *Int'l J. Comp. Lab. L. & Indus. Rel.* 18, 479; Ellen F Murray, Anti-prostitution Laws: New Conflicts in the Fight against the World's Oldest Profession [1978] *Alb. L. Rev.* 43, 360; Julia O'Connell Davidson, the rights and wrongs of prostitution [2002] *Hypatia* 17.2, 84-98.
[24] Lipi Ghosh, Economic Liberalisation and History of Prostitution in Contemporary Civil Society of Thailand, [1999] *Proceedings of the Indian History Congress*. Vol. 60; Lacey Sloan, and Stephanie Wahab, Feminist voices on sex work: Implications for social work, [2000] *Affilia* 15.4, 457-479; Giri, V. Mohini, *Emancipation and empowerment of women (*Gyan Books, 1998); Bernstein (n 2) 91.
[25] Elli P Schachter, Identity configurations: A new perspective on identity formation in contemporary society [2004] *Journal of personality* 72.1, 167-200; Kup Lenore, Prostitution policy: revolutionizing practice through a gendered perspective (New York; London: New York University Press, 2005) 5, 10.

nonetheless that all perceptions are based on certain societal projections of the values and moral norms relating to sexuality and/or women and their place within a society.[26]

3.3 Placing the wide-ranging views on prostitution on a philosophical roadmap

The study of relevant legal theory and philosophy entails conducting philosophical and scientific examinations of law and justice as a social phenomenon.[27] This may include engaging with theories and studies about law and justice with potential elements of speculations on the basis of ideas found in numerous disciplines, such as law, sociology, history, political science, philosophy, economics and natural sciences. The aim is to elucidate the character and nature of law, particularly in relation to society.[28] In practice, this takes shape in seeking to answer an indefinite range of questions about law and justice, which are not only interesting in themselves, but also offer unique insights and an in-depth understanding of legal provisions and concepts in relation to their context.[29]

Due to the nature and extent of legal theory, it is impossible to consider every possible question which could be raised on a subject matter, especially in subject areas, which may be perceived as controversial, such as laws on prostitution. The vast amount of academic literature available on the subject covers a broad range of different concepts and ideas. This can make it difficult to piece together an initial overview of the core theoretical theories and basic notions before conducting a more in-depth analysis.

Due to the vast range of legal theories available on the subject matter, it will only be possible to discuss a carefully selected number. The intention of this section is to

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[26] See for example: Carol Smart, *Law, Crime and Sexuality* (Sage Pub 1995); John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 2007); Ann M. Lucas, 'Race, Class, Gender, and Deviancy: The Criminalization of Prostitution' [1995] *Berkeley Women's Law Journal*, 47; Jeffrey Weeks, *Sex, Politics and Society* (Routledge 2014); Phil Hubbard, Sexuality, immorality and the city: red-light districts and the marginalisation of female street prostitutes [1998] *Gender, Place and Culture: A Journal of Feminist Geography* 5.1, 55-76; Laurie Shrage, *Moral Dilemmas of Feminism* (Routledge 2013).
[27] Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2013) 3.
[28] Ibid.
[29] Richard A Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 1; 220.

provide a point of reference for the analysis of the regulatory approaches under investigation within this project, specifically through a Eurocentric lens.

Within the study of legal theories, there are two predominant species of jurisprudence identified in academic literature, namely, analytical and normative jurisprudence.[30] Analytical jurisprudence is the umbrella term for theories seeking to answer questions relating to any major concepts of law as well as general questions of the meaning of law.[31] Normative jurisprudence covers legal theoretical ideas that focus on questions relating to the moral dimensions of law.[32]

Legal theory classifications are merely labels of convenience. When researching specific theories, they provide valuable navigational aids. However, it is important not to view each theory as a true category. Even within the distinction between analytical and normative jurisprudence, one will find analytical elements in normative jurisprudence and normative elements in analytical jurisprudence.[33] Thus, even in this "Roadmap" certain theorists may appear in several classifications.

3.3.1 Examination Framework

Due to the vast amount of legal theories, it has been important to develop an examination structure of the existing fundamental ideas of the various legal theories, in order to enable a targeted investigation of legal approaches to prostitution and the underlying philosophies. Thus, a so-called "roadmap" has been developed that will direct the research through any potential legal theoretical concepts and underlying ideas found within the researched prostitution laws. The aim is to provide a guided overview of some of the most relevant concepts of jurisprudence that will enhance efficiency

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[30] See for example: Dennis M Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 9; 531; William Twining, *General Jurisprudence* (Cambridge University Press 2009) 226; Antony Duff and Stuart P Green, *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) Chapter 1; Scott Shapiro, *Legality* (Harvard University Press 2011) 2.
[31] H. L. A Hart, *The Concept of Law* (Oxford University Press 2012) xliv.
[32] Howard Davies and David Holdcroft, *Jurisprudence* (Butterworths 1991) v; Ratnapala (n 27).
[33] Ibid.

when later comparing different regulatory approaches, as it will enable the researcher to refer to legal theoretical ideas in a more structured way, than is currently possible in light of the abundance of literature available on the subject. The starting point consists of the questions "What is the nature of law?" and "How are laws determined?." This will provide the first relevant information to determine whether the research will be directed towards the legal umbrella-theories of Natural Law, Legal Positivism, Critical Legal Studies and Legal Realism. In the following "roadmap", the paths down each of these overarching categories will be addressed in turn *(See: Figure 1)*.

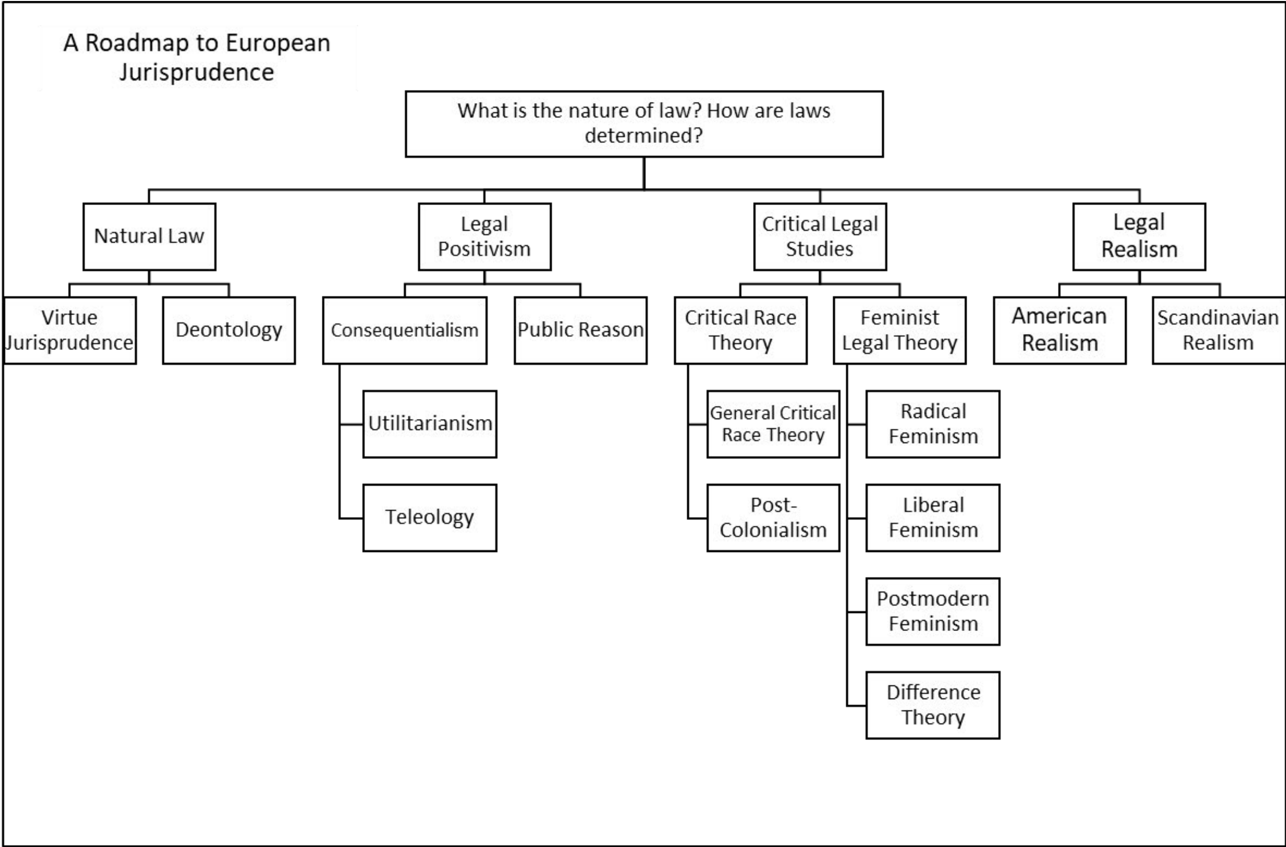

Figure 1

3.4 Exploring the legal theoretical views on prostitution

In accordance with the examination framework depicted above, the first questions to ask in determining the legal theoretical classification of prostitution laws are how these fit into ideas of the way the nature of law is regarded and how laws are thought to be determined. These initial questions will point towards Natural Law, Legal Positivism, Critical Legal Studies or Legal Realism. The following will address each of these classifications individually in relation to their theoretical concepts of morality, sexuality and law and the way these apply to prostitution and how the interpretations fit into the most prominent sub-classifications.

3.4.1 Natural Law

According to natural law theory, laws are derived from the nature of morality and are, thus, natural moral laws. Accordingly, many Natural law theorists support the premise of *lex injusta est non lex* (Law which is not just is not law).[34] In other words, this means that laws, which contradict a moral sense of justice, are considered invalid.

Over the millennia, natural law has developed from being based on the idea of the existence of divine laws, over canon laws, towards the idea of laws being inherently based on the fundamental moral foundations of human nature and in more recent times from human biology. Despite the developments in the ideas of where natural laws are derived from, some essential aspects remain consistent, namely, that laws are already omnipresent and need to be uncovered by legal scholars.[35] The following will consider some of the main ideas in relation to sex, morality and prostitution from the key Natural law thinkers in jurisprudential history.

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[34] Joel Feinberg, *Problems at the Roots of Law* (Oxford University Press 2003) 6; J. S. Russell, 'Trial by Slogan: Natural Law and Lex Iniusta Non Est Lex' (2000) 19 Law and Philosophy.
[35] Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence: Legality, Legitimacy and the Foundations of the Law* (Routledge 2019) Chapter 1; Jeffrie G. Murphy and Jules Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (Routledge 2018) 11-18; Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press 2017) 23.

In Plato's *Symposium*,[36] he focussed on the passion to possess the good and beautiful, which he referred to as *eros*.[37] Within his writings, one can recognise the same theoretical underpinnings which were later reflected in the Christian's antagonism to sexuality.[38] One example can be found in Plato's distinction between vulgar and spiritual *eros*. The latter, according to Plato, is free from lust, wantonness, or lewdness,[39] and has virtue as a central concern between mentally beautiful lovers.[40] In *Phaedrus*, Socrates explains that genuine lovers will only engage in sexual intercourse when they are overcome with *akrasia* (weakness of the will) or when they have been disinhibited due to having had alcohol to drink.[41] Plato was concerned about the links between sexuality and power and autonomy.[42] A particular concern in this regard was the influence sexual pleasure had on a human being's actions and on their lives in general. Accordingly, people became slaves to their passion and, in turn, subservient towards others. This could then threaten freedom and a happy life.[43] Plato lamented the dominant governing influence. He viewed sexual pleasure as having an absolute sovereignty over the actions a person takes in life.[44]

A few decades later, Aristotle,[45] confirmed these thoughts in relation to *philia* (friendship-love).[46] Accordingly, genuine friendships sought the good in one another and improved the other's virtue. Sexual desire, in Aristotle's view was based on an appetite, similar to the form of appetite one has for food and drink. This way of thinking was supported by Augustine and Kant in later centuries, who both agreed that sexual

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[36] Plato and others, *The Symposium of Plato* (University of Massachusetts Press 1970).
[37] Alan Soble, 'A History of Erotic Philosophy' (2009) 46 Journal of Sex Research, 104-120, 106; Plato and others (n 36).
[38] Vern L. Bullough, 'Christianity and Sexuality', *Religion and Sexual Health. Theology and Medicine* (1st edn, Springer 1992) 3-5; James B Nelson and Sandra P Longfellow, *Sexuality and the Sacred* (Westminster/John Knox Press 1994) 380.
[39] Plato and others (n 36) 181c–181d, 185c, 209b–210c.
[40] Plato, Republic (G. M. Grube, Trans.) (Indianapolis: Hackett, 1992) 403a– 403b.
[41] Plato, Phaedrus (A. Nehamas & P. Woodruff, Trans.) (Indianapolis: Hackett, 1995) 256b–256c.
[42] A. W Price, *Love and Friendship in Plato and Aristotle* (Oxford University Press 1997); Alan Soble, *Sexual Investigations* (New York University Press 1996) 146–148.
[43] Plato, Symposium (S. Groden, Trans.). (Amherst: University of Massachusetts Press. 1970).
[44] Soble (n 37) 104-120, 107.
[45] Aristotle, Nicomachean ethics (T. Irwin, Trans.) (Indianapolis: Hackett, 1985).
[46] Ibid.

appetite was analogous to hunger and thirst and constituted a form of animal appetite.[47] However, Aristotle's ethics of moderation prescribed that the virtue of temperance required these appetites to be controlled.[48] This was based on the idea that the satisfying of these appetites was an attribute of animals rather than rational beings. These ideas have later been reflected in the virtue of chastity found in Christianity.[49]

According to these Aristotelian natural law doctrines it is logical to deduct from the virtue-based ideas, that prostitution would be regarded as morally wrong. However, there are indications that Aristotle may not have thought prostitution to be as objectionable as one would first expect. Prostitution was a widespread phenomenon in Ancient Athens and included several forms, such as street prostitution, which similarly to today, constituted the lower end of the prostitution hierarchy, from young boys of poorer families through to courtesans who enjoyed a higher status in the prostitution hierarchy.[50] Thus, according to Aristotle, this phenomenon was reconcilable with social morals due to the fact that he believed that poorer people were not as capable of developing to the same level of mental capacity as members of the Athenian upper class.[51] Furthermore, in line with Aristotle's moral conception of only indulging in the pleasures of the flesh in moderation,[52] it could be assumed that if, for instance, a person only purchased a CSP's services on rare occasions, this may not fall within the realms of what Aristotle thought was a moral vice.[53]

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[47] Soble (n 37) 104-120, 115.
[48] P. T Geach, *The Virtues* (Cambridge University Press 1977) 131 et seq.; Raja Halwani, Sexual temperance and intemperance, in Raja Halwani, *Sex and Ethics* (Palgrave Macmillan 2007).
[49] Soble (n 37) 104-120, 107.
[50] E. N., Yankah, An (In)decent Proposition: Prostitution, Immorality and Decriminalisation (2010) University of Illinois - College of Law, Available at: http://works.bepress.com/ekow_yankah/2 [accessed: 26th July, 2015].
[51] Aristotle. and Peter Simpson, The Politics of Aristotle (University of North Carolina Press 1997) Book I, Chapter IV-VIII, Book III, Chapter IV; Yankah (n 50).
[52] Aristotle, *Nicomachean Ethics, in* Aristotle and others, *The Basic Works of Aristotle* (Random House 1941) at Bk. III, Ch. X-XI.
[53]Martha C. Nussbaum, Objectification, Philosophy and Public Affairs 24:4 (1998) reprinted in Alan Soble, *The Philosophy of Sex* (Rowman & Littlefield 2002) 394-396; Russell, B., Marriage and Morals (1958) 121-122 and I. Primoratz, What's Wrong with Prostitution?, 451-453 in Alan Soble, *The Philosophy of Sex* (Rowman & Littlefield 2002) 462-466.

Augustine,[54] took Plato's and Aristotle's moral ideas further in relation to sexual intercourse in marriage, and expressed accordingly that when carried out merely for the purpose of pleasure the wife would constitute the husband's harlot and the husband would classify as his wife's adulterous lover.[55] The foundation for this thinking needs to be sought in the Christian schools of thought of the 4th and 5th centuries.[56] Jerome, 4th century Christian philosopher, argued, for instance, that Adam and Eve were virgins while in Eden, yet with their first sin they were "cast out of Paradise" and "immediately married."[57] Hence, sex was not considered to be part of God's initial plan for human beings, and thus the ideal would be for people to abstain.[58] Although Augustine was not as radical in his thoughts, he supported the idea that sex prior to the fall was not lustful. In his view, God's original purpose for sex was solely for procreation.[59] This is also the underlying principle applied in Augustine's disapprobation of contraception. Accordingly, he even went as far as to describe practices such as blocking conception or aborting foetuses as "criminal conduct" as people engaged in this kind of conduct were coming together by "abominable debauchery."[60]

It appears that in the almost 1000 years that followed, the attitudes towards sexuality became slightly less negative. Accordingly, in the mid-13th century, the theologian St. Thomas Aquinas developed his Natural Law theory of sexuality within his *Summa Theologiae*.[61] This work later became the authoritative foundation of the Catholic teachings. Here, he explained that *coitus* resulted from a God-given natural inclination and thus, the sexual organs would be fulfilling their natural purpose during sexual

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[54] Augustine, On marriage and concupiscence, in T Edinburgh and T Clark (Eds.), Augustine, Marcus Dods and Peter Holmes, *The Works of Aurelius Augustine, Bishop of Hippo* (T & T Clark 1874).
[55] Ibid.
[56] See: Elizabeth A. Clark, '« Adam's Only Companion »: Augustine and the Early Christian Debate on Marriage' (1986) 21 Recherches Augustiniennes et Patristiques, 21, 139–162; Gilles Quispel and Elaine Pagels, 'Adam, Eve and the Serpent' (1989) 43 Vigiliae Christianae; Uta Ranke-Heinemann, Eunuchs for the Kingdom of Heaven: Women, sexuality and the Catholic church. (New York: Penguin, 1990).
[57] St Jerome, printed in Augustine, Saint Bishop of Hippo.; John Chrysostom, Saint; Philip Schaff; Henry Wallace, Nicene and post-Nicene fathers. Second series, Volume VI Jerome: Letters and Select Works (New York, NY: Cosimo Classics, 2007) 359.
[58] Soble (n 37) 108.
[59] Augustine, Gerald G Walsh and Grace Monahan, *The City of God* (1st edn, Catholic University of America Press 2008) Book 14, Chapter 24, 402.
[60] Ibid 109; Augustine (n 54) 93 - 202.
[61] Aquinas, T. Summa theologiae (Vols. 1–60, Cambridge, England: Blackfriars, 1964).

intercourse.[62] According to Aquinas, sexual pleasure had to be considered as a good thing, as it had been created by God. Yet, this type of pleasure had its rightful purpose and use, in the same way as everything else created by God. Hence, God planned for sexual pleasure in sexual acts as a contribution to "His" continuous work of creation. God intended for human beings to have a natural inclination for sexual intercourse to ensure they continued to obey "His" command to be fruitful. Thus, sexual pleasure in itself was not considered a sin, as long as this was conducted in conjugal sexual acts which were intended to be procreative.[63]

Aquinas derived his judgements about sexual activity from his natural law ethics.[64] In his line of arguments, he asserted that any unnatural vice[65] consisted "the gravest of sins" which he perceived to be worse than adultery or rape. The reason for this idea was that these unnatural vices were a direct "affront to God" and "His" intentions, whereas crimes such as rape or adultery merely violated "the developed plan of living according to reason" which was a creation of man.[66]

Approximately half a millennium later, in the 1700s, David Hume and Immanuel Kant contributed to the Natural law thoughts on sexual desire, love and morality in a secular form. Hume claimed that love developed through a connection based on a person's perception of beauty, bodily appetite and compassion which resulted in people becoming inseparable.[67] He explained that the latter two aspects of amorous passion were "too remote [by their natures] to unite easily."[68] Kant expressed the idea that true human love was merely goodwill, affection, and the promotion of the "happiness of others and finding joy in their happiness."[69] In his reference to the benevolence component of Hume's concept of amorous passion, Kant asserts that this component is

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[62] Aquinas, T, On the truth of the Catholic faith: Summa contra gentiles (book III, pt. 2; V. Bourke, Trans.) (Garden City, NY: Image Books. 1956) (Original work published 1258–1264).
[63] Ibid book III, pt. 2, chapter 122, x6.
[64] Aquinas (n 61) IIaIIae, ques. 154, arts. 1–12; Soble (n 37) 110.
[65] Self-abuse, Bestiality, Sodomy or failure to use the proper organs in the natural style of intercourse.
[66] Soble (n 37) 104-120, 111.
[67] David Hume, A Treatise of Human Nature (Oxford, England: Oxford University Press, 2000) Book II, pt. ii, chap. 11.
[68] Ibid.
[69] Immanuel Kant, Peter Heath and J. B Schneewind, *Lectures on Ethics* (Cambridge University Press 1997) Ak 27:384.

too different from sexual desire for these two to be able to be joined. The reason for this is that in Kant's view, sexual desire is nothing more than an appetite towards persons, which in essence objectifies them.[70] In his opinion, sexual desire and benevolence would contradict one another, as the former would result in all motives of moral relationships ceasing to function and *vice versa*, benevolence would deter a person from carnal enjoyment.[71] This objectification of another person for sexual intercourse, according to Kant, could only be overcome in marriage.[72] Similarly to Aquinas, Kant thought that engaging in *crimina carnis contra naturam*, such as masturbation, constituted in essence the treatment of oneself as an object and, thus, degraded "human nature to a level below that of animal nature and [made] man unworthy of his humanity."[73]

Kant's philosophical approach has been incorporated into several contemporary philosophies. In particular the feminist theorists have resorted to Kant's critique of sexual objectification, especially in evaluating subject matters such as rape, prostitution, sexual harassment or pornography.[74] In contrast to the liberal ideas of consent, Kant believed that the objectification of another human being was too immoral as to allow for it to be justified with consent.[75]

One of the first philosophers to develop the Natural law ideas regarding sex towards the scientific realm was the German philosopher, Arthur Schopenhauer. Accordingly, he asserted that the beauty of an object of one's sexual desire was the way nature tricked men into believing that they sought to satisfy their erotic desires for their own individual good. However, he argued that sexual intercourse, in fact, only benefitted the survival of

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[70] Ibid.
[71] Immanuel Kant and Mary J Gregor, *The Metaphysics of Morals* (Cambridge University Press 1996) Ak 6:426.
[72] Kant (n 69); B Herman, Could it be worth thinking about Kant on sex and marriage? (1993) in Karen Jones, Louise Antony and Charlotte Witt, 'A Mind of One's Own: Feminist Essays on Reason and Objectivity.' (1995) 104 The Philosophical Review; Alan Soble, Sexual use in Alan Soble and Nicholas Power, *The Philosophy of Sex* (Lanham, MD: Rowman & Littlefield, Publishers, 2008) 259–288.
[73] Ibid.
[74] Yolanda Estes, Prostitution: A subjective position, in Alan Soble & N Nicholas Power (Eds.), Philosophy of sex (Lanham, MD: Rowman & Littlefield Publishers, 2008) 353–365; Martha Craven Nussbaum, *Sex & Social Justice* (Oxford University Press 1999).
[75] Soble (n 37) 113.

the species,[76] and yet caused men to irrationally give up their fortune and freedom in pursuit of their erotic goals.[77]

3.4.2 Determining the necessity of laws governing prostitution under natural law ideas: Virtue Jurisprudence or Deontology

As discussed in the previous section, Natural law believes that ideals of justice and laws are pre-established by, for example, nature, or a higher power. Virtue jurisprudence is a sub-category of Natural Law that believes that the purpose of laws is to promote virtuous behaviour in a given society.[78] Thus, laws criminalising prostitution are necessary to promote the development of the virtuous characters of citizens. Established above, key supporters of these ideas can be found in Plato, Aristotle and St. Thomas Aquinas.

Legal deontologists believe that actions are morally wrong, regardless of the consequences. According to Rawls, these moral intuitions, which vary between individuals, can be determined through a process he describes as "*reflective equilibrium*."[79] Accordingly, the collective of raw moral intuitions may be ordered in general principles, which could unify the collective of judgments in certain cases.[80]

Kant, following a deontological ideology, thought that the central idea of morality was found in duty. He based this ideology on the idea of a good will. Accordingly, "nothing can possibly be conceived in the world or out of it that can be called good without qualification except a good will."[81] Good will, accordingly, was seen to be a will, which has the objective of achieving *good* rather than merely being based on desire and

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[76] Ibid.
[77] Arthur Schopenhauer, *The World as Will and Representation, Vol. 2* (Dover Publications 2012) 532, 550.
[78] Colin Patrick Farrelly and Lawrence Solum, *Virtue Jurisprudence* (Palgrave Macmillan 2008) 20; Denise Meyerson, *Understanding Jurisprudence* (Routledge-Cavendish 2007) 3.
[79] Søren Holm and Monique F Jonas, *Engaging the World* (IOS Press 2004) 140 et seq.
[80] John Rawls, A theory of Justice (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999).
[81] Immanuel Kant, *On the Metaphysics of Morals and Ethics* (A & D Pub 2008) 10.

inclination.[82] As already discussed under the umbrella term of Natural Law, Kantian Deontology as well as Aristotelian virtue-based theories regarded prostitution as a moral harm. However, this in itself does not necessarily mean that the law should prohibit it.[83]

Instead of determining the self-inflicted harm as resulting from the indulgence in base pleasures, Kant argued that the harm was caused due to a breach of one's moral duties and the effects this had on one's dignity. However, despite Kant believing that prostitution constituted a grave violation of a person's moral duties, his theories in relation to autonomy are often used as a theoretical basis to claim that the law cannot force people to be morally upright.[84] In recent decades there has been a significance placed on Kantian ideas in discussions about prostitution, which make it advisable to conduct a review of his theories in relation to prostitution at an early stage of jurisprudential research into prostitution laws.[85]

3.5 Legal Positivist understandings of prostitution, sexuality and morality

Maybe one of the most significant and most often mentioned forms of analytical jurisprudence is Legal Positivism,[86] which also constitutes the counterpart to Natural Law theories. The reason for this is that they constitute opposites in various areas of their concepts. Natural law, for instance, is considered a normative legal theory. Hence, it is predominantly focussed on what law ought to be. Legal Positivism, on the other hand, looks at laws in order to determine what law is, what the laws are, and their effects. In essence one could generalise positive legal theories as concerning facts

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[82] Ibid.
[83] Yankah (n 50).
[84] Ibid.
[85] See for example: Helga Varden, 'A Kantian Conception of Rightful Sexual Relations' (2006) 22 Social Philosophy Today, 199-218; Evangelia Papadaki, 'Sexual Objectification: From Kant to Contemporary Feminism' (2007) 6 Contemporary Political Theory, 330-348, 330-335; Clelia Smith and Yolanda Estes, 'The Myth of the Happy Hooker: Kantian Moral Reflections on a Phenomenology of Prostitution', Analyzing Violence against Women (Springer 2019) 257-264.
[86] Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law* (Springer Netherlands 1986) 124.

whereas normative legal theories are about values.[87] In essence, positive legal theories can be categorised as dealing with three different aspects of legal analysis. These are doctrinal or descriptive theories, explanatory or causal theories, and effects and predictive theories.[88]

When considering the above characteristics, it may be difficult to pinpoint the exact point in time at which the positivist tradition began. Hobbes's theory of law includes certain positive characteristics. Furthermore, theorists such as Jeremy Bentham or John Austin can clearly be placed within the realm of the positivist tradition.[89] In "The Province of Jurisprudence Determined,"[90] Austin asserted that a given rule only constituted a law if it had been commanded by the sovereign towards the sovereign's subjects, and when the commands were supported by threats of punishment. Accordingly, the rule of reason is a social rule, which determines whether rules classify as valid rules or not.[91]

When looking at legal positivism it is important to note that the scope of the theory can cover a wide range of theorists with a wide range of different approaches to the examination of laws. Often theorists who are classified as positivists may also be placed in other categories of jurisprudence. Bentham, for example, as mentioned above, is a clear representative of positive legal thinking.[92] Nevertheless, in line with the examination framework depicted above, Bentham's concepts fall within the sub-category of utilitarianism.

The key point when looking at prostitution laws from a positivist perspective is the insignificance, if not neutrality, of moral concerns. Accordingly, normative considerations

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[87] Joseph Raz, *The Authority of Law* (Oxford University Press 2009) 135; Hans Kelsen, *Pure Theory of Law* (University of California Press 1978) 219; Enrico Pattaro and others, *A Treatise of Legal Philosophy and General Jurisprudence* (Springer Netherlands 2009) 221.
[88] Roy Bhaskar, *The Possibility of Naturalism* (New York: Routledge, 2014) 160.
[89] Reidar Edvinsson, *The Quest for the Description of the Law* (Springer-Verlag Berlin Heidelberg 2009) 5; Alexandra Rengel, *Privacy in the 21St Century* (Martinus Nijhoff Publishers 2013) 17; Michael D Bayles, Hart's *Legal Philosophy: An Examination* (Dordrecht: Springer Netherlands, 1992) 21.
[90] John Austin, *The Province of Jurisprudence Determined* (John Murray 1861).
[91] Jeffrey Brand-Ballard, *Philosophy of Law* (London: Bloomsbury, 2013) 7.
[92] Xiaobo Zhai and Michael Quinn, *Bentham's Theory of Law and Public Opinion* (Cambridge: Cambridge University Press, 2014) 144.

are not necessary to determine the validity of laws.[93] This is not to say that morals may not be mentioned at all, as they may become relevant in the investigation of jurisdictions, especially in the area of explanatory and causal theories. However, in these cases the moral concerns will merely be regarded as facts without any normative value.

3.5.1 Determining why laws should be enacted concerning prostitution: Consequentialism or Public Reason

Consequentialism holds that the consequences of someone's conduct or laws are the decisive foundation for judgments in relation to the right- or wrongness of a specific conduct or provision. Hence, the consequentialist stance is that a morally right act will produce an outcome society would describe as good. In essence, consequentialists believe that "the ends justify the means."[94] Accordingly, if a specific consequence is morally significant enough, it will justify any method.[95]

Consequentialism feeds into the realm of paternalists and other representatives of holistic understandings of societies who claim that human beings are intrinsically social beings. Thus, due to the fact that people form complex, inseparable relationships with other members within their societies, their individual actions will automatically have an effect on the other members of their society or even on the entire society as a whole.[96] In terms of consequentialist thoughts, ethical considerations play an important role. This is based on the assumptions that certain behaviours may have negative effects on society. Consequently, it may be necessary to restrict the liberties of individuals.[97] In regard to prostitution, some consequentialist ideas, whether relevant or not, are thought to include concerns such as prostitution contributing to the spread of sexually

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[93] Kenneth Einar Himma, Law, morality, and legal positivism (Wiesbaden: F. Steiner Verlag, 2004) 147-156.
[94] John Mizzoni, *Ethics* (Wiley-Blackwell 2010) 104.
[95] Ted Lockhart, *Moral Uncertainty and its Consequences* (Oxford University Press 2000) x.
[96] Rohnn B Sanderson and Marc A Pugliese, *Beyond Naïveté* (University Press of America 2012) 160.
[97] Ibid.

transmitted diseases. A hypothetical consequentialist consideration in this respect may involve removing prostitution from criminalisation in order to remove these kinds of adverse effects by including provisions for regular health and safety check-ups.

One of the more significant sub-categories of consequentialism is utilitarianism. As mentioned previously, one of the theorists whose ideas have been historically attributed to utilitarianism is Jeremy Bentham. The *ratio legis* of utilitarianism is the goal of producing “the Greatest Good, for the Greatest Number.”[98] Thus, legal rules should be adopted which will maximise utility.[99]

As aforementioned, Jeremy Bentham has been attributed to the Utilitarian School of Legal Thought. Especially his thoughts about marriage, sexual relations and morals touch on philosophical issues relating to prostitution and prostitution laws. Based on the fundamental idea that men and women are equal, Bentham designed a draft marriage law which was based on utilitarianism. One of his conclusions was that questions concerning the relative value of spiritual or physical love were to be placed in the realm of personal choice rather than constituting decisions which a legislator could decide on for “the species in general.”[100] In later writings he uses similar ideas of the law of property. In his reasoning for a utilitarian approach to marriage he called for marriage to be allowed, as long as it was solely governed by the individual’s desire to gain pleasure and avoid pain.[101] In contrast to Kant, for instance, Bentham described sexual intercourse as a pleasure. Thus, legislators needed to ensure that the quantity of this pleasure was as high as possible within society. This needed to be proportionate to the level of pleasure sexual intercourse entailed, which, according to Bentham, constituted the greatest of all pleasures.[102]

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[98] John Troyer, *The Classical Utilitarians* (Indianapolis: Hackett Pub Co., 2003) 92.
[99] J. J Chambliss, *Philosophy of Education* (Credo Reference Ltd 2008) 556.
[100] Jeremy Bentham, The Works of Jeremy Bentham, 11 Vols. [1843], Published under the Superintendence of His Executor, John Bowring (William Tait 2020) 543-544.
[101] Mary Sokol, 'Jeremy Bentham on Love and Marriage: A Utilitarian Proposal for Short-Term Marriage' (2009) 30 The Journal of Legal History, 1-21, 3; J. R Dinwiddy, *Bentham* (Oxford University Press 1989) 22; See Jeremy Bentham, Principles of Morals and Legislation (Theclassics Us, 2013) 42–59, 103–104, 115–116.
[102] Sokol (n 101); Bentham (n 100) 543-544.

It is of significance in relation to prostitution that Bentham acknowledged in these ideas that this pleasure was not necessarily exclusively within legal marriage. In his considerations of non-conforming sexual intercourse, by which he meant sexual intercourse outside of marriage for other reasons than procreation, he explained that the harm caused from the enforcing of a marriage contract was "palpable enough."[103] In his utilitarian view, men may commonly realise after having enjoyed sex with one woman, that they could enjoy sex just as much with another woman. This idea was not solely attributed to male views and he saw this to be equally true for women. Accordingly, the sexual restraint which came with the enforcement of a marriage contract was an inconvenience for both sexes.[104] These thoughts have also been expressed by others in a way which could be reconcilable with the concepts of Natural Law. Denis Diderot viewed a lifelong commitment to one woman incompatible with the natural inconstancy of men[105] and Rousseau, although believing that marriage was advantageous for the human species as a whole, did not believe that the permanent union between women and men was dictated by nature.[106]

In regards to prostitution, Bentham recognised similar distinctions between forms of prostitution, which he viewed in a form of hierarchy, similarly to the views of Aristotle, as mentioned earlier.[107] Accordingly, he distinguished between "public women", which referred to women working in street prostitution, and which constituted the lower ranks within the hierarchy, "kept women", which described CSPs who worked in brothels and "courtesans", who were considered to be at the top of the hierarchy.[108] On the one hand, Bentham was not against prostitution, and he did not condemn women, especially poor women, who worked as CSPs.[109] He was aware of their economic situation and,

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[103] Ibid.
[104] Ibid.
[105] See: Blandine L. McLaughlin, 'Diderot and Women', in Samia I Spencer, *French Women and the Age of Enlightenment* (Indiana University Press 1984) 297.
[106] Jean-Jacques Rousseau and Maurice Cranston, *A Discourse on Inequality* (Penguin Books 1984) 111.
[107] See section 3.4.1.
[108] Bridget Hill, *Women Alone* (Yale University Press 2001) 110; R. Probert, 'Chinese Whispers and Welsh Weddings' (2005) 20 *Continuity and Change* 211–228, 220; Sokol (n 101) 9.
[109] Sokol (n 101) 1-21.

thus, proposed solutions which were in line with many feminist concepts found today,[110] and which were far beyond the common thinking of Bentham's time. Bentham regarded prostitution to be an economic problem. He explained that poor women prostituted themselves due to the fact that they were not able to find alternative employment to support themselves. He stressed the disadvantageous position women were in when seeking work in comparison to male labourers. In his opinion, this situation was intensified by men carrying out jobs which could be described as more suitable for women, such as sewing or tailoring, selling toys or running fashion shops.[111] Bentham's proposed solution can be viewed as an early form of positive discrimination. He proposed to implement legislation which would exclude men from working in these kinds of sectors in order to reserve them for women.[112]

In his utilitarian examinations of prostitution, Bentham saw the harm caused in the areas of the potential transmission of venereal diseases[113] and issues regarding paternity of illegitimate children. The latter point in particular was of concern for Bentham due to high rates of infanticide[114] or the harsh exclusive provisions that the common law placed on illegitimate children.[115]

In order to reduce these harms Bentham proposed changes to the law in order to allow for illegitimate children to gain legitimacy after the parents got married, and to decriminalise infanticide for the protection of mothers.[116] Bentham argued that as the offences of prostitution or infanticide could not be prevented, at least the harm caused needed to be reduced.[117] In terms of imposing sanctions on prostitution, Bentham

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[110] See section 3.6.2.
[111] Ibid 12; Jeremy Bentham, The Theory of Legislation, C.K. Ogden, ed., trans. from the French of E´tienne Dumont by Richard Hildreth, (New York, 1931) 385.
[112] Jeremy Bentham; G W H Fletcher, Analysis of Jeremy Bentham's Theory of Legislation (Trübner & Co.: London, 1864) 72; Charles F Bahmueller, *The National Charity Company* (University of California Press 1981) 16; Sokol (n 101) 12.
[113] Bentham (n 100).
[114] Ibid.
[115] John Hamilton Baker, *An Introduction to English Legal History* (Butterworths 2002) 489–490.
[116] Mark Jackson, *New-Born Child Murder* (Manchester University Press 1996) 3–7; Bentham (n 100); See Hill (n 108) 113–115; Sokol (n 101) 10.
[117] Ibid.

further was of the opinion that the harms caused by prostitution were sufficient moral sanction, which revoked any further need for political sanctions.[118]

One final point to be mentioned, which may be of significance in the examination of the regulation of prostitution was Bentham's ideas of welfare provisions as a potential solution to reduce harm, which are notably paternalistic. As such. he proposed for particular hospitals to act as a form of asylum for women, not only CSPs, but also abused married women. He proposed these places to constitute a safe place of concealment in which women could find protection.[119]

Teleology as a legal theory is very closely related to utilitarianism. The crucial distinction is that, in relation to the purpose of prostitution laws, they should be developed to achieve a specific goal, regardless of whether this achieves the greatest good for the largest amount of people. John Stuart Mill's ideas can be classified as teleological in nature. Similarly to Bentham, Mill also spoke up in favour of a utilitarian approach to prostitution, however, with scepticism towards intangible metaphysical moral duties.[120]

Mill believed that it should be for the individual to decide how he or she wished to pursue achieving pleasure and the absence of pain.[121] In his idea of pleasure, he believed that people would usually prefer pleasures associated with their higher capabilities over purely lower pleasures.[122] Here, a parallel can be drawn to Aristotle's idea of the highest *eros* being the pleasures of the mind.[123] Mill classified prostitution as falling within the category of base pleasures. Furthermore, he associates prostitution with a number of harms, which affect the lives of both the CSP and the CSPu in a negative fashion. However, this does not necessarily include the fact that the work of prostitution is unpleasant for CSPs, as work is seen to be unpleasant for most

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[118] Bentham (n 100) 545-546.
[119] Bentham (n 100) 579, see also: Janet Semple, *Bentham's Prison* (Clarendon Press 1993) 290–295; Robert Dingley, *Proposals for Establishing a Public Place of Reception for Penitent Prostitutes, &C* (W Faden 1758); Roy Porter, *Enlightenment* (Allen Lane/Penguin Press 2000) 373.
[120] John Stuart Mill, Jeremy Bentham and Alan Ryan, *Utilitarianism and other Essays* (Penguin Books 1987) 272-276, 301-303.
[121] Ibid at 278.
[122] Ibid.
[123] See section 3.4.1.

employees. Again, the utilitarian perspective emerges here, in the argument that one undertakes unpleasant work for remuneration, which allows for later enjoyment and pleasures. However, according to Mill, the act of prostitution may impede a person's ability to enjoy pleasures due to negative effects on a person's health or psychological fitness.[124] In particular, this kind of emotional distress may affect a CSP's ability to form relationships with other human beings, either romantically or in friendship.

A significant element of Mill's ideas is the emotional damage he associated with prostitution, which could negatively affect one's ability to form deep friendships or supportive, intimate romantic relationships.[125] These harms are not only attributed to affect CSPs. CSPus are also seen to be negatively affected in the sense. As prostitution does not involve the same pleasures as sex in a caring and intimate relationship, the easy access to short-term pleasures of prostitution, may prevent CSPus from obtaining the greater long-term pleasures derived from meaningful relationships.[126]

A further niche of positive jurisprudence to be mentioned at this point is the relationship between public reason and the law. Some argue that the notion of Public Reason first came about through Rawls' work.[127] However, there are indications of it having been mentioned by earlier scholars. Hobbes, for instance, wrote:

> In which question we are not every one, to make our own private Reason, or Conscience, but the Publique Reason, that is, the reason of God's Supreme Lieutenant, Judge; and indeed we have made him Judge already, if wee have given him a Sovereign power, to doe all that is necessary for our peace and defence.[128]

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[124] Mill, Bentham and Ryan (n 120) 281 – 285; Peter De Marneffe, *Liberalism and Prostitution* (Oxford University Press 2010) 13-15, 22-26. W Chapkis, *Live Sex Acts* (Routledge 1997) 1, 78.
[125] Ibid; Yankah (n 50).
[126] Ibid 21.
[127] James M. Buchanan, 'Rawls on Justice as Fairness' (1972) 13 Public Choice, 123-128; John Horton, 'Rawls, Public Reason and the Limits of Liberal Justification' (2003) 2 Contemp Polit Theory, 5-23; Bruce W. Brower, 'The Limits of Public Reason' (1994) 91 The Journal of Philosophy.
[128] Thomas Hobbes and others, *Hobbes: "Leviathan"* (Cambridge University Press 1996).

Here, it seems clear that Public Reason is used to describe the judgements of a sovereign.

Furthermore, Rousseau explained in his "Discourse on Political Economy,"[129] that a father should not only trust his own personal reason in being a good father. Instead

> (…) the only rule he should follow is the public reason, which is the law. Hence nature has made quantities of good fathers, but it is doubtful whether, since the world began, human wisdom has produced ten men capable of governing their fellows.[130]

In contrast to Hobbes, Rousseau sees public reason as a form of general will, which seeks to achieve the common good.

Kant also touched on the idea of Public Reason. Accordingly, he stated that:

> [t]he public use of man's reason must always be free, and it alone can bring about enlightenment among men; the private use of reason may quite often be very narrowly restricted, however, without undue hinderance to the progress of enlightenment. But by the public use of one's own reason I mean that use anyone may make of it as a man of learning addressing the entire reading public. What I term the private use of reason is that which a person may make of it in a particular civil post or office with which he is entrusted.[131]

Accordingly, for Kant, public reason appears to be the reason people gain from one another in the process of becoming enlightened. This appears to be in direct contradiction to Hobbes' use of the term.

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[129] Jean-Jacques Rousseau and Jean-Jacques Rousseau, *Discourse on Political Economy* (Oxford University Press 1999).
[130] Ibid 5.
[131] Immanuel Kant, Hans Reiss and H.B Nisbet, *Political Writings* (Cambridge University Press 1991) 55.

As mentioned above, Rawls is often considered the founder of the modern concept of Public Reason. This is based on his work "Justice as Fairness: A restatement,"[132] in which he stated that:

> great values fall under the idea of free public reason, and are expressed in the guidelines for public inquiry and in the steps taken to secure that such inquiry is free and public, as well as informed and reasonable. These values include not only the appropriate use of the fundamental concepts of judgment, inference, and evidence, but also the virtues of reasonableness and fair-mindedness as shown in the adherence to the criteria and procedures of common sense knowledge, and to the methods and conclusion of science when not controversial, as well as respect for the precepts governing reasonable political discussion.[133]

This definition indicates that Public Reason is defined as the reason of political societies. This constitutes a way for a society to formulate its plans in addressing and prioritising its objectives and putting these into action. Furthermore, according to Rawls, Public Reason finds its limitations within the realms of reasoning which could still appeal to the wider general public, such as "presently accepted general beliefs and forms of reasoning found in common sense, and the methods of science when these are not controversial."[134]

According to the underpinning ideas of Rawls' Public Reason, the regulation of prostitution depends on the way the ideas and wishes of the majority of the general public filter through the democratic law-making mechanisms to be transformed into laws. As a law-making tool, this seems straightforward at first, especially as it is a process that appears to have little possibilities to be influenced by the moral ideals of a few individuals to determine the way laws, which are intended to govern everyone equally, are made. However, especially in the area of prostitution and THB, there remain many scientifically unsound research findings being disseminated within current literature, the media, and by campaigners in a way, which often reports these findings

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[132] John Rawls and Erin Kelly, *Justice as Fairness* (Harvard University Press 2001).
[133] Ibid 190.
[134] John Rawls, Political liberalism (New York: Columbia University Press, 2005) 224.

are entirely reliable facts.[135] Some scholars have critiqued the distribution of flawed research findings, which influence the way the general population think, which ultimately may result in laws being created on the basis of public reason filtering through the democratic law making processes, and influencing the regulation of other people's lives. Weitzer,[136] for example, has explained the way anti-trafficking "moral crusades" that were often supported by the religiously motivated, conservative organisations as well as feminist abolitionist groups, have "demonized" prostitution in the US and contributed to the way the US government adopted anti-trafficking policies, which ultimately turned out to be harmful.[137] Fedina further highlights that members of the general population are more susceptible to being misled by false data distributed via the media, due to the absence of peer-reviewing processes to ensure that information is reliable.[138] This exacerbates the issue of false information influencing the views of the majority, which in turn will determine which forms of regulatory approaches to prostitution are chosen.

However, despite the criticisms in relation to public reason and the way prostitution regulation is determined, there is one significant aspect to be taken away from this section at this point in the thesis. This is the understanding of Rawls' concept of Public Reason as constituting a reflection of the law-making processes found within the legislatures within the majority of Western legal systems, and the way the moral ideas and majority opinions influence the laws this way.[139] This is also reflected in the use of "reasonable person" tests, which are often used as a device to aid the interpretation of laws.[140] Deciding how to understand laws on the basis of the ideas or "reason" of members of the general public is a clear reflection of the democratic views that the ideas of the majority should determine rules.[141]

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[135] Lisa Fedina, 'Use and Misuse of Research in Books on Sex Trafficking' (2014) 16 Trauma, Violence, & Abuse.
[136] Ronald Weitzer, 'The Movement to Criminalize Sex Work in the United States' (2010) 37 Journal of Law and Society.
[137] Ibid.
[138] Fedina (n 135).
[139] Rawls (n 134) 136 – 137.
[140] Cécile Laborde and Aurélia Bardon, *Religion in Liberal Political Philosophy* (Oxford University Press 2017) 105.
[141] Samuel Freeman, *Justice and the Social Contract* (Oxford University Press 2009) 239.

3.6 Critical Legal Studies and the understanding of prostitution, sexuality and morality

Critical legal studies first emerged in the 1970s as a revolutionary legal theory, which sought to reshape society in accordance with human personality, without the influences of class domination and political agendas.[142] Supporters of these ideas, such as Kennedy and Klare defined Critical Legal Studies as being "concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society."[143]

When initially conducting research into jurisprudence of prostitution laws, it becomes clear that theoretical approaches falling under the umbrella term of Critical Legal Studies (CLS) form by far the most extensive category. Nevertheless, this “Roadmap” to understanding prostitution laws in Europe, will only be able to provide a selective glimpse of the available theoretical ideas. Thus, the following is based on a selection of the most established umbrella theories within CLS in relation to prostitution.

3.6.1 Determining the Critical Voices: Critical Race Theory

Over the past decades, the significance of the Critical Legal Studies movement has disappeared and been replaced by more specialised movements, that share the initial common foundation inspired by Critical Legal Studies, such as feminist legal theory and critical race theory (CRT).[144]

CRT views prostitution as a social phenomenon, which reflects the social injustices within society. Within these views, this is most significantly seen in the

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[142] Jonathan Turley, ‘Hitchhiker's Guide to CLS, Unger, and Deep Thought’ [1987] *Northwestern University Law Review* 81, 595.
[143] Duncan Kennedy and Karl E. Klare, ‘A Bibliography of Critical Legal Studies,’ [1984] *Yale Law Journal*, Vol. 94, 461.
[144] John Henry Schlegel*, ‘Critical Legal Studies’, in* Sally E Hadden and Alfred L Brophy, *A Companion to American Legal History* (John Wiley & Sons 2013).

overrepresentation of people with certain ethnic backgrounds.[145] The aim of Critical Race Theories is to direct the law towards a focus on the experiences of minority groups in prostitution in order to tackle racial injustice.[146]

The general ideas of CRT perceive the laws as still predominantly made by middle to upper class white males. This means that the experiences of people from other backgrounds are inadequately regulated for. The consequence is that people belonging to less advantaged groups have less options and are, thus, more likely to end up in prostitution. This calls for more inclusive laws throughout the legal system in order to not only fight the negative effects of prostitution but also disadvantaged groups of people from being more likely to have to resort to prostitution.[147]

Within contemporary literature, it is contested whether Postcolonialism is a critical theory in its own right, or if it is a sub-category of CRT.[148] One of the key underlying questions is whether subsuming the two theories into each other, their distinctive power is lost.[149] Nevertheless, regardless whether Postcolonialism is placed as a sub-category of CRT, or as a standalone theory alongside it, their content is undoubtedly related. According to the ideas of Postcolonialism, Europeans have robbed their former colonies of their culture and their wealth.[150] The effects of this background are still visible in society today and many ethnic minorities are still suffering from poverty as a result. The

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[145] Richard Delgado and Jean Stefancic, *Critical Race Theory* (Temple University Press 2000) 295; U.S. Dept. of Health & Human Services, *Health Status of Minorities and Low-Income Groups* (US Dept of Health & Human Services, Public Health Service, Health Resources and Service Administration, Bureau of Health Professions, Division of Disadvantaged Assistance 1991) 193; Elijah Anderson, Code of the street: decency, violence, and the moral life of the inner city (New York: W.W Norton, 2000) 32.
[146] Stephen A Saltzburg, *Criminal Law* (Lexis Pub 2000) 87; Diana Elizabeth Kendall, Sociology in our times (Boston, MA: Cengage Learning, 2016) 280.
[147] C. Hakim, Feminist Myths and Magic Medicine: The Flawed Thinking Behind Calls for Further Equality Legislation (London: Centre for Policy Studies, 2011).
[148] See for example: Alana Lentin, 'Eliminating Race Obscures its Trace: Theories of Race and Ethnicitysymposium' (2016) 39 Ethnic and Racial Studies, 388; Carl G. Hempel and Paul Oppenheim, 'Studies in the Logic of Explanation' (1948) 15 Philosophy of Science, 152; Aníbal Quijano, 'Coloniality of Power and Eurocentrism in Latin America' (2000) 15 International Sociology, 534; Eduardo Bonilla-Silva, 'More Than Prejudice' (2015) 1 Sociology of Race and Ethnicity, 81.
[149] Nasar Meer, '"Race" and "Post-Colonialism": Should One Come Before the Other?' (2018) 41 Ethnic and Racial Studies, 1163, 1178-1181.
[150] Agata Anna Lisiak, *Urban Cultures in (Post)Colonial Central Europe* (Purdue University Press 2010) 21, Akhil Gupta, *Postcolonial Developments* (Duke University Press 1998) 170; Edward P Antonio, *Inculturation and Postcolonial Discourse in African Theology* (P Lang 2006) 232.

underlying idea according to this legal theoretical approach is that the poverty suffered by ethnic minority groups, leads to an overrepresentation of ethnic minorities in prostitution. Hence, positive action would be required to achieve a fairer labour market and in turn reduce the prevalence of prostitution.[151]

3.6.2 Determining the Critical Voices: Feminist Legal Theory

Prostitution is a subject matter, which has been considered in extensive detail in Feminist Legal Theories and there are clear indications of the great significance of the issues of prostitution within Feminist Legal Theories, as well as vice versa, that is to say that there is significance of Feminist Legal Theories within prostitution.[152] The following will attempt to consider some of the more relevant aspects of the prostitution discussions in relation to Feminist Jurisprudence.

Feminist Jurisprudence is mainly focussed on the way in which the law was instrumental in women's historical subordination and the way this is still reflected in laws and society today. The key objective in this process is to encourage changes in relation to women's status by means of adaptation and modification of the law and its approach to gender, in order to achieve a system which can be regarded as equally just for members of all genders.[153]

There are four main schools of thought within Feminist Jurisprudence, which are generally described as the four models of feminism, each incorporating different concepts. These models are: the Liberal Equality Model, the Difference Theory, the Sexual Dominance model and the Postmodern and Anti-essentialist model.[154] Probably the two largest schools are the Liberal Equality Model, which is also often referred to as

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[151]Sumi Madhok, Anne Phillips, Kalpana Wilson, Gender, agency and coercion (Basingstoke: Palgrave Macmillan, 2012) 128.
[152] M Fineman, J E Jackson, & A P Romero, Feminist and queer legal theory: intimate encounters, uncomfortable conversations (Farnham, UK: Ashgate, 2009).
[153] Ibid.
[154] Nancy Levit & Robert R.M. Verchick, *Feminist legal theory: a primer* (New York: New York University Press, 2006).

Liberal Feminism, and the Sexual dominance model, which incorporates the ideas of Radical Feminism, and is, thus, often referred to by this name.[155] However, the other two schools should not be considered as being insignificant to the issue of prostitution.

The Liberal Equality Model seeks genuine equality for women in contrast to merely nominal equality. This objective is sought by means of application of liberal values.[156] The Sexual Difference Model in contrast, seeks to highlight the natural gender differences and seeks these differences to be acknowledged within the law. Proponents of this theory believe that this is the only way distinctive female issues can be adequately remedied.[157] This approach is based on the idea that there are natural or cultural characteristics that distinguish women from men, which need to be taken into account in the laws.[158] The Dominance Model strongly rejects the ideas of liberal feminism. It views the legal system as a system which has historically been developed by men, in order to manifest perpetual male dominance.[159] The Postmodern and Anti-essentialist Model focusses on the general post-modern idea, that every individual perspective is socially situated. Accordingly, this school of thought rejects the idea of a universal women's voice and explores the ways other characteristics, such as race, sexual orientation or class, which contribute to social subordination correlate and interplay with women's experiences and the future destinies of women.[160] The Difference Theory is based on the idea that formal equality will not always lead to substantive equality. The liberal feminist ideas are criticised for being male-biased.[161] As men and women are different in many biological aspects, both potentially have different needs that need to be considered in law. However, as the legal system has

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155 Ibid.
156 Jerry D. Leonard, *Legal Studies as Cultural Studies: a reader in (post) Modern Critical Theory* (New York, State University of New York Press, 1995) 92.
157 Ibid. 93 et seq.
158 S. Kumra, R. Simpson, & R. J. Burke, the *Oxford handbook of gender in organizations* (Oxford; New York, NY: Oxford University Press, 2014) 114.
159 Levit and Verchick (n 154) 22.
160 Tracy A. Thomas, Tracey Jean Boisseau, *Feminist Legal History: Essays on women and Law*, (New York: New York University Press, 2011) 22 et seq.
161 Levit and Verchick (n 154) 15.

developed over thousands of years based on male experiences, the female needs have not been equally considered in the evolution of legal systems.[162]

Due to the wide range of feminist analyses of prostitution, the following will review a few selected legal theoretical concepts in relation to prostitution in order to serve as a representative indication of the attitudes within the scholarly realm. Thus, representatives of the most prevalent schools of thought within feminist jurisprudence will be illustrated here.

According to the ideas of Radical Feminism, prostitution is always morally undesirable, as it constitutes one of the most graphic accounts of men's domination over women in society.[163] CSPs are seen as symbols of the value that women have in society. Accordingly, CSPs are representative not only of women's sexual subordination, but also of women's social and economic subordination in society.[164] Radical feminists highlight the harm caused by prostitution to female experiences in order to illustrate the present inequalities within a gendered analysis of sexuality and the state.[165] The most significant criticism in accordance with the writings of Barry,[166] Dworkin,[167] MacKinnon,[168] Millet,[169] and Pateman[170] is the understanding of prostitution as

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[162] Gad Barzilai, Communities and law: politics and cultures of legal identities (Ann Arbor: University of Michigan Press, 2003) 169; Tjitske Akkerman, Jean Monnet, Siep Stuurman, Perspectives on Feminist Political Thought in European History: From the Middle Ages to the Present (New York: Routledge, 2013) 90.
[163] Camille Pateman, Defending Prostitution: Charges against Ericsson' (1983) *Ethics* 93: 561–65; Jane Scoular, The Subject of Prostitution (2011) *Feminist Theory* 2004; 5; 343.
[164] E. Giobbe, Confronting the Liberal Lies about Prostitution, in D. Leidholdt, & J. Raymond (eds) *The Sexual Liberals and the Attack on Feminism, (*New York: Elsevier Science, 1990) 77.
[165] Scoular (n 163) 343, 344.
[166] See: Kathleen Barry, *Female Sexual Slavery*. (Englewood Cliffs, NJ: Prentice-Hall, 1979); Kathleen Barry, *The Prostitution of Sexuality*. (New York: New York University Press, 1995), Scoular (n 163) 343, 345.
[167] Andrea Dworkin, *Intercourse*. (New York: Free Press, 1987); Dworkin, A., *Pornography: Men Possessing Women*. (New York: Plume, 1989).
[168] Catharine A. MacKinnon, Feminism, Marxism, Method and the State (1982) *Signs* 7(3): 515–44; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law. (*Cambridge, MA: Harvard University Press, 1987); Catharine A. MacKinnon, *Toward a Feminist Theory of the State*. (Cambridge, MA: Harvard University Press, 1989); Catharine A. MacKinnon, Confronting the Liberal Lies about Prostitution, (1990) in D. Leidholdt & J. Raymond (eds), *The Sexual Liberals and the Attack on Feminism*. (New York: Elsevier Science, 1990); Catharine A. MacKinnon, Prostitution and Civil Rights (1993) *Michigan Journal of Gender and Law* 1: 13–31.
[169] Kate Millet, *The Prostitution Papers*. (St. Albans: Paladin, 1975).
[170] Pateman (n 163) 561–65; Carole Pateman, *The Sexual Contract*. (Cambridge: Polity Press, 1988).

constituting a form of violence against women. This violence is not solely interpreted in the actual conducting of prostitution, but is seen more fundamentally as the representation of "the absolute embodiment of patriarchal male privilege."[171] Shelia Jeffries provides a good insight into the reasoning behind these thoughts by explaining that prostitution constitutes "the ultimate in the reduction of women to sexual objects which can be bought and sold, to a sexual slavery that lies at the root of marriage and prostitution and forms the foundation of women's oppression."[172] Radical feminists believe that prostitution contributes to women's oppression. Thus, they seek to have all prostitution classified as a human rights violation.

A representative perspective of the Liberal Feminist Views can be found in Phetherson's "A Vindication of the Rights of Whores."[173] Accordingly, CSPs are placed in the realm of a civil rights movement in which they are demanding for the right "to charge for what other women give for free."[174] The ideas offer significant counter-hegemonic insights by challenging the identification of sexual acts with acts of desire and opposing the distinction between erotic and affective activity, on the one hand and economic life on the other.[175]

Paglia's account of "drag queen feminism" highlights some of the liberal ideas of prostitution and sexuality.[176] Accordingly, Paglia explains that women are the dominatrix of the universe. She explains that CSPs constitute the ruler of the sexual empire, which men can only have access to by paying.[177] This demonstrates the way in which the liberal ideology is willing to view the freedom of women to separate themselves from their subordinate position by utilising their bodies and their sexuality to gain power. Accordingly, feminist perspectives such as the sexual dominance model are criticised

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[171] Kari Kesler, Is a Feminist Stance in Support of Prostitution Possible? An Exploration of Current Trends (2002) *Sexualities* 2: 219–35, 219.
[172] Sheila Jeffries, *The Idea of Prostitution. (*Melbourne: Spinifex Press, 1997) 2.
[173] Gail Pheterson, *A Vindication of the Rights of Whores* (Seattle, WA: Seal Press, 1989).
[174] Frédérique Delacoste and Priscilla Alexander, *Sex Work: Writings by Women in the Sex Industry*. (London: Virago, 1989) 273.
[175] Noah D. Zatz, 'Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution' (1997) 22 Signs: Journal of Women in Culture and Society. 22(2): 277–308, 277.
[176] Camille Paglia, *Vamps & Tramps: New Essays (*Vintage, New York, 1994).
[177] Ibid 42 et seq.

as "reducing [CSPs] to pitiable charity cases in need of their help."[178] Hence, in doing so, they are "guilty of arrogance, conceit, and prudery."[179] In contrast to the radical ideas of prostitution, the Liberal Feminists believe that prostitution can be a desirably chosen activity.[180]

Postmodern Feminists do not tend to consider prostitution as a dissident sexual practice or a fundamentally oppressive one. Accordingly, "the referent, the flesh-and-blood female body engaged in some form of sexual interaction in exchange for some kind of payment, has no inherent meaning and is signified differently in different discourses."[181] Postmodern Feminism is often recommended to be viewed in light of their empirical research. The reason for this is because postmodern feminism seeks to include a wide range of separate accounts of prostitution within their perspectives. An example that showcases this in practice can be found in O'Connell Davidson's research, which empirically examines a multitude of types of prostitution in relation to the degrees of control CSPs have over their lives.[182]

A key point in postmodern discussions of prostitution is concerned with its links to migration. In this regard Agustín, for instance, criticises the Coalition Against Trafficking in Women (CATW) of having attempted to merge the concepts of human trafficking and prostitution "in an effort to save as many victims as possible."[183] However, this practice totalises all experiences of migrants and women within prostitution, who find themselves in a variety of different circumstances and with a variety of different levels of personal will, which impedes the effective process of proposing practical solutions.[184]

The Difference Theory can be used to argue many different and opposing arguments to prostitution. The crucial element is the consensus of an inadequate consideration of

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[178] Ibid 57.
[179] Ibid.
[180] ibid.
[181] Shannon Bell, *Reading, Writing and Re-Writing the Prostitute Body* (Bloomington: Indiana University Press, 1994) 1.
[182] O'Connell Davidson (n 22).
[183] Laura Agustín, 'Sex Workers and Violence against Women: Utopic Visions or Battle of the Sexes?' (2001) *Development* 44(3): 107–10, 107, available at: http://www.walnet.org/csis/papers/dsid-0109.html
[184] Ibid.

sexual differences in the law. Some use the ideas of this theory to support the argument that women are economically forced into prostitution due to inadequate labour laws that are still ineffective in achieving gender equality in the labour market.[185] Others take a completely different stance, and explain that due to the different gender roles in sexual intercourse, women are inadequately perceived as automatically constituting the victim within the transaction. Accordingly, due to the nature of female genitals, it is perceived that women are the "inactive" party in sexual activity, to whom something is done, whereas men are considered the "active" party, who are doing something to someone.[186] Thus, the sexual differences result in laws that depict men as perpetrators and women as victims.[187]

A contemporary theoretical approach which deserves particular emphasis in the examination of Feminist Legal Theories and Prostitution is found in the works of Martha Nussbaum. In particular in her piece "Sex and Social Justice"[188] she seeks to explain how sex and sexuality are immaterial distinctions in relation to morality. Nussbaum's work is of key significance in modern developments of Feminist Legal Theory. Although she is often classified as a Liberal Feminist, it may be justifiable to say that she is a Liberal, who also happens to be a Feminist.[189] The reason for this is the way she has developed her own distinct version of Liberal Feminism. In a way, Nussbaum attempts to move Liberal Feminism towards a new era, in which women can be equal and enjoy equal rights on the basis of Legal Liberalism, not only as women, but as individual

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[185] Annette Jolin, 'On the Backs of Working Prostitutes: Feminist Theory and Prostitution Policy' (1994) 40 Crime & Delinquency, 77-83; Bernstein (n 2) 91-93; Maggie O'Neill, *Prostitution and Feminism: Towards a Politics of Feeling.* (Polity Press 2001) 15-40, 121-124; Deborah L Rhode, *Justice and Gender* (Harvard University Press 1991) 253-257.
[186] Sheila Jeffreys, Anticlimax: a feminist perspective on the sexual revolution (Women's Press, 1990) 138; Alan Soble & N Nicholas Power (Eds.), Philosophy of sex (Lanham, MD: Rowman & Littlefield Publishers, 2008) 121, 379.
[187] Linda LeMoncheck, Loose Women, Lecherous Men: A Feminist Philosophy of Sex. (New York: Oxford University Press, 2006) 173; Vern L Bullough; Bonnie Bullough, Human sexuality: an encyclopaedia (New York: Garland Pub., 1994) 211.
[188] Nussbaum (n 74) 29-47.
[189] Martha Nussbaum, *The Feminist Critique of Liberalism* (Department of Philosophy, University of Kansas 1997) 3-6; 25-27; Anne Phillips, 'Feminism and Liberalism Revisited: Has Martha Nussbaum Got It Right?' (2001) 8 Constellations, 260-265; Martha C. Nussbaum, 'Political Liberalism and Respect: A Response to Linda Barclay' (2003) 4 SATS 25-30.

persons. This is reflected in her idea of personhood in relation to rights which she describes in the following manner:

> […] the core of rational and moral personhood is something all human beings share, shaped though it may be in different ways by their differing social circumstances. And it does give this core a special salience in political thought, defining the public realm in terms of it, purposefully refusing the same salience [...] to gender and rank and class and religion.[190]

Especially in relation to prostitution, Nussbaum has reviewed the concept of objectification as found in Kant's ideas as well as in the feminist arguments put forward by Catherine MacKinnon and Andrea Dworkin.[191] In her chapter "Seven Ways to Treat a Person as a Thing" she lists seven notions as being inherently involved in the objectification of a person. These include instrumentality, denial of autonomy, inertness, fungibility, violability, ownership and the denial of subjectivity.[192] A key point in Nussbaum's opinions is the fact that, contrary to the empowerment and sex-positive considerations of the Liberal Feminist Model discussed above, Nussbaum believes that pornography, for instance is still a form of objectification in accordance with her analysis. She demonstrates similarities in her reasoning with the ideas of radical feminism. Nevertheless, she remains a strong advocate of the removal of prostitution from criminalisation. In 2008, Nussbaum became known for her statement in relation to prostitution and abortion that "the idea that we ought to penalise women with few choices by removing one of the ones they do have is grotesque."[193] One of Nussbaum's key arguments in relation to prostitution is the fact that the act of selling sexual services cannot be argued in terms of its moral dubiousness. Accordingly, when women choose to enter into prostitution on the basis of a lack of economic options, the wrongfulness is not in the act of prostitution itself, but instead in the economic circumstances of women

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[190] Martha C. Nussbaum, & E. Freud, E., Sex and Social Justice (New York: Oxford University Press, 1999) 70.
[191] Ibid.
[192] Ibid.
[193] Martha C. Nussbaum, 'Trading on America's Puritanical Streak, Prostitution Laws Mean-spirited, Penalize Women' (2008) the Atlanta Journal-Constitution on March 14th, 2008. Available online at http://www.ajc.com/search/content/opinion/2008/03/13/spitzered_0314.html.

which lead to the lack of alternative choices.[194] When reviewing this reasoning, one is reminded of Bentham's utilitarian ideas on prostitution and the issue of women being forced into prostitution due to a lack of economic alternatives.[195] Both scholars, Bentham and Nussbaum, see the harm in prostitution in the absence of other choices rather than the participation in prostitution itself.

A particularly interesting account of the evaluation of the selling of one's body in form of prostitution is Nussbaum's analysis of prostitution in comparison with other physical labour. By examining the similarities between prostitution and six hypothetical accounts of other forms of labour, consisting of "1. A factory worker in the Perdue chicken factory, who plucks feathers from nearly frozen chickens", "2. A domestic servant in a prosperous upper-middle-class house", "3. A nightclub singer in middle-range clubs, who sings (often) songs requested by the patrons", "4. A professor of philosophy, who gets paid for lecturing and writing", "5. A skilled masseuse, employed by a health club (with no sexual services on the side)" and "6. A person whom [she calls] the "colonoscopy artist"; she gets paid for having her colon examined with the latest instruments, in order to test out their range and capability."[196] In her examination, she concludes that all employed people accept money in return for some form of use of their bodies. Although she explains that certain stigmatisation may be valid in relation to some professions based on well-reasoned arguments. However, she explains that prostitution appears to be stigmatised in relation to other professions on the basis of class-prejudice and stereotyping, especially in relation the criminalisation of prostitution and historic perceptions of immorality.[197]

In the process of the development and justification of her ideas, Nussbaum draws on the concepts of many of the mentioned philosophers in this paper, such as Mill, Kant, Rawls, and Aristotle.[198] In particular, Nussbaum explains how she shares the

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[194] Martha C. Nussbaum, 'Whether from reason or prejudice': Taking money for bodily services (1998) *Journal of Legal Studies,* 27, 2; Voice, P., Martha's Pillow: Nussbaum on Justice and Sex (2002) *Social Justice Research, Vol. 15, No. 2, June 2002.*
[195] See earlier discussion in 3.5.1.
[196] Nussbaum (n 194) 2.
[197] Ibid.
[198] Nussbaum (n 74).

understanding with Mill that “a moral critique of deformed desire and preference is not antithetical to liberal democracy” but is rather essential for its success.[199] Moreover, she draws from Mill that sexual desire is influenced by dynamics of power and subordination.[200] Moreover, ideas of empathy and respect for the individual person have been derived from the ideas of Aristotle and Kant, in particular in relation to ideas of dignity and sex relations.[201] In particular, the concept of objectification within sexual acts have been heavily influenced by the ideas of Kant.[202] Finally, Nussbaum draws a bridge between the ideas of Kant and the radical feminist views of MacKinnon. In particular, she explains that MacKinnon’s radical feminism demands for equal respect by requesting that women’s equal worth is acknowledged within the law. She explains that Mackinnon’s arguments, rather than portraying women as victims, makes the Kantian request for women to be treated as “centres of agency and freedom”[203] instead of just “adjuncts to the plans of men.”[204]

3.7 Realist notions of prostitution, sexuality and morality

The core element of Legal Realism is its challenge of the classical legal claims of legal institutions providing autonomous systems, self-regulating legal discounts which are untouched by politics. Similarly to Legal Positivism, Legal Realism examines the law purely as the commands of a sovereign, which in today’s political environment is most commonly the state. However, contrary to positivists such as Austin, realists see this as a process which is achieved through the mediation of the courts.[205] As the legislation deals with matters in relation to general classes of persons, things or actions, statutory wording needs to be kept general in order to achieve a broad application. This often means, however, that the texts lack precision.[206] This generality, thus, can open itself up

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[199] Ibid 13.
[200] Ibid 17-18.
[201] Ibid 24,
[202] Ibid 213-239.
[203] Ibid 20.
[204] Ibid.
[205] John W Salmond and P. J Fitzgerald, Jurisprudence (Sweet & Maxwell 1966) 35.
[206] Ibid. 39.

to potential borderline cases emerging.[207] Accordingly, one of the main tasks of realists is to seek to uncover the uncertainties of laws. They argue that for any particular person in any particular factual situation, the law and the way it will affect the particular person in question is a matter for the courts to determine. Thus, the law for that particular subject will only come to exist after a court has ruled on the particular facts of the particular case.[208] Based on this idea, laws and statements of law are merely predictions of future court decisions.[209]

3.7.1 Determining where the power to influence is located: American or Scandinavian realists

The American Realists are considerably sceptical about legal rules. In cases where a court needs to decide between certain alternatives, the outcome will heavily rely on certain characteristics of the members of the Bench such as their social background, personality, gender or other personal characteristics and/or experiences.[210] Wendell Homes Jr, one of the most significant representatives of this school of thought,[211] wrote in his book, “The Common Law,” that:

> [the] life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[212]

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[207] Ibid.
[208] Jerome Frank, Law & the Modern Mind (Stevens & Sons Ltd 1949) 46.
[209] Ibid.
[210] Fitzgerald (n 205) 40.
[211] Steven J. Burton, The path of the law and its influence: the legacy of Oliver Wendell Holmes, Jr. (Cambridge: Cambridge University Press, 2007) 133.
[212] Oliver Wendell Holmes, *The Common Law* (Macmillan and Co., 1911) 1.

Dean Roscoe Pound explains accordingly, that judges should use wide discretion, recognise unique circumstances, employ flexible standards and be encouraged to achieve “free judicial finding[s] of the grounds of decision”; and that “certainty attained by mechanical application of fixed rules to human conduct has always been illusory.”[213] This statement indicates how Pound views the law as a form of social engineering, instead of legal imperatives which are obeyed by subjects due to fear of coercive sanctions.[214]

While the American realists predominantly looked into the way in which law is made and the way it ought to be made, the Scandinavian realists focussed on the way in which the law affects people’s behaviour and is able to change it. The approach of this theory is to explain the force of the law in a scientific manner, which is separate from the traditional metaphysical elements.[215] These scientific investigations have revealed that the force of law is a result of its psychological effect, which in turn is created by the ritualistic modes in which law is made. This includes both the process of legislation being approved by parliament as well as judges making decisions. The four most well-known Scandinavian realist scholars are Hägerström, Olivecrona, Lundstedt and Ross.[216]

When seeking applications of the ideas of these theorists in current literature it becomes apparent that there is little or no work which looks into the correlation between the ideas of Scandinavian realism and approaches to prostitution. The reason for this may be that the focus of realism is in the functioning of law itself and not the substantive elements of the law, which would be regarded as mere realist facts. An interesting point here, which links with the later discussion on public reason and the Swedish approach to prostitution regulation,[217] is the understanding that law has the ability to change behaviour. In this sense, in relation to prostitution, this would mean that the purpose of prostitution

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[213] Jerome Frank, ‘*Law and the Modern Mind’* (London: Stevens & Sons Ltd., 1949) 207.
[214] Krishna Iyer, V. R., *Justice at Crossroads, (*Deep & Deep Publications, New Delhi, 1992) 34.
[215] Ratnapala (n 27) 119.
[216] Ibid.
[217] See chapter 7.

regulation would be to achieve changes within society, not only in relation to behaviour, but also in relation to the mindset on the issue itself.

3.8 Summary and concluding remarks on the theoretical and philosophical concepts of prostitution, sexuality and morality

The aim of this "roadmap" was to provide a guided overview of some of the most relevant concepts of jurisprudence in order to enhance efficiency by creating an examination structure for the further research into the specific regulatory approaches of prostitution within the jurisdictions being compared. Being able to initially determine whether the approaches being examined point towards the ideas of Natural Law, Legal Positivism, Critical Legal Studies or Legal Realism narrows down the research focus and prevents aimless and irrelevant research, which is not only time-consuming, but can also result in the loss of initial focus. Hereafter, a guided "tour" down the various paths of these four legal umbrella-theories has developed an understanding of the relevant concepts of various sub-theories, as they have developed from one another over the historic evolution of legal theory. It can be seen that legal theory has developed from a predominant Natural Law environment, to an increasingly positivist outlook on laws, that in recent decades has become increasingly critical. This, however, does not mean that the previous ideas have become obsolete; they have continued to be present in the underlying ideas of many contemporary approaches. Some essential ideas of Aristotle are clearly reflected in the theoretical ideas of Kant, whose ideas have influenced the thoughts of feminist legal theorists, such as MacKinnon or Nussbaum.

Although the "roadmap" has been based on a selected number of theories and theorists, it provides a foundation, from which one can proceed into a more in-depth analysis of the jurisprudence of prostitution laws and an understanding of their interplay in practice. In particular, the foundation of theoretical views on prostitution established here will be vital for an in-depth understanding of the models and concepts of prostitution regulation, which will be discussed in the next chapter.

Chapter 4

4 Relevant theoretical models and concepts pertaining to prostitution regulation

4.1 Classifying the regulatory approaches to prostitution

Considering the fact, that within Europe, in line with the prevalent democratic ideas, one of the leading notions of the law and the way it is formed is that it is a reflection of society, which is reflected by its representatives within the legislative power of the government[1] and in light of the objective of this project, to understand the discrepancies between the different regulatory approaches to prostitution in Europe, the following will look into the understandings of the different policies as found in the literature.

It has become clear from the previous chapter, that throughout the history of philosophy there have been two streams of concepts surrounding the harm related to prostitution: That prostitution is harmful in itself or that the environment in which prostitution is placed is harmful. However, the one consistent aspect throughout has been the fact that any harm associated with prostitution has involved a social element.[2]

Along these same lines of reasoning, the past three to four decades have seen two positions in relation to the regulation of prostitution become prominent within the literature, which have contributed to the development of the theoretical models of regulating it. These involve a number of different ideas in relation to the way prostitution is viewed as a social problem. One of these two positions predominantly draws on the ideas of radical feminism that focus on the subordination of women, while arguing that prostitution is intrinsically exploitative and violent.[3] The other opposing position claims

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[1] See for example: John Rawls, *The Law of Peoples* (Harvard Univ Press 2003) 30- 32; Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press 2010) 177; Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997); Eugene V. Rostow, 'The Democratic Character of Judicial Review' (1952) 66 Harvard Law Review.

[2] See chapter 3.

[3] See: Kathleen Barry, *The Prostitution of Sexuality* (New York University Press 1995) 20 -28; Kathleen Barry, *Female Sexual Slavery* (New York University Press 1979); Andrea Dworkin, *Intercourse* (Basic Books 2007) 86, 87, 201; Andrea Dworkin, *Pornography* (Plume published by Penguin Group 1989) 203; Sheila Jeffreys, *The Spinster and Her Enemies: Feminism and Sexuality, 1880-1930* (Spinifex 1997) 33,

that prostitution is not problematic *per se*, but rather the conditions surrounding it.[4] These positions indicate some of the issues presumed to exist when dealing with questions such as the way to regulate prostitution. According to Vlassopoulos,[5] states are mandated to address social problems though public action, which makes the academic and moral debate on the regulation of prostitution a policy issue.

As stated in the introduction, there are three predominantly recognised approaches to prostitution regulation in Europe, namely, prohibitionism, abolitionism and regulationism. However, the way these approaches are understood varies significantly in the literature. Some categorisations also include a fourth category, decriminalisation.[6]

According to the Council of Europe, there are three approaches in Europe, which are either prohibitionist, regulationist or abolitionist,[7] whereby Sweden is placed a in sub-category of abolitionism, which they refer to as a neo-abolitionist approach.[8] According to the understanding of the approaches by the Council of Europe, prohibitionist approaches prohibit prostitution by penalising both CSPs and CSCs, while CSPus and CSUs may also be penalised.[9] However, the latter element is not a requirement to be classified as a prohibitionist approach, but is rather a component that is often found in prohibitionist approaches. The Council of Europe further understands the regulationist approach to involve regulating rather than prohibiting or abolishing prostitution, while

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34, 55, 98, 162, 195; Catharine A MacKinnon, *Feminism Unmodified* (Harvard University Press 1987) 5, 25, 52, 59, 118, 216; Catherine A. MacKinnon, 'Sexuality, Pornography, and Method: "Pleasure under Patriarchy' (1989) 99 Ethics; Kate Millett, *The Prostitution Papers* (Avon (The Hearst comp) 1975); Carole Pateman, 'Defending Prostitution: Charges against Ericsson' (1983) 93 Ethics.

[4] Claude Jaget, *Prostitutes, Our Life* (Falling Wall Press 1980) 21, 205; Barbara Ryan, *Identity Politics in the Women's Movement* (New York University Press 2001) 92 – 102; Noah D. Zatz, 'Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution' (1997) 22 Signs: Journal of Women in Culture and Society.

[5] Chloe Vlassopoulos, 'How Policies Change: Clean Air Policy in France and Greece', *Studying Public Policy* (Policy Press 2014) 18.

[6] See for example: Marjan Wijers, 'Women, Labor and Migration', *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge 1998) 69 - 78; Roger Matthews, *Prostitution, Politics and Policy* (Routledge-Cavendish 2008) 97.

[7] Council of Europe, Parliamentary Assembly, Resolution 1579 (2007) Prostitution – Which stance to take?, Assembly debate on 4 October 2007 (35th Sitting), s. 4 et seq.; see chapter 1.

[8] Council of Europe (n 7) s. 4 et seq.

[9] Ibid s. 5 et seq.

their definition of abolitionism is seeking to abolish prostitution through the penalisation of CSUs, CSPus and CSCs instead of CSPs.[10]

Within academic research, numerous scholars, although using similar terminology, appear to define these terms in slightly different ways, which may have significant impacts on the way regulatory approaches in different jurisdictions are classified in practice. For example, Askola[11] understands the prohibitionist approach as prohibiting the involvement in all forms of prostitution, as these are viewed as immoral activities within this classification, whereas regulationism is understood as an approach which seeks the regulation of prostitution as a necessary evil. Moreover, abolitionism according to Askola is described as the political aim of abolishing the control states, CSCs and in some cases CSPus have over CSPs through criminalisation, without specifying the exact methods of doing this, but rather mentioning that CSPu criminalisation is merely one option of doing this.[12] According to Askola, the key difference between prohibitionist and abolitionism is the underlying reason for criminalisation, which in the latter is social harm, whereas in the former it is immorality.[13] Scoular, however, defines prohibitionism as the approach of prohibiting prostitution by penalising CSPs and CSCs, however, not always the CSPus. She describes regulationism as the pragmatic approach by governments to accept that prostitution is inevitable and rather to seek to change the situation to "manage" it through the implementation of regulation systems including "licensing, inspections, working permits and the promotion of forms of self-organisation and unionisation."[14] Moreover, Scoular uses the term abolitionism to describe the approach to prostitution regulation whereby criminalisation takes place, similarly to the prohibitionist approaches, yet "rather than relying solely on Christian moralism, it is informed by certain strains of feminist ideology which situates prostitution on a spectrum of male violence against women."[15] In contrast

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[10] Ibid.
[11] Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007).
[12] Ibid 13-14.
[13] Ibid.
[14] Jane Scoular, *The Subject of Prostitution* (Routledge 2015) 8.
[15] Ibid 9.

to scholars, such as Askola, Scoular also describes decriminalisation as a further approach which she claims is often used as a "'third way solution" between the two aforementioned extremes: as an idyll of non-interference that circumvents both the harms of legal sanction and bureaucratic regulation."[16] Although she does not offer much more explanation as to what exactly is meant by the fourth category of decriminalisation, other scholars, who have used a similar four-category classification system, have explained that the theoretical concept of decriminalisation of prostitution involves the complete removal of prostitution activities from criminalisation, without any regulation in any form.[17]

Outshoorn,[18] represents another example of the way the terminology varies between scholars, yet only slightly. Consequentially, she defines prohibitionist approaches as outlawing prostitution through the criminalisation of all parties involved, including CSUs, CSPs, CSPus and CSCs.[19] She further defines regulationism as the approach whereby states organise prostitution.[20] In light of the notion of regulationism involving the organisation of prostitution by the government, some scholars have explained that historically this approach was founded on the attempts of states to control CSPs (which historically were only considered to be female), to prevent sexually transmitted diseases from spreading and to protect public morality.[21] Thus, the understanding of regulationism originated as a system used to control CSPs by enforcing measures such as licensing of brothels, or forced medical examinations and registrations of presumed CSPs.[22]

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[16] Ibid.
[17] Matthews (n 6) 95; Jenny Westerstrand, *Mellan Mäns Händer* (Uppsala Univ 2008) 119 - 120.
[18] Joyce Outshoorn, *The Politics of Prostitution* (Cambridge University Press 2004).
[19] Ibid 8.
[20] Ibid 7.
[21] See for example Judith Kilvington, Sophie Day and Helen Ward, 'Prostitution Policy in Europe: A Time of Change?' (2001) 67 Feminist Review, 79; Judith R Walkowitz, *Prostitution and Victorian Society* (Cambridge University Press 1982) 71, 162; Stephanie A. Limoncelli, 'International Voluntary Associations, Local Social Movements and State Paths to the Abolition of Regulated Prostitution in Europe, 1875–1950' (2006) 21 International Sociology, 35 – 36.
[22] Jackie West, 'Prostitution: Collectives and the Politics of Regulation' (2000) 7 Gender, Work and Organization; Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18 Gender Issues, 26; Outshoorn (n 18) 8.

In recent years, the idea of regulationism is focussed less on the idea of implementing forced control of CSPs, but rather on the regulation of consensual prostitution activities that are undertaken between adults, which is largely based on the assumption that there is a difference between forced prostitution and voluntary prostitution.[23] This is necessary, as the regulation of prostitution according to this approach will only seek to regulate prostitution where the commercial sex has been provided, purchased and used voluntarily between consenting adults in contrast to forced prostitution, which according to this approach is a product of some form of coercion.[24] Although the notion of voluntariness within this concept has been a source of criticism from supporters of other approaches, this is a point that will be discussed in more detail in chapter 9, and shall not be elaborated on at this point in time. Some scholars have described abolitionism as a stance against regulationism.[25] The two main reasons for this are, firstly, the belief that regulationist approaches constitute states' endorsements of the sexual exploitation of women,[26] and secondly, regulationism was criticised for following a set of sexual double standards whereby women (understood as the CSPs) but not male clients (understood as the CSUs and CSPus) were viewed as the culprits responsible for issues of public health and morality.[27] Thus, this double standard of regulationism was criticised for resulting in an unfair stigmatisation of CSPs and police harassment

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[23] Phil Hubbard, Roger Matthews and Jane Scoular, 'Regulating Sex Work in the EU: Prostitute Women and the New Spaces of Exclusion' (2008) 15 Gender, Place & Culture 142.
[24] Prabha Kotiswaran, *Dangerous Sex, Invisible Labor* (MTM 2015) 36; Andrea Di Nicola and others, *Prostitution and Human Trafficking* (Springer New York 2009) 105 – 109; Ratna Kapur, *Erotic Justice* (Routledge-Cavendish 2016) 118.
[25] Melissa Hope Ditmore, *Encyclopedia of Prostitution and Sex Work: A-N. Vol. 1* (Greenwood Press 2006) 5; Junius P Rodriguez, *Slavery in the Modern World* (ABC-Clio 2011) 82.
[26] See for example: Beverly Balos, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' [2004] Harv. Women's LJ. 137; Janice G. Raymond, 'Prostitution as Violence against Women' (1998) 21 Women's Studies International Forum.
[27] Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18 Gender Issues, 27; Limoncelli (n 21) 37; Anne Summers, 'Introduction: The International Abolitionist Federation' (2008) 17 Women's History Review, 150; David J. Pivar, 'The Military, Prostitution, and Colonial Peoples: India and the Philippines, 1885–1917' (1981) 17 The Journal of Sex Research; Brian Harrison, 'Prostitution and Victorian Society: Women, Class, and the State. Judith R. Walkowitz' (1982) 54 The Journal of Modern History; Kamala Kempadoo, 'Prostitution and Sex Work Studies', *A Companion to Gender Studies* (Blackwell Publishing Ltd 2009) 255 - 256.

towards CSPs as well as any other women behaving in ways considered to be deviant.[28]

In light of the contemporary debates surrounding the regulatory approaches to prostitution, these fundamental criticisms of regulationism by abolitionism supporters does not seem logical. However, it needs to be noted, that when scholars claim that abolitionism was developed to eliminate regulationism, this is not true in relation to the contemporary concept of regulationism, but rather the traditional historical notion of regulationism, which bears little resemblance to the contemporary approach.[29] Thus, in light of this background, most definitions of abolitionism have in common, that they view CSPs as victims and not as criminals. However, even this definition can be vague and inaccurate. For instance Danna,[30] understands abolitionism to describe approaches to regulating prostitution by not criminalising individual CSPs, but rather to make related activities criminal, such as profiting from prostitution, exploiting CSPs, encouraging or facilitating prostitution.[31]

This brief example of a number of different understandings of the different classifications of regulatory approaches to prostitution, has demonstrated an apparent lack of consensus regarding the exact meaning of each approach, as well as the exact number of separate classifications. It has been argued by Östergren[32] that one of the primary reasons for this incoherence and confusion of terminology can be traced back to semantic deficiencies. An example of this is the way the term “decriminalisation” is used. Some have used the term to describe policies, which have sought to remove criminal law from the regulation of prostitution and, instead, placed it under the scope of

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[28] Doezema (n 27) 27; Gail Pheterson, 'The Whore Stigma: Female Dishonor and Male Unworthiness' [1993] Social Text JSTOR 37, 39; Ann M. Lucas, 'Race, Class, Gender, and Deviancy: The Criminalization of Prostitution' [1995] Berkeley Women's Law Journal.
[29] Raymond (n 26); Pivar (n 27); Harrison (n 27).
[30] Daniela Danna, *Prostitution and Public Life in Four European Capitals* (06 - Curatela di volume, Universita Degli Studi Di Milano 2007) 7.
[31] Ibid.
[32] Petra Östergren, *From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies* (10th edn, DemandAT Working Paper No 10, International Centre for Migration Policy Development (ICMPD) 2017) <http://www.demandat.eu> accessed 12 November 2017, 2.

commercial and labour laws.[33] However, essentially the term refers to a process used in regulatory approaches, rather than a specific policy in itself. Thus, decriminalisation describes the process of removing a particular action from the scope of criminal sanctions.[34] A regulatory approach taken by states to regulate prostitution will not only consist of decriminalising actions related to prostitution, such as the purchase, use or provision of services, but will also involve any other regulatory actions taken by the state in relation to the way prostitution is dealt with within the law. Subsequently, decriminalisation could potentially be an element within both regulationist and abolitionist approaches, as regulationist approaches, as understood from the above explanations could involve the decriminalisation of the use, purchase and provisions of commercial sex services, whereas abolitionist approaches, may involve the decriminalisation of, for instance, the provision of commercial sex services.

Similar points can be made in relation to the term "legalisation," which is a term which usually refers to the process of making something previously deemed illegal, legal under the laws of a particular jurisdiction.[35] The terms "decriminalisation" and "legalisation," both seem interchangeable at first, however, a closer examination of the two legal processes reveals certain distinctive differences. In order to understand these, one needs to first understand the semantic differences between "illegal" and "criminal." Although there are a number of different ways to understand the distinction of these two terms,[36] the simplest way to understand them is to take a literal and semantic

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[33] See for example: Wijers (n 6); West (n 22); Outshoorn (n 18) 83 – 103; Joanna Phoenix, *Regulating Sex for Sale* (Policy Press 2009) 18 – 19; Hendrik Wagenaar, Sietske Altink and Helga Amesberger, 'Final Report of the International Comparative Study of Prostitution Policy: Austria and the Netherlands' (Platform31 2013) 15 – 16.

[34] Antony Duff, *The Boundaries of the Criminal Law* (Oxford University Press 2010) 4, 239 – 240; Steven H Gifis, *Dictionary of Legal Terms* (5th edn, Barron's Educational Series 2016) D – Decriminalisation; Gerald N Hill and Kathleen Hill, *Nolo's Plain-English Law Dictionary* (Nolo 2009) 118.

[35] *Cambridge Business English Dictionary* (Cambridge University Press 2011) 487; Saladin Meckled-García and Başak Cali, *The Legalization of Human Rights* (Routledge 2006) 5 – 6; Cambridge English Dictionary, 'Legalisation | Meaning in the Cambridge English Dictionary' (*Dictionary.cambridge.org*, 2020) <https://dictionary.cambridge.org/dictionary/english/legalization> accessed 22 August 2020; European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) EMCDDA, 'Decriminalisation in Europe?' (EMCDDA 2001) 2, <https://www.emcdda.europa.eu/attachements.cfm/att_5741_EN_Decriminalisation_Legal_Approaches.pdf> accessed 22 August 2020.

[36] See for example: Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 The Journal of Legal Studies; John C Coffee, 'Does Unlawful Mean Criminal: Reflections on the

understanding. Accordingly, if something is illegal, on the one hand, it is unlawful, which means that it is outwith the realm of the law. However, on the other hand, if something is criminal, it is prohibited by criminal laws and will involve criminal activities. Thus, decriminalisation is the process of removing something from prohibition by criminal laws, whereas legalisation is the process of governing or regulating something within the law. An example of the latter can often be found in the area of international law. Here, the term legalisation refers to the inclusion of specific rules or areas of regulation into international law through, for instance conventions, agreements or protocols.[37] Hence, when people refer to the legalisation of human rights, this does not refer to human rights becoming legal in the sense of legally permitted. Legalisation here refers to the process of human rights becoming part of law - generally international law.[38]

When applying this understanding of legalisation to the regulation of prostitution, this means that when certain elements of prostitution are removed from the criminal laws of a jurisdiction, these elements are decriminalised. However, if the regulation of prostitution is placed under the laws of a particular jurisdiction, this will amount to legalisation. Hence, it is clear that neither legalisation nor decriminalisation amount to a regulatory approach *per se*, but rather form elements of certain prostitution policies.

Weitzer[39] and de Marneffe[40] have both addressed this terminology issue. Weitzer explains that it is unlikely prostitution will be decriminalised without the sector being regulated at the same time.[41] His solution is to use the terms "*de jure*" and "*de facto*" legalisation. Here *de jure* legalisation refers to an approach which involves the decriminalization of prostitution as well as some form of formal government regulation.[42] *De facto* legalisation in Weitzer's classification system describes a system in which prostitution activities are illegal yet still regulated by authorities, whereby CSPs, CSUs

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Disappearing Tort/Crime Distinction in American Law' (1991) 71 BUL Rev.; Also: illegal may be understood as either unlawful or against or not authorised by the law, see for example: *Nolo's Plain-English Law Dictionary* (Nolo 2009) 207.

[37] Meckled-García and Cali (n 35) 7, 32 – 53.

[38] Ibid.

[39] Ronald John Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (NYU Press 2012).

[40] Peter De Marneffe, *Liberalism and Prostitution* (Oxford University Press 2012).

[41] Weitzer (n 39) 3.

[42] Ibid 77.

or CPUs would be allowed to operate freely as long as they follow any rules set by the authorities, do not violate other laws, or disturb public order.[43] De Marneffe instead follows the more common distinction of approaches into the three categories outlined above, namely, abolitionism, regulationism and prohibitionist, however, highlights that these are to be differentiated from terms such as decriminalisation and legalisation, by explaining that the latter terms merely constitute legal mechanisms, which form the foundation elements of the former approaches.[44] This line of reasoning suggests, that viewing decriminalisation as a further regulatory approach, as suggested by some such as Scoular,[45] would be flawed.

Another reason for the wide-ranging differences in classification terminology can be traced back to the perspective from which they have been determined. There is an apparent trend in the literature to define the approaches in accordance with the practices in specific jurisdictions, rather than using theoretical concepts to establish the approaches and then to use these to analyse the jurisdictions in practice.[46] Brubaker and Cooper[47] refer to this issue as a conflation of “categories of practice” and “categories of analysis.”[48] Accordingly, the current literature found on the subject matter of the regulation of prostitution often seeks unambiguous, experience-distant analytical concepts to examine regulatory approaches in relation to understanding patterns related to them. However, in the process of doing this, they still resort to using classifications which were developed and applied by political entrepreneurs or other non-experts, which has resulted in an elevation of the terms to analytical positions which are not warranted. An example can be found in relation to abolitionism, which is often used synonymously with other equally non-scientific terms, such as the “Swedish” or the

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[43] Ibid 79.
[44] De Marneffe (n 40) 28 – 30, 52, 76.
[45] Scoular (n 14) 9.
[46] See for example: Daniela Danna, 'Client-Only Criminalization in the City of Stockholm: A Local Research on the Application of the “Swedish Model” of Prostitution Policy' (2011) 9 Sexuality Research and Social Policy; Gillian Abel, *Taking the Crime out of Sex Work* (Policy Press 2010); Geetanjali Gangoli and Nicole Westmarland, *International Approaches to Prostitution* (TPB 2011); Jane Scoular, *The Subject of Prostitution. Sex/Work, Law and Social Theory* (Taylor & Francis Ltd 2016) 9.
[47] Rogers Brubaker and Frederick Cooper, 'Beyond “Identity”' (2000) 29 Theory and Society.
[48] Ibid 4.

"Nordic" model.[49] Firstly, it has been argued that the policies in Sweden were developed and marketed predominantly by politicians and activists opposing prostitution without an empirical foundation.[50] Secondly, the amalgamation of all the approaches in the Nordic countries[51] into one "Nordic model" is in itself imprecise. Skilbrei and Holmström[52] explain that there are many legal, historical as well as practical differences between the regulation of prostitution in each of the Nordic countries.[53] They clarify that the terms "Swedish" or "Nordic" model merely refer to a single law within the approaches of these countries, namely the ban against purchasing sex, despite the overall legal systems having many other laws that also regulate prostitution.[54] In addition to this, the specific law referred to in these classifications was implemented in Sweden in 1999.[55] However, although some other Nordic countries followed in subsequent years, such as Finland in 2006 and Norway in 2009, not all Nordic countries have decided to implement this law.[56]

In light of the points made above, it is not surprising that the current terminology as it has developed over the past decades, to classify and analyse regulatory approaches to prostitution lack precision and fail to comply with the fundamental scientific standards.[57]

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[49] See for example: Danna (n 46); Molly Dragiewicz, *Global Human Trafficking* (Routledge, Taylor & Francis Group 2015) 156; Eilís Ward and Gillian Wylie, *Feminism, Prostitution and the State* (Routledge 2017) 130 et seq.; Julia Smith, *Civil Society Organizations and the Global Response to HIV/AIDS* (Routledge 2017) 150.
[50] Östergren (n 32) 3.
[51] The Nordic countries include the five countries Denmark, Finland, Iceland, Norway and Sweden, as well as the Faroe Islands, Greenland, and the Åland Islands, see: *Nordic Statistical Yearbook 2013: Nordisk Statistisk Årsbok 2013* (Nordic Council of Ministers 2013).
[52] May-Len Skilbrei and Charlotta Holmstrom, *Prostitution Policy in the Nordic Region* (Taylor and Francis 2016).
[53] Ibid 1, 5, 144.
[54] May-Len Skilbrei and Charlotta Holmström, 'Is There a Nordic Prostitution Regime?' (2011) 40 Crime and Justice.
[55] Jo Phoenix, 'Regulating Prostitution: Different Problems, Different Solutions, Same Old Story' (2007) 6 Safer Communities; Section 12, Swedish Penal Code (*Lag om förbud mot köp av sexuella tjänster SFS 1998:408*) available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/criminal_code_chapter_6_sweden_en_1.pdf accessed: 13th November, 2017.
[56] Skilbrei and Holmström (n 54); Janice G. Raymond, 'Ten Reasons for not Legalizing Prostitution and a Legal Response to the Demand for Prostitution' (2004) 2 Journal of Trauma Practice; Niklas Jakobsson and Andreas Kotsadam, 'The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation' (2011) 35 European Journal of Law and Economics, 87-107.
[57] Karl R Popper, *Objective Knowledge* (Clarendon Press 1966) 2 - 35; also see in particular pp. 24-25.

4.2 Summary of Terminology Discussion

In light of the terminology issues found within the literature, one may ask why the classification of regulatory approaches is necessary, and whether it may be easier to merely compare the legal approaches as they are found in practice without a theoretical analysis. Bailey answers this question by explaining that the categorisation is a valuable explanatory and illustrative tool which assists researchers in their endeavours to compare and evaluate systems by reducing complexities while still maintaining nuance.[58] Accordingly, typologies and categories may offer a solid basis for empirical as well as theoretical research.[59] However, in order for these to be effective for this purpose, it is essential to have fixed criteria for each classification. Bailey continues by explaining that it is necessary to have an exhaustive list of attributes or dimensions which form the basis of any classifications, as well as knowledge of the way the different classifications and their attributes and properties are interrelated.[60]

This review of the literature on the classifications of legal approaches to prostitution suggests that there are incoherencies regarding the understanding of the approaches. It has also revealed that there are numerous terms, which are often used interchangeably to describe different legal approaches, such as “criminalisation” and “prohibitionism,” in some cases “legalisation” and “decriminalisation” as well as in other cases “decriminalisation” and “abolitionism.”[61] However, when investigating the terms, it has become clear, that what is often used to describe a particular regulatory system in the media or certain policy documents, or even in certain journal articles, is not actually in line with the theoretical meaning of the terms, which leads to confusion. It has to be explained that these terms fall into two fundamentally separate categories. Accordingly,

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[58] Kenneth D Bailey, *Typologies and Taxonomies* (Sage Publications 2005) 3, 12, 16, 28.
[59] Ibid 1 - 12.
[60] Ibid.
[61] See for example: Global Commission on HIV and the Law, 'Sex Work, HIV and the Law' (Global Commission on HIV and the Law Working Paper 2011) <http://hivlawcommission.org> accessed 13 November 2017; Frances M. Shaver, 'Prostitution: A Critical Analysis of Three Policy Approaches' (1985) 11 Canadian Public Policy / Analyse de Politiques; Elaine Mossman, 'International Approaches to Decriminalising or Legalising Prostitution' (New Zealand Ministry of Justice 2007); Janet Wojcicki, 'Race, Class and Sex: The Politics of the Decriminalisation of Sex Work' [1999] Agenda; Phoenix (n 55); Daniela Danna, 'Organizations Active in the Field of Prostitution in Comparative Western European Perspective' [2000] Paper for the Workshop in the ECPR Joint Session.

the Council of Europe Resolution 1579 (2007) was correct when explaining that the three predominant approaches adopted in the 47 member states of the Council of Europe are prohibitionist, regulationist and abolitionist.[62] This is because these three terms actually address and describe regulatory approaches. However, as discussed in the previous section, it is often found that decriminalisation is mentioned as a fourth option, often with reference made to the system in New Zealand.[63] However, "decriminalisation" is not technically an approach in itself. Instead, it is a function, or a tool used within the development of approaches, which merely describes the process of removing aspects of prostitution from, and later absence of, these aspects from criminalisation. Following from the discussions in the previous section, the terms "criminalisation" and "legalisation" fall into the same category of legal terminology. Accordingly, "criminalisation" describes the process of making an activity prohibited under criminal law provisions[64] and "legalisation" describes the process of reform in which something, which was considered unlawful or illicit, ceases to be viewed as such under the law, and instead becomes legitimate and governed by laws.[65] Subsequently, although these three terms, legalisation, criminalisation and decriminalisation, may constitute key attributes within the regulatory approaches to prostitution, they are not the same and cannot be used interchangeably.

In terms of the different theoretical regulatory approaches to prostitution discussed above, prohibitionist approaches generally target both the sale and the purchase of these services by utilising criminalisation. Prohibitionism can also involve a categorical prohibition of certain behaviours, which are closely related to selling or purchasing

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[62] Council of Europe, Parliamentary Assembly, 'Resolution 1579 (2007) Prostitution – Which Stance to Take?' Assembly debate on 4 October 2007 (35th Sitting) s.4 et seq; see chapter 1.

[63] See for example: Scoular (n 46) 116; Victor Minichiello, Male sex work and society (Harrington Park Press, 2014) 191; Phoenix (n 33) 19; for an example of the issues of decriminalisation as a term to classify the model taken in New Zealand, see: Liz Kelly, Maddy Coy, and Rebecca Davenport. Shifting sands: a comparison of prostitution regimes across nine countries (2009) London: London Metropolitan University.

[64] See for example: M J Allen, Textbook on criminal law (Oxford University Press, 2015) 12 et seq.; Nina Peršak, Criminalising harmful conduct: the harm principle, its limits and continental counterparts (Springer, 2007) 5; Caron Beaton-Wells; Ariel Ezrachi, Criminalising Cartels: Critical Studies of an International Regulatory Movement (Hart Publishing, 2011) Chapter 13.

[65] See for example: Philip Bean, Legalising drugs: debates and dilemmas (Bristol: Policy Press, 2010) iv; Janina Dill, Legitimate targets? Social construction, international law and US bombing (Cambridge University Press, 2015) 145.

sexual services, including activities like street solicitation, or running agencies or sex businesses.[66]

Abolitionist approaches involve policies, which do not unconditionally criminalize acts of prostitution or activities closely related. The defining attribute of an abolitionist approach is that it will target only one side of an interaction in an attempt to make the entire interaction obsolete. Usually, the side targeted is the procurement side, which is then categorically criminalized, as it is thought that the elimination of demand will eliminate the entire transaction.[67]

Regulationism refers to a set of policies that neither criminalise the sale or purchase of prostitution services nor any other activities that are closely related. Accordingly, regulationist approaches will decriminalise and legalise the activity of selling and buying sex itself, however, while imposing certain restrictions, which differentiate prostitution from other transactions or businesses. Restrictions in this sense can involve, imposing age restrictions or introducing targeted health regulations.[68] This attribute of regulationism differentiates it from full decriminalisation. Full decriminalisation may be what is meant by "decriminalisation" when used to describe a regulatory approach to prostitution. Full decriminalisation refers to a set of policies that incorporate normalisation or *laissez-faire*.[69] However, considering the restrictions imposed on prostitution through international law, such as age restrictions prohibiting any prostitution involving people under the age of 18,[70] which have been adopted in most countries, and which are followed throughout the European Union, full decriminalisation will not be discussed for the purpose of this project.

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[66] De Marneffe (n 40) 16; Hubbard, Matthews and Scoular (n 23).
[67] De Marneffe (n 40) 12, 29; Outshoorn (n 18) 8, see also: Geetanjali Gangoli and Nicole Westmarland, International Approaches to Prostitution (Policy Press 2006) 175; Thorlby, 'May-Len Skilbrei and CharlottaHolmstrom, Prostitution Policy in the Nordic Region: Ambiguous Sympathies.' (2015) 18 Sexualities.
[68] De Marneffe (n 40) 29; Brigit C. A Toebes, The Right to Health. A Multi-Country Study of Law, Policy and Practice; Ditmore (n 25) 372.
[69] Ibid.
[70] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

4.3 Key underpinning notions within the regulatory approaches to prostitution

As already mentioned above in relation to the key differences between prohibitionist and abolitionist approaches, a key factor within this distinction is the underpinning intention of the approaches in general. However, these underpinning intentions are not limited to these two approaches. Indeed, although the terminology above has been based on technical legal mechanisms, an in-depth understanding of these approaches, or more precisely, the underpinning thoughts and intentions behind the decisions to follow these approaches will provide a more comprehensive understanding of the conceptual approaches as analysis tools.[71] Although the classification criteria above have clarified that for the purpose of analysing regulatory approaches a wide range of different policies can fall within the regulatory models, an examination of the available literature has revealed three key questions of which the answers commonly (yet not necessarily) determine the approaches followed by states. These questions are:

1) Where is the harm in prostitution and/or the regulation thereof perceived to be most prevalent?
2) Who are the key victims of prostitution and/or the regulation thereof?
3) What is the purpose of the sought prostitution regulation?

Legal theoretical questions that can be found in the foreground of prohibitionist approaches may include the following: [72]

- What is the purpose of criminal laws?
- What is the purpose of criminal sanctions?
- Can prostitution be considered a victimless crime?
- What are the elements of harm which need to be addressed by criminal law means?

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[71] Bailey (n 58) 3, 12, 16, 28; Popper (n 57) 2 - 35; also see in particular pp. 24-25.
[72] L O Ericsson, Charges against Prostitution: An Attempt at a Philosophical Assessment' in D Kelly Weisberg (ed) Application of Feminist Legal Theories to Women's Lives: Sex, Violence, Work and Reproduction (Temple University Press, 1996) 208-216; Kilvington, Day and Ward (n 21).

A prohibitionist rationale may view society as a whole as the victim of prostitution and thus favour an approach that protects public order, society, and public morals through the criminalisation of prostitution. This is often tied to ideas of criminal law and criminal sanctions having the purposes of "deterrence, incapacitation, rehabilitation, retribution, and restitution."[73] In line with these ideas, deterring effects, which prevent people from undertaking the activities prohibited under these criminal provisions, may involve the fear of criminal sanctions, the stigma tied to breaking the law or the reduced availability due to others having been deterred. Moreover, criminal sanctions are thought to prevent people who have nevertheless committed prostitution related offences from repeating these in the future. Thus, the main purpose of the criminalisation aspects of prohibitionist approaches are aimed at achieving preventative justice.[74]

Abolitionism describes approaches in which a set of policies do not unconditionally criminalise acts of prostitution *per se*, nor does it unconditionally criminalise activities that are closely related to prostitution, such as solicitation or brothel keeping. However, it may categorically criminalise one side of the prostitution interaction, often the procurement, in an attempt to eliminate the entire transaction.[75]

The legal theoretical concerns found in the forefront of abolitionist approaches pose questions regarding the social order within society and the concept of "victim." Consequently, an abolitionist approach may be founded on the philosophical notion that the people selling the services in prostitution constitute the primary victims, and as such, need to be protected from criminalisation. However, on the other hand, it is believed that the social order still requires prostitution to be tackled by criminal law means. Thus, it is often found within abolitionist approaches that the criminal laws seek to criminalise the procurement rather than the sale of services.[76] Thus, in light of the

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[73] Lisa M Storm, *Criminal Law by Storm* (Lulu Publishing Services 2015) 17.
[74] Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013) 12.
[75] Kilvington, Day and Ward (n 21).
[76] South African Law Commission (SALC) Issue Paper 19 (Project 107) 'Sexual Offences: Adult Prostitution' (2002); 'Prostitution and Sex Trafficking Offences' (*UN Women*, 2017) <http://www.endvawnow.org/en/articles/560-prostitution-and-sex-trafficking-offences.html> accessed 13 November 2017.

discussions on the terminology and the different approaches discussed above, the third question about the intended purpose of these regulatory approaches primarily focus on the end-goal of eliminating the social harm of prostitution entirely, while protecting the perceived victims, namely the CSPs.[77]

Regulationism is a term used to describe a set of policies, which criminalises neither the sale nor purchase of prostitution services nor any activities viewed as being closely related. However, this approach will impose certain restrictions on these activities, which differentiate prostitution from other transactions or businesses. Examples of this may include age restrictions or health regulations.[78] These imposed restrictions constitute the element, which differentiates regulationism from full decriminalisation.

Legal theoretical approaches to regulationism often follow the ideas of libertarian paternalism. The underlying objective is to affect people's behaviour while at the same time, respecting their freedom of choice. This way, regulationists seek to direct people's choices towards welfare-promoting behaviours without disregarding their freedom of choice.[79] The key legal theoretical questions seek to investigate what harm is caused by decriminalisation in contrast to criminalisation. The answers to these questions often reflect the idea that although prostitution may attract certain elements of harm, the harm caused by criminalisation will outweigh the harm caused by liberalisation, with paternalistic elements specifically targeting the areas of harm wherever they come about.[80]

An essentialist view of the classification may summarise the above approaches as prohibitionist approaches predominantly viewing prostitution as immoral, and thus seek to protect the wider society from the harms caused by it. However, abolitionist

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[77] 'Prostitution and Sex Trafficking Offences' (*UN Women*, 2017) <http://www.endvawnow.org/en/articles/560-prostitution-and-sex-trafficking-offences.html> accessed 13 November 2017; David V Canter, Maria Iannou and Donna Youngs, *Safer Sex in the City* (Routledge 2016) 102 – 103; Section 8, Chapter 20, the Penal Code of Finland (743/2006): "Abuse of a victim of prostitution".

[78] De Marneffe (n 40) 29; Toebes (n 68); Ditmore (n 25) 372.

[79] Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism Is Not an Oxymoron' SSRN Electronic Journal, *University of Chicago Public Law & Legal Theory* Working Paper No. 43, 2003.

[80] Phoenix (n 33) 14.

approaches focus on the practical harms predominantly caused to the CSPs and, thus, seeks to protect them while still trying to abolish prostitution through the use of criminal laws. Regulationism does not seek to eliminate prostitution, but rather the harms connected to it, such as ancillary crimes like violence and exploitation, as well as other public nuisances. Accordingly, this thesis summarizes the conceptual understanding of prostitution underpinning the regulatory approaches to prostitution as the following:

1. Prostitution is understood as an economic activity
2. Prostitution is understood as a public nuisance
3. Prostitution is understood as a social harm

In particular, for the purpose of the conceptual examination of the regulation of prostitution within the EU within the next section, this thesis will be looking at representative jurisdictions of these three understandings of prostitution.

Section C: Conceptual Examination of Inter-EU Cross-Border Interactions of Regulatory Approaches to Prostitution: Practical Examples

Chapter 5

5. Prostitution as an Economic Activity: The case of Germany

Following on from the theoretical breakdown of regulatory models within the EU as well as the way these may interact in practice within the EU's single market, it is important for the overall understanding of the matter to view how these theoretical components sit together in practice. In particular, in order to examine the wider impact of the linking of national approaches to prostitution regulation within a supranational legal system, such as the EU, it is important to examine the way the various conceptual approaches translate into real-life implementations within domestic legal frameworks. The following will thus, showcase the implementation of a regulationist approach wherein prostitution has been understood to constitute an economic activity, namely, the current legal situation in Germany.

5.1 Classifying the regulatory approach to prostitution regulation taken in Germany

As explained in chapter 4, Regulationism describes regulatory approaches which follow a set of policies that criminalise neither the sale or purchase of commercial sex, nor any activities considered closely related to such activities. However, in contrast to an entirely decriminalized approach, which has been deemed impossible due to, amongst other things, international child protection standards,[1] a regulationist approach will impose

[1] See section 4.1.

certain restrictions on commercial sex that may differentiate prostitution from other transactions or businesses.[2]

Since the implementation of the German Law for the Improvement of the Legal and Social Position of Prostitutes (Gesetz zur Verbesserung der rechtlichen und sozialen Stellung von Prostitutierten – ProstG), the German approach to prostitution has been openly regulationist by nature. Thus, this German legislation removed prostitution from the realms of illegality in contract and criminal law, while adding a number of restrictions, for example in relation to contractual terms and managerial direction rights in order to ensure CSPs' consent to provide commercial sex services cannot be circumvented.[3] Although, a more detailed account of the individual provisions within this regulatory approach will follow in the next section, for the classification of the German regulatory system overall, it is instrumental to understand that many considered it not only as the most liberal approach to prostitution in Europe, but also to be one of the most liberal approaches in the world until their move to stricter regulation and enhanced paternalistic measures in July 2017.[4] Nevertheless, the majority of available comparative studies looking into the different forms of prostitution regulation in relation to discussions about prostitution reform focus on other country cases, such as the New Zealand model, or even the Dutch model, rather than the German approach.[5] One possible reason for this may be the stark criticism Germany has faced in the media in

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[2] Peter De Marneffe, Liberalism and Prostitution (Oxford University Press 2010) 29; Brigit C A Toebes, The Right to Health. A Multi-Country Study of Law, Policy and Practice; Melissa Hope Ditmore, Encyclopedia of Prostitution and Sex Work (Greenwood Press 2006) 372.

[3] Paras 1-3, Germany 2002 Prostitution Act (ProstG), Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten, Prostitutionsgesetz of 20th December 2001 (BGBl. I S. 3983).

[4] See: Germany 2002 Prostitution Act (ProstG), Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten, Prostitutionsgesetz of 20th December 2001 (BGBl. I S. 3983); Danna, Daniela. "Trafficking and prostitution of foreigners in the context of the EU countries' policy about prostitution.'." In *NEWR Workshop on Trafficking, Amsterdam*, vol. 26. 2003; Milivojević, Sanja, and Sharon Pickering. "Football and sex: the 2006 FIFA World Cup and sex trafficking." *Temida* 11, no. 2 (2008): 21-47; Louise Osborne, 'Why Germany Is Now 'Europe's Biggest Brothel' (the Guardian, 2013) <https://www.theguardian.com/world/shortcuts/2013/jun/12/germany-now-europes-biggest-brothel> accessed 28 March 2017.

[5] Mossman, Elaine. "International approaches to decriminalising or legalising prostitution." *New Zealand: Ministry of Justice* (2007); Brown, Emma, Imy McCaw, and Raquel Bosó Pérez. "Prostitution Law Reform (Scotland) Evidence."; Unit, Abuse Studies. "A critical examination of responses to prostitution in four countries: Victoria, Australia; Ireland; the Netherlands; and Sweden." (2003); Geist, Darren. "Amnesty International's Empty Promises: Decriminalization, Prostituted Women, and Sex Trafficking." *Dignity: A Journal on Sexual Exploitation and Violence* 1, no. 1 (2016): 6.

light of the size of its sex industry since its implementation of a regulationist approach to prostitution.[6] Accordingly, Germany is often referred to as the “bordello of Europe.”[7] However, a quick examination of the stances taken in Germany in 2002[8] and New Zealand in 2003[9] shows that the implemented approaches were in fact very similar. Accordingly, both approaches primarily sought the elimination of invalidity of commercial sex contracts due to prostitution being *contra bonos mores*. Furthermore, both systems prioritised CSPs’ rights to sexual self-determination and the protection of other human rights that could be affected within commercial sex services provisions in their choices to decriminalise the sale and procurement of sex services. However, despite both governments having conducted evaluations of their models five years after the implementation of each approach, in which both revealed similar findings, opposite conclusions were reached.[10] While the evaluation of the New Zealand model was seen as a success, in particular due to the theoretical legal application and the way this was able to protect the rights of CSPs, the German evaluation critiqued the practical results being experienced due to a slow implementation.[11] It appears the way a regulatory approach is marketed makes a difference in relation to the uptake of examinations of the approaches in scholarly comparative studies. In New Zealand, the decriminalisation

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[6] See for example: Laura María Agustín, New research directions: the cultural study of commercial sex [2005] *Sexualities* 8, no. 5, 618-631; Wade Jacoby, Managing globalization by managing Central and Eastern Europe: the EU's backyard as threat and opportunity." [2010] *Journal of European Public Policy* 17, no. 3, 416-432; Heather Macrae, The EU as a gender equal polity: Myths and realities [2010] *JCMS: Journal of Common Market Studies* 48, no. 1, 155-174; Friedrich Schneider and A. T. Kearney, The shadow economy in Europe, 2013 [2013] *Johannes Kepler Universitat, Linz*; Kirston L Isgro, Maria Stehle, and Beverly M. Weber, From sex shacks to mega-brothels: the politics of anti-trafficking and the 2006 soccer World Cup [2013] *European Journal of Cultural Studies* 16, no. 2, 171-193.

[7] Don Kulick, Sex in the new Europe: The criminalization of clients and Swedish fear of penetration [2003] *Anthropological theory* 3, no. 2, 199-218; Roni Hirsh-Ratzkovsky, City, Alter City: German Intellectuals writing on Paris, 1900–1933 [2011] *Unpublished PhD thesis. Tel Aviv: Tel-Aviv University* (2011); Noémi Katona, "Sex work” and “prostitution." [2016] *Solidarity in Struggle,* 89.

[8] Germany 2002 Prostitution Act (ProstG).

[9] Prostitution Reform Act 2003 (New Zealand).

[10] Alicia Danielsson, 'Competing Ideas of Regulationism – What Can be Learnt from the German Move to a More Comprehensive Regulation of Prostitution' (2017) 5 International Journal of Advanced Research.

[11] Philipp S Fischinger and Norbert Habermann, §§ 134-138; Anh. Zu § 138: Prostg (1st edn, Sellier -de Gruyter 2011), §1 ProstG; See in particular: the critique from the CDU/CSU-fraction: Deutscher Bundestag, BT-Drucks 14/6781, -Entschließungsantrag, Urheber: Fraktion der CDU/CSU (Motion for a resolution, author: Group of the CDU / CSU) 1 etseq; Maria Eichhorn [CDU], StenographischerBericht der 196. Sitzung des Deutschen Bundestages (Stenographic report of the 196rd meeting of the German Bundestag) 14/196, 19195 et seq.

element of the regulationist approach was marketed, thereby resulting in the widespread misconception, that New Zealand had implemented a decriminalisation approach.[12] Moreover, the positive evaluation of their approach was based on the theoretical idea that in the long-term, when society adapted, the approach would achieve the initially set objectives.[13] In contrast, the German evaluation focused on the short-term practical application of their regulationist model and emphasised the experienced slow adaptation of their decriminalisation of commercial sex contracts as something that needed addressing in order to ensure the rights of vulnerable CSPs are protected effectively.[14]

5.2 The legal situation prior to the entering into force of the ProstG

In order to understand the German viewpoint underpinning the laws on prostitution, a brief overview will also be provided on the legal system prior to the introduction of the ProstG in 2002.[15]

One of the initial critiques of the former prostitution laws in Germany, as explained by Fischinger in the leading comprehensive Staudinger Commentary on Civil Law,[16] is that

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[12] New Zealand Government, Ministry of Justice, Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003'(New Zealand Ministry of Justice 2008) <https://maggiemcneill.files.wordpress.com/2012/04/report-of-the-nz-prostitution-law-committee-2008.pdf> accessed 31 March 2017.

[13] Ibid.

[14] Deutscher Bundestag, BT-Drucksache 16/4146, Deutscher Bundestag Drucksache 16/4146 16. Wahlperiode, Bericht der Bundesregierungzu den Auswirkungen des GesetzeszurRegelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG), 9, (Report of the Federal Government on the effects of the law regulating the legal situation of prostitutes) (2007) 9, English translation available online at https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf accessed: 31st March 2017.

[15] Germany 2002 Prostitution Act (ProstG).

[16] When researching laws in Germany, a valuable source is found in the German legal commentaries. These commentaries are considered a form of hybrid primary and secondary source as they provide the text of the relevant statute, which forms the primary material, but add further explanatory texts including interpretations and analyses of the statutory provisions by leading scholars that are considered secondary materials. These additional secondary materials within the commentaries often refer to any relevant judicial decisions, as well as other statutory provisions or even other significant secondary sources, such as other commentaries, see for example: Nigel G Foster and Satish Sule, *German Legal System and Laws* (Oxford University Press 2010) 41; Harvard Law School Library, 'Research Guides: German Law

prostitution as the "world's oldest profession" was essentially, a millennia-old set of double standards which involved a form of legal discrimination.[17] On the one hand, there were the clients, who lived a respectable life as first class citizens, whereas on the other hand, there was the commercial sex providing CSP, who was mostly regarded as a second class citizen and was exposed to social contempt. This critique resembles some of the conceptual critiques of the historic form of regulationism, laid out in section 4.1. As explained in this section, scholars, such as Summers,[18] Doezema[19] and Limoncelli[20] argue that women who are understood to constitute the majority of CSPs, yet not the male CSUs or CSPs, were historically viewed as the culprits who were responsible for issues relating to public health and morality. Fischinger continues to explain the depth of the perceived double standard in Germany, whereby the double standard not only existed in society via criminal laws, but also existed within the legal system itself. Prior to the introduction of the ProstG, this societal double standard was also implemented through the laws of the state, whereby on the one hand, CSPs were required to pay income and sales tax, whereas on the other hand, they were denied access to social security and were categorized as acting in violation of moral standards (*Sittenwidrigkeit*).[21]

The same double standard is also visible within the German jurisprudence over several decades. An example can be found in the opinion of the German Federal Administrative Court (Bundesverwaltungsgericht (BVerwG)) that prostitution equated professional criminals ("*Ausübung von Gewerbsunzucht*") and, thus, could not fall under the

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Research: Statutory Commentaries' (*Guides.library.harvard.edu*, 2018) <https://guides.library.harvard.edu/c.php?g=310823&p=2079015> accessed 3 March 2018.

[17] Fischinger and Habermann (n 11) §1 ProstG.

[18] Anne Summers, 'Introduction: The International Abolitionist Federation' (2008) 17 Women's History Review, 150.

[19] Doezema (n 27).

[20] Stephanie A. Limoncelli, 'International Voluntary Associations, Local Social Movements and State Paths to the Abolition of Regulated Prostitution in Europe, 1875–1950' (2006) 21 International Sociology, 37.

[21] Fischinger and Habermann (n 11) §1 ProstG; see also: Uwe Wesel, Frauen schaffen an, das Patriarchat kassiert ab, NJW (Neue juristische Wochenschrift) 1998, 120-121; Uwe Wesel, Prostitution als Beruf; in: NJW (Neue juristische Wochenschrift) 1999, S. 2865–2866; Erardo Cristoforo Rautenberg, Prostitution. Das Ende der Heuchelei ist gekommen! NJW (Neue juristische Wochenschrift) 2002, S. 650 et seq.

protection of Article 12 of the German Constitution (das Grundgesetz - GG).[22] The Bundesverwaltungsgericht maintained this conception for several decades due to the perception of prostitution being a violation of moral standards and as such *contra bonos mores* and in many aspects socially repugnant.[23] This position was also put forward by the German Federal Administrative Court in 1981, when it was held that CSPs could not be granted free movement rights in accordance with European Economic Community (EEC) law.[24] In the area of civil law, the jurisprudence of the Bundesgerichtshof (BGH – The German Federal Court) not only considered prostitution contracts to be *contra bonos mores*, but also contracts involving telephone sex services[25] or loan agreements for the purpose of financing brothels.[26] A significant issue in relation to the societal view of CSPs and CSUs in Germany that reflect some of the societal themes strongly critiqued by radical feminists, such as MacKinnon and Dworkin,[27] can be found in the reasoning of the German Supreme Court (BGH) in a criminal law case in 1973. Here, the BGH considered whether the victim was an "unblemished woman" or a CSP for the determination of the culpability of a rapist.[28] Accordingly, this case not only highlights the stereotypical societal idea of CSPs constituting immoral or deviant women in contrast to the societal ideal of women expected to be obedient and sexually passive but also reflects the unequal power dynamics between men and women in societies that have been criticised by radical feminists.[29] However, the issues found in this case also

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[22] BVerwGE 22, 286 (Decisions of the Federal Aministrative Court, vol 22), pp. 286, 289, [1a)]; Monatsschrift für Deutsches Recht (M.D.R.) 1996, p. 260; BGH, 30.06.1987 - 4 StR 267/87, NJW (Neue juristische Wochenschrift) 1987, 3209, MDR 1987, 948; BGH (Bundesgerichtshof – German Federal Supreme Court), 20.05.1981 - 2 StR 784/80, NJW (Neue juristische Wochenschrift) 1981, 2071, MDR 1981, 863, NStZ 1981, 395; BVerwG (Bundesverwaltungsrericht - Federal Aministrative Court), 28.06.1995 - 4 B 137.95, NVwZ-RR 1996, 84, BauR 1996, 78, ZfBR 1995, 331 only exception: BVerwG (Bundesverwaltungsrericht - Federal Aministrative Court) GewArch (GewerbeArchiv) 1973, 192, 193].

[23] Bénédict Winiger, Essential cases on damage, Digest of European tort law, v. 2 (Berlin: De Gruyter, 2011) 381; Silke Ruth Laskowski, 'New German Prostitution Act-An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law' (2002) *Int'l J. Comp. Lab. L. & Indus. Rel.* 18, 479; Anja Schmidt, 'Die Reform Des Rechts der Freiwilligen Prostitution' (2015) 48 Kritische Justiz.

[24] BVerwG (Bundesverwaltungsrericht - Federal Aministrative Court) 15.07.1980, Az. 1 C 45/77 (Lueneburg) NJW (Neue juristische Wochenschrift) 1981, 1169;

[25] BGH NJW (Neue juristische Wochenschrift) 1998, 2895, 2896.

[26] BGHZ (German Supreme Court Reporter for Civil Matters) 67, 119; NJW (Neue juristische Wochenschrift)-RR 1990, 750.

[27] See section 3.6.2.

[28] BGH at Dallinger, MDR 1973, 555.

[29] See section 3.6.2.

touch on some of the criticisms made by other feminist schools of thought. In particular, liberal feminists would argue that this double standard was a consequence of the unequal treatment of men and women, as men would not be viewed as equally deviant, if the majority of CSPs were male in contrast.[30] A significant critique of the old German view of CSPs and prostitution in general could be taken from Nussbaum's "Seven Ways to Treat a Person as a Thing."[31] As explained in chapter 3, Nussbaum lists seven underlying elements of the objectification of a person, namely, instrumentality, denial of autonomy, inertness, fungibility, violability, ownership and the denial of subjectivity.[32] Accordingly, the judgement denied CSPs the autonomy to refuse sex and instead determined them to be violable as a form of ownership. This legal situation that mirrored these societal double standards regarding CSPs persisted in Germany until the turn of the millennium. It was at this time, that a significant change became apparent in the German courts' jurisprudence towards a softer attitude towards prostitution, which will be addressed in the following section.

5.3 The reasons for the German choice of regulatory approach to prostitution regulation

As explained in the previous section, the legal approach to regulating prostitution in Germany prior to the implementation of the German regulationist approach involved a number of legal and societal double standards to the detriment of the CSPs. It was clear at the time, that the laws were structured around the societal ideas regarding prostitution, which persisted until the end of the twentieth century and the beginning of the 21st century. In particular, in 2001, the German Federal Administrative Court changed its previous decision in relation to the free movement status of CSPs by revoking its previous decision, which stated that CSPs were not part of economic life

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[30] Ibid.

[31] Martha C. Nussbaum, & E. Freud, Sex and Social Justice (New York: Oxford University Press, 1999) 70; see section 3.6.2.

[32] Ibid.

after a Dutch national was caught working in a brothel in Germany.[33] In particular, by referring to EU case law, such as *Royer*[34] it was explained that prostitution was not a significant threat that could justify a limitation of the freedom of services.[35] Most significantly, the German Federal Administrative Court referred to the EU case law of *Jany*[36] and *Adoui und Cornuaille*[37] to repeal its previous decision from 15th July 1980[38] which had originally explained that prostitution was *contra bonos mores* and thus could not be considered an economic activity in accordance with the EU (then EEC) free movement provisions.[39] The court explained that in light of EU case law since their initial judgement, in particular *Jany* and *Adoui und Cornuaille*[40] there were clear indications of prostitution falling within scope of economic activities in light of the meaning given to it by the EU. In particular, reference was made to the advocate general Léger's opinion in the *Jany* case.[41] Interestingly, following this reference, the court continued to put forward similar arguments as the CJEU in *Jany*. The German Federal Administrative Court explained that prostitution was not prohibited in all EU member states, and, thus, it would not depend on the applicable principles regarding criminal law. In particular, reference was also made to the *Schindler* case[42] to argue that it was likely that prostitution was to be seen as an economic activity rather than

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[33] BVerwG (German Federal Administrative Court) 18.9.2001, Az. 1 C 17/00 (Mannheim), NVwZ 2002, 339, 340.

[34] Case C-48-75, Jean Noël Royer. - Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium. - The right to stay in a Member State and public policy, ECR 1976-00497.

[35] BVerwG (German Federal Administrative Court) 18.9.2001, Az. 1 C 17/00 (Mannheim), NVwZ 2002, 339, 340 at II. 1.

[36] Case C-268/99 Jany Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001], ECR I-8615.

[37] Joined cases 115–116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1665.

[38] Judgement of the German Administrative Court: BVerwG, 15.07.1980 - 1 C 45.77, BVerwGE 60, 284, at 288 et seq.

[39] BVerwG (German Federal Administrative Court) 18.9.2001, Az. 1 C 17/00 (Mannheim), NVwZ 2002, 339, 340 at II. 1.

[40] *Jany* (n 36).

[41] BVerwG (German Federal Administrative Court) 18.9.2001, Az. 1 C 17/00 (Mannheim), NVwZ 2002, 339, 340 at II, 2, see also Léger, closing remarks in *Jany* (n 36) IV.

[42] Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, 1090.

harmful and immoral to the extent that could justify a limitation to free movement rights.[43]

The legal reasoning in this case is particularly significant for this examination, for a number of reasons. Firstly, this case took place prior to the German ProstG entering into force. The situation in question had come about in 1997, and the final judgement was made in September 2001.[44] Secondly, it shows how the EU case law was utilised in a national court of a member state in a way that ultimately resulted in a change to the regulatory approach taken in regards to prostitution. Although this case was not the only one to signal a change in perception regarding the regulation of prostitution in Germany and, thus, cannot be seen as the sole cause, it does demonstrate the influence the EU has had on legal reasoning in relation to this subject matter. Thirdly, this case involved a balancing of perceived threats and harm, whereby mere moral objections were concluded to be too insignificant to constitute a form of harm that could justifiably limit EU nationals' free movement rights.

Another significant judgement at the time was given by the Berlin Administrative Court (Verwaltungsgericht Berlin). Here, an appeal of a denied liquor license due to suspected prostitution had been denied. The woman running the establishment in question sought to further appeal this outcome, stating that the rejection had been based on grounds of the establishment promoting activities that were *contra bonos mores*. The issue put forward was that the authority in question did not have the competence to make a reasonableness assessment pertaining to public morality.[45] In this sense the competence was challenged on the ground that the German Catering Act (Gaststättengesetz), as commercial regulatory law, was merely intended to regulate the coexistence of people, insofar as their behaviour was deemed socially relevant based on the appearance to the outside world and the potential to impair the general welfare. However, this was not a matter of prescribing a minimum level of morality for people in

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[43] BVerwG (German Federal Administrative Court) 18.9.2001, Az. 1 C 17/00 (Mannheim), NVwZ 2002, 339, 340 at II, 2.
[44] Ibid.
[45] Ibid Tatbestand.

general.[46] The reasoning of the Berlin Administrative Court marked a significant change in the attitudes towards prostitution, as it clearly rejected the *contra bonos mores* nature of commercial sex as well as the idea of commercial sex involving a violation of human dignity.[47] In relation to the change of public perception of prostitution, the court explained that "Prostitution, which is voluntarily exercised by adults and without any criminal concomitants, is, according to the socio-ethical values recognised in our society today - irrespective of the moral judgment – no (longer) to be viewed as *contra bonos mores* under administrative law."[48] The court also explained that a reasonable person assessment of prostitution could no longer be based on the personal moral opinions of a judge, but, instead, needed a form of empirical, objective evidence in addition to case law. Examples of empirical evidence were given, including official practice, media coverage and demographic surveys as well as statements from experts and democratically legitimized public authorities.[49] This point raised by the court resulted in the downfall of the entire argument on which the German regulation of prostitution at the time had been based, and ultimately lead to the implementation of the German regulatory approach to prostitution.[50] The court then used a representative study as a significant indicator for the change of public opinion in Germany in the rationale of this case.[51] The study had looked into the public opinion in Germany as to whether prostitution should be recognised as employment, and revealed that more than two

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[46] Ibid, in reference to BVerwG (German Federal Administrative Court) 16. 9. 1975 – 1 C 44.74, BVerwGE 49, 160.

[47] VG Berlin, Urteil v. 01.12.2000, NJW 2001,983 (986) - „Widerruf der Gaststättenerlaubnis"

[48] Ibid para. III, Translated from German "Prostitution, die von Erwachsenen freiwillig und ohne kriminelle Begleiterscheinungen ausgeübt wird, ist nach den heute anerkannten sozialethischen Wertvorstellungen in unserer Gesellschaft - unabhängig von der moralischen Beurteilung - im Sinne des Ordnungsrechts nicht (mehr) als sittenwidrig anzusehen."

[49] Ibid, Leitsatz 3.

[50] BVerwGE 22, 286 (Decisions of the Federal Aministrative Court, vol 22), pp. 286, 289, [1a)]; Monatsschrift für Deutsches Recht (*M.D.R.*) 1996, p. 260; BGH, 30.06.1987 - 4 StR 267/87, NJW (Neue juristische Wochenschrift) 1987, 3209, MDR 1987, 948; BGH (Bundesgerichtshof – German Federal Supreme Court), 20.05.1981 - 2 StR 784/80, NJW (Neue juristische Wochenschrift) 1981, 2071, MDR 1981, 863, NStZ 1981, 395; BVerwG (Bundesverwaltungsrericht - Federal Aministrative Court), 28.06.1995 - 4 B 137.95, NVwZ-RR 1996, 84, BauR 1996, 78, ZfBR 1995, 331 only exception: BVerwG (Bundesverwaltungsrericht - Federal Aministrative Court) GewArch (GewerbeArchiv) 1973, 192, 193].

[51] Urteil des VG Berlin (Verwaltungsgericht Berlin) (Judgement of the Berlin Administrative Court) NJW (Neue juristische Wochenschrift) 2001, 893, 988.

thirds of the questioned participants[52] thought that prostitution was to be considered legal employment.[53]

The significance of this decision can be understood when looking back at the previous two sections of this chapter, in light of the central legal issue surrounding prostitution at the time being based on the characterisation of prostitution contracts being *contra bonos mores*.[54] This meant that even after CSPs had fulfilled commercial sex services, they did not have any legally enforceable claims under German contract law.[55]

Finally, the judgement of the Berlin Administrative Court was also significant in relation to the stance taken by the German government when implementing the ProstG two years later. The court took a strong stance against hard paternalism by explaining that "anyone who thinks they have to protect the human dignity of [CSPs] against their will takes in truth their freedom of self-determination protected by human dignity and cements their legal and social disadvantage."[56] It is important to understand here, that the protection of human dignity is the highest and most protected human right in German law, protected by Article 1 of the German Constitution.[57] Moreover, this quote from the judgement demonstrates legal reasoning that is in accordance with the underpinning ideas of regulationism, as discussed in section 4.1.

Ultimately, it can be argued that three main points resulted in the German move to a regulatory approach. Firstly, societal changes that resulted in the reasonable person

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[52] Especially, 68% of the total participants agreed that prostitution should be considered legal employment, of which 69% of all female participants agreed. The survey also recognised a trend in relation to age, whereby 77% of all participants between 30 and 45 years of age supported this idea, whereas merely 51% of participants over the age of 60 agreed. The age of the participants was also taken into consideration by the court to show trends in societal changes. See case III. 2. b) cc).
[53] Urteil des VG Berlin (Verwaltungsgericht Berlin) (Judgement of the Berlin Administrative Court) NJW (Neue juristische Wochenschrift) 2001, 893, 988; this is in contrast to: Deutscher Bundestag (n 14).
[54] See: BGH NJW (Neue juristische Wochenschrift) 1976, 1883, 1884; Hefermehl, in Hans Theodor Soergel, Wolfgang Siebert and Jürgen F Baur, Bürgerliches Gesetzbuch (2nd edn, Kohlhammer 1997).
[55] See: J. von Staudinger and others (n 70) § 138 Rn 453 mwNw; for most current version see: J. von Staudinger and Volker Emmerich, J. Von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch, Mit Einführungsgesetz Und Nebengesetzen (1st edn, Sellier-de Gruyter 2016).
[56] Case, Leitsatz 4: Translated from German "4. Wer die Menschenwürde von Prostituierten gegen ihren Willen schützen zu müssen meint, vergreift sich in Wahrheit an ihrer von der Menschenwürde geschützten Freiheit der Selbstbestimmung und zementiert ihre rechtliche und soziale Benachteiligung."
[57] Article 1 of the German Constitution (Grundgesetz – GG).

argument underpinning the German *contra bonos mores* principle no longer applying to prostitution. Secondly, the development of the idea, that the paternalism involved in prohibiting prostitution for the protection of prostitution was more harmful to CSPs than prostitution itself, as it violated Article 1 of the German constitution (GG). Thirdly, the influence of EU case law in the German system resulted in prostitution being recognised as an economic activity in German national courts.

5.4 The German prostitution regulation laws in practice

As it is now understood why Germany chose to implement a regulationist approach to prostitution, it is important to examine how this approach was implemented and applied in practice. As discussed in section 4.1., legal theoretical approaches to regulationism often follow the ideas of libertarian paternalism with the underlying objective seeking to affect people's behaviour while simultaneously respecting their freedom of choice. The idea is to direct people's choices in the direction of welfare-promoting behaviours without ignoring their freedom of choice.[58] When balancing the potential harm caused by decriminalisation of prostitution in contrast to the criminalisation thereof, the rationale of the Berlin Administrative Court followed the common ideas of regulationism as the harm caused by criminalisation of prostitution would outweigh the harm caused by liberalisation.[59] Ultimately, Germany implemented a number of paternalistic elements that then specifically targeted the areas of harm wherever they come about, for instance by ensuring the laws merely pertained to adults.[60]

The creation of the law for the improvement of the legal and social status of CSPs is only comprehendible on the basis of the previously described legal situation. Following calls for reform for many years,[61] the German legislature started drafting a prostitution

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[58] Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism Is Not an Oxymoron' SSRN Electronic Journal, *University of Chicago Public Law & Legal Theory* Working Paper No. 43, 2003.
[59] De Marneffe (n 2) 29; Toebes (n 2); Ditmore (n 2) 372, see also chapter 3.1.3.
[60] Greggor Mattson, The cultural politics of European prostitution reform: governing loose women (Palgrave Macmillan, 2016) 101; Deutscher Bundestag (n 14).
[61] Deutscher Bundestag, BT-Drucks 14/4456 (German Parliament Print No. 14/4456) –. Entwurf eines Gesetzes zur beruflichen Gleichstellung von Prostituierten und anderer sexuell Dienstleistender (Draft law on the professional equality of prostitutes and other sexually employed persons).

code.[62] Despite diverse ideas relating to the way this was to be conducted, all parties of the Bundestag (the German House of Representatives) agreed that the legal status of CSPs had to be improved.[63] Apart from the purely legal changes, a primary goal was to send a clear signal that the social double standards were to be removed.[64]

The German prostitution code is essentially based on three pillars: The first pillar ensures that under civil law, CSPs should have an entitlement to the agreed remuneration after commercial sex services have been performed.[65] The second pillar ensures that CSPs have access to social security.[66] Finally, the third pillar involves the expungement of § 180a Abs. 1 No. 2 StGB (Strafgesetzbuches – The German criminal code) which provides CSPs the possibility of being legally safeguarded. This pillar also enables CSPs to voluntarily act as persons in dependent employment[67] in brothels. The key objective was to achieve an improvement of working conditions in these types of establishments.[68]

The most significant part of the ProstG is the first out of three paragraphs, which states:

> § 1 When sexual acts have been undertaken for a previously agreed fee, the agreement shall constitute a legally valid claim. The same applies if a person, especially in the context of an employment relationship, keeps the provision of such acts ready against an agreed fee for a certain period of time.[69]

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[62] Deutscher Bundestag, BT-Drucks 14/5958 (German Parliament Print No. 5958)– Entwurf eines Gesetzes zur Verbesserung der rechtlichen und sozialen Situation der Prostituierten (Draft law to improve the legal and social situation of prostitutes).
[63] See in particular: the critique from the CDU/CSU-fraction: Deutscher Bundestag, BT-Drucks 14/6781, - Entschließungsantrag, Urheber: Fraktion der CDU/CSU (Motion for a resolution, author: Group of the CDU / CSU) 1 et seq; Maria Eichhorn [CDU], Stenographischer Bericht der 196. Sitzung des Deutschen Bundestages (Stenographic report of the 196rd meeting of the German Bundestag) 14/196, 19195 et seq.
[64] See: Remarks of the fraction Buendnis 90/Die Gruenen BT-Drucks 14/19171 German Bundestag, 14th election period, 196th meeting. Berlin, Friday, den 19. Oktober 2001, at 8.
[65] Germany 2002 Prostitution Act (ProstG) §§ 1 & 2.
[66] Ibid.
[67]"Dependent Employment" here refers to employment as an employee.
[68] Deutscher Bundestag, (n 51) 6.
[69] Translated from German: § 1 ProstG: "Sind sexuelle Handlungen gegen ein vorher vereinbartes Entgelt vorgenommen worden, so begründet diese Vereinbarung eine rechtswirksame Forderung. Das Gleiche gilt, wenn sich eine Person, insbesondere im Rahmen eines Beschäftigungsverhältnisses, für die Erbringung derartiger Handlungen gegen ein vorher vereinbartes Entgelt für eine bestimmte Zeitdauer bereithält."

The *ratio legis* of the 2002 code, as stated within the published draft of the law, is solely the legal improvement of the legal status of CSPs. In this sense it was clearly stated that there is no intention to legally improve the legal status of third parties involved in prostitution, such as CSCs, to ensure that CSPs are empowered rather than strengthening the sector itself.[70] It is clear from this, that the German approach reflects many of the ideas found in liberalism and especially liberal feminism. As seen in section 3.6.2., the liberal feminist views on prostitution regulation strongly focus on empowerment of CSPs while preserving their autonomy.

From a purely legal perspective, the two key priorities of the introduction of § 1 ProstG were to remove any barriers CSPs may have accessing social security[71] and to create a civil claim for CSPs against clients or brothel and club managers, when commercial sex acts have been performed, or have been kept ready.[72] Although the term "kept ready" sits uncomfortably in the English language, it has the vital function of securing voluntariness in CSPs consent. However, this point will be addressed in the next section on the material scope of the German laws.

As indicated above, the intention of the first paragraph of the ProstG was to help CSPs in two respects, namely, legally, by granting CSPs an enforceable claim due to the repeal of the contractual finding of *contra bonos mores*, as well as factually, by reducing the dependence of CSPs on CSUs/CSPus or pimps, as CSPs no longer required the help of so-called "fist law."[73] Fist law, here refers to the German term "*Faustrecht*," which refers to a form of justice achieved via the use of violence.[74] Interestingly, when considering the meaning of the term "*Faustrecht*" in relation to prostitution, Hegel's view of it involving obtaining mastery over property, as reflected in Goethe's Faust[75] comes

[70] Deutscher Bundestag (n 62) 4, 6.
[71] Bruckert, Chris, and Stacey Hannem, 'Rethinking the prostitution debates: Transcending structural stigma in systemic responses to sex work.' (2013) Canadian Journal of Law and Society 28, no. 1, 43-63.
[72] German Prostitution Act (ProstG) 2002 § 1; Bernhard Pichler, *Sex als Arbeit: Prostitution als Tätigkeit im Sinne des Arbeitsrechts* (Hamburg: Disserta Verlag, 2013) 104.
[73] Fischinger and Habermann (n 11) §1 ProstG.
[74] Sergej Sergeevič Alekseev and Jane Sayer, *Socialism and Law* (Progress Publ 1990) 47.
[75] Johann Wolfgang von Goethe, *Faust* (Nikol 2012); Johann Wolfgang von Goethe and John R Williams, *Faust: The First Part of the Tragedy, with Unpublished Scenarios for the Walpurgis Night and the Urfaust* (Wordsworth Editions Limited 1999).

to mind.[76] Accordingly, one could interpret the removal of CSPs' needs for physical protection due to the absence of legal protection as a further removal of CSPs from the objectifying perception of being property.

Another interesting point to be made is one of the key motivations for the German legislators to argue for the decriminalisation of commercial sex contracts. Due to the history of human rights violations during the Third Reich period in relation to the holocaust and other atrocities which took place during the time of the Second World War, the highest legal provision on the basis of which all other laws need to be measured can be found in the first article of the German Basic Law, which essentially is the German constitution, which states that human dignity shall be inviolable.[77] The strong sense that human dignity needs to be ensured and protected at all costs is typical of a German legal philosophy. Accordingly, it is interpreted widely.[78] As a basic human right, the protection of human dignity is a defensive tool to protect citizens from the state. The wide understanding of the inviolability of human dignity has been interpreted in Germany, once again, on the basis of ideas of safeguarding autonomy. In this sense, it is understood to include preventing the state from dictating what an individual's dignity entails. Accordingly, part of the protection of dignity entails being able to decide for oneself what is and what is not in accordance with one's own dignity.[79] However, although the state understands that it is not able to decide whether providing sexual services is in accordance with one's own understanding of one's dignity, the German government accepts the responsibility to protect its citizens regardless of the way they perceive their own human dignity, and the life choices they make on the basis of this.[80] Thus, the German model is based mostly on ensuring the

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[76] See for example Marc Shell, *Money, Language, and Thought* (Johns Hopkins University Press 1993) 118.
[77] German Grundgesetz (Basic Law) Article 1, para. 1: Die Würde des Menschen ist unantastbar (English translation: The human dignity is inviolable).
[78] Peter Unruh, *Der Verfassungsbegriff Des Grundgesetzes: Eine Verfassungstheoretische Rekonstruktion* (Mohr Siebeck 2002) 599.
[79] BVerfGE (Decision of the German Federal Constitutional Court) 45, 187, 227f. – Lebenslange Freiheitsstrafe; Robert Esser; Hans-Heiner Kühne, *Festschrift für Hans-Heiner Kühne* (Müller, 2013) 97; Barbara Sandfuchs, *Privatheit wider Willen? Verhinderung informationeller Preisgabe im Internet nach deutschem und US-amerikanischen Verfassungsrecht* (Mohr Siebeck, 2015) 126 – 129.
[80] Rahel Gugel, *Das Spannungsverhältnis zwischen Prostitutionsgesetz und Art. 3 II Grundgesetz eine rechtspolitische Untersuchung* (Münster Lit 2010) 115 et seq.

human rights protection of CSPs, including providing them legal protection from harm, by ensuring they are able to press charges under criminal law and make civil action claims,[81] as well as ensuring access to social security provisions. Thus, CSPs in Germany are entitled to the same rights as any other worker, including pension rights, holidays, sick leave, maternity or parental leave and healthcare.[82]

Since the ProstG entered into force, the classification of prostitution as an occupation is protected under Article 12 of the German Basic Law (GG),[83] despite the fact that during the law-making procedure it was emphasized by various speakers that prostitution was not intended to constitute a normal occupation like any other ("*normaler Beruf wie jeder andere*").[84] Instead, this has been interpreted to mean differences, such as the fact that prostitution cannot be subject to placements by the Federal Employment Agency as well as other exceptions, such as limitations to employers' rights of direction.[85]

5.4.1 The Scope of the ProstG

As the ProstG only consists of three paragraphs that have deliberately been kept as general as possible, the scope of the code and its effects in practice are far reaching. However, the amendments made to the German approach with the introduction of the PrstSchG (Gesetz zum Schutz von in der Prostitution tätigen Personen - Prostituiertenschutzgesetz - The Code for the Protection of people working in prostitution)[86] in 2017 have limited the extent of the reach of the ProstG.[87] Yet, in order to understand the German approach, it is necessary to first understand the scope of the ProstG as the foundation of the entire approach, before looking at the move towards

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[81] Janice G Raymond, Prostitution on demand: Legalizing the buyers as sexual consumers [2004] *Violence against women* 10, no. 10, 1156-1186; Fischinger and Habermann (n 11) §1 ProstG.
[82] Ibid.
[83] Deutscher Bundestag, BT-Drucksache 16/4146, Deutscher Bundestag Drucksach 16/4146, 5.
[84] See: Anni Brandt-Elsweier & Hanna Wolf [both SPD], Stenographischer Bericht der 168. Sitzung des Deutschen Bundestages 14/168, 16486, 16488.
[85] Deutscher Bundestag (n 62).
[86] Gesetz zum Schutz von in der Prostitution tätigen Personen (Prostituiertenschutzgesetz - *ProstSchG*). Nichtamtliches Inhaltsverzeichnis. *ProstSchG.* Ausfertigungsdatum: 21.10.2016. Vollzitat: "Prostituiertenschutzgesetz vom 21. Oktober 2016 (BGBl. I S. 2372)
[87] Ibid.

stricter regulation. Thus, the focus in this section will be placed on the ProstG, whereas the ProstSchG will be examined in the next section.

In relation to the persons covered by the provisions in the ProstG, it is clear through the wording that it applies to all genders of CSPs due to the neutral wording of the provision.[88] Due to the short and general nature of the ProstG, it is not surprising that the material scope was not clearly defined within the wording of the act, and, thus, needed to be established by legal interpretation. According to van Galen, the material scope of the ProstG is to be interpreted narrowly.[89] Hence, "sexual acts" in the sense of the first sentence of the first paragraph were understood the same way as the term would be understood in society, meaning the performance of sexual acts with or in front of a client with direct contact.[90] This interpretation would exclude practices such as telephone sex, peep-shows, striptease performances or webcam transmissions of a sexual nature. However, although the prevailing opinion initially appeared to distance itself from this narrow interpretation by concentrating in the term "sexual act" in the sense of § 1 S 1 ProstG instead of "prostitution",[91] the ProstSchG clarified the definition of "sexual acts" as interpreted above, to involve sexual acts of at least one person undertaken on, to or in front of at least one other present person for remuneration, or allowing a sexual act to be undertaken on, to or in front of one's own person for remuneration.[92] In particular, the element of "on, to or in front of"[93] is significant, as it ensures that the mere acquiescence is sufficient without any requirement to have the

[88] Götz Schulze, *Die Naturalobligation: Rechtsfigur und Instrument des Rechtsverkehrs einst und heute - zugleich Grundlegung einer zivilrechtlichen Forderungslehre* (Mohr Siebeck, 2008) 548, 549; Germany 2002 Prostitution Act (ProstG) § 2.
[89] Margarete von Galen, Rechtsfragen der Prostitution (1st edn, Beck 2004) 43.
[90] Ibid.
[91] J. von Staudinger and others, J. Von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch, Mit Einführungsgesetz Und Nebengesetzen (1st edn, Sellier-de Gruyter 2003) § 138 Rn 452; Franz Jürgen Säcker, Münchener Kommentar Zum Bürgerlichen Gesetzbuch (1st edn, CH Beck 2015) Rn 3 et seq.
[92] § 2 Begriffsbestimmungen, Gesetz zum Schutz von in der Prostitution tätigen Personen (Prostituiertenschutzgesetz - ProstSchG),
[93] Translated from the two German forms "an" and "vor" which, however, for the sake of linguistic accuracy need to be translated into the three forms in English.

CSP, CSU or CSPu actively have performed something.[94] Thus, the passive participation in sexual acts is also covered by this term.

5.4.2 Contractual forms of prostitution

Following the German regulationist approach to prostitution regulation, commercial sex services can be carried out in a self-employed as well as an employed contractual form.[95] In the event that a CSP is self-employed, which is the more common practice,[96] there is only a contractual relationship between the CSP and the CSU/CSPu. However, in contrast to the majority of contracts, contracts involving commercial sex provision, as intended by the German government, are unilateral, which means that CSPs are under no obligation perform a service, even after having agreed to it, meaning that their agreement can be withdrawn at any time, however, after a commercial sex service has been performed, CSPs are entitled to an enforceable claim to remuneration for the service provided, regardless of the circumstances. In this sense, a CSU or CSPu cannot refuse to make a payment on grounds, such as unsatisfactory performance.[97]

An important clarification in relation to the nature of contracts involving commercial sex was made by the Berlin Administrative court in 2001. Here it was explained, that the acts of commercial sex sold within prostitution contracts constituted services and not goods.[98] Although this may seem logical from a legal perspective, it can be assumed that the language used in relation to certain ideologies pertaining to prostitution may

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[94] Dirk Looschelders, Dirk Olzen and Gottfried Schiemann, J. Von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch (1st edn, 2015) Anhang zu § 138 Rn 6.
[95] Fischinger and Habermann (n 11) §1 ProstG Rn. 48-53.
[96] Synnøve Økland Jahnsen and Hendrik Wagenaar, Assessing Prostitution Policies in Europe (Routledge 2019) Chapter 7.
[97] Andreas Zöllner, 'Neue Arbeitsformen Und Ihre Herausforderungen im Arbeits- Und Sozialversicherungsrecht' (2018) 9 Rechtswissenschaft; Sebastian Reichle and Roman Schister, 'Sittenwidrigkeit Des Sexdienstleistungsvertrags?' (2017) 2 Ex Ante, German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 'Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)' (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth – BMFSFJ 2007) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf> accessed 6 March 2020, 15-21.
[98] VG Berlin NJW 2001, 983, 986.

have contributed to the need to clarify this point. In particular, as mentioned in 3.2., some prostitution critics often talk about prostitution involving the sale and purchase of CSPs' bodies. In relation to these arguments, the court clarified that the body or person cannot be regarded as a merchandise.[99] This view correlates, once again, more closely with the ideas and views of liberalism. For example, liberal feminists argue that prostitution in itself is not necessarily exploitative.[100] Instead, it is understood that exploitative and discriminatory views surrounding prostitution is the source of harm. It could be argued that viewing commercial sex as the provision of one's body would disregard CSPs' autonomy and freedom to decide to use their bodies to provide commercial sex services if they wish to do so.

As stated above, self-employment is not the only mechanism through which prostitution can be undertaken. It is also possible within the German regulatory approach for CSPs to work as employees in brothels, which means that CSPs receive a fixed salary.[101] In these circumstances, there is no contractual relationship between the CSPs and the CSUs, but rather between the CSUs and the brothel owners.[102] In accordance with the second sentence of §1 of the ProstG, CSPs are considered to be keeping their services ready to provide these to CSUs for a specific amount of time. In return the CSPs will receive their "previously agreed remuneration."[103] However, it is within these forms of contractual relationships, where it becomes apparent that there are certain differences between the way prostitution is regulated in contrast to other forms of employment. It becomes clear from §3 ProstG and the explanations provided within the draft law document, that the legislator aimed at limiting brothel owners' right of direction as employers.[104] Brothel owners as employers of CSPs are able to determine the working place and working hours of CSPs, yet cannot dictate to whom the commercial sex services should be provided to or the specifics of the nature of the service, as this would disregard the element of consent from CSPs. As the activity for which CSPs are

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[99] Ibid.
[100] See section 3.6.2.
[101] Deutscher Bundestag (n 62) 4, 6.
[102] Fischinger and Habermann (n 11) §1 ProstG Rn. 48-53.
[103] Danielsson (n 10) 14.
[104] Deutscher Bundestag (n 62) 6.

employed is not the provision of commercial sex in itself, but rather for being available to provide commercial sex services over a designated time period at a designated location, CSPs are, thus, still entitled to their salary, even when business is slow or when they refuse to provide commercial sex to CSUs when they do not wish to do so.[105] In other words, this allows for employed CSPs to also have the right to reject any CSUs without losing any claim towards the brothel owner in relation to salary.[106] In contrast to the contracts between CSPs and CSUs when commercial sex services are provided in a self-employed capacity, contracts between CSPs and brothel owners are not unilateral and, instead, fall within the scope of ordinary contracts. This is based on the fact that the CSPs are only contracted to keep the services ready for provision, and thus does not directly apply to the actual provision of any commercial sex service provisions *per se*.[107] However, the right of direction of brothel owners, even if it is only limited, is based on the contractual obligation to keep prostitution services ready, which due to its nature, does not fall under the human dignity protection of the German constitution, as it cannot be equated to actually providing commercial sex acts *per se*.[108] Nevertheless, although this is theoretically true, it appears that this would remain unenforceable in practice. The reason for this can be found in another regulatory exception the legislators introduced that differentiated prostitution from other forms of work, namely, that CSPs are able to terminate employments contracts at any point without notice.[109] As will be seen in chapter 8, these differences could arguably blur the lines between what is considered an employee and what is considered a self-employed worker, due to the similarities to dependent self-employed workers.[110] Nevertheless, it needs to be taken into account that the options of CSPs to disregard employers' rights of direction are also limited. CSPs may be able to refuse commercial sex services and determine how commercial sex acts should be carried out, yet apart from this, their only option would be to resign. Thus, it is assumed here, that the limitations of the CSPs, as long as they

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[105] Fischinger and Habermann (n 11) rn. 52; von Galen (n 89) Rn. 132 et seq.
[106] Ibid § 2 ProstG, Rn. 15.
[107] von Galen (n 89) Rn. 43 et seq.
[108] Ibid.
[109] Deutscher Bundestag (n 62) 4 et seq.
[110] European Commission, 'Consultation Document: Second Phase Consultation of Social Partners under Article 154 TFEU on a Possible Action Addressing the Challenges of Access to Social Protection for People in all Forms of Employment in the Framework of the European Pillar of Social Rights' (2017) 12.

are willing to work by keeping their services ready, to direct the conditions of their work would still be viewed as employees rather than self-employed CSPs. It is clear that the German legislators intended for prostitution to be able to be categorised as a form of employment under these conditions, as CSPs are entitled to social security in accordance with § 7 Abs. 1 S 1 SGB IV (Sozialgesetzbuch IV – the German Social Code: book IV).[111] Fischinger explains that for this reason, the necessary contractual obligations for employment contracts need to be assumed in these cases, despite brothel owners not being able to enforce these in practice.[112]

In cases in which CSPs are employed, the general German individual and collective employment laws apply, including that the employment contract can only be limited by § 14 TzBfG,[113] that CSPs have holiday entitlements, an entitlement to continued payment in case of illness,[114] a protection against dismissal as well as the right to form a union.[115]

As CSPs are merely contractually obliged to keep themselves ready to provide sexual acts,[116] there is no due performance of the actual provision of commercial sex and CSPs will be owed remuneration, even when commercial sex acts have not been performed.[117]

The question that naturally follows is how brothel owners' interests can be protected from CSPs declining to perform sexual acts persistently or at least in an unreasonably large number of cases. The answer to this question can be found in the understanding of the term "keeping ready". It is understood that to keep something ready involves an

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[111] § 7 Abs. 1 S 1 SGB IV (Sozialgesetzbuch IV – the German Social Code: book IV).
[112] J. von Staudinger, George Annub and Dieter Reuter, J. Von Staudingers Kommentar Zum Burgerlichen Gesetzbuch Mit Einfuhrungsgesetz Und Nebengesetzen (1st edn, Sellier 2011) §§ 138, 586, 50.
[113] Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Teilzeit- und Befristungsgesetz - TzBfG) (Act on part-time work and temporary contracts) 21st December 2000 (BGBl. I S. 1966).
[114] Sick leave.
[115] Christian Armbrüster, Kurt Rebmann and Franz Jürgen Säcker, Allgemeiner Teil (Auszug) (1stedn, Beck 2003) Rn 4 in Säcker, Armbrüster and Rebmann (n 91).
[116] von Galen (n 89) rn 147 et seq.
[117] Looschelders, Olzen and Schiemann (n 91) Rn 9.

internal willingness to serve suitable clients who are willing to pay for the service.[118] According to van Galen, this requirement of willingness extends to the CSPs' appearance as well, meaning that it requires CSPs to present themselves in an externally sufficiently attractive manner.[119] Thus, the employment nature of the work relationship between CSPs and brothel owners may also assume instruction rights of owners or managers in relation to CSPs' appearances and clothing.[120] However, this does not mean that CSPs can be forced against their will to follow these requirements. Instead, it merely means that non-compliance will be understood as an absence of internal willingness,[121] which in the worst case will result in a termination of the employment contract.[122]

As mentioned above, CSPs are able to terminate their employment contracts without prior notice. However, there is no corresponding termination right for employers of CSPs unless there are qualifying reasons for an extraordinary termination.[123] Accordingly, CSPs would receive between 2 weeks and 7 months' notice, depending on the length of their employment contract.[124]

Finally, a point worth mentioning in relation to the current effects of the ProstG in Germany involves the way damages are regulated. Accordingly, claims for damages in prostitution usually follow the same *cupla in contrahendo* rules as in any other contractual relationship.[125] However, an area which deserves particular attention in relation to the issue of damages involves situations in which parties to a commercial sex contract are infected by diseases by the other party. The resulting claim in such a scenario would be derived from the German civil law provisions of duty of care.[126] Prior to the amendments to the laws in Germany in 2017, a CSP who had infected a CSU,

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[118] Fischinger and Habermann (n 11) rn. 52.
[119] von Galen (n 89) Rn 148.
[120] Ibid.
[121] Fischinger and Habermann (n 11) rn 56.
[122] Ibid.
[123] § 626 BGB.
[124]See: § 622 BGB - Kündigungsfristen bei Arbeitsverhältnissen (Section 622 Notice periods in the case of employment relationships).
[125] Fischinger and Habermann (n 11) Rn. 45; Bergmann 2003 JR, 2003, 270, 275.
[126] § 280 s. 1 in conjunction with § 241 s. 2 BGB.

was not protected by the German general limitations of liability,[127] as the non-use of barrier protection, such as condoms, was regarded as negligence, unless the surrounding circumstances of the risk of infection was known to the CSU who nevertheless requested the omission of said protective measures.[128] However, following the German move to stricter regulationism, which will be discussed in further detail in the next section, condom use is mandatory, with the legal responsibility placed on the CSU, thereby protecting CSPs from being legally able to negligently infect CSUs with diseases.[129]

5.5 The German move toward stricter regulation

After more than a decade, it became apparent to the German legislators, that the initial objective of legally and practically eliminating the hurdles of CSPs gaining access to social security had been missed.[130] It is important to understand at this point that German social security insurance is only obligatory for employees, with self-employed workers only being subject to the German pension insurance under specific conditions. Self-employed workers in Germany are responsible for ensuring their own social security through private providers.[131] According to Zacher, this can be traced back to the historical view of employers constituting the capitalists from which the employees need to be protected via an obligation to provide social security.[132]

Thus, although the facilitation of access to social security was one of the key demands of lobbyists and stakeholders before the introduction of the ProstG, it appeared that only

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[127] This situation will still apply in the reverse setting, where a CSU negligently infects a CSP, unless barrier protection has not been used, which would now no longer be negligent due to the legal obligation to use condoms.
[128] Fischinger and Habermann (n 11) Rn 47.
[129] 'The New Prostitute Protection Act (Das Neue Prostituiertenschutzgesetz)' (*Bmfsfj.de*, 2020) p6, <https://www.bmfsfj.de/blob/117624/ac88738f36935f510d3df8ac5ddcd6f9/prostschg-textbausteine-en-data.pdf> accessed 25 April 2020.
[130] Para 3 ProstG.
[131] 'Germany: Self-Employed Workers | Eurofound' (*Eurofound.europa.eu*, 2018) <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/germany/germany-self-employed-workers> accessed 17 March 2018.
[132] Hans Friedrich Zacher, *Social Policy in the Federal Republic of Germany* (Springer Verlag 2013) 234.

a limited amount of CSPs actually found themselves within employment that was subject to social security contributions.[133] The reasons for this were diverse, yet the key reasons were either based on fears from the CSPs that they would lose their sexual autonomy, in particular their autonomous choice of working hours and place, as well as the threatening loss of anonymity, whereas employment contracts were unattractive for brothel operators due to the additional remuneration obligations with only limited rights of direction.[134] Thus, the German government worked towards drafting new legislation targeted at implementing further regulation of prostitution, which entered into force on 1st July, 2017.[135]

In order to understand the changes that were implemented, it is important to understand the issues and gaps revealed from the initial Prostitution Code (ProstG). When the ProstG was drafted, a key philosophical stance towards prostitution was that it was a given, which realistically had to be dealt with regardless of moral attitudes.[136] Accordingly, the Act sought neither to end prostitution, nor to augment its status.[137] Instead, a particular focus was directed towards the improvement of CSPs' working conditions, in order to support people voluntarily earning their living through the provision of commercial sex services.[138]

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[133] See: report on the ramnifications of the ProstG, BT-Drucks 16/4146, 8 et seq, 12 et seq, 44.
[134] Ibid.
[135] Committee on the Elimination of Discrimination against Women (CEDAW) Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all Forms of Discrimination against Women, List of issues and questions in relation to the combined seventh and eighth periodic reports of Germany, Sixty-sixth session, 13 February-3 March 2017, CEDAW/C/DEU/Q/7-8/Add.1, available online at: <http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/CEDAW/cedaw_state_report_germany_7_8_2015_loi_reply_en.pdf> accessed 31 March, 2017.
[136] Deutscher Bundestag (n 14).
[137] Ibid.
[138] Pajnik, Mojca, 'Reconciling paradigms of prostitution through narration.' (2013) *Društvena istraživanja* 22, no. 2, 257-276; Bruckert and Hannem (n 71) 43-63.

Thus, the Act sought to enhance CSPs' legal as well as social situations, by removing the negative effects of prostitution having been classified as immoral, and as such invalid, legal transactions,[139] as well as by facilitating access to social insurance.[140]

The idea was for the ProstG to assist in reducing prostitution-related crimes as well as making it easier for people working in prostitution to exit the industry.[141] A crucial point, however, was that prostitution was not a "job like any other," in particular, due to strict legal protection provisions related to the rights of CSPs to sexual self-determination.[142]

A key rationale here is the notion that the state is not responsible for the protection of people from their own life-choices, especially when these have been a product of free self-determination. In this context, freedom as part of the right to sexual self-determination proscribes that people should be allowed to freely choose whether, how and when to engage in sexual acts.[143]

The basis for this is found, in particular, in the fact that, today, prostitution, as an occupation aimed at sustaining one's livelihood, is protected by Article 12 s. 1 GG.[144] As an occupation, people working in the area need to be protected from harm in the same way as anyone else. The German government recognised the vulnerability of people

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[139] Venla Roth, Defining human trafficking and identifying its victims: a study on the impact and future challenges of international, European and Finnish legal responses to prostitution-related trafficking in human beings (Martinus Nijhoff Publishers, 2012) 36, 37; Barbara Kavemann, and Heike Rabe. 'The Act Regulating the Legal Situation of Prostitutes—Implementation, Impact, Current Developments: Findings of a Study on the Impact of the German Prostitution Act.' (2007) *Berlin: Sozialwissenschaftliches FrauenForschungsInstitut eV*, <www.cahrv.uni-osnabrueck.de/reddot/BroschuereProstGenglisch.pdf> accessed: 31 March, 2017.
[140] Laskowski (n 23); Dodillet, Susanne. 'Cultural clash on prostitution: Debates on prostitution in Germany and Sweden in the 1990s.' (2004) In *First Global Conference: Critical Issues in Sexuality, Salzburg, Austria, October*.
[141] Elfriede Steffan, Prof. Dr. Barbara Kavemann, Tzvetina Arsova Netzelmann & Prof. Dr. Cornelia Helfferich, 'Abschlussbericht der wissenschaftlichen Begleitung zum Bundesmodellprojekt Unterstützung des Ausstiegs aus der Prostitution' (translation into English: Final report of the scientific accompaniment to the federal model project Supporting the withdrawal from prostitution) (2015) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany] <https://www.bmfsfj.de/blob/95446/b1f0b6af91ed2ddf0545d1cf0e68bd5e/unterstuetzung-des-ausstiegs-aus-der-prostitution-langfassung-data.pdf> accessed: 31st March, 2017.
[142] Mattson (n 60) 101.
[143] Sick, Brigitte, and Joachim Renzikowski. 'Lücken beim Schutz der sexuellen Selbstbestimmung aus menschenrechtlicher Sicht.' (2015) In *Über allem: Menschlichkeit* 928-942. Nomos Verlagsgesellschaft mbH & Co. KG.
[144] Deutscher Bundestag (n 14).

working in prostitution. Thus, it was emphasised that the state needs to combat any prostitution-related crimes, in particular socially damaging human rights violations, such as forced prostitution, trafficking in human beings, child prostitution and other human rights violations by all available means provided by law.[145] These means include criminal prosecution, monitoring, preventive and repressive measures, and victim protection, including the provision of assistance to victims.[146]

In line with the German gender equality framework, the Federal Government recognised a need to take countermeasures against the gender equality issues found within prostitution.[147] This included the high proportion of women working in the industry in contrast to men, as well as considerations of the nature of the industry, which can be "physically and psychologically demanding, risky and dangerous."[148] Thus, while accepting the free choice of adults to work in this industry, it is understood that any threats, including poor hygiene conditions, as well as any other threats to CSPs health, safety and overall wellbeing need to be addressed. In particular, it is important to ensure the voluntariness of the decision to work in prostitution. Accordingly, it was considered necessary to ensure that the social reality of many CSPs finding themselves in social and psychological situations, in which the ability to freely and autonomously chose to practice this occupation could be called into question, were counteracted. The social responsibility taken up by the Federal Government in this respect included providing possibilities for CSPs to "earn their living by other means and to prevent them drifting into dependencies which make prostitution appear to be the lesser evil or an acceptable way out."[149] These objectives are sought to be achieved through state-funded assistance programmes as well as labour market and education policy in order to offer viable alternatives.[150]

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[145] Ibid.
[146] European Parliament, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, 'Sexual Exploitation and Prostitution and its Impact on Gender Equality' (2014) 40-43, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf> accessed 31 March 2017.
[147] Deutscher Bundestag (n 14).
[148] Ibid.
[149] Deutscher Bundestag (n 14) 12.
[150] Ibid.

The German Federal Government was particularly critical in their 5-year review of their prostitution laws. Here, they took a pragmatic stance in its evaluation of laws in practice. It explained that despite the unreliability of statistical data, the legislators had to assume that the ProstG had only achieved its objectives to a limited extent. As previously explained, the objectives of the ProstG included to eliminate the legal immorality of prostitution, to enable CSPs to take legal action, not only under criminal law, but also to ensure they could take civil measures, such as to enforce payment, to ensure access to social insurance, to combat prostitution-related crime, to facilitate CSPs to exit prostitution, and to better working conditions.[151]

Accordingly, the German government stressed that the legislation itself ensured that all the objectives were met legally. However, the situation in practice revealed that not all people working in prostitution were making use of these legal provisions. In particular, it was noted that there were no indications of the legislation having worsened the situation in prostitution, nor of human trafficking for the purpose of sexual exploitation as well as other prostitution related crimes having been enhanced or made more difficult to prosecute through the legalisation of prostitution, as initially feared by critics of the ProstG. However, the improvements through the legislation were still tentative, and despite some indications of improvements, these suggested that the ProstG proved rather a long-term rather than a short-term solution to the situation of prostitution in practice.[152]

It was recognised by the Government, that the particularly liberal approach taken only represented a limited approach, and as such could only be taken as a first step towards achieving the government's objectives regarding the regulation of prostitution.[153]

Following the evaluation of the ProstG in 2007, the Act on the Protection of Persons engaged in Prostitution (short: Prostituiertenschutzgesetz - ProstSchG) was issued as the first Article of the Law on the regulation of Prostitution and the Protection of Persons

[151] Ibid.
[152] Ibid.
[153] Ibid.

engaged in Prostitution (Gesetz zur Regulierung des Prostitutions sowie zum Schutz von in der Prostitution tätigen Personen - ProstSchGEG) on the 21st October 2016, which entered into force on 1st July 2017.[154]

The aim of the ProstSchG is to improve the situation for CSPs by strengthening their right to self-determination as well as ensuring the protection from exploitation, coercion, violence and trafficking in human beings.[155] The legal basis also serves to improve the legal instruments relating to the monitoring of the prostitution industry in order to tackle any threats therein.[156]

The act is based on two key pillars, namely, the regulation of the prostitution industry, as well as the protection of persons engaged in prostitution.[157]

The first pillar primarily involves introducing an authorization requirement within the prostitution industry for brothels and brothel-like establishments, as well as all other forms of commercial prostitution.[158] Accordingly, operators now need to undergo a personal reliability test. This also applies to any persons acting as a legal agent or who have been entrusted with any managerial or security related duties.[159] In order to obtain authorisation, operators are required to draw up an operating concept and comply with the minimum requirements for the equipment within the business premises.[160] A significant milestone, according to the German Federal Ministry of Family Affairs, Senior

[154] Article 7, Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.
[155] Deutscher Bundestag, 'Drucksache 18/8556, Entwurf Eines Gesetzes zur Regulierung Des Prostitutionsgewerbes Sowie Zum Schutz von in der Prostitution Tätigen Personen (Draft Law on the Regulation of Prostitution and the Protection of Persons Engaged in Prostitution)' (Bundesanzeiger Verlag GmbH 2016).
[156]Ibid.
[157] Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Rahmenbedingungen Für Die Legale Prostitution Schaffen (Framework for Legal Prostitution)' (2016) <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/rahmenbedingungen-fuer-die-legale-prostitution-schaffen/83928> accessed 31 March 2017.
[158] Ibid.
[159] §15 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.
[160]Ibid § 12.

Citizens, Women and Youth, is the newly created obligations to ensure acceptable working conditions.[161]

The obligatory checks introduced by the new regulation are aimed at ensuring, for instance, that people who have previously been convicted of human trafficking offences will no longer be permitted to operate brothels.[162] It also seeks to ensure that there is an evaluation of reasonableness of operating concepts and business models prior to the start-up of prostitution businesses. This can be interpreted as a direct response to the consequences of capitalist market forces in Germany following the particularly liberal regulation of prostitution, which resulted in new business models, such as "flat rate brothels" being introduced, as well as an increasing demand for harmful or dangerous sex acts, such as "group sex" or "gangbangs."[163] Any breaches would result in the operators being subject to sanctions, such as the loss of authorisation as well as penalties.[164]

The second pillar, covering the protection of persons engaged in prostitution, has implemented a personal notification obligation as well as health advice provisions for CSPs, which are to be repeated at regular intervals.[165] The idea is to provide CSPs with additional support and to ensure that CSPs are actually able to exercise their rights and to work freely in a self-determined manner.[166]

Thus, since July 2017, CSPs receive personal information and consultation sessions at registration, during which they are to be informed about their rights and receive

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[161] Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany] (n 159), commenting on §18 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.
[162] Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany] (n 157).
[163] Ane Mathieson, Easton Branam and Anya Noble, Prostitution Policy: Legalization, Decriminalization and the Nordic Model [2016] *Seattle Journal for Social Justice* 14, no. 2, 10, 395; Monica Stephens, Gender and the GeoWeb: divisions in the production of user-generated cartographic information [2013] *GeoJournal* 78, no. 6, 981-996.
[164] Section 6, §33 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.
[165] Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany] (n 157).
[166] Deutscher Bundestag (155) 1.

important information on available support,[167] such as the Germany-wide “Violence against women support Hotline”.[168] The provided services and information are available in currently 17 languages,[169] however, § 7 (3) ProstSchG indicates that the provided information should be provided in a language understood by the CSP, which may require further languages to be made available. Moreover, CSPs should be given the opportunity to discuss any health-related aspects of their work confidentially in one-to-ones.[170]

In particular, a number of advocacy groups, such as BSD Hydra,[171] BesD,[172] BSD[173] and the Doña Carmen eV[174] argue that the new stricter regulation is a step backward from the ideal decriminalised regulation of prostitution, with merely few regulatory measures, such as age-restrictions. The main criticism is based on the argument that any restrictions, such as imposed by the obligatory registration and authorisation for businesses, will unreasonably interfere with and potentially limit CSPs’ right to self-

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[167] §§7-9, Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

[168] 'The Violence against Women Support Hotline – Support and Counselling for Women' (*Hilfetelefon.de*, 2017) <https://www.hilfetelefon.de/en.html> accessed 31 March 2017.

[169] 'Beratung in 17 Sprachen: Hilfetelefon' (Hilfetelefon.de, 2017) <https://www.hilfetelefon.de/das-hilfetelefon/beratung/beratung-in-17-sprachen.html> accessed 18 March 2018.

[170] §8 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.

[171] HYDRA e.V., 'Information About the ‘Prostitution Protection Law’, That Will Go into Effect Nationwide Starting 01.07.2017' (2017) <http://www.hydra-berlin.de/sexarbeit_von_a_bis_z/infos_zum_neuen_gesetz/information_about_the_new_law/> accessed 31 March 2017.

[172] Berufsverband erotische und sexuelle Dienstleistungen e.V. (BesD e.V.) - (English Translation: Professional association erotic and sexual services e.V.), 'BesD unterstützt Verfassungsbeschwerde gegen das ProstSchG (English Translation: BesD Supports Constitutional Complaints against the Prostschg)' (2017) <http://berufsverband-sexarbeit.de/besd-unterstuetzt-verfassungsbeschwerde-gegen-das-prostschg/> accessed 31 March 2017.

[173] Bundesverband Sexuelle Dienstleistungen e.V. (English Translation: Federal Association for Sexual Services e.V.), 'Stellungnahme Zum Referentenentwurf Des Bundesministeriums Für Familie, Senioren, Frauen Und Jugend: „Entwurf Eines Gesetzes zur Regulierung Des Prostitutionsgewerbes Sowie Zum Schutz von in der Prostitution Tätigen Personen„ (Statement to the Draft Paper by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth: "Draft Law for the Regulation of the Prostitution Industry as Well as for the Protection of Prostitution Persons")' (2015) <http://www.bsd-ev.info/publikationen/index.php> accessed 31 March 2017.

[174] Doña Carmen e.V, '25 Gute Gründe Für Ein Klares NEIN zur Geplanten ‚Erlaubnispflicht Für Prostitutionsgewerbe‘(English Translation: For a Clear NO to the Planned , Permission for Prostitutes')' (2016) <http://www.donacarmen.de/wp-content/uploads/25-gute-Gr%C3%BCnde-gegen-Erlaubnispflicht.pdf> accessed 31 March 2017.

determination and other basic rights protected in the German constitution.[175] However, the German Federal government has argued that these provisions are necessary in order to ensure the self-determination of vulnerable CSPs and the protection of victims.[176] Accordingly, it can be argued that a balancing of these competing interests, namely the limitation of the general right to self-determination and the rights of vulnerable CSPs and exploitation victims to be protected from harm, justifies the implementation of such measures.[177] This will, however, be discussed in more detail in chapter 10 in relation to the German anti-trafficking laws.

5.6 The role of public reason in the German regulatory approach to prostitution

When looking at the key influencing factors which contributed to the German decision to follow a regulationist approach to prostitution, as well as the way this has been implemented, it has become apparent, that public reason as understood by Rawls' has played a key role. As discussed, in section 3.5.1., Rawls' concept of Public Reason is based upon his ideas of justice and fairness, whereby free, public informed and reasonable moral ideas filter into laws through democratic law-making procedures and methods.[178]

Accordingly, this theory submits that the regulation of prostitution will be influenced by the opinions of the general public, in particular the majority views, as well as the manner in which these views are considered through the democratic law-making mechanisms and ultimately become law. In Germany, the legislature forms the central law-making body similarly to the way most parliamentary systems of government operate. The

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[175] Ibid.
[176] Deutscher Bundestag (n 14)12-15.
[177] Michael C Dunn, Isabel C H Clare and Anthony J. Holland, To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy [2008] *Legal studies* 28, no. 2 (2008): 234-253; Alana Klein, Criminal Law and the Counter-Hegemonic Potential of Harm Reduction [2015] *Dalhousie LJ* 38 447.
[178] John Rawls and Erin Kelly, *Justice as Fairness* (Harvard University Press 2001) 190.

parliament is bicameral, which means that it consists of two chambers, namely the Bundestag (the Federal Diet or lower house) and the Bundesrat (the Federal Council or upper house). Both of these two chambers are able to initiate legislation, and the majority of bills have to not only be approved by both of the chambers, but also by the executive branch before they can become law.[179]

The Bundestag, which is considered the principal legislative chamber, is formed via elections whereby the members directly elected by the members of the public who are eligible to vote in accordance with Art. 38, para. 2 GG.[180] The majority of the legislative efforts within the Bundestag are the result of standing committees, which differentiates this system, for instance, from the British House of Commons.[181] Here, plenary sessions constitute forums for public debate on specific legislative issues.[182] Although it has been criticised that participation is low in debates covering less prominent issues,[183] this could also be a consequence of public reason in itself, as the public may not view the matters as particularly important, the lower participation rates for some issues may equally be representative of the reasoning and views of the public.

The Bundesrat is the second legislative chamber, and forms the federal body within which the 16 *Land (state)* governments are represented directly, as Germany is a federalist system of government.[184] Although the members of the Bundesrat are not directly elected via popular elections as they are appointed by the corresponding *Land* governments, generally being *Land* government ministers, it can be argued that public

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[179] Eric Solsten, Germany (Federal Research Division 1995) 356.
[180] Art. 38, para. 2 GG.
[181] José M Magone, Contemporary European Politics (Routledge 2013) Chapter 6.
[182] International Business Publications USA, Germany Government System Handbook - Strategic Information and Developments (International Business Publications USA 2020) 46.
[183] Marco R Steenbergen and others, 'Measuring Political Deliberation: A Discourse Quality Index' (2003) 1 Comparative European Politics; Ralf Lindner and Ulrich Riehm, 'Broadening Participation through E-Petitions? An Empirical Study of Petitions to the German Parliament' (2011) 3 Policy & Internet; Rainer Eising and Florian Spohr, 'The More, the Merrier? Interest Groups and Legislative Change in the Public Hearings of the German Parliamentary Committees' (2016) 26 German Politics.
[184] Yvonne Hegele and Nathalie Behnke, 'Horizontal Coordination in Cooperative Federalism: The Purpose of Ministerial Conferences in Germany' (2017) 27 Regional & Federal Studies; Matthias Niedobitek, 'The German Bundesrat and Executive Federalism' (2018) 10 Perspectives on Federalism.

reasoning still filters through the democratic processes, as these ministers were put in place via state elections.[185]

The German two-chambers system ensures, due to the different set-ups with different majorities, that any legislation that is approved, has a broad support from the political spectrum of views within the general public, and thereby ensures that the reasoning of the public is represented widely within the law-making processes.[186] Thus, the setup of the law making bodies already means that the decisions to develop and implement the German regulatory approach to prostitution has been derived from representatives of the public and is therefore representative of the public reasoning. However, apart from the democratic setup of the legislative branch and the way the moral ideas of the public filter through these mechanisms, there are further areas in which the reasoning of the public in Germany influences the development and application of law. For instance, it can be understood that public reason mechanisms are also reflected in the use of "reasonable person" tests, which are often used as a device to aid the interpretation of laws.[187] Deciding how to understand laws on the basis of the ideas or "reason" of members of the general public is a clear reflection of the democratic views that the ideas of the majority should determine rules.[188] This is most significantly reflected in the court decisions that preceded the introduction of the ProstG and with that the German regulatory approach. The court based its decision to deviate from the *contra bonos mores* perception of prostitution on "the socio-ethical values recognised in [the German] society"[189] rather than the personal moral opinions of a judge.[190] It was explained that the views of the reasonable person needed to be based on objective evidence, such as the representative study which then served as a significant indicator

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[185] Bjørn Erik Rasch, Shane Martin and José Antônio Cheibub, Parliaments and Government Formation (Oxford University Press 2015) Chapter 4.
[186] Ibid.
[187] Cécile Laborde and Aurélia Bardon, *Religion in Liberal Political Philosophy* (Oxford University Press 2017) 105.
[188] Samuel Freeman, *Justice and the Social Contract* (Oxford University Press 2009) 239.
[189] Rechtsprechung, VG Berlin, 01.12.2000 - 35 A 570.99, NJW 2001, 983, [986], Para. III, Translated from German "Prostitution, die von Erwachsenen freiwillig und ohne kriminelle Begleiterscheinungen ausgeübt wird, ist nach den heute anerkannten sozialethischen Wertvorstellungen in unserer Gesellschaft - unabhängig von der moralischen Beurteilung - im Sinne des Ordnungsrechts nicht (mehr) als sittenwidrig anzusehen."
[190] Ibid.

for the change of public opinion in Germany in the rationale of this case. This way the empirical approach to the reasonable person test ensured that the representative public reason filtered through into the judiciary and later influenced the German executive and legislative powers.

5.7 Other significant legal philosophical underpinnings: The notion of harm and paternalism

A key point for discussion is the relationship between the understanding of harm caused from the German understanding of prostitution previously being *contra bonos mores* and the necessity to protect and guarantee human dignity. Within the current German jurisdiction it is clear that the finding of prostitution being *contra bonos mores* is not able to be deduced from human dignity as understood from Article 1 GG (the German basic law) and the therein rooted right of sexual self-determination.[191] According to the German understanding of this article, the subjective determination of human dignity involves the autonomy of each individual being able to voluntarily exclude a right.[192] However, due to the wording of the German Constitution's Article 1, which uses the term "unimpeachable", this cannot apply. Thus, the only dogmatic practicable approach is to allow for the individual to realise their freedom of self-determination, and thus to grant each individual a large margin to act and behave in a way which is in accordance with their individual human dignity.[193] In accordance with this principle of subjective determination of human dignity, a CSP, who freely and independently decides, after having balanced the positive and negative arguments, to enter into prostitution and who, furthermore, voluntarily choses whom to provide services to in the same manner, demonstrates, that they do not see a violation of their human dignity by performing these services. Hence, on the basis of the underlying anthropology of the German constitution, it is not in accordance with Article 1 GG to protect a CSP from their own,

[191] BVerfGE 45, 187, 227 et seq.
[192] Ibid.
[193] Fischinger, 2007, 808, 811. XYZ

freely established will.[194] Furthermore, it is not the task or the responsibility of any judge to impose their perception of what they consider to be in accordance with human dignity and what is not, as this would impose a result for the CSP that would neither correspond to their will nor to their best interest.[195]

5.8 Summary of the findings: Germany's legal approach to regulating prostitution as an economic activity

Germany is a key example of a legal system that classifies prostitution as an economic activity. This stance was influenced predominantly by three key factors: Firstly, societal changes that resulted in the reasonable person argument underpinning the German *contra bonos mores* principle no longer applying to prostitution; Secondly, the development of the idea, that the paternalism involved in prohibiting prostitution for the protection of CSPs was more harmful to CSPs than prostitution itself, as it violated Article 1 of the German constitution (GG); and thirdly, the influence of EU case law which had held that prostitution was, from an EU law perspective, an economic activity, within the German system.

The initial set-up of the German regulationist regulatory approach to prostitution with the entering into force of the ProstG, was one of the most liberal approaches in the world. The German legislation removed prostitution from the realms of illegality in contract and criminal law, while adding a number of restrictions, for example in relation to contractual terms and managerial direction rights in order to ensure CSPs' consent to provide commercial sex services cannot be circumvented.[196]

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[194] BT-Drucks 16/4146, 5; Stiebig BayVbl 2004, 545, 547; Laskowski (n 23) 406.
[195] Staudinger/Richardi/Fischinger [2011] Rn 266.
[196] Paras 1-3, Germany 2002 Prostitution Act (ProstG), Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten, Prostitutionsgesetz of 20th December 2001 (BGBl. I S. 3983).

When the ProstG was drafted, a key philosophical stance towards prostitution was that it was a given, which realistically had to be dealt with regardless of moral attitudes.[197] Accordingly, the Act sought neither to end prostitution, nor to augment its status.[198] Instead, a particular focus was directed towards the improvement of CSPs' working conditions, as an empowerment tool intended to support people who had voluntarily decided to earn their living through the provision of commercial sex services.[199]

This was based on a prioritisation of autonomy and the right to sexual self-determination as well as the protection of other constitutional rights affected in the commercial sale of sex services in their choice to decriminalise the sale and procurement of sex services. This is in line with the overall German idea of human dignity being unimpeachable constituting the highest ranked human right in the German constitution. This underpinning notion, which is heavily influenced by the history of human rights violations in the Third Reich, dictates that the German Government cannot dictate what is or is not in accordance with the dignity of a human being. It also impacts the ability of the Government to decide what is considered moral.

When reviewing the German approach to regulating prostitution in its totality, it becomes clear that the protection of human dignity impacts not only the stance on which approach to take, but also any other aspects related to the regulation of prostitution. In this sense, it has been shown that the perceived threat in criminalising prostitution was the loss of autonomy, which is viewed as a key element of human dignity. In order to still ensure CSPs are protected when working in prostitution, the German government sought to provide legal mechanisms for CSPs to access social security provisions, which are also underpinned by the ideas of safeguarding human dignity. Moreover, the decision to introduce more paternalistic mechanisms in the regulation of prostitution was based on the short-term need to protect vulnerable CSPs who in practice were potentially not benefitting from the social security provisions in practice. This too has

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[197] Deutscher Bundestag, (n 7) 9, English translation available online at: <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf> accessed: 31 March 2017.
[198] Ibid.
[199] Mojca (n 138) 257-276; Bruckert and Hannem (n 71) 43-63.

been underpinned by the German constitutional understanding that the Government is responsible to protect individual's rights and wellbeing while seeking to find a balance between autonomy and paternalism. Thus, the aim of the ProstSchG is to improve the situation for CSPs by strengthening their right to self-determination as well as ensuring the protection from exploitation, coercion, violence and trafficking in human beings.[200] The legal basis also serves to improve the legal instruments relating to the monitoring of the prostitution industry in order to tackle any threats therein.[201]

A key difference between the German system and the way it was developed thereafter in contrast to other national approaches can be found in the way the approach was marketed internationally as well as the way it was evaluated internally. In this sense, countries, such as New Zealand, which had adopted similar approaches, marketed these under the term "decriminalisation" whereas Germany has referred to its system as "regulationist." In contrast to the Swedish evaluation of the regulatory approach, it is clear that Germany did not look beyond its national borders when undertaking its evaluation processes. Accordingly, the tone of the evaluation was critical and focussed strongly on necessary improvements to the current laws.

The German idea of prostitution constituting an economic activity can be found in its possible contractual forms within German civil law, in particular, within German employment law. In this sense, prostitution can be carried out in a self-employed as well as in an employed capacity. It has been discussed, that here the notion of the need to protect human dignity is also apparent, for instance in the areas of deviations from standard employment provisions, to prevent CSPs from being contractually obliged to undertake sexual acts involuntarily.

The past decades have seen developments in the German understanding of the importance of public reason in shaping the laws, which go beyond the political structures described by Rawls. In this sense, apart from the legislature constituting a representative collective of the German population, put in place via elections, the

[200] Deutscher Bundestag (155).
[201] Ibid.

judiciary has also established provisions regarding the reasonable person test which seek to enhance the inclusion of public reason. Accordingly, a reasonable person assessment of prostitution must now be based on some form of empirical evidence to ensure that the personal moral opinions of a judge do not influence the assessment.

Chapter 6

6. Prostitution as a Social Harm: The case of Sweden

The previous chapter demonstrated a practical example of an implementation of a regulationist approach wherein prostitution has been understood to constitute an economic activity. Here, one of the key findings was that the national system in Germany had, in fact, been influenced by the EU. Keeping in mind that the focus on this examination is to review the interrelationships of regulatory approaches under the EU's legal supranational umbrella, it is important to also examine representatives of other regulatory approaches. Thus, the following chapter will now showcase a current practical example of a jurisdiction which has sought to regulate prostitution on the basis of the understanding that prostitution constitutes a social harm, namely, the current legal situation in Sweden.

6.1 Classifying Sweden's regulatory approach: Abolitionism

As discussed in chapter 4, abolitionism describes approaches in which policies do not unconditionally criminalise acts of prostitution *per se*, nor activities which are closely related to prostitution like brothel keeping or solicitation. Instead, abolitionist approaches seek to categorically criminalise one side of a prostitution interaction, often the procurement, in order to achieve the elimination of the entire transaction.[1]

It is further beneficial to recall at this point that the legal theoretical concerns found in the forefront of abolitionist approaches pose questions regarding the social order within society and the concept of "victim." As will be demonstrated in the following, Sweden follows an abolitionist approach that is founded on the philosophical notion that the people selling the services in prostitution, i.e. CSPs, constitute the primary victims, and as such, need to be protected from criminalisation, whereas, the idea still persists that

[1] Judith Kilvington, Sophie Day and Helen Ward, 'Prostitution Policy in Europe: A Time of Change?' (2001) 67 Feminist Review.

the social order requires prostitution to be tackled by criminal law means.[2] Since the 1st January, 1999, purchasing sexual services has been a criminal offence under Swedish law.[3] Although the criminalisation of purchasing prostitution services has been nothing new in law,[4] the 1999 Swedish legislation was the first of its kind in the sense that the criminalization only pertained to purchasers of sexual services without the CSPs being criminalised for the service provision.[5] However, as will be discussed within this section, there is a possible argument to be made that CSPs may still potentially fall under the scrutiny of criminal law provisions due to a number of activities that are often linked to the provision of prostitution services. This may render the abolitionist attempts to protect CSPs from criminalisation fruitless at times. It could even be argued that this may challenge the classification of Sweden's approach as abolitionist and rather indicate elements of prohibitionism in practice.

The following section will examine the Swedish legal approach to prostitution.

6.2 The legal situation prior to the entering into force of the *Kvinnofrid* and the *Sexköpslagen*

Historically, prostitution was not *per se* a criminal offence in Sweden. In the 19th century and the first two decades of the 20th century it was controlled by a regulationist system[6]

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[2] Ola Florin, A Particular Kind of Violence: Swedish Social Policy Puzzles of a Multipurpose Criminal Law (2012) 9 Sexuality Research and Social Policy, 269-272.
[3] Pursuant to Act 1998:408 on the prohibition of sexual services (Now amended by lag (2005:90) om ändring i brottsbalken and regulated in chapter 6, para. 11 of the Swedish Criminal Code).
[4] Venla Roth, *Defining Human Trafficking and Identifying its Victims* (Martinus Nijhoff Publishers 2012) 221-222; for other examples of different jurisdictions in which the purchase of prostitution services is criminal, see: Article 9(c) of Law No. 10/1961 on the Combating of Prostitution (Egypt); Book Five, Chapter 18 of the Islamic Penal Code of the Islamic Republic of Iran (1996 – Iran); Article 427 of the Penal Code 1976 (Afghanistan).
[5] Gunilla Ekberg, The Swedish Law That Prohibits the Purchase of Sexual Services (2004) 10 Violence against Women; Jay Levy and Pye Jakobsson, 'Abolitionist Feminism as Patriarchal Control: Swedish Understandings of Prostitution and Trafficking' (2013) 37 Dialectical Anthropology.
[6] Please note that this refers to the traditional historical notion of regulationism, which bears little resemblance to the contemporary approach, as explained in section 4.1.

which consisted of mandatory registration and supervision in towns and cities.[7] It is said that this approach was influenced by the concepts of Alexandre Jean-Baptiste Parent-Duchâtelet.[8] Parent-Duchâtelet investigated the backgrounds and living conditions of CSPs in Paris in the 19th century and came to the conclusions that CSPs had mostly taken up prostitution out of social or economic necessity.[9] He also looked into the issue of venereal diseases and public health, describing prostitution and the threat it posed to public health and potential reforms via improved healthcare as being analogous "to a Paris cabaret that is making poisonous wine that the public still wish to drink. If the public has the taste for the wine […] surely they should praise the man who knows how to remove the poison but keep the wine."[10] The rationale for this was predominantly found in concerns for public health and hygiene, especially to prevent the spread of venereal diseases as well as public order or morality concerns.[11] He proposed a rigorous control system with registration and monitoring of CSPs.[12] However, although prostitution was not necessarily criminal in Sweden prior to 1999, in some ways, prostitution was still able to be criminalised, in particular when looking further back into Sweden's legal history, when it was possible to fall under the scope of the rules that prohibited extramarital sexual conducts,[13] such as found, for instance in Chapters 54-56 of the Criminal Offences Book (*Missgärningsbalk*) within the Statute of 1734. These offences would apply to all parties involved in the conduct as long as at least one of

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[7] Ida Blom, 'Fighting Venereal Diseases: Scandinavian Legislation C.1800 To C.1950' (2006) 50 Medical History <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1472108/>.
[8] A.-J.-B Parent-Duchâtelet and Fr Leuret, *De La Prostitution Dans La Ville De Paris* (1st edn, Société Belge de Librairie, etc, Hauman, Cattoir et Ce 1836) 611–612.
[9] Joshua Cole, *The Power of Large Numbers: Population, Politics, and Gender in Nineteenth-Century France* (Cornell University Press 2018) 5-8.
[10] Parent-Duchâtelet, Alexandre-Jean-Baptiste, De la Prostitution dans la ville de Paris: considérée sous le rapport de l'hygiène publique, de la morale et de l'administration; suivi d'un Précis hygiénique, statistique et administratif sur la prostitution dans les principales villes de l'Europe, 3rd edn, 2 vols (Paris: J-B. Baillère et fils, 1857) 611–612, as cited in English in Ellis, Catherine, Rose (2018) Sex Work and Ingestion in Eighteenth-Century France, Durham theses, Durham University. Available at Durham E-Theses Online: http://etheses.dur.ac.uk/12629/ [accessed 1st September, 2018].
[11] See for example Anna Jansdotter and Yvonne Svanström, *Sedligt, Renligt, Lagligt* (1st edn, Makadam 2007); Yvonne Svanström, *Policing Public Women* (Atlas Akademi 2000) 9-10, 75, 91.
[12] Svanström (n 11) 9-10, 75, 91.
[13] In Sweden, these kinds of offences fell within the offences category of 'horbrott', which meant 'adulterous offences'; Anthony Perrone and Ho Yin Wong, 'The Antecedents of Re-Purchase Intentions: The Service Quality Perspective' (2013) 5 International Journal of Services, Economics and Management.

them was married.[14] According to the provisions contained herein, both the service providers as well as the clients of prostitution services were able to be subject to criminal sanctions.[15] This suggests that the historic legal situation reflected particular views of acceptable and unacceptable sexual conduct. However, apart from this scenario, non-coercive sex taking place between adults, was not dealt with in the history of Swedish criminal law. Accordingly, prostitution, either the purchase or sale of sex services, was not included in the Swedish Penal Code of 1864, which replaced the Statute of 1734[16] or in the Penal Code of 1962, which is the current Swedish penal code.[17] In contrast, facilitating prostitution, or in other words the "procurement of sexual services"[18] has constituted a criminal offence under Swedish law dating back several centuries.[19] In the current Swedish laws, the procurement of sexual services, *koppleri*, is dealt with in Chapter 6 of the Sexual Offences Code.[20] It can be deduced that the Swedish legislators believed that criminalisation was in fact an appropriate method to tackle prostitution, yet, also thought that this was best achieved by tackling the facilitators of prostitution rather than CSPs themselves. In light of this, the discussions that came about in the years prior to the introduction of this current Swedish approach, which looked into the criminalisation of prostitution, were a new consideration.

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[14] 'Hor | SAOB' (*Saob.se*, 2018) <https://www.saob.se/artikel/?seek=hor&pz=1> accessed 6 September 2018.

[15] Sweden, Reglementeringskommittén, Underdånigt betänkande angående åtgärder för motarbetande af de smittosamma könssjukdomarnas spridning (Stockholm, Marcus, 1910) 179 et seq.; Penalties varied in relation to the sexual acts perpetrated and whether the perpetrators were married or unmarried men with married or unmarried women. The statute only referred to heterosexual sex.

[16] The Penal Code of 1864 retained however same provisions from the Statute of 1734, for instance the prohibition of adultery (Chapter 17). Also, the 1864 Code contained a chapter that covered vice offences (Sw. 'sedlighetsbrott') (Chapter 18) with a collection of conduct items that were deemed to be contrary to the ethical and/or sexual morals of the time, *inter alia* incestuous offences, particlar forms of sexual exploitation, 'offences against nature', the distribution of pornography as well as illicit gambling; see also Isa Blom, Medicine, morality, and political culture: legislation on venereal disease in five northern European countries, c.1870-c.1995 (Lund [Sweden]: Nordic Academic Press, 2012) Chapter Sweden-From regulation to Scandinavian Sonderweg.

[17] Wong (n 16) 177–195.

[18] Gunilla (n 5) 1187-1218.

[19] See, for example, Chapter 57 in the Swedish Book on Criminal Offences of the Statute of 1734 and Chapter 18, Section 11, of the Penal Code of 1864.

[20] Chapter 6 Section 12, A person commits the offence both in a case where A promotes prostitution and in case where A improperly exploits another person, who acts as a prostitute. The maintenance of a brothel may constitute an offence under this section. The standard level of this offence is punishable by imprisonment up to four years while an aggravated offence (e.g. when human trafficking is involved) is punishable by imprisonment for a minimum of two years and up to a maximum of eight years.

6.3 The reasons for the Swedish choice of regulatory approach to prostitution regulation

The Swedish laws on prostitution as found today are the result of active debates surrounding gender equality, which had started in the 1960s.[21] These debates resulted in numerous institutional structures like the Ministry of Equal Status which was put into place in 1976, and the Equal Opportunities Ombudsman which was introduced in 1980.[22] These were set up as a consequence of the introduction of new equal status laws which covered a wide range of policy areas, including social, economic and labour market provisions.[23] In 1976 demands became apparent for additional inquiries, amongst other things into prostitution. This was primarily based on a gendered recommendation for the legal provisions on rape through a state commission that was looking into sexual offences, which had seen a strong consensus from sides of both the Swedish women's movement as well as the parliamentary women's groups.[24] During this time another commission was also set up to look into prostitution as a phenomenon.[25] When looking at the proposal, it becomes clear that the key rationale was to protect the people who are most vulnerable from being exploited. In particular, this can be taken from recommendations made therein, such as not to criminalise the provision of commercial sex provided by people suffering from drug addictions.[26]

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[21] Yvonne Svanström, Criminalising the john–a Swedish gender model? [2004] *The Politics of Prostitution* 225; Don Kulick, "Sex in the new Europe: The criminalization of clients and Swedish fear of penetration." *Anthropological theory* 3.2 (2003): 199-218; Outshoorn, Joyce. "The political debates on prostitution and trafficking of women." *Social Politics: International Studies in Gender, State and Society* 12.1 (2005): 141-155.
[22] M Goodyear, Controlling Loose Women: International trends in the regulation of the exchange of sexual services. Department of Medicine, Dalhousie University, Halifax, Nova Scotia, Canada B3H2Y9, v2.0 September 9 2009; Laura Carlson, "Sweden's Experience in Combating Employment Discrimination." *Institute of European and American Studies, Academica Sinica, Taipei, Taiwan.* Academia Sinica, 2007; Laura Carlson, "Constructing Human Rights from Soft Law: The Swedish Journey Towards Protection against Unlawful Discrimination." (2013); Christina Florin and Bengt Nilsson, "Something in the nature of a bloodless revolution", in Madeleine Hurd, Rolf Torstendahl and Teresa Kulawik, 'State Policy and Gender System in the Two German States and Sweden, 1945-1989' (2001) 106 The American Historical Review.
[23] Christina Bergqvist, *Equal Democracies?* (Scandinavian University Press 2000) 170-173; 191- 193.
[24] Statens offentliga utredningar (SOU) 1981: 71, Prostitutionen i Sverige (Prostitution in Sweden).
[25] SOU 1976: 9.
[26] SOU 1981:71 Prostitution i Sverige, bakgrund och åtgärder [Prostitution in Sweden: background and remedial measures].

However, this part of the commission's proposal was not put forward to Parliament.[27] As mentioned previously, the more significant report was put together by the 1977 Commission of Public Inquiry into Sexual Offences.[28] The final report, however, only proposed amending the provisions from the Penal Code that dealt with the procurement of sexual service, and there was no mention of prostitution *per se*.[29] This resulted in an inquiry that was conducted in 1981.[30] Some of the findings of this commission's report were seen to be particularly controversial, such as that prostitution did not fall within gender equality issues, as it was a human problem that applied equally to both equivalent parties of an agreement according to which one party would sell a service in return for financial compensation.[31] One of the key findings of this commission was that prostitution was already appearing to be declining and a consequential recommendation was, thus, not to criminalise it, as this would only result in it being driven underground, which in turn would increase stigmatisation of CSPs.[32]

Another interesting point included the division of groups in relation to the different approaches favoured. Criminalisation was generally opposed by the police, the Ombudsman, the judiciary, members of gay rights groups as well as the Swedish Association for Sex Education (RSFU).[33] These groups spoke out in support of the investigation's view that the criminalization of prostitution by itself was not an appropriate form for keeping such activities under the control of society. In line with the investigation, they found that intensive social efforts in cooperation with the police were better devoted to address the most offensive forms of prostitution, such as street prostitution. However, such efforts had to be made continuously, or they would quickly lose their effect.[34] In particular, the commission's investigation had found that the

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[27] Christoffer Wong, 'Prohibition in Swedish Law of the Purchase of Sexual Service', in Prostituzione e diritto penale: problemi e prospettive, a cura di Alberto Cadoppi, Dike Giuridica Editrice, Roma 2014, pp. 177–195, 180.
[28] SOU 1982:61 Våldtäkt och andra sexuella övergrepp [Rape and other sexual assault].
[29] Ibid.
[30] Statens offentliga utredningar (SOU) 1981: 71, Prostitutionen i Sverige (Prostitution in Sweden).
[31] Joyce Outshoorn, European women's movements and body politics: the struggle for autonomy (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2015) 138.
[32] Statens offentliga utredningar (SOU) 1981: 71, Prostitutionen i Sverige (Prostitution in Sweden); Outshoorn (n 31) 138.
[33] Goodyear (n 22).
[34] Prop. 1981/82: 187, 34 – 44.

combined efforts of social workers, the police, the prosecution, and other authorities had already been contributing to a reduction in street prostitution without the need for criminalisation.[35] In contrast, representatives of battered women's shelters, as well as the majority of the women's political groups (with the exception of the conservatives) spoke out in favour of the criminalisation of clients.[36] The main argument for this was that, although they shared the investigator's view that prostitution was incompatible with the principles of equality and freedom of all people, they criticised that the investigation did not, however, draw the consequences of its principal statements. They argued that legislation had to reflect the ethical rules and norms set by society, as it set out the rules of behaviour that society approves. They highlighted that the investigator claimed in several places in their investigation that prostitution would disappear if there was no demand and that consequently, social problems arose because there were customers. They supported the view that the criminalization of CSUs would be a means of reducing prostitution, as society would be declaring that it did not accept this method of satisfying sexual needs.[37] Although the bill that was released after this commission report, in 1982, only involved pornography, it nevertheless shed light on the way prostitution was seen within the Swedish society at the time, namely as a social evil, which was incompatible with gender equality, and which needed to be fought.[38]

The decade that followed saw around 50 different bills on the subject matter of prostitution, with the majority favouring the criminalisation of the purchase of services. Moreover, a significant lobby developed within the Riksdag, as well as externally from the Swedish women's movements which called for further commissions on prostitution, which eventually resulted in a commission being instigated in 1993.[39] At the same time, a bill created by women parliamentarians from the SDP, the Liberals and the Left Party under the lead of Elisabeth Persson, which sought the immediate criminalisation of

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[35] Ibid 187, 7.
[36] Svanström (n 21).
[37] Prop. 1981/82: 187, 44 - 45.
[38] Svanström (n 21).
[39] Arthur Gould, 'The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden' (2001) 30 Journal of Social Policy; Stuart Miller, Recognising Men's Violence as Political: An Analysis of the Swedish Feminist Movement and its Interaction with the State (2013); Ekberg (n 5).

clients, as according to the bill, there was satisfactory evidence without an additional commission on prostitution.[40]

The initial task of this commission was to "investigate, without prejudice, whether the criminalization of prostitution is an appropriate measure to reinforce society's effort in the fight against prostitution."[41] The inquiry report sets the scene early on within the document, from which the current Swedish stance on prostitution becomes apparent. Within the remit it states that "prostitution is incompatible with the individual's potentials to develop as a human being, prostitution is a phenomenon that society finds despicable and prostitution is associated with so many negative consequences for society that it must be combated vigorously."[42] The findings of this inquiry were published in 1995 under the title “Sex Trade”[43] (or “trading in sex”), which also appears to be the label used within the report for the proposed offence of prostitution. Accordingly, prostitution is defined within the report as

> “A person who exploits another for casual sexual liaison in return for economic or similar compensation shall be sentenced for the offence of sex trade to fines or imprisonment for a maximum of six months. The same shall apply to a person who makes himself/herself available for such sexual liaison described in the paragraph above. If the crime is gross, the offender shall be sentenced to imprisonment for a maximum of four years. When determining whether the crime is gross, special consideration shall be given to the abuse of a person's youth, lack of judgment, vulnerability or dependent position.”[44]

At this point in time, it is difficult to determine what situations are exactly covered by the term “dependent position” as found in this quote, however, without indicative case-law, it will still depend on individual cases in the future. Presumably, the nature of the dependency will be decisive. Accordingly, criminalization was proposed to target both CSUs and CSPus as well as CSCs, who are all viewed as culpable due to their

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[40] Sveriges Riksdag, 'Motion 1992/93:Ju622' (1993).
[41] Dir. 1993:31 (The Govemment's instructions setting up the commission of public inquiry, author’s translation into English.)
[42] Ibid.
[43] SOU 1995:15.Könshandeln [Sex Trade]. The report contains a summary in English (pp. 21-31).
[44] Ibid.

participation within the sex trade.[45] Although the term “casual sexual liaison” has not been defined, it is intended to include "not only the purchase of sexual intercourse and other sexual acts but also sexual [...] services of a kind not involving direct genital contact, e.g. private posing."[46] This, however, would not cover posing of an artistic nature, as the preceding sentence makes it clear that the purpose of the service is significant, namely to satisfy the sexual drive of the CSU.[47] As the justification the commission stated for the criminalization that

> “[a] penal provision would serve a normative purpose and make it clear that prostitution is not socially acceptable. For many clients, the risk of discovery, police investigation and legal proceedings would be a powerful deterrent. Criminalisation would also have a restraining effect on many of the women. Above all, it would be an effective means of preventing women from entering prostitution. Women would also obtain a stronger position for resisting pressure in favour of prostitution if they could argue that the activity was criminal.”[48]

Although this appears to support the notion that the law is meant as a tool to effect social change rather to reflect it, the wider movement into which the debate fell, as well as this notion itself could be argued to reflect the views of the Swedish society regarding law and morality of the time.

Another significant paragraph in this report reveals the stance taken in relation to gender equality, as the title of the chapter, “The Proposal from the Point of View of Gender Equality,” indicates:

> That people can buy access to other people's sex to satisfy their own sexual needs are contrary to the concept of equality of all people and their right to respect and integrity.

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[45] Julie Lefler, Shining the spotlight on johns: moving toward equal treatment of male customers and female prostitutes [1999] *Hastings Women's LJ* 10, 11; Anat Klin, Impeding the Reform Criminalizing Sex Industry Clients: Three Decades of Israeli Press Coverage" (Conference: Conference: Communication and Conflict, Lisbon, 18th March 2015).
[46] SOU 1995:15; It is also worth noting here, that this definition is different from the definition of prostitution used for the purpose of this investigation. However, the effect of this is judged to be minor, and would merely mean that for the purpose of this research project, an in-depth analysis of wider understandings of prostitution, such as private posing, will not be undertaken at this point.
[47] SOU 1995:15.
[48] Ibid 30.

> That women are considered as objects of men's sexuality is not consistent with the perception of women and men in an equal society. Increased efforts to achieve gender equality is an important tool when it comes to preventing prostitution. The proposal's [aim is], *inter alia*, to achieve greater gender equality.[49]

The recommendations made by the commission, however, did not result in an independent governmental legislative initiative. Instead, the criminal elements of dealing with prostitution were legislated as part of a larger legislative project entitled *kvinnofrid,* which translates to "women's peace".[50] This legislation targeted numerous offences considered to be gender specific and contrary to gender equality, such as for instance the offence of *grov kvinnofridskränkning*, meaning "gross violation of women's peace," which deals with domestic violence offences and similar harm to women within close relationships.[51] This is a significant and interesting point, as it reflects the theoretical stance Sweden takes in relation to prostitution by placing prostitution within the framework of offences related to issues of male violence directed against women. This appears to share the views of radical feminists on the subject matter, such as Dworkin or MacKinnon, as discussed in 3.6.2. Accordingly, Träskman, for instance, explains that "for reasons of ideology, which is openly based on a feministic understanding of reality, one chooses to explicitly characterize prostitution as a crime of violence against women."[52] According to this view, the service providers are viewed as the victims of the harm caused by prostitution, which would mean that criminalising this supply would be sanctioning the victims of an offence. According to the Swedish government's view of

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[49] SOU 1995: 15, p. 235 (author's translation into English): *"Att människor kan köpa tillträde till andra personers kön för att tillfredsstalla sina egna sexuella behov strider mot uppfattningen om alla människors lika värde och deras rätt till respekt och integritet. Att kvinnor betraktas som objekt for mäns sexualitet är inte heller förenligt med synen på kvinnor och män i ett jämstallt samhälle. Ökade ansträngningar för att uppnå jämställdhet är ett viktigt medel när det gäller att förebygga prostitution. De förslag [jag] nu lämnat syftar bl.a. till att uppnå ökad jämställdhet."*

[50] See report of the commission of public inquiry SOU 1995:60 Kvinnofrid [Women's Peace] and the Government Bill prop. 1997/98:55 Kvinnofrid. The commission proposed amendments for the rape provision within the Swedish Penal Code, as well as for the legislation covering the punishment of female circumcision and other measures outwith the area of criminal law, such as labour law provisions on sexual harassment.

[51] Chapter 6, Section 4a, of the Penal Code.

[52] Per Ole Träskman, Den som betalar för sex är en brottsling. "Om den svenska kriminaliseringen av sexköp som ett medel för att motverka prostitutionen" ('The one who pays for sex is a criminal' on the Swedish criminalization of purchase of sexual service as an instrument to combat prostitution), Nordisk Tidsskriftfor Kriminalvidenskab 2005, 73-92, 75.

prostitution, which underpins their gender equality policy, prostitution "is thus a form of male violence against women and one of the more extreme expressions of inequality, that men can buy and utilize women and children and treat them as goods."[53] Thus, the Swedish Government introduced a Bill to Parliament which proposed the criminalisation of clients rather than service providers. The *kvinnofrid* legislation was adopted by the Swedish Parliament in 1998.[54]

6.4 The Swedish prostitution regulation laws in practice

As mentioned in the previous section, the Swedish way of regulating prostitution, also known as the "Swedish model" or the "Nordic Model"[55] usually focusses on the criminalisation of the demand side of prostitution whereas the supply is exempt from this criminalisation.[56] However, apart from this provision, the Swedish approach actually consists of a number of laws and regulations. There are three main provisions which seek to criminalise or prevent prostitution, which cover the areas of pandering,[57] the forfeiture of rental apartments and rooms used for prostitution,[58] and the purchase of sex.[59] The following will look into all of these provisions in turn.

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[53] "Enligt den syn på sexhandeln som ligger till grund för svensk jämställdhetspolitik är sexhandeln således en form av manligt våld mot kvinnor och ett av de mer extrema uttrycken för en ojämlikhet som tar sig uttryck i att män kan köpa och utnyttja kvinnor och barn och behandla dem som varor." (SOU 2010:49, s. 55)

[54] Heather Monasky, On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, But Not the Victim-Sweden's Sexköpslagen in America (2011); Jane Scoular and Anna Carline, A critical account of a 'creeping neo-abolitionism': Regulating prostitution in England and Wales [2014] *Criminology & Criminal Justice* 14.5 (2014): 608-626.

[55] See for example Daniela Danna, Client-only criminalization in the city of Stockholm: A local research on the application of the "Swedish Model" of prostitution policy [2012] *Sexuality Research and Social Policy* 9.1 (2012): 80-93; Phil Hubbard, Mathew Roger and Jane Scoular, Regulating sex work in the EU: prostitute women and the new spaces of exclusion [2008] *Gender, Place & Culture* 15.2, 137-152; May-Len Skilbrei, and Charlotta Holmström, Is there a nordic prostitution regime? [2011] *Crime and Justice* 40.1, 479-517; House of Commons, Home Affairs Committee, 'Prostitution, Third Report of Session 2016–17 Report, Together with Formal Minutes Relating to the Report' (Order of the House 2016).

[56] Lag (2005:90), Chapter 6, Section 11.

[57] Lag (2005:90), Chapter 6, Section 12.

[58] Ibid.

[59] Ibid Chapter 6, Section 11.

6.4.1 The Sex Purchase Law

Sweden's current laws which deal with prostitution by prohibiting the purchase of the service are contained in Chapter 6, Section 11, of the Swedish Penal Code. Here it is stated that

> [a] person who, otherwise than as previously provided in this Chapter [on Sexual Crimes], obtains a casual sexual relation in return for payment, shall be sentenced for purchase of a 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.[60]

Despite the highly gendered nature of the debates surrounding how to deal with prostitution in the discussions leading up to the introduction of the Swedish approach, the provision found in the legislation is written in a gender-neutral language, which ensures that men as well as women are able to fall within the scope of purchasers or service providers. Furthermore, there is no mention of the circumstances in which the transaction has to take place, which means that the seller does not have to be working in a continuous manner as a professional CSP, but rather that single isolated occurrences will also fall under the offence within the provision. The attempt is also considered an offence in accordance with Chapter 6, section 15.[61]

The offence of purchasing prostitution as defined above, is the most current version. It is almost the same as the initial version which was introduced through Act 1998:408, however, in 2005 it was integrated within the Swedish Penal code within a wider revision of the sexual offences chapter.[62] In particular, the laws have been extended to include situations in which the payments for commercial sex are made or promised by

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[60] Ibid "Den som, i annat fall än som avses förut i detta kapitel, skaffar sig en tillfällig sexuell förbindelse mot ersättning, döms för köp av sexuell tjänst till böter eller fängelse i högst sex månader. Vad som sägs i första stycket gäller även om ersättningen har utlovats eller getts av någon annan. Lag (2005:90)", Section 11, 22 September 2014 Chapter 6 of the Swedish Penal Code (unofficial translation) http://www.government.se/contentassets/602a1b5a8d65426496402d99e19325d5/chapter-6-of-the-swedish-penal-code_unoffical-translation_20140922.pdf accessed 8th September, 2018.

[61] Ibid Section 15, 22 September 2014 Chapter 6 of the Swedish Penal Code (unofficial translation) http://www.government.se/contentassets/602a1b5a8d65426496402d99e19325d5/chapter-6-of-the-swedish-penal-code_unoffical-translation_20140922.pdf accessed 8th September, 2018.

[62] Through Act (2005:90) on amendments to the Penal Code.

third parties.[63] Moreover, in 2011 the maximum penalty for the offence was increased from six months to one year of imprisonment.[64] An important aspect to highlight in the practical application of the provisions prohibiting the purchase of commercial sex is that it is treated as a subordinate offence to other more severe situations. Accordingly, the provision will become applicable when the other major provisions listed in Chapter 6, Sections 1-10a of the Swedish Penal Code are not applicable.[65] This means that in cases in which coercion or exploitation are present, other provisions will be applicable. This automatically means that in order for Chapter 6, Section 11 to apply, the provision as well as the supply of prostitution services needs to be voluntary and consensual.[66] This is a significant point, as the voluntariness requirement is contrary to the feminist ideas that underpin the Swedish approach, which are based on the notion that prostitution is a general result of female exploitation by men, which means that any free and voluntary choice is in itself the product of exploitation by men, and, thus, cannot be considered as voluntary.[67] However, this will be addressed in more detail in the following section.

Another point that needs to be highlighted is that the term used within Chapter 6, Section 11 of the Swedish Penal Code for clients' conduct, namely the "purchase of sexual service" lacks legal clarity. Accordingly, the offence does not *per se* prohibit the purchase of commercial sex. Instead, the offence refers to the procurement of sex or

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[63] Brottsbalk (1962:700), 12§ as amended by Lag (2005:90).
[64] Through Act (2011:517) on amendments to the Penal Code.
[65] The primary provisions define the following offences: 'rape', 'gross rape', 'sexual coercion', 'gross sexual coercion', 'sexual exploitation of a person in a dependent position', 'gross sexual exploitation of a person in a dependent position', 'rape of a child', 'gross rape of a child', 'sexual abuse of a child', 'gross sexual abuse of a child', 'sexual intercourse with a descendent', 'sexual intercourse with a sibling', 'exploitation of a child for sexual posing', 'gross exploitation of a child for sexual posing', 'purchase of a sexual act by a child', 'sexual harassment/ molestation' and 'contact with a child for a sexual purpose (grooming)'.
[66] Even with this assumption, the criminal provision in Chapter 6, Section 11, of the Penal Code is associated with a great number of problems of interpretation/application. See for example Case No B 4156-04, 2005-06-02: Here a number of offenses related to prostitution transactions were dealt with, including purchasing sex acts, exploitation, procuring and trafficking in human beings in relation to women who were both under and over 18 years of age. Only a minority of charges were based on Section 11 of the Swedish Penal Code. As soon as there was an absence of voluntariness/consent, the charge was based on a different privision.
[67] Catharine MacKinnon, Prostitution and civil rights [1993] *MICH. j. gender & L.* 1, 13; Catherine A MacKinnon, Trafficking, prostitution, and inequality [2011] *Harv. CR-CLL Rev.* 46, 271.

“casual […] sexual liaison” for a payment. This means that the procurement is the actual offence and not the fact that sex was provided for a payment. Although both elements will need to have been present, the mere presence of a contract is not sufficient.[68] In order to understand the implications of this, it is important to differentiate between purchasing and procuring. The issue in doing so, is a common misconception that both terms can be used synonymously. However, as Gordon Murray explains, interpretation issues can arise due to this confusion of the terms having different meanings for different people.[69] When clarifying these two terms it appears that the term procurement is much broader than purchasing. A useful definition in the English language that clarified the distinction can be found from the Office of the Deputy Prime Minister/Local Government Association within their 2003 National Procurement Strategy. Here it is explained that procurement “is the process of acquiring goods, works and services, covering both acquisition from third parties and from in-house providers. This process spans the whole cycle from identification of the needs, through to the end of a services contracts […].”[70] This means that in order for CSUs or CSPus to fulfil the requirements of committing the offence, the entire procurement process, including the fulfilment of the prostitution service needs to have been completed. Although, there may be the possibility of being charged with the attempt at earlier stages of the transaction, it can still be argued that the procurement rather than the purchase of the service places the threshold between the attempt of committing the offence and the offence itself in a more harmful point in time for the CSP than the CSU. This contradicts the underlying intention to protect CSPs from exploitation by CSUs.

Despite the laws having been in place for almost two decades, there is still a lack of case-law which could shed light on the exact interpretations of the individual elements of the provision. Accordingly, there has only been one fully-reported case by the Swedish Supreme Court on the matter of procurement of sex, which merely looked into

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[68] Wong (n 27) 177–195.
[69] Gordon Murray, Towards a common understanding of the differences between purchasing, procurement and commissioning in the UK public sector, Journal of Purchasing and Supply Management 15 (2009) 198 – 202, 198.
[70] P 17.

questions of sentencing.[71] Thus, the purchasing stage may have already taken place, however, the procurement may only be viewed as completed once the service has been provided. It can be argued that the issue here is contrary to the underlying reasoning for the introduction of the approach all together. As explained earlier in this chapter, the onus for the introduction of the abolitionist approach was to protect CSPs from the exploitation of prostitution and empower CSPs by providing them with the leverage of the threat of criminal sanctions for CSUs/CSPus. However, without the possibility of the law being able to step in prior to sexual acts taking place, it lacks a preventative layer of protection.

Returning to the lack of reported court cases on the matter of prostitution in practice under the Swedish abolitionist regime, it needs to be said that despite the lack of Supreme Court cases, there have been some Court of Appeal decisions, which shed light on some of the definitional questions surrounding the regulation of prostitution. For instance, the key aspect of the provision which requires clarification is the meaning of "sexual liaison" (Sw. *sexuell förbindelse*). When looking towards the *travaux preparatoires*, it can be taken that the term was meant to describe "primarily sexual intercourse but also other sexual relations''.[72] However, there are also indications that suggest that there are boundaries to the scope of the term. Statements such as the ones found in the *travaux prepatatoires* indicating that "naked posing" for instance should not be covered by the term "sexual liaison" suggest that physical contact between the CSPs and clients is necessary.[73] Although this clearly contradicts the statement made in SOU 1995:15, as mentioned above, that sexual liaisons should also include non-physical conduct, such as private posing, it has been confirmed by a number of district court decisions in which it has been clarified that "strip-tease" do not

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[71] Judgment of the Supreme Court of 9 July 2007 in Case B 3947-00, reported in NJA 2007 s. 527.
[72] Prop. I997/98:55 Kvinnofrid [Women's peace] at 136. In colloquial English one would simply speak of 'sex' or 'sexual act'. In the following the term 'sexual liaison' will be used in the technical sense at the cost of being awkward from a stylistic point of view.
[73] Ibid 136-7; The Govemment was thus of a view different from that of the commission on prostitution as reported in SOU 1995:15.

fall under the term “sexual liaison”.[74] To clarify the nature of the physical contact, it needs to be explained that in order for the contact to be deemed a “sexual liaison” it must be sexual in nature, which, as discussed above involves the satisfying of someone’s sexual desires. However, where the line is to be drawn legally has not yet been adequately established by the courts, in particular as a number of judgments do not discuss the nature of the provided services within the courts’ reasoning prior to establishing whether sexual liaison has been established beyond reasonable doubt.[75]

Another element of the provision which requires clarification is the meaning of the term “casual” (Sw. *tillfällig*). The obvious meaning of this term is that it prevents monetary exchanges for sex taking place within stable relationships, such as marriages or cohabitation from falling within the scope of the provision. It is also clear in situations in which there is an apparent buyer-seller transaction in place, however, the distinction becomes more complicated in cases in which there is a form of social relationship between the client and the service provider. An example of the lines blurring can be found in cases in which the procurement becomes habitual in the sense that a potential social relationship could have developed. It is unclear whether clients who regularly procure sex from the same CSP would also be contrary to the term “casual.” Ekberg,[76] for instance, argues that, the law excludes these “men who regularly purchase the same prostituted woman” from liability. However, Wong argues the opposite, and claims that the law would nevertheless consider these scenarios to be “casual” as the law would treat these CSUs as serial buyers of casual sexual liaison.[77] As it appears that these questions remain unclear, even amongst scholars, and as the *travaux preparatoires* do not provide any indication, these areas would still require addressing in court if such situations were to present themselves.

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[74] See, e.g., judgment of Stockholm District Court of 27 July 2006 in Case B 3158-05, judgment of Huddinge District Court of23 December 2005 in Case B 1666-05 and judgment of Stockholm District Court of 22 September 2003 in Case B 3470-03.
[75] Wong (n 27) 177–195.
[76] Ekberg (n 5).
[77] Wong (n 27) 177–195.

As indicated above, the crucial element for the offence of procurement to be established is that the CSU or CSPu has obtained (Sw. *att skaffa sig*) a sexual liaison. In the absence of this, the mere establishment of a binding contract would instead potentially constitute an attempt, as the transaction would not have been completed.[78] Swedish criminal law generally follows a strict interpretation of the Swedish criminal statutes.[79] This is important when looking into the requirement of "payment" (Sw. *mot ersättning*). Although the payment itself does not have to be made, it has to have been promised or implied prior to a sexual act having been carried out. The means used as payment cover money, both in cash as well as electronic, as well as any items of monetary value. According to the *travaux preparatoires*, this also includes alcohol and narcotic drugs.[80] However, as certain immaterial benefits are not mentioned anywhere, like specific favours, such as refraining from pressing charges, employment positions or examination results, etc., the strict interpretation of criminal statutes will exclude these types of exchanges for sex.[81] It is not necessary that the CSU is actually aware of the payment. It has been established in case law, that the burden of ensuring that the sexual liaison is not entered into for a payment is placed on the CSU. This is important for instance in situations in which a third party (CSPu) had paid or promised to make a payment without the knowledge of the CSU.[82] However, the court appears to take a wide approach, as seen for example in the 2011 case B 8277-10. Here the Svea Court[83] dealt with a case in which the CSU was not the CSPu. In determining the extent of the guilt of the CSU, the court considered legally

> "whether [the accused] realised or had been conscious of the facts that there a risk existed that the women were [CSPs] who provide sex services in exchange for payment, that somebody had paid for their company and services and that [the accused], despite

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[78] See Chapter 23 Swedish Penal Code.
[79] Axel Adlercreutz and Birgitta Nyström, *Labour Law in Sweden. 2Nd, Rev. Ed* (1st edn, Kluwer Juridische Uitgevers 2015) 104-106.
[80] Prop. 1997/98:55 at 136.
[81] Wong (n 27) 177–195.
[82] See judgment of Svea Court of Appeals of 10 January 2011 in Case B 8277-10, p. 16 of the judgment, my translation.
[83] One of the 6 appellate courts in Sweden.

having this knowledge, had taken the conscious risk and had undertaken sexual intercourse with N.N."[84]

In determining whether the accused had had the necessary insight, the court considered the conditions "such as the women’s provocative make-up and clothes, and the fact that that they spoke English with a strong accent" and come to the conclusion that "it had to have been obvious for [the accused], or at least have appeared to be possible that the women were paid escorts."[85] Although the intention of such a broad approach may be understandable from the perspective of wishing to move any burden of proof away from the CSP, the generalisation undertaken by the court may be criticised, as it reinforces harmful stereotypes held by society about CSPs.[86]

As mentioned above, the absence of physical contact of a sexual nature may result in the client merely being charged with attempt, as the requirements for the offence of purchasing sexual liaisons are not fulfilled. However, when looking into the specific laws on attempt it becomes apparent, that the establishment of attempt in these cases is legally complicated. Accordingly, a perpetrator will be held to have attempted a crime only when a concrete step has been taken by said person to commence the performance of the offence.[87] In the case of attempted procurement of prostitution, the term “sexual liaison” is defined in a way that would mean that the crime would have already be viewed as completed at the same time as a concrete step towards commencing the performance. Generally, in the Swedish laws on attempt, a crime could be considered to have been attempted if the commencement began at an earlier point in time, i.e., following the perpetrators last act which would then be immediately followed

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[84] See judgment of Svea Court of Appeals of 10 January 2011 in Case B 8277-10, p. 15 of the judgment, my translation.
[85] Ibid.
[86] See sections 3.1. and 3.6.2.
[87] On the Swedish Criminal Law System generally, see Suzanne Wennberg, Criminal Law, in Michael Bogdan (ed.), Swedish Law in the New Millennium (Stockholm, 2000) 155-200; See also Nils Jareborg, Justification and Excuse in Swedish Criminal Law, in Scandinavian Studies in Law (Uppsala, 1987) 159-174; Per Ole Traskman, Harmonisation Des Sanctions Pe´Nales, Constat: Sweden (F Chaltiel, 1998) https://halshs.archives-ouvertes.fr/halshs-00419159/file/RAPPORTS_NATIONAUX_-_Sweden_-_Per_Ole_TRASKMAN.pdf.

by the performance of the actual offence.[88] Currently, there seems to be a margin of appreciation within the courts to decide whether the performance has been commenced or not. What is currently certain, is that the mere agreement to have sex does not suffice. A case which demonstrates a situation in which a court has applied this margin of appreciation can be found in a decision of the Court of Appeal for Skåne and Blekinge. Here it was held that the accused was guilty of attempting to procure sexual liaison, by travelling in a car to the CSPs flat after having agreed to procure sex in exchange for payment.[89] The reasoning for this decision was that it could have been reasonably assumed that the accused would have completed the offence, had he not been interrupted by the police. This decision raises more questions than it answers. As the reasoning of the Court of Appeal in this case is clearly contrary to the general principles laid out in the Swedish criminal provisions on attempt which does not provide for moments in time in which the completion of an offence would have been probable.[90] Thus, there is an indication that attempted procurement of prostitution may constitute an exceptional case. However, in order for this to be confirmed, there would need to be a judgement on the matter from the Supreme Court, which has not come about as of yet. If this were to be the case, it would mean that it would be no longer necessary to have had the sexual liaison services fulfilled for the offence of procurement to be established, and that the mere payment would be enough to fulfil the requisites of the offence.

The Swedish Criminal Laws on procuring prostitution services parts from some of the Swedish general criminal legal principles. Thus, the CSPs are not held responsible for the offences of instigation or charged as accomplices.[91] However, although this is generally assumed and can be understood as intended from the *travaux preparatoires*, the doctrine of *concursus necessarius* does not officially justify this exemption of criminal responsibility, as legally, the purchase is not viewed as an offence that has been committed against a CSP, and there is no mention of it within the statute.[92] The

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[88] The classical example is the case of break-in to houses, where the thief is sentenced for 'attempted theft' even before the person has laid hands on the intended object of theft.
[89] Judgment of the Court of 6 March 2002 in Case B 1041-01, reported in RH 2002:16.
[90] Brottsbalken [SFS 1962:700] 2.4.
[91] Ekberg (n 5)1187-1218.
[92] Chapter 23, the Penal Code; in particular 2.4.; Wong (n 27) 177–195.

implication of this is that a CSP is unable to claim damages for the harm caused by the specific offence of procuring prostitution services. This, however, does not mean that they cannot seek damages if any other harm is caused, other than the procurement itself.

6.4.1.1 The Swedish pandering laws and the forfeiture of rental apartments and rooms used for prostitution

According to section 12 of Chapter 6 of the Swedish Criminal Code a person promoting or improperly financially exploiting another person's engagement in casual sexual liaisons in return for payment is to be sentenced for procuring to imprisonment for four years at the most.[93] In relation to pandering laws, the section continues with stating that when a person who holds the right to the use of premises, has granted another person the right to use said premises and subsequently finds out that the premises are used for prostitution either "wholly or to a substantial extent,"[94] yet fails to reasonably seek to terminate the granted right, they will be considered to have promoted the activity and, thus, will be held criminally responsible for the offence. The offences of both procuring as well as pandering would be considered gross, which would mean a minimum of 2 years up to a maximum of eight years imprisonment, when the circumstances are particularly severe, such as, for example, when the crime involves large-scale activities, has brought significant financial gains or has "involved ruthless exploitation of another person."[95] However, what these terms mean is subjective and would need to be determined by a court in relation to the specific circumstances. Thus, according to the Swedish Criminal Code, pimping or procuring is prohibited by pandering laws, which provide for a fine and up to 4 years imprisonment. The penalty will increase to up to eight years if there are aggravating circumstances, such as gross procuring. The term pandering refers to the situations in which people promote or improperly financially

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[93] Chapter 6, Section 12 of the Penal Code (2005:90) - Penal Code: Chapter 12 §.
[94] Ibid.
[95] Chapter 6, Section 12 of the Penal Code (2005:90) - Penal Code: Chapter 12 § 12.

exploit other people's casual sexual liaisons for payment.[96] The serious form of this crime is defined as a large-scale activity, which involves significant financial gain or ruthless exploitation of another person.[97] In order to prevent apartments and rooms from being used for the purpose of prostitution and pandering, Sweden also has a number of criminal provisions which provide for sanctions and confiscations, such as the Chapter 6, Section 12.2 of the Penal Code, Chapter 12, Section 42.1.9 of the Land Code (1970:994) and Chapter 7, Section 18.8 of the Condominium Act (1991:614; 2003:31). The consequence of these provisions is that landlords or tenants are required to terminate tenancies in the event that the premises are used for prostitution purposes. The aim of these provisions is to prevent the operations of brothels, or the facilitation of prostitution by renting apartments, rooms or hotel rooms. Other prohibited conduct involves assisting to find clients, acting as security guards or allowing advertising for sex workers.[98] In practice, this means that sex workers are not able to work together or recommend customers to one another, advertise their work, or work from their home, or at least from a property they rent or own.

In situations in which the CSPs are cohabiting with a partner, working from home may also result in the partner being held criminally liable for pandering. Even if the CSPs do not work from home, a partner could be criminalised for benefitting financially from the sex work of the CSP.[99] This is specifically derived from section 12, chapter 6 of the Swedish Penal code, which states that if someone holds the right to the use of premises and grants the right to use them to another with prior or subsequent knowledge that the premises are "wholly or to a substantial extent used for casual sexual relations in return for payment" and does not take reasonable steps to end this, will "be considered to have

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[96] Ibid.
[97] Ibid.
[98] Susanne Dodillet and Petra Östergren, The Swedish Sex Purchase Act: Claimed Success and Documented Effects, by Conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges. The Hague, March 3 and 4, 2011.
[99] Ann Jordan, The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering, April 2012, Program on Human Trafficking and Forced Labor Center for Human Rights & Humanitarian Law issue 4; Dodillet, Susanne and Petra Östergren, The Swedish Sex Purchase Act: Claimed Success and Documented Effects, Conference paper, 2011. http://www.petraostergren.com/upl/files/542 59.pdf; Sandra Ka Hon Chu and Rebecca Glass, Sex Work Law Reform in Canada: Considering Problems with the Nordic Model Alberta Law Review (2013) 51:1.

promoted the activity and shall be held criminally responsible."[100] For CSPs who are involved in the provision of commercial sex in order to provide for their families, this adds additional burdens. Although the CSP may be viewed as the victim and be protected under the law from criminal sanctions, their partners become more vulnerable. In cases in which the partners contribute to the finances or are solely responsible for the premises, the situation could become even more complicated, as the criminalisation of the partner, which could see a prison sentence of up to four years[101] could place the CSP in more financial difficulties, thereby contributing to cementing their need to provide commercial sex services. In relation to partners living off the proceeds of commercial sex, it is presumed that the wording was selected to ensure that there is a reasonableness element to protect dependents of CSPs. Accordingly, the provision explains that any financial exploits need to be "improper."[102] It is presumed that the term "improper" here is intended to safeguard dependents, however, in order to be certain, it will need to be clarified what is meant by "improper" by the courts.

6.4.1.2 Prostitution and Taxation Law

Within the area of taxation, there are provisions which also affect CSPs' ability to support themselves as all income is taxable in Sweden.[103] This means that prostitution earnings are also taxable. However, the tax office will not accept companies to register businesses for "prostitution" or "sex work," especially as the pandering laws prevents this.[104] As a result, people selling sex will either have to register a company under

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[100] Chapter 6, Section 12 of the Penal Code (2005:90) - Penal Code: Chapter 6 § 12.
[101] Ibid.
[102] Ibid.
[103] Don Fullerton, *The Taxation of Income from Capital* (University of Chicago Press 2010) ch. 4; 'Sweden - Taxes on Personal Income' (*Taxsummaries.pwc.com*, 2018) <http://taxsummaries.pwc.com/ID/Sweden-Individual-Taxes-on-personal-income> accessed 8 September 2018.
[104] Ibid.
[104] Östergren, Petra (2003), Synden ideologiserad. Modern svensk prostitutionspolicy som identitets- och trygghetsskapare. Department of Social Anthropology at Stockholm Universitet. http://www.petraostergren.com/upl/files/8914.pdf (2nd January 2017), Östergren, Petra (2003), Sexworkers critique of Swedish policy. www.petraostergren.com (2nd January 2017), Östergren, Petra (2006), Porr, horor och feminister. Stockholm. http://www.nok.se/nok/allmanlitteratur/titlar-allmanlitt/p/Porr-horor-och-feminister-ISBN- 9789127113947/ (2nd January 2017).

another type of business or provide their services for sale illegally in the informal economy.[105]

If a CSP decides to register under a different type of business, it will be possible to pay taxes and in return receive social security benefits. However, it is difficult to deduct business expenses.[106] If CSPs decide not to register, they will not be able to pay taxes and will not be entitled to social security benefits. Moreover, as they will not have the opportunity to deduct business expenses and may be faced with arbitrary tax assessments due to the Treasury basing this assessment on an estimated income, CSPs may have to retrospectively pay high taxes.[107] A qualitative study conducted by Östergren in 2003, five years after the introduction of the sex purchase laws, investigated the situations of CSPs in Sweden and found that the consequence of these kinds of tax issues included situations in which CSPs had deliberately not registered their work, and, thus, were financially forced to continue their work due to lack of social security.[108] Other CSPs were forced to continue working in order to cover the high tax payments owed, despite wanting to retire from working in prostitution.[109] Many of the CSPs expressed that these situations that were a direct consequence of the differential treatment of CSPs and CSUs legally had left them feeling more vulnerable than prior to the introduction of the sex purchasing laws.[110] Apart from the vulnerability, it appears that the CSPs are put in a position in which they are obliged to operate illegally in relation to taxation, despite selling prostitution services being legal in Sweden. The underlying reason for this appears to be the strong emphasis that rests on public morality perceptions of prostitution. Although it is not illegal to sell prostitution services, it is still immoral, and thus, incompatible with business and taxation laws which have a

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[105] Ibid.
[106] Ibid 20,37-38.
[107] Ibid 20,37-38, Östergren, Petra (2003), Sexworkers critique of Swedish policy. www.petraostergren.com (2nd January 2017).
[108] Petra Östergren, Synden ideologiserad. Modern svensk prostitutionspolicy som identitets- och trygghetsskapare. Department of Social Anthropology at Stockholm Universitet [2013]. http://www.petraostergren.com/upl/files/8914.pdf (2nd January 2017) 37-38.
[109] Ibid.
[110] Ibid.

morality requirement.[111] Ultimately, this demonstrates that CSPs are not able to work legally and be protected from illegality if the law still considers the activities to be immoral.

6.4.1.3 Jurisdictional questions

In light of Sweden's understanding of prostitution being a social harm or evil it is not surprising that the question has arisen, as to whether Swedish nationals can be held liable for procuring prostitution services when in a different country. Generally, Sweden deals with their criminal jurisdiction by categorising offences into two categories, namely, offences harming the protected interests of the personal well-being of individuals, such as homicide, assault, rape and other sexual offences, and offences which harm the protected interest of the public order. The former category of crimes is considered crimes under Swedish law regardless of the location they were committed.[112] The latter, however, will only fall under Swedish law if the offence was committed in Sweden.[113] The issue found in the procurement of prostitution services is that it could be arguable categorised in either category, which is substantiated by the wide-ranging debate prior to the introduction of the provisions. According to Träskman,[114] the offence of procuring prostitution services would fall under the category of harming public order, which would mean that the offence would only be applicable when committed on Swedish territory. However, according to the Swedish government, the offence of procurement of prostitution services is universally applicable.[115] However, this form of jurisdiction can only be exercised in double criminality situations, which

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[111] German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 'Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)' p 9 (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth – BMFSFJ 2007) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf> accessed 6 March 2020.
[112] Träskman (n 52) 301.
[113] Christoffer Wong, Prohibition in Swedish Law of the Purchase of Sexual Service (2013) Lund University Faculty of Law.
[114] Träskman (n 52) 85 et seq; 301.
[115] Prop. 2010/11:77 *Skärpt straff för köp av sexuell tjänst* [Increased penalty for purchase of sexual service], at 13.

means when the conduct in question is punishable in the country in which the conduct took place as well as in the country of which the perpetrator is a national or resident.[116] This means that Sweden will only be able to hold Swedish nationals or residents criminally liable for purchasing sex, when the sex was procured in a country in which prostitution is criminal. This, however, raises the question of whether this would be necessary as the CSU or CSPu were already sanctionable in the country in which the sex was procured. A possible scenario may be if the conduct took place in a country in which the penalties for purchasing prostitution services exceed what is considered humane in Sweden, as this could otherwise mean that the CSU could potentially avoid any penalties in the country in which the offence was committed via extradition.[117]

6.5 Two key philosophical and ideological stances

In retrospect, and in particular by looking through the *travaux preparatoires* and governmental statements on the regulation of prostitution, it becomes apparent that there are two key legal philosophical agendas underpinning the Swedish abolitionist approach. These are a strong radical feminist agenda, as well as a commitment to demand reduction in accordance with deterrence theory. In the following, these two theoretical links to the Swedish approach to regulating prostitution will be discussed in turn.

6.5.1 The Swedish approach as a feminist agenda

As seen above, the creation of the legislation in Sweden was strongly politically influenced by a radical feminist agenda, according to which prostitution was seen as a

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[116] Wong (n 113) in Prostituzione e diritto penale: problemi e prospettive, a cura di Alberto Cadoppi, Dike Giuridica Editrice, Roma 2014, 177–195.
[117] 'Extradition for Criminal Offences' (*Regeringskansliet*, 2020) <https://www.government.se/government-of-sweden/ministry-of-justice/international-judicial-co-operation/extradition-for-criminal-offences/> accessed 25 April 2020.

consequence of male violence against women.[118] The Neo-Abolitionist approach to prostitution taken in Sweden was the result of a long process and ongoing strive of feminist activism in Sweden. It was viewed by a majority of women at the time as a chance in which the lives of women, which were viewed as having been hidden from the public eye for too long, could be successfully taken into consideration in an organised and articulated claim that had been based on a clearly defined collective identity.[119] In order to understand how this came about and what this actually meant in practice it is crucial to look at the matter via a historical perspective.

In Sweden in the early 1950s the labour force participation of married women was amongst the lowest in Europe.[120] Women in Sweden predominantly lived inside the home and were excluded from public life and as a consequence did not have equal opportunities in terms of civic participation as men did.[121] Thus, according to Scott[122] they upheld the hidden transcript, "a set of thoughts and actions hidden from the public, especially the public containing the oppressor. A servant, for example, who does not display any evidence of ill will towards her employer does not mean she is not critical of him in private, with her "private" thoughts making up the hidden transcript."[123] The consequence of these "hidden transcripts" according to Scott are that once they come to light in public, all the oppressed classes are confirmed in their opinions and more likely to come forward, as they become aware of the commonality of their status. In Domination and the Arts of Resistance: Hidden Transcripts,[124] Scott explains that subordinate groups of people within a society use strategies of resistance, which are not often visible for superordinate groups. This phenomenon is what Scott refers to as

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[118] Gould (n 39) 437; Outshoorn (n 21) 141-155; Svanström (n 21) 225; Janet Halley, et al. "From the international to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: Four studies in contemporary governance feminism [2006] *Harv. JL & Gender* 29, 335.
[119] Joybe Outshoorn, Assessing the impact of women's movements [2012] *Women's Studies International Forum*. Vol. 35. No. 3. Pergamon.
[120] Evelyne Huber, John D Stephens, Development and Crisis of the Welfare State: Parties and Policies in Global Markets. (Chicago: University of Chicago Press, 2001) 125.
[121] Lars Trägårdh and Lars Svedberg, The iron law of rights: citizenship and individual empowerment in modern Sweden [2013] *Social Policy and Citizenship, the Changing Landscape*.
[122] James C Scott, *Domination and the Arts of Resistance* (1st edn, Yale University Press 1990) 37-44.
[123] Ibid 23-26.
[124] Scott (n 122).

"infrapolitics."[125] The open interactions that take place between the subordinate and superordinate groups in public form the "public transcript," whereas the opposition to the power dynamics that run alongside the public transcripts are the "hidden transcripts."[126] It follows that the members of the subordinate groups, as in this case referring to women, could not only be understood on the basis of their public actions, but rather to the internal processes that lay beneath the visible surface. Accordingly, it can be understood, how, in public, for hundreds of years it seemed that the oppressed group of women appeared to accept their domination, while still questioning this domination in private. Only when these "hidden transcripts" started to gain common status due to increased public attention, did the oppressed classes start to openly speak up, as the consciousness of the shared views spread. It is assumed that these dynamics can be seen clearly in the development of the prostitution approach in Sweden, as opposed to Germany for instance, due to differences in the historical developments of power dynamics within the different jurisdictions. As mentioned above, the participation rates of women within the labour market in Sweden were amongst the lowest in Europe in the 50s. As such, there was presumably a more radical change in a shorter time period in Sweden than elsewhere. There may also be cultural as well as other reasons underlying the dynamic as well, however, this is outwith the scope of this research project.

When the Swedish government increased social programming, jobs were created in sectors that were largely taken up by women. This trend continued due to limitations on guest worker programs as well as political commitment to encourage dual-earner households.[127] The period that followed can be described as a “feedback cycle between left-union strength, women’s labour force participation, women’s mobilization, and public service employment that continued to the late 1980s when the employment crisis hit Sweden.”[128]

[125] Ibid 183 – 199.
[126] Ibid.
[127] Huber and Stephens (n 120) 27, 126.
[128] Ibid 126.

This also resulted in an increase in women in higher education. With the changing demographics the attitudes amongst the Swedish society changed as well.[129] It appears that the change in attitudes influenced a wide range of areas of the law, including family law, employment law and criminal law, for instance with the introduction of laws on parental leave or work-related equal treatment legislation.[130]

A significant point to critique in the development of the approach in Sweden is the exclusion of CSPs perspectives in the law. Accordingly, after the 1977 inquiry onto prostitution, the chair, Inger Lindqvist, was not comfortable with the content of the report in which the experiences of CSPs had been included through interviews.[131] Olsson, the principal secretary of the inquiry, explained that she did not want the analyses based on the interviews with CSPs to be published. Thus, the report was only submitted to the Ministry of Health and Social Affairs once these had been removed.[132] This in clearly contrary to the ideas of autonomy, whereby the perceived victims' experiences have not been included in the process. Moreover, the report was initially neglected following its submission.[133] The consequence was that a number of women's groups, most notably ROKS (*Riksorganisationen för Kvinnojourer och Tjejjourer i Sverige*), felt the need to step in and put pressure on the ministry to have the report released.[134] It is presumed that this will have increased tensions and resulted in the perception that a more radical drive would be necessary, thereby setting the scene for what was to become an

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[129] Ronald Inglehart and Christian Welzel, *Modernization, cultural change, and democracy: The human development sequence* (Cambridge University Press, 2005); Livia Sz. Oláh, Rudolf Richter and Irena E. Kotowska, State-of-the-art report the new roles of men and women and implications for families and societies, A project funded by European Union's Seventh Framework Programme under grant agreement no. 320116, 11 (2014), http://www.familiesandsocieties.eu/wp-content/uploads/2014/12/WP11OlahEtAl2014.pdf [accessed 15th December 2016].
[130] Laura Carlson, Comparative Discrimination Law (Brill 2017) 92.
[131] Hanna Olsson, Från manlig rättighet till lagbrott: Prostitutionsfrågan i Sverige under 30 år [2006] Kvinnovetenskaplig Tidskrift, No. 4, 52-73; for information in English, see for example: Josefina Erikson, 'Institutions, Gendered Perceptions, and Frames of Meaning: Explaining Strategic Choices of Women Mps in Swedish Prostitution Policy' (2018) 40 Journal of Women, Politics & Policy; Magaly Rodríguez García, Selling Sex in the City: A Global History of Prostitution, 1600S-2000S (Brill 2017) 220 - 224.
[132] Olsson (n 131) 52-73.
[133] Ibid.
[134] Ibid.

abolitionist feminist movement with ROKS taking the lead in pushing for an underpinning feminist ideology. [135]

With this in mind, it is not surprising that the Swedish abolitionist approach to prostitution that criminalises demand but not supply is closely related to radical feminism and, probably most closely related to the radical feminists MacKinnon and Dworkin. Although the feminist views of these two theorists have been discussed in section 3.6.2., the following will briefly lay out the important concepts in relation to the introduction of the Swedish model. In short, MacKinnon follows the notion that “sexuality is to feminism what work is to Marxism: that which is one’s own yet most taken away.”[136] According to Marx, the bourgeois exploit the proletariat in the sense that they purchase their labour and take what they have produced.[137] The key distinguishing characteristics between those who labour and those who do not is the ownership of material capital.[138]

MacKinnon uses this approach analogously to sex in the sense that men represent the bourgeois, whereas women the proletariat, and sexuality is considered the labour. “As the organized expropriation of the work of some for the benefit of others defines a class-workers-the organized expropriation of the sexuality of some for the use of others defines the sex, woman.”[139] Dworkin believes that “no rights to hold government office or other public positions of civil or professional power will change her status as long as she is exploited in sex.”[140] Accordingly, Marxism requires workers to overthrow capitalism, and, thus, women need to reject the violence of sexual servitude.[141] As prostitution clearly involves sexual exploitation as understood by Dworkin, and can also be argued to fall both within the commercial realms of capitalism, it can be argued that

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[135] Ibid 52-73; Whitney Russell, Peace for Women: Swedish Feminism and the Pornotopia, Diss. Central European University, 2011.
[136] Catherine MacKinnon, Feminism, Marxism, method, and the state: An agenda for theory [1982] *Signs: Journal of women in culture and society* 7.3 (1982): 515-544, 515.
[137] Karl Marx, Das Kapital: kritik der politischen ökonomie (*Verlag von Otto Meisner,* 1885; 1867; 1894, English version: Karl Marx, Friedrich Engels and Ernest Untermann, Capital (Cosimo 2007).
[138] Karl Marx and David McLellan, *Karl Marx* (1st edn, Oxford University 2000) 539-549.
[139] Catherine A MacKinnon, Feminism, Marxism, method, and the state: An agenda for theory [1982] *Signs: Journal of women in culture and society* 7.3 (1982): 515-544, 516.
[140] Andrea Dworkin, *Intercourse* (1st edn, Free Press 1987) 20.
[141] Marx and McLellan (n 138) 188; MacKinnon (n 139) 518.

the ideas of abolitionism seeking to eradicate prostitution while protecting the CSPs as the victims of the transaction is especially fitting.

The more significant question now, is how these ideas from scholars in the US contributed to the introduction of the Swedish Abolitionist model. In 1990, the organisers of ROKS first international conference invited Catharine MacKinnon and Andrea Dworkin to speak at this event. The event was visited by approximately three to four hundred women from across Sweden.[142] Although the title of the event was “Pornografi - verklighet eller fantasi?” (Pornography - Reality or Fantasy?),[143] some of the lectures, such as the one from MacKinnon, also discussed prostitution as an issue that was important for all women.[144]

> The degradation of women in pornography, this sexualized lowering and dehumanization of women, reflects and reinforces and reproduces and reifies the lower status of women throughout society. The women who are in those materials, who become women in general, are not the people who become authorities: powerful, legitimate, respected. […] Pornography creates bigotry, hostility, and contempt towards women, as well as aggression. […] It engenders resentment of your presence when your voice registers in the larger society, the sense that you do not belong […] Whether or not any of its other violations hit individual women, these larger attitudinal and ideological dynamics affect all women to varying degrees.[145]

Moreover, MacKinnon introduced the abolitionist legal model for prostitution in her speech as a possible solution. She explained further that

> Men’s demand creates prostitution. If men did not buy prostitutes, there would be no prostitution, and if there was no prostitution, there would be no pornography. Women

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[142] Max Waltman, Prohibiting sex purchasing and ending trafficking: The Swedish prostitution law [2011] *Mich. J. Int'l L.* 33, 137.
[143] Andrea, Dworkin. "Pornografi: Kriget mot kvinnorna” in ROKS Pornografi: Verklighet eller fantasi." (1991).
[144] Catharine A MacKinnon, "Pornografi och jämställdhet." In Bettan Andersson and Margareta Björkman, Pornografi - Verklighet Eller Fantasi? (Riksorganisationen för kvinnojourer i Sverige (ROKS) 1991), MacKinnon’s speech was translated into Swedish. For an edited English version, see Catherine A. MacKinnon, On Sex and Violence: Introducing the Antipornography Civil Rights Law in Sweden, in are women human? And other international dialogues 91 (2006).
[145] Ibid 98.

> have to sell sex because men want to buy it. Because this is not a symmetrical world, it does not call for a symmetrical legal solution. It is an unequal world and calls for a law against the men using the women, not against the women being used.[146]

When reading this quote, the first thing that comes to mind is the strong, emotive language that is used. Expressions such as "buy prostitutes"[147] would, of course, from a legal perspective not be accurate, as this would refer to slavery rather than the provision of prostitution services. However, as was discussed in chapter 3, the stance and aims of radical feminism are not found in legal pragmatism, but rather in fighting the patriarchal structures, and it is assumed the tone has been selected for this specific purpose. Nonetheless, one cannot disregard the tone, as this will have had an inciting effect overall.

Moreover, looking more towards the content of the quote, it can be said that, in a way, the underlying notions reflect ideas of positive discrimination and setting historical injustices right. As women have been oppressed historically, especially in relation to prostitution and crimes linked to prostitution, the exclusion of CSPs from criminal liability within the criminal prohibition, according to these ideas, would constitute a form of positive discrimination. Because the majority of CSPs are women, the imbalance in society in relation to prostitution is attempted to be counteracted by reversing the imbalance within the criminal sanctions connected to prostitution by only imposing criminal sanctions on the CSUs and CSPus.

6.5.2 The Swedish approach and demand reduction though deterrence theory

According to the Swedish Government, the key reason for the introduction of the legislation criminalising the purchase of sex, is the importance to fight prostitution in society. The Ministry of Gender Equality stated in 2009 that

> [p]rostitution is considered to cause serious harm both to individuals and to society as a whole. Large-scale crime, including human trafficking for sexual purposes, assault,

[146] Ibid 100.
[147] Ibid.

> procuring and drug-dealing, is also commonly associated with prostitution. [...] The vast majority of those in prostitution also have very difficult social circumstances.[148]

The abolitionist approach is viewed as following Sweden's gender equality programme, in particular due to the fact that, as discussed above, the law is written in a gender neutral manner to cover all situations of prostitution, rather than the stereotypical heterosexual transaction of men purchasing sex from women.[149] However, at the same time, despite the gender neutral terms used, it can be argued that the highly gendered nature of prostitution in practice is tackled in a manner, which seeks to empower women under the law. Accordingly, the official position on prostitution from the Swedish government, demonstrates that prostitution policy is based on the idea that prostitution constitutes a type of gendered exploitation of women, which is harmful for both CSPs, as well as society as a whole. As Gunilla Ekberg explains:

> Eliminating demand as the root cause of prostitution is a cornerstone of Swedish policies. If men did not consider that they had the right to buy and sexually exploit women and children, prostitution and trafficking in human beings for sexual purposes would not occur [...] Prostitution and trafficking in human beings for sexual purposes are seen as issues that cannot, and should not be separated; both are harmful practices and intrinsically linked.[150]

This quote showcases another point that will be addressed in chapters 9 and 10 of this thesis, namely, the Swedish ideas regarding the conflation of prostitution, sexual exploitation and THB. Keeping the discussion at this point in time focussed on the issue of prostitution regulation, it is worth looking back to sections 4.3. and 6.5.2., where it was explained that the deterrence theory applied to criminal behaviour states that

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148 Ministry of Gender Equality: Legislation on the purchase of sexual services, Government of Sweden, 4 February 2009, cited in Michael Palmiotto, Combating human trafficking: a multidisciplinary approach (Boca Raton: CRC Press, 2015) 248.
149 Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs Women's Rights & Gender Equality, the Policy on Gender Equality in Sweden, European Union 2015, PE 510.011.
150 Gunilla Ekberg, Briefing: Swedish law and policies on prostitution and trafficking in human beings: An overview. Scottish Centre for Crime and Justice Research. 2013 Retrieved from http://www.sccjr.ac.uk/publications/briefing-swedish-law-and-policies-on-prostitution-and-trafficking-in-human-beings/.

rational actors balance the threat of punishment against any advantages of committing illegal activities prior to deciding to commit a crime. When the predicted costs outweigh the perceived benefits, these rational actors will be deterred from committing the criminal activity in question.[151]

As it has been demonstrated, the cost of purchasing prostitution services according to the Swedish Penal code is a maximum of 1 year in prison. According to the deterrence theory this would mean that the benefits gained from purchasing prostitution services would need to outweigh the cost of up to a year in prison. In theory it could be assumed that the benefit would not outweigh this cost. However, when looking at the situation in practice, one also needs to take the practical enforcement into consideration. In 2018, for instance, of the 720 processed offences of purchasing commercial sex, 364 persons were charged, no one received a prison sentence, and 69 were issued fines.[152] In addition to this, 51 people were charged with procurement or aggravated procurement of commercial sex, of which 18 people received prison sentences and one person was issued a fine. This can be seen as an indication, that not all people are being deterred by the current laws. Also, when considering the vast amount of fines used rather than prison sentences, if any, it is not surprising that recent studies have found that the offence of purchasing prostitution services is being taken less seriously with it having been compared to the traffic offences such as driving above the speed limit.[153]

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[151] See for example: Frank C. Zagare, 'Classical Deterrence Theory: A Critical Assessment' (1996) 21 International Interactions, 365-370; Robert Jervis, 'Rational Deterrence: Theory and Evidence' (1989) 41 World Politics, 183-4; Darryl K. Brown, 'Cost-Benefit Analysis in Criminal Law' (2004) 92 California Law Review, 323.

[152] National Council on Crime Prevention, 'Processed offences based on whether investigation has been initiated, type of decision, as well as person-based clearance rates and prosecution rates, 2018, available online at: 'Processed Offences Based on Whether Investigation Has Been Initiated, Type of Decision, as well as Person-Based Clearance Rates and Prosecution Rates, 2018' (Bra.se, 2019) <https://www.bra.se/download/18.62c6cfa2166eca5d70e55ef/1554456180226/Processed_offences_2018.xls> accessed 31 October 2019; 'Total Number of Conviction Decisions, by Principal Offence and Principal Sanction, 2018' (Bra.se, 2019) <https://www.bra.se/download/18.62c6cfa2166eca5d70e1a534/1559111757943/420%20eng%202018.xls> accessed 31 October 2019.

[153] Susanne Dodillet and Petra Östergren, The Swedish Sex Purchase Act: Claimed Success and Documented Effects, Conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges. The Hague, March 3 and 4, 2011, http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf [accessed 4th December 2016].

6.5.3 The Swedish evaluation of their abolitionist approach and subsequent international marketing

When seeking to explore the evaluation of the Swedish abolitionist approach, there are some difficulties that complicate the ability to compare it with other evaluations of regulatory approaches. In particular, when considering the expansionist statements that were made in relation to the objectives set by Sweden when putting the laws in place. In this sense, it was initially stated that the main objectives were not only to eradicate prostitution, but also to eliminate violence against women as well as achieve a cultural shift regarding sexuality values.[154] Moreover, when factoring in the extent of the problem, the sex services sector in Sweden was much smaller than in other European countries, even prior to the introduction of the abolitionist approach.[155] The responsibility for the evaluation as well as the monitoring of the Swedish laws was given to the Socialstyrelsen, which is the Swedish National Board of Health and Welfare. Between 2000 and 2007, it released three reports, which all pointed towards the difficulties of evaluating how well the set objectives have been met and at the same time lacking any real hard evidence of the law's success.[156] In this sense, many statements are made in these reports pertaining to the increase of street prostitution and the use of mobile devices.[157] However, as these are merely assumptions which have not been based on scientifically reliable evidence, it is not possible to make a conclusive statement at this point in time.

Even prior to the introduction of the Swedish sex purchase ban, critics feared that the Nordic model would result in a number of unintended and undesired consequences, such as CSPs being driven underground, a heightened risk of violence, and difficulties

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[154] Katie Beran, 'Revisiting the Prostitution Debate: Uniting Liberaland Radical Feminism in Pursuit of Policy Reform' (2012) 30 Law & Inequality: A Journal of Theory and Practice, 50 - 54; Ekberg (n 5); May-Len Skilbrei and Charlotta Holmström, 'Is There a Nordic Prostitution Regime?' (2011) 40 Crime and Justice, 490 - 491.
[155] Gould (n 39) 439.
[156] Socialstyrelsen, 'Prostitution in Sweden 2007' (Socialstyrelsen 2007) <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/ovrigt/2008-126-65_200812665.pdf> accessed 19 May 2020; Socialstyrelsen, 'Kännedom Om Prostitution 1998–1999' (Socialstyrelsen 2000); Socialstyrelsen, 'Kännedom Om Prostitution 2003' (Socialstyrelsen 2004).
[157] Ibid.

in enforcement. When looking at the previous section, it can be assumed that some of these fears have become reality. Interestingly, the 2003 report[158] explains that it is not possible to "state with certainty whether there has been an increase of violence [in prostitution] Some informants speak of greater risks [...] few have observed an actual increase [...] Police who have studied the occurrence of violence have not found any evidence of an increase [...] The interview data and other research indicate that violence and prostitution are closely linked, whatever sort of legislation may be in effect."[159] Another report, from the police in Malmö in 2001, suggested that the situation found in practice indicated that rather than seeing a reduction in violence, it was appearing to increase.[160]

In 2008, Wahlberg,[161] a representative from the human trafficking unit at Sweden's national police board, indicated that despite an initial reduction in prostitution figures in the first 5 years since Sweden introduced its approach, in the following 5 years the numbers were rising again.[162] Considering the issues mentioned earlier regarding the difficulties in enforcing the laws in practice, it is not surprising that this is the case in practice. When using a similar analogy as in the previous section, the enforcement of the offence of purchasing sex has become similar to driving offences, in which the costs of being caught are not substantial enough in practice to result in high deterrence rates.

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[158] Månsson Sven-Axel, 'Den Köpta Sexualiteten', *Purchased Sex, in Sex in Sweden: About Sexual Life 1996* (Statens Folkhälsoinstitut 1998), cited in Norwegian Ministry of Justice and the police, 'Purchasing Sexual Servicesin Sweden and the Netherlands' (Norwegian Ministry of Justice and the police 2004).
[159] Eva Ambesjö, Annika Eriksson and Merike Lidholm, *Prostitution in Sweden* (The National Board of Health and Welfare 2003) 9.
[160] Polismyndigheten i Skåne, Rapport - Lag (1998:408) om förbud mot köp av sexuella tjänster, Malmö-rapporten, s. 27. (Skåne Police, Report - Law (1998:408) prohibiting the purchase of sexual services, Malmo report, s. 27) ALM 429-14044/99, 2001; Nathalie Magnusson and Maria Svensson, 'Manlig Lusta Eller Tabu? En Undersökande Uppföljning Av Sexköpslagen Lag (1998:408)' (*Lup.lub.lu.se*, 2006) <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1324863&fileOId=1324864> accessed 25 April 2020.
[161] Kajsa Wahlberg, 'Statement by Kajsa Wahlberg, Detective Inspector at the Intelligence Service within the National Criminal Investigation Department in Sweden, and Also National Rapporteur on Trafficking in Human Beings at the Conference "Preventing and Combatting Trafficking in Human Beings and Reducing Prostitution and Sexual Exploitation" The Czeck Republic, June 3 2006' (*Mvcr.cz*, 2009) <http://www.mvcr.cz/soubor/kajsa-wahlberg-swedish-model-pdf.aspx> accessed 25 April 2020.
[162] Ibid.

However, the commission's final 2010 report, makes the claim that the abolitionist approach had achieved all the set objectives.[163] Nevertheless, the report mentioned that because the nature of prostitution and THB was "complex and multifaceted" and occurred in secret in part, empirical surveys only had a limited scope.[164] Despite this, Sweden's original attitude was re-affirmed, stating that

> [t]hose who defend prostitution argue that it is possible to differentiate between voluntary and non-voluntary prostitution, that adults should have the right to freely sell and freely purchase sex [...] However, based on a gender equality and human rights perspective, [...] the distinction between voluntary and non-voluntary prostitution is not relevant.[165]

Based on the competing elements of the vague methodology and the affirmed position, the responses were expectedly equally mixed. In this sense supporters of the Swedish approach focussed on the affirmed points, whereas the critics have emphasised that the lack of scientific validity of the findings, which means that no new insights can be made without empirical findings, in particular adequate consultations with CSPs.[166]

Apart from the actual approach taken in Sweden to regulate prostitution, Sweden has been actively promoting its regulatory approach to prostitution internationally.[167] In this

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[163] Anna Skarhed and Ulrika Kullman, 'Förbud Mot Köp Av Sexuell Tjänst En Utvärdering 1999–2008' (Statens offentliga utredningar SOU: 2010:49 2010) 29-33, <https://web.archive.org/web/20100821034921/http://www.regeringen.se/content/1/c6/14/91/42/ed1c91ad.pdf> accessed 25 April 2020.
[164] Ibid.
[165]The Swedish Government, Swedish government report SOU 2010:49, The Ban against the Purchase of Sexual Services. An evaluation 1999-2008, 5, available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_ban_against_the_purchase_of_sexual_services._an_evaluation_1999-2008_1.pdf accessed: 19th November, 2019.
[166] Laura Agustin, 'Swedish Law | Anti-Prostitution | Evaluation | Skarhed | Louise Persson' (The Naked Anthropologist, 2019) <https://www.lauraagustin.com/behind-the-happy-face-of-the-swedish-anti-prostitution-law> accessed 19 November 2019; Gregg Bucken-Knapp, 'Evaluating the Swedish Ban on the Purchase of Sexual Services: The Anna Skarhed Report | Nordic Prostitution Policy Reform' (Web.archive.org, 2019) <https://web.archive.org/web/20100709082031/http://nppr.se/2010/07/02/evaluating-the-swedish-ban-on-the-purchase-of-sexual-services-the-anna-skarhed-report/> accessed 19 November 2019, for an example of critical views see: Dodillet and Östergren (n 153).
[167] For example: The holding of the first ever World Congress against Sexual Exploitation in 1996 in Stockholm; Nordic Council of Ministers, 'Prostitution in the Nordic Countries - Conference Report' (Norden 2008) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/prostitution_in_the_nordic_countries_1.pdf> accessed 19 May 2020;

sense, both activists as well as Swedish authorities have been involved in these marketing practices.[168] In particular, the Swedish Government has been promoting its abolitionist approach to the regulation of prostitution through activities, such as conferences on topics such as THB, violence against women and prostitution,[169] and has also made numerous information materials available in various languages.[170] The point to be made here, is that in contrast to the other approaches to prostitution regulation, which, as was seen for instance in the previous chapter on Germany, have focussed predominantly on the regulation of prostitution within the boundaries of the national jurisdiction, whereas Sweden's approach, has sought to sell its approach to other jurisdictions. A reason for this could arguably lie in the concept of prostitution constituting a social harm. As such, this chapter has demonstrated how the laws in Sweden's regulatory approach have been heavily based on feminist idealism and the goal of eliminating prostitution. This ideal itself is not confined by national boundaries and, thus, may pose one explanation for this crucial difference.

The Swedish Institute, 'Prostitution Policy in Sweden – Targeting Demand' (2019) <https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi_.pdf> accessed 19 May 2020.

[168] Ibid; Ekberg (n 5); Eilís Ward, 'Prostitution and the Irish State: From Prohibitionism to a Globalised Sex Trade' (2010) 25 Irish Political Studies, 48-50; 'Seminar on the Effects of Legalisation of Prostitution Activities', , *Seminar on the Effects of Legalisation of Prostitution Activities* (Swedish Government 2002) <https://web.archive.org/web/20070315232816/http://www.sweden.gov.se/content/1/c4/22/84/0647d25a.pdf> accessed 19 May 2020; Åsa Regnér and Margot Wallström, '"We Must Teach More Countries About Our Sexual Purchases Act"' (*Regeringskansliet*, 2016) <https://www.government.se/opinion-pieces/2016/04/we-must-teach-more-countries-about-our-sexual-purchases-act/> accessed 19 May 2020.

[169] Ibid.

[170] Jean-Yves Le Drian and Margot Wallström, 'We're Taking up the Fight against Prostitution' (*Regeringskansliet*, 2019) <https://www.government.se/opinion-pieces/2019/03/were-taking-up-the-fight-against-prostitution/> accessed 19 May 2020; Government Offices of Sweden, 'Search Results: Prostitution' (*Regeringskansliet*, 2020) <https://www.government.se/search/?query=prostitution&includePdf=true> accessed 19 May 2020; 'Embassy of Sweden - Suchergebnisse: Prostitution' (*Sweden Abroad*, 2020) <https://www.swedenabroad.se/de/search-page/?q=prostitution&type=0> accessed 19 May 2020.

6.5.4 The role of public reason in the Swedish regulatory approach to prostitution

In relation to the function of Rawls' ideas of public reason in incorporating public morality within the Swedish legal regulation of prostitution, the most important point to note is that Sweden follows a democratic parliamentary system established via free elections, similarly to the system found in Germany in the previous chapter. Accordingly, all public power is derived from the Swedish people.[171] For instance, the Riksdag undertakes the usual functions performed by legislatures within parliamentary democracies, such as enacting laws, amending the constitution as well as appointing governments.[172] Although in the majority of parliamentary democracies, it is the head of state who commissions a particular politician to form a government, a new Instrument of Government enacted in 1974, has removed this role from the Swedish monarch and given the role to the speaker of the Riksdag.[173] Furthermore, apart from being able to vote in local, national and EU elections, the Swedish people can also influence policy in other ways, such as becoming a member of a political party, participating in referendums as well as submitting opinions in inquiries.[174]

The dynamics involved between the implementation of the Swedish model in Sweden and public reason, appear to support a Scandinavian realist view of the function of laws.[175] At the time the Swedish abolitionist approach prohibiting the purchase of sex acts was first introduced in 1999, it was the first time a country had followed this kind of legal model. Although the people advocating for the introduction of this legislation did not think that prostitution would be entirely removed, the intention was to influence the public attitudes against prostitution, and, in particular, against CSUs and CSPus.[176] Nevertheless, the government reviews of the laws sought to evaluate the success of the

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[171] Government Offices of Sweden, 'English - How Sweden Is Governed' (*Regeringskansliet*, 2020) <https://www.government.se/other-languages/english---how-sweden-is-governed/> accessed 19 May 2020.
[172] Ibid.
[173] Jon Pierre, *The Oxford Handbook of Swedish Politics* (Oxford University Press 2016) 97.
[174] Ibid.
[175] See section 3.7.
[176] Ibid.

new laws, by looking at the supply of sex acts for purchase, rather than the public perception of prostitution.[177] Nevertheless, the key finding these government reports highlight, is a reduction of street prostitution.[178] The issue with this evaluation, however, is that its findings do not actually provide a reliable basis to make valid assumptions of the extent of the entire sex industry. In this sense, there remains limited knowledge on the way the laws have contributed to the demand for purchasing sex acts or the figures related to prostitution that takes place off the streets.[179] Nevertheless, there are a number of non-governmental studies, which indicate that the introduction of the Sex Purchase Act in fact had a significant impact of public attitudes towards prostitution in Sweden.

Unlike the German system, in which the changes to the approach to the laws on the regulation on prostitution were in part based on the findings of a national poll which indicated that the majority of members of the general public were in favour of the move, in Sweden a national poll in 1996 indicated that only a minority of the Swedish population were in favour of the proposed sex purchase laws.[180] Accordingly, the 1996 survey suggested that merely 20 percent of men and 45 percent of women were in favour of introducing the offence of purchasing sex acts.[181] However, following the introduction of the sex purchase laws in Sweden, a series of surveys have indicated a significant rise in support for the Swedish abolitionist approach amongst the public. As such, in 1999, following the introduction of the sex purchase laws, 70 percent of men and 81 percent of women favoured criminalising CSUs and CSPus.[182] Another SIFO poll in 2002 showed yet another increase in support for the introduced legislation in

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[177] Socialstyrelsen, 'Kännedom Om Prostitution 1998–1999' (Socialstyrelsen 2000); Socialstyrelsen, 'Kännedom Om Prostitution 2003' (Socialstyrelsen 2004); Socialstyrelsen, 'Prostitution in Sweden 2007' (Socialstyrelsen 2007) <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/ovrigt/2008-126-65 200812665.pdf> accessed 19 May 2020.
[178] Socialstyrelsen (n 177) 7; Socialstyrelsen (n 177) 46.
[179] Ibid.
[180] 'Evidence Assessment of the Impacts of the Criminalisation of the Purchase of Sex: A Review - Gov.Scot' (*Gov.scot*, 2017) <https://www.gov.scot/publications/evidence-assessment-impacts-criminalisation-purchase-sex-review/pages/8/> accessed 19 May 2020.
[181] Ibid.
[182] Socialstyrelsen, 'Kännedom Om Prostitution 1998–1999' (Socialstyrelsen 2000) 2.

Sweden from 76 percent 81 percent, whereas merely 15 percent of respondents wished to see the law repealed.[183]

Kuosmanen hypothesizes that this can be traced back to the fact that in 1996 the inquiries into the proposed changes to the law had not had an impact on public opinion yet. Nevertheless, once the government's bill for the abolitionist approach was put forward, as well as a number of other legal proposals in the area of enhancing and protecting women's rights, the matter gained increased media attention and, thus, increased its public attention, which could have had a positive impact on public support of the Swedish model in Sweden. Moreover, Kuosmanen also explains that prior to the 2002 study, the issue of THB and its negative impacts had started to gain increased media attention in relation to the debate on prostitution.

Accordingly, it can be deduced that although public reason will have contributed to the introduction of the Sex Purchase Act in Sweden in 1999 via the democratic processes followed to form the legislature, the laws have also been influenced to a significant extent by interest groups and activists, with much of the public attitude being formed after the laws were already in place. As indicated above, this clearly supports the ideas of Scandinavian realists which highlight the ability of the law to change behaviours and attitudes.[184]

6.6 Summary of the findings: Sweden's legal approach to regulating prostitution as a social harm

In many respects the Swedish regulatory approach to prostitution can be seen as a counter opposite to the German one reviewed in the previous chapter. In the developments leading up to the introduction of the current system in Sweden, it has been made clear repeatedly that the stance upon which the abolitionist approach has

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[183] Swedish Ministry of Industry, Employment and Communications, 'Prostitution and Trafficking in Women' (Regeringskansliet 2004) 1.
[184] See section 3.7.1.

been based is that prostitution is perceived as a social harm. As a social harm it is understood to exploit women as CSPs as well as women's status in society more generally in accordance with the views of radical feminism.[185] After having examined the developments leading up to the Swedish approach being implemented, this does not come as a surprise, as some of the leading academic voices of radical feminism of the time, such as MacKinnon and Dworkin, were actively involved in its creation.

As prostitution is perceived as a social harm, the measures introduced in Sweden to tackle prostitution not only fit the feminist agenda, but also send a clear message regarding the perceived power dynamics within prostitution. In this sense, the *Kvinnofrid* provisions, which translate to "women's peace" introduced the Swedish sex purchasing law. According to this law, the purchase of "sexual liaisons" are prohibited under criminal law and are punishable by criminal sanctions, including imprisonment. However, within this constellation, selling sex would remain legal for CSPs, at least in theory. This approach was introduced within a wider law revision agenda which sought to enhance gender equality in Sweden, whereby prostitution was considered an activity that threatened gender equality. Accordingly, prostitution, which is considered to be a social harm that mostly affects women as the victims and men as the perpetrators is sought to be eradicated by criminalising CSPus and CSUs while protecting CSPs from criminalisation. Although the introduction of criminal measures against CSUs and CSPus was stated in the *travaux prepatatoires* to constitute a tool to empower CSPs, there are elements within the setup which contradict this notion. In particular the disregard, if not complete denial, of autonomy of CSPs comes to mind here. This is particularly evident in two situations, namely, the exclusion of the voices of CSPs in the consultation processes leading up to the introduction of the laws as well as the portrayal of CSPs to constitute victims regardless of their own views on the matter. As such, the absence of recognition of autonomy of CSPs may be justified from the perspective of radical feminism, which challenges the autonomy of CSPs based on the influences they are under by operating in a patriarchal society, liberal feminists would argue the

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[185] See section 3.6.2.

opposite here and claim that this absence of autonomy in itself would be contrary to female empowerment.[186]

This chapter has seen that the foundation of the Swedish approach is largely based on idealistic goals based on radical feminist notions of prostitution and in some cases sexual activity in general being exploitative in nature for women. It is this idealism which also underpins the Swedish theoretical conflation of prostitution and THB for the purpose of sexual exploitation. Accordingly, the Swedish approach argues that prostitution and THB for the purpose of sexual exploitation cannot be separated as they both involve CSPs being exploited for commercial sex against either their perceived or actual will.

It can also be argued that the idealistic underpinning of the Swedish approach has contributed to a number of other consequences related to the regulation of prostitution in Sweden, such as the extraterritorial scope of offences, the national and international evaluation and marketing of the regulatory approach as well as the rise in support for the approach within the Swedish population after it was introduced. The extraterritorial scope of the offense of sex purchasing can be based on the idealistic understanding of prostitution being a social harm. As the concept of social harm in itself is normative and as such based heavily on the Swedish understanding of morality, it would not suffice to deal with the issue merely within the national boundaries of the Swedish jurisdiction. Instead, the ideal of prostitution being a social harm, means that it is a social evil which needs to be fought at all costs, which explains why Sweden seeks to legally deter its nationals or residents from causing this kind of harm, even when outside of Sweden.

In contrast to the case of Germany in the last chapter, Sweden’s evaluation of the laws portrayed the regulatory approach as a significant success, despite similar lacks of evidence. Again, this can be argued to fit the idealistic views of prostitution, as the priority appears to be to fight the social harm on society and beyond. The same can be said about the Swedish approach to marketing its regulatory model. Sweden has focussed a lot of efforts on the international marketing of its regulatory approach as a

[186] See section 3.6.2.

successful tool to combat prostitution. In the process, Sweden strongly emphasises its philosophical stance related to prostitution. However, it also needs to be highlighted, that the model that is marketed by Sweden, merely focusses on their sex purchasing laws and does not take their structural elements of their legal system into consideration, or the other laws that are linked to the sex purchasing laws.

It can further be argued that the media attention given to the Swedish regulatory approach following its introduction, alongside its strong idealistic underpinning of prostitution being a social harm that the sex purchasing law fights by criminalising the perpetrators while protecting the victims, may also have contributed to the rise in support for the law by the Swedish population following its introduction. This not only supports the ideas of Scandinavian realism, which suggests that laws can affect opinions and behaviours in society,[187] but also shows the attractiveness of the idealistic tone portrayed by the Swedish approach to prostitution regulation.

Finally, it has become apparent, that although the ideological message is one of women's empowerment and support for gender equality, there is reason to believe that this ideological stance of prostitution constituting a social harm is more superficial and targets the idea of harm in society rather than the actual harm caused to individual CSPs in practice. In this sense, as previously mentioned, the views of CSPs were consciously excluded from the consultation processes leading to the introduction of the Swedish sex purchasing laws. Moreover, the previously mentioned issue of CSPs autonomy being disregarded comes to mind. However, although this denial of autonomy forms the basis of the theoretical understanding and justification of the sex purchasing law, in practice it appears that voluntariness still needs to be apparent in order for the law to be applied in practice, thereby resulting in a contradiction of the implementation of the Swedish idealistic views on prostitution in practice.

Another contradiction can be found in relation to the theoretical removal of CSPs from criminalisation. In this sense, although the sex purchase law itself does not seek to criminalise CSPs for selling sex, this does not mean that CSPs are protected from

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[187] See section 3.7.

criminalisation. As this chapter has shown, CSPs are still vulnerable to criminalisation when selling sex due to the links of commercial sex with other areas of law, such as business and taxation laws, due to the understood immorality of the practices. Moreover, other areas of criminal laws related to prostitution, such as the prohibition of being responsible for premises in which prostitution is carried out can have significant impacts on the personal lives of CSPs and add to their vulnerability.

Finally, it has been seen that CSUs and CSPus appear to mostly receive relatively mild sanctions if their cases make it in front of a judge in court, which affects the deterrence capability of the sex purchase law in practice. In particular, when viewed from the perspective of Scandinavian realism, which claims that laws are not what is written in the legal texts but rather how these legal texts are applied in practice, this fact challenges the effectiveness of the Swedish regulatory approach to prostitution and its classification more generally.

Nevertheless, for the purpose of this investigation it needs to be summarised that as a perceived social harm, Sweden holds on to the idea that prostitution is immoral and regulates this within criminal law. Moreover, although Sweden does look beyond its national boundaries in respect to addressing prostitution, this merely takes place from the Swedish viewpoint on prostitution, which seeks to change other national systems, rather than reviewing the impact of other national legal approaches on prostitution in Sweden.

Chapter 7

7. Prostitution as a public nuisance: The case of the United Kingdom

The previous two chapters demonstrated practical examples of implementations of a regulationist approach wherein prostitution has been understood to constitute an economic activity and an abolitionist approach, whereby prostitution has been understood as a social harm. It has been seen how one national system has been influenced by the EU's stance on prostitution, while another system has been strongly influenced by radical feminist ideologies. Keeping in mind that the focus on this examination is to review the interrelationships of regulatory approaches under the EU's legal supranational umbrella, it is important to examine representatives of all three regulatory approaches to prostitution. Thus, the following chapter will now showcase a current practical example of a jurisdiction which has sought to regulate prostitution on the basis of the understanding that prostitution constitutes a public nuisance, namely, the current legal situation in England and Wales as well as Scotland. Although Northern Ireland has recently openly followed the Swedish model, it has been decided to keep this jurisdiction within this chapter for two key reasons: Firstly, due to the shared legal history with the rest of the UK jurisdictions; and secondly, due to the fact that some national legislation discussed within this chapter will apply to all three jurisdictions.

7.1 Classifying the UK's regulatory approaches: Prohibitionism and abolitionism

The UK is formed of several jurisdictions. In this sense the three main jurisdiction, as explained in chapter 2 are England and Wales, Scotland and Northern Ireland. Finding one's way around the multitude of approaches within the UK's diverse legal environment seems complex when trying to untangle the grasp of various laws within the various jurisdictions which form the UK. In this sense, the policies concerning prostitution differ by region both *de jure* as well as *de facto*. Thus, there is no legal

consistency in relation to the legal approaches taken to regulate prostitution across the UK.[1] The reason for this is that prostitution policy and any legislation on it are considered devolved subject matters, whereby it is open to the individual jurisdictions of Northern Ireland and Scotland to legislate on their own accord for their separate jurisdictions.[2] What further complicates matters of undertaking research into these jurisdictions, is the fact that much of the available literature refers incorrectly to the UK as a whole, when often the laws drawn upon merely apply in England and Wales.[3] In line with the objectives of this research project, the focus in this chapter will be on the three main UK jurisdictions, namely, England and Wales, Scotland and Northern Ireland. As it currently stands, there is a system involving partial criminalisation in England and Wales, and Scotland which involve activities related to the sale of sex acts/services to be considered criminal offences rather than the acts/services themselves.[4] In contrast, Northern Ireland has introduced an approach under which the purchase of sex constitutes a criminal offence, while the sale of these kinds of services is not in itself criminal in most cases.[5]

Looking back at chapter 4, one is reminded that within prohibitionist approaches, criminal laws are mostly utilised within the regulation of prostitution. This is based on the prevailing rationale that society constitutes the victim of prostitution and thus aims at the protection of public order, society, and public morals as its main objective. Moreover, the key ideas behind the approach to achieving this objective are that criminal law and

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[1] As will be explained in more detail throughout this chapter.
[2] Russell Deacon, *Devolution in the United Kingdom* (Edinburgh University Press 2012) 81; Scotland Act 1998, c 46; Northern Ireland Act 1998, c 47.
[3] See for example: Gail Deady, 'The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry' (2011) 17 Washington and Lee Journal of Civil Rights and Social Justice <http://law2.wlu.edu/deptimages/journal%20of%20civil%20rights%20and%20social%20justice/Deady.pdf> accessed 22 December 2019; Giulia Federica Zampini, 'Morality Play: A Comparative Study of the Use of Evidence in Drug and Prostitution Policy in Australia and the UK' (Doctor of Philosophy (PhD), University of Kent 2016) 137; Helen J Self, The Fallen Daughters of Eve (Frank Cass 2004) 251.
[4] See section 7.2.
[5] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

criminal sanctions have “deterrence, incapacitation, rehabilitation, retribution, and restitution”[6] as their effect and as such are aimed at achieving preventative justice.[7]

Although regulated separately, the approaches taken in England and Wales and Scotland are similar. Both approaches see the purchase as well as the sale of sex acts as legal[8] to a certain extent, yet, as numerous “associated activities” are considered criminal, such as soliciting, brothel-keeping or activities linked to exploitation or activities which may be understood to be public nuisances,[9] there are only limited hypothetical scenarios in which the sale and purchase of sex acts will not also involve some form of criminal offence in practice. Thus, the categorisation would fall within the realm of prohibitionism according to the understanding of this approach.

As indicated above, Northern Ireland has adopted an approach according to which the sale of sex acts is legal, however, purchasing said acts is considered a criminal offence.[10] Considering that Northern Ireland has officially declared to have adopted the “Swedish” or “Nordic Model” to tackling prostitution,[11] it can be assumed at this point that they now follow an abolitionist approach according to the terminology used in this thesis.

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[6] Lisa M Storm, *Criminal Law by Storm* (Lulu Publishing Services 2015) 17.
[7] Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013) 12.
[8] Despite some enforceability issues, which will be discussed in section 7.2.
[9] House of Commons Home Affairs Committee, "Prostitution: Third Report of Session 2016–17," parliament.uk, July 1, 2016; ScotPep, "The Law," scot-pep.org (accessed Mar. 9, 2018)
[10] Article 15 of the *Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015*, chapter 2.
[11] Graham Ellison, 'Criminalizing the Payment for Sex in Northern Ireland: Sketching the Contours of a Moral Panic: Table 1' (2015) 57 British Journal of Criminology, 1; 'House of Commons - Prostitution - Home Affairs Committee' (*Publications.parliament.uk*, 2020) <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/2607.htm> accessed 22 June 2020.

7.1.1 The progressive development of the laws in Scotland, and England and Wales

As mentioned in the previous section, prostitution is an area of law which falls under the individual powers of the separate jurisdictions within the United Kingdom of Great Britain and Northern Ireland.[12] Nevertheless, within the legal setup of the United Kingdom, England and Wales operate under a unitary legal system with only limited devolved areas over which the National Assembly of Wales has jurisdiction, which however, do not relate to the area of prostitution, and are, thus, irrelevant for the purpose of this project.[13] Within this unitary legal system, case law and statutes apply equally in both countries.[14] In the areas of law reform this also applies in the same way, as the UK government passes laws for both England and Wales. It also has the competence to enact statutes, which specifically apply to Northern Ireland and Scotland, however, these do not currently relate to prostitution for the purpose of this chapter.[15] However, these two jurisdictions also have a limited amount of self-government due to their devolved governments, for instance covering areas such as the legal system, including both civil as well as criminal law.[16] As mentioned above, the approaches taken

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[12] Hendrik Wagenaar, Helga Amesberger and Altink Sietske, *Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade* (Policy Press 2017) 87.

[13] Carlo Guarnieri and Patrizia Pederzoli, *The Judicial System: The Administration and Politics of Justice* (Edward Elgar Publishing 2020) 100; 'Law Wales - Devolved Areas' (*Law.gov.wales*, 2020) <https://law.gov.wales/constitution-government/how-welsh-laws-made/devolved-areas/?lang=en#/constitution-government/how-welsh-laws-made/devolved-areas/?tab=overview&lang=en> accessed 22 June 2020; 'Criminal Justice and Devolution' (*The Institute for Government*, 2020) <https://www.instituteforgovernment.org.uk/explainers/criminal-justice-devolution> accessed 22 June 2020.

[14]Thomas Glyn Watkin and Daniel Greenberg, *Legislating for Wales* (University of Wales Press 2018) Chapter 4, 66, 120; 'Law Wales - Understanding Legislation' (*Law.gov.wales*, 2020) <https://law.gov.wales/constitution-government/how-welsh-laws-made/understanding-legislation/?lang=en#/constitution-government/how-welsh-laws-made/understanding-legislation/?tab=overview&lang=en> accessed 22 June 2020; 'Law Wales - Case Law on Legislative Competence' (*Law.gov.wales*, 2020) <https://law.gov.wales/constitution-government/how-welsh-laws-made/case-law/?lang=en#/constitution-government/how-welsh-laws-made/case-law/?tab=overview&lang=en> accessed 22 June 2020.

[15] 'Westminster and Whitehall' (*The Institute for Government*, 2020) <https://www.instituteforgovernment.org.uk/publication/devolution-at-20/westminster-and-whitehall> accessed 22 June 2020.

[16] Gary Slapper and David Kelly, *The English Legal System* (Routledge 2015) 1; Helen Fenwick and Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (2nd edn, Cavendish Publishing Limited 2003) 29.

in Scotland and England and Wales are similar and, thus, also have similar consequences. It is for this reason, that they will be discussed together in this section.

7.1.2 Legal history of prostitution in the laws of England and Wales and Scotland prior to the 1950s

In contrast to the previous two jurisdictions reviewed, Germany and Sweden, the UK, apart from Northern Ireland, has not undergone sudden changes in the laws on prostitution which involved government reviews, select committees and proposed bills quite in the same fashion, which would have allowed for a clear understanding of the underpinning rationales of the laws in place. Thus, in light of the slow progression of the laws on prostitution in Scotland and England and Wales[17] it is necessary to provide a historic overview of the progression of the laws in this area.

It appears that selling sex acts in itself was not criminalised, but over the past centuries, as it still is today, the aim of criminalisation was targeted at certain related activities. In this sense, in 1751 the Disorderly Houses Act[18] first criminalised the running of so-called common bawdy houses or brothels, betting houses, gaming houses, and disorderly places of entertainment. The Act specifically declared these acts to constitute misdemeanours, which were punishable by a fine or imprisonment.[19] The first time in British history that the term “common prostitute” was used was almost a century later, in the Vagrancy Act of 1824, which applied solely in England.[20] At the time this was enacted, the term “common prostitute” was, however, not defined.[21] Subsection 3 stated that “any common prostitute behaving in a riotous or indecent manner in a public place or thoroughfare” was committing an offence and, thus, punishable by fine or

[17] Excluding Northern Ireland.
[18] 1751 c.36, Act (Old GB Parliament). UK Statute Law Database.
[19] A Lopes and T Owen, 'Recommendations for Political Policy on Prostitution' [2000] IUSW, Appendix 8.
[20] Vagrancy Act of 1824 c. 83; Julia Laite, 'Paying the Price Again: Prostitution Policy in Historical Perspective' (*History & Policy*, 2006) <http://www.historyandpolicy.org/policy-papers/papers/paying-the-price-again-prostitution-policy-in-historical-perspective> accessed 26 April 2020.
[21] William Acton, *Prostitution, Considered in its Moral, Social, & Sanitary Aspects, in London and Other Large Cities* (J Churchill 1857) 2.

imprisonment. Although it is not explained in more detail what kind of conduct was being referred to in this section, it does appear to indicate that the main issue of CSPs originally was the effect they had in public, which in turn suggests that the main victim sought to be protected was the general public, public order and public morality. This demonstrates that the idea of prostitution constituting a public nuisance has been an underlying understanding throughout, and is not something that has developed together with the laws. This criminalisation trend was continued in the Metropolitan Police Act,[22] which was enacted in 1839, and stated that "any common prostitute loitering or soliciting for the purposes of prostitution to the annoyance of inhabitants or passers-by" could be subject to an arrest and in the case that a conviction followed, the offender would be fined.[23] In Scotland the term "common prostitute" was first found in the Burgh Police (Scotland) Act 1982[24] which allowed for women to be prosecuted within the police courts for "being a common prostitute or streetwalker."[25]

In order to prevent the spread of venereal diseases, the late 19th century saw a string of Contagious Diseases Acts passed in England and Wales, that made it necessary for "common prostitutes" to register and to undergo an internal medical examination every two weeks.[26] Although the Contagious Disease Acts were not applicable in Scotland, other approaches evolved, called the "Glasgow System." This system involved a unique collaboration between the police and the medical authorities.[27] The Glasgow Police Act or "Brothels Act" was enacted in 1866 and gave the police and the courts increased authority to raid and vanquish brothels, brothel-managers and owners of low houses.[28] The expression used for the police was "street walking and sanitary duties",[29] which

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[22] Metropolitan Police Act 1839, 2 & 3 Vict. c .47.
[23] Metropolitan Police Act 1839, 2 & 3 Vict. c .47, s. 54.
[24] Burgh Police (Scotland) Act 1982, c. 45.
[25] Louise Jackson, *Woman Police: Gender, Welfare and Surveillance in the Twentieth Century* (Manchester University Press, Palgrave 2006) 173.
[26] Acts of 1864, 1866 and 1869; Walkowitz, Prostitution and Victorian Society (New York: Cambridge University Press, 1980) cited in Balos and Fellows Law and Violence against Women (Durham, NC: Carolina Academic Press, 1994) 509.
[27] Claire Lightowler, Susie Cameron and Brian Rogers, 'History of Scottish Criminal Justice' (*Scottishjusticematters.com*, 2014) <http://scottishjusticematters.com/wp-content/uploads/Pages-from-SJM_2_3_Nov2014-TheGlasgowSystem.pdf> accessed 25 April 2020.
[28] Ibid.
[29] Ibid.

indicates two key things. Firstly, one can see the emphasis on street prostitution, which suggests the objective being the protection of public order. Secondly, once again, the understanding that prostitution involves unsanitary practices becomes apparent.

In 1885, the UK government passed the Criminal Law Amendment Act, which applied throughout the UK.[30] The long title of this act was "An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes."[31] Interestingly, the long title suggests the aim of the act is to protect women. It also reiterates that prostitution is a practice that involves women who are the main victims. Within the Act, in section 13, keepers or managers of buildings that were used for the purposes of prostitution, such as brothels, were made liable and could be subjected to sanctions ranging from a fine up to three months' imprisonment. An issue here was the absence of a definition for the term "brothel." Thus, in *Singleton v Ellison*,[32] the Court needed to determine, whether a single person who was working on her own from a property, could still be considered to be running a brothel. The court held that "brothel" was to refer only to premises, which were used by more than one person (woman) for the purposes of prostitution. This ruling, however, had other consequences which still exist today.[33] According to this definition, any CSP who was living together with another CSP would automatically be committing the offense of keeping a brothel.[34] In 1889 the offences attached to prostitution were extended to include living off the earnings of a prostitute, which was added with the amendment to the Vagrancy Act 1898.[35]

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[30] The Criminal Law Amendment Act 1885, 48 & 49 Vict. c 69.
[31] Ibid.
[32] *Singleton v Ellison* [1895] 1 QB 607.
[33] See section 7.2.2.
[34] Julia Laite, *Common Prostitutes and Ordinary Citizens: Commercial Sex in London, 1885-1960* (Palgrave Macmillan, 2011).
[35] 1898 c. 39.

7.1.3 Legal history of prostitution in the laws of England and Wales and Scotland after the 1950s

In 1956 the Sexual Offences Act was passed, which repealed the 1885 Criminal Law Amendment Act in England and Wales.[36] The Act was repealed for Scotland by section 21(2) and schedule 2 of the Sexual Offences (Scotland) Act 1976.[37]

Around the same time as the 1956 Sexual Offences Act was passed, a Departmental Committee on Homosexual Offences and Prostitution was set up, known as the "Wolfenden Committee," after Lord Wolfenden, the Chairman of the Committee.[38] The report by this committee amounted to one of the most significant discussions on the legal approach to prostitution and public morality which ultimately resulted in a number of changes to the laws. The committee was tasked with reassessing the legal approaches to prostitution and homosexuality. The results were published the following year in 1957 in the Wolfenden Report. Its recommendations resulted in a large-scale public debate, which also involved the well-known debate within a series of publications by Devlin, who argued against the philosophical foundation of the report as well as Hart, who supported the report.[39]

In this sense, in Devlin's opinion the Wolfenden report was "recognized to be an excellent study of two very difficult legal and social problems."[40] He criticised the ideas supported by Hart, which were based on the views of Mill's on liberty,[41] according to which the law should not deal with matters of "private immorality", explaining that the Wolfenden Report needed "special circumstances to be shown to justify the intervention of the law [which he thought was] wrong in principle."[42] The report stipulated that the state did not have the responsibility to police private morality. Accordingly, prostitution

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[36] The Sexual Offences Act 1956 c. 69.
[37] The Sexual Offences (Scotland) Act 1976, c. 67.
[38] Wolfenden Committee (1957) Departmental Committee on Homosexual Offences and Prostitution, 1954-57. *London: Home Office Papers, PRO HO*, *345*, 2-16.
[39] Laurie Shrage and Robert Scott Stewart, Philosophizing About Sex (Broadview Press 2015) 92-93.
[40] Patrick Devlin, The Enforcement of Morals (Oxford University Press 1965).
[41] See sections 3.5.1. and 3.6.2.
[42] Devlin (n 40) 11.

per se was not able to be condemned as immoral by the state.[43] The Report further noted that the solicitation laws in place at that time relied upon a double standard between men and women.[44] It also explained that the term “common prostitute” stigmatised CSPs and was unjust.[45] Despite the reports opposition to the principled solicitation laws, the Committee came to the conclusion that CSPs (the women) were nonetheless guilty of committing some form of offence, as they were the people who were most visible in public, and thus, the most nuisance-generating face of commercial sex. Hence, it concluded further that a removal of the solicitation laws would ultimately place innocent women at risk of being arrested.[46]

In relation to the parts on the report on female prostitution, there are generally three main forms of interpretation to be found within the literature, which are somewhat linked.[47] The first approach is mostly narrative and seeks to place the Committee as well as any subsequent legislation within the wider context of the way sexual mores change and moral panics come about.[48] The second approach, which has often been followed by sociologists or social historians, focusses on the coercive and regulatory implications of the report as well as the Street Offences Act 1959, often while applying a Foucauldian analysis framework.[49] Mort, for instance, explains that one of the most noteworthy elements was the way it codified a “new geography of sexuality”[50] that increased the visibility of the “troublesome and dangerous sexualities of prostitution”[51] and founded a new “topography of regulation.”[52] Weeks takes the stance that the Wolfenden Report has allowed for a restatement of police authority within the public

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[43] Ibid.
[44] Wolfenden Committee 9n 38) 2-16.
[45] Ibid. 1, part 3.
[46] Ibid.
[47] Ibid.
[48] See for example: Lesley A Hall, *Sex, Gender, and Social Change in Britain Since 1880* (Palgrave Macmillan 2013) Chapter 9; Cate Haste, *Rules of Desire* (Vintage 2002) chapter 7; Paul Ferris, *Sex and the British: A Twentieth-Century History* (Michael Joseph 1993) chapter 8.
[49] Roger Davidson and Gayle Davis, ''A Festering Sore on the Body of Society': The Wolfenden Committee and Female Prostitution in Mid-Twentieth-Century Scotland' (2004) 24 Journal of Scottish Historical Studies, 80.
[50] Frank Mort, 'Mapping Sexual London: The Wolfenden Committee on Homosexual Offences and Prostitution 1954–57' [1999] New Formationsm 92-113, 94.
[51] Ibid.
[52] Ibid.

realm in order to protect public order and general decency by redefining the connection between private morality and the law.[53] The third and potentially most prominent approach within the literature is taken up by feminist scholars. In this sense, Smart, for instance, explains that the essence of the Wolfenden Committee's deliberations on the Street Offences Act and prostitution more generally was the control of female sexuality.[54] Accordingly, these sources formed a reaffirmation of stereotypical family life and mother roles which cemented "women's position within the patriarchal order" and sought to transfer CSPs into "a new folk devil in spite of an apparent liberation of female sexuality in discourses on sex."[55]

As mentioned previously, in Scotland, in the 1950s, solicitation by women was mainly prosecuted in the police courts following the Burgh Police (Scotland) Act of 1892. Generally, the charge was "being a common prostitute or streetwalker"[56] with the accused having "loiter[ed] about or importune[d] for the purposes of prostitution."[57] Furthermore, several byelaws concerning for instance pleasure grounds, public parks, seashores or other public places contained provisions which prohibited soliciting.[58] Moreover, the Licensing Acts sought to decrease the number of CSPs working in hotels or public houses.[59] The penalties varied across the UK, and mostly involved substantial fines, which, if the CSPs were unable to pay, meant imprisonment.[60] In Scotland, imprisonment was utilised as a form of penalty more frequently than in England and Wales.[61] In the early 1950s, Scotland saw up to approximately 20% of the proven

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[53] Jeffrey Weeks, *Sex, Politics and Society* (Longman 1994) 243.
[54] Carol Smart, 'Law and the Control of Women's Sexuality: The Case of the 1950s', *Controlling Women: The Normal and the Deviant* (Croom Helm 1984) 40 - 60.
[55] Ibid. 48.
[56] National Archives of Scotland (hereafter NAS), HH 60/268,memo. submitted by Scottish Home Department, 'Prostitution and Allied Offences',Oct.1954; Roger Davidson and Gayle Davis, The Sexual State (Edinburgh University Press 2012) 17.
[57] National Archives of Scotland (hereafter NAS), HH 60/268, memo. submitted by Scottish Home Department, 'Prostitution and Allied Offences', Oct. 1954, cited in Davidson and Davis (n 49).
[58] Ibid.
[59] Davidson and Davis (n 49) 82.
[60] The National Archives, Public Record Office, Kew (hereafter PRO), Proceedings of the Wolfenden Committee (hereafter PWC), HO 345/16, evidence of Assistant Chief Constable (here-after ACC) for Edinburgh, 10 Apr. 1956, cited in Davidson and Davis (n 49) 82.
[61] Ibid.

charges involving women being imprisoned.[62] A reason for this difference between the two jurisdictions could have been the legal level of disturbance required by the offences. In this sense, England and Wales required soliciting to be “to the annoyance of the inhabitants or passengers” for it to become an offence.[63] As this was not the case in Scots Law, the process of prosecuting CSPs was easier in Scotland.[64]

Finally, in its finished report to Parliament in September 1957, the Wolfenden Committee made a number of recommendations which involved both punitive as well as reformatory procedures intended to aid the prosecuting of street offences, enhance penalties for repeated solicitation, as well as increase effectiveness of the laws prohibiting brothel-keeping and the living off immoral earnings.[65] Following the Scottish approach, the Committee recommended that the requirement to establish “annoyance” for the prosecution of soliciting offences should be removed.[66] Furthermore, it was recommended to increase the maximum penalties for street offences, in particular with increasingly higher penalties available for repeated offences[67] as well as stricter powers for the courts and the policing authorities.[68] Some of these powers included the ability of the courts to rescind tenancy rights of CSPs working in habitual prostitution and to indict landlords charging high rents in order to live off immoral earnings.[69] Other powers involved recommending that CSPs who had been cautioned for either the first or second time by the courts to be directed to moral welfare workers, and, if necessary to keep these CSPs imprisoned for up to three weeks for the purpose of obtaining a social or medical report.[70] The report clearly favoured the collective rights of the general public to the enjoyment of their neighbourhoods without the immoral influences of street prostitution. Supporting arguments in this regard included also the perceived need to

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[62] NAS, HH 60/268, memo. submitted by the Scottish Home Department, ‘Prostitution and AlliedOffences’, Oct. 1954, cited in Davidson and Davis (n 49) 82.
[63] Report of the Street Offences Committee, 1928–9 (Cmd. 3231), IX, 13, 16, 24–5.
[64] Ibid.
[65] Wolfenden Committee (n 38) 82-100.
[66] Ibid c 386.
[67] Ibid 123-124.
[68] Ibid 116-117.
[69] Ibid.
[70] Davidson and Davis (n 49) 92.

protect the rights of women not to be harassed.[71] In this sense, the Committee was faced with two potential directions. On the one hand, they could have emphasised and condemned the double standard between the sexes, or the injustice within the existing solicitation laws, or on the other hand, they could have strengthened the solicitation laws in order to protect the rights of the general public to be free of the visibility of prostitution in public spaces. As mentioned above, the Committee chose the latter approach and proposed the removal of the proof of annoyance requirement from the new statute. The rationale behind this recommendation was to aid the police in clearing the streets from CSPs, which in turn would protect the collective rights of the public.[72] Another recommendation was to merge and standardise the disparate solicitation laws as well as a number of by-laws into a single Act.[73]

A number of Scottish Members of Parliament (MPs) voiced opposition to the legislative proposals put forward by the Wolfenden Report. Most of the concerns aimed at maintaining public order and morality. For instance, Lord Kilmuir explained that CSPs visible on the streets was "offensive to the ordinary citizen's sense of decency."[74] In his view CSPs set bad examples to girls and unnecessary temptations for CPUs.[75] However, others, such as Jo Grimond and Lord Balfour of Burleigh objected the Street Offences Bill due to its moral double standard of treating CSPs as criminals while CPUs and CSPus were less likely to be penalised.[76] The predominant criticism found amongst Scottish MPs concerned the effectiveness of the Scottish legal approach at the time and

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[71] Wolfenden Committee (n 38) 82-100; Caroline Derry, 'The Sexual Offences Act 1967. Part 2: Wolfenden's Silent Women | The National Archives' (*Archives Media Player*, 2017) <https://media.nationalarchives.gov.uk/index.php/sexual-offences-act-wolfendens-silent-women/> accessed 22 June 2020; Julia Laite, *Common Prostitutes and Ordinary Citizens* (Palgrave Macmillan 2014) 198.
[72] Wolfenden Committee (n 38) c.386.
[73] Wolfenden Committee (n 38) 2-16.
[74] Hansard (HL), vol. 206, cols 769–79, 4 Dec. 1957.
[75] Ibid.
[76] Hansard (HC), vol. 598, cols 1310–11, 29 Jan. 1959; Hansard (HL), vol. 216, cols 96–101, 5 May 1959; vol. 217, cols 1182–4, 14 July 1959.

that there was no need for new legislation within the jurisdiction.[77] Thus the Secretary of the Scottish Home Department recommended that:

> As regards prostitution, the Committee made few criticisms of the existing Scottish law, and their main recommendations were designed to bring the English law closer to the Scottish, which does not require annoyance to be established before an offence is committed, provides higher penalties (including imprisonment) for repeated offences, and automatically terminates any lease of premises used as a brothel or for the purposes of habitual prostitution.[78]

As a result of the Scottish criticism, the final Street Offences Act of 1959 only applied in England and Wales.[79]

Hereafter, the Government repealed the former solicitation laws, which were replaced with the Street Offences Act in 1959.[80] According to this Act, it was an offence for "a common prostitute to loiter or solicit for the purposes of prostitution."[81]

This new legislation resulted in a number of unplanned consequences. In this sense, in the years following these changes to the laws addressing outdoor prostitution indirectly resulted in an increase in the area of indoor prostitution, like massage parlours or escort services.[82] Despite this unplanned consequence, one could argue, however, that the main intention was to remove prostitution from the public view, which this nonetheless would have done.

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[77] See for example: Lord Lothian, Hansard (HL), vol. 206, cols 780–7, 4 Dec. 1957; Jean Mann, Labour MP, Coatbridge, Hansard (HC), vol. 596, col. 402, 26 Nov. 1958; Lord Silkin, Hansard (HL), vol. 216, cols 78–9, 5 May 1959.

[78] NAS, HH 60/265, minute by Sir William Murrie, Secretary, Scottish Home Department to Secretary of State for Scotland, 30 Oct. 1957.

[79] Davidson and Davis (n 49) 95.

[80] S Kingston, Prostitution in the Community: Attitudes, Action and Resistance (Oxon: Routledge, 2014) 35; The Street Offences Act 1959 (7 & 8 Eliz 2 c 57).

[81] The Street Offences Act 1959 (7 & 8 Eliz 2 c 57), section 1.

[82] The Crown Prosecution Service, 'Prostitution and Exploitation of Prostitution | The Crown Prosecution Service' (*Cps.gov.uk*, 2019) <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution> accessed 23 June 2020.

In 1985 the Sexual Offences Act was enacted in England and Wales,[83] which introduced kerb-crawling as the offence of persistent soliciting of a woman by a man for the purposes of prostitution, following a recorded increase in this area.[84]

Following a 2000 report "Setting Boundaries"[85] which looked into issues of sexual exploitation of women and children, a number of recommendations relating the issue of exploitation in a broader sense were made. This included putting forward a number of offences, including receiving money or other rewards from CSPs, the management or control of prostitution activities of others for money or other rewards, the recruitment of people into prostitution as well as the trafficking of people for the purpose of exploitation in prostitution for a form of reward.[86] In particular, this report recommended a further review of the laws on prostitution,[87] which led to the government's White Paper: "Protecting the Public: Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences" in 2002.[88] The title in itself, again, highlights the focus of England and Wales and Scotland on the protection of the public rather than individuals involved in prostitution, which is in line with the underpinning objectives of prohibitionism. The White Paper stated that a wide range of the current laws within the Sexual Offences Act of 1956 were archaic, incoherent, discriminatory and failed to reflect changes within society.[89] It also laid out the intention of the government to protect the public from sexual offences.[90] The recommendations within this report were

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[83] The Sexual Offences Act of 1985, 1985 c. 44:
1. Kerb-crawling (1) A man commits an offence if he solicits a woman (or different women) for the purpose of
prostitution— (a) from a motor vehicle while it is in a street or public place; or
(b) in a street or public place while in the immediate vicinity of a motor vehicle that he has just got out of or off, persistently or, in such manner or in such circumstances as to be likely to cause annoyance to the woman (or any of the women) solicited, or nuisance to other persons in the neighbourhood. (2) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

[84] S Edwards, The legal regulation of prostitution. *Rethinking prostitution: Purchasing sex in the 1990s (*London, 1997) 57; The Sexual Offences Act of 1985, 1985 c. 44.

[85] Home Office, 'Setting the Boundaries - Reforming the Law on Sex Offences' (Home Office Communication Directorate 2000).

[86] Ibid, Recommendations 49, 50 and 52.

[87] Ibid, Recommendation 53.

[88] Home Office, 'Protecting the Public' (Home Office Communication Directorate 2002).

[89] Ibid, 5.

[90] Home Office, 'Protecting the Public' (Home Office Communication Directorate 2002) 7, 11, 27.

enacted in 2004 in the Sexual Offences Act 2003.[91] According to this Act, it is an offence to cause or incite prostitution or control any of another person's activities relating to their prostitution, for the purpose of receiving a gain.[92]

Interestingly, in contrast to the other jurisdictions examined in this thesis, this is the only act that provides a definition for the term "prostitute". Accordingly, section 51(2) of the Act states that a prostitute is "a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to A or a third person." "Payment" in this sense refers to any "any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount."[93]

The Act also amends section 33 of the Sexual Offences Act of 1956 by introducing section 33A.[94] Here the keeping or managing a brothel, to which people resort to prostitution has been included within the offence. It is important to point out at this point that the Sexual Offences Act 2003, despite being an important renovation and review of the Sexual Offences Act of 1956, has not replaced or repealed it entirely.

7.2 The current legal situations in Scotland, England and Wales

In England and Wales as well as in Scotland, selling and purchasing sex acts by consenting adults is not in fact criminal.[95] However, a number of related activities such as kerb crawling, soliciting, brothel-keeping and other forms of exploitation, remain criminal. As has become clear in the previous section, these laws have been established and implemented over several decades, by various different laws. Some

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[91] 2003 chap 42.
[92] Sections 52 and 53 of the Act.
[93] Section 54(2) of the Act.
[94] S. 33A inserted (1.5.2004) by Sexual Offences Act 2003 (c. 42), ss. 55(2), 141; S.I. 2004/874, art. 2.
[95] House of Commons, Home Affairs Committee, 'Prostitution, Third Report of Session 2016–17 Report, Together with Formal Minutes Relating to the Report' (Order of the House 2016) 4.

which apply only to individual jurisdictions and others that apply across both England and Wales and Scotland.[96]

7.2.1 The underpinning reasons for the prohibitionist approaches in Scotland, and in England and Wales

The Home Office stated that the Government's legislative aim is to prevent people leading or forcing others into prostitution and to target those who make a living from the earnings of CSPs.[97] The legal approach is therefore intended "to tackle those who recruit others into prostitution for their own gain or someone else's by charging offences of causing, inciting or controlling prostitution for gain, or trafficking for sexual exploitation."[98] The Crown Prosecution Service (CPS) guidance on prostitution provides an overview of the relevant English and Welsh legislation, and contains practical and legal guidance for prosecutors dealing with prostitution-related offences.[99] Nevertheless, there are numerous indications to suggest that the main focus of the approaches taken in England and Wales, as well as in Scotland are in fact aimed at the protection of the general public and to maintain public order and morality rather than the protection of vulnerable individuals from exploitation.[100]

7.2.2 The prohibitionist approach in law and its consequences

As mentioned previously, the English and Welsh laws on prostitution largely rely on legislation which was enacted more than half a century ago. Accordingly, prostitution is not in itself criminal in England and Wales. Nevertheless, the majority of activities connected to prostitution are criminal. Accordingly, the Sexual Offences Act 1956 together with the Street Offences Act 1959 criminalise loitering or soliciting by CSPs.

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[96] See section 7.2.
[97] The Crown Prosecution Service (n 82).
[98] Ibid.
[99] Ibid.
[100] Ibid.

The Sexual Offences Act 1985 criminalises kerb-crawling by clients. Furthermore, it is a criminal offence to pimp, procure, operate a brothel or live off the proceeds of a CSP.[101]

As seen in the previous chapter, historically, the laws on prostitution in Scotland have been similar, if not the same as the legal situation in England and Wales. However, as also mentioned in the previous section, Scotland has its own legal system, both civil and criminal, and pursues its own policies on prostitution. Despite now also having its own legislature,[102] it has continued to adopt the same approach as England and Wales in the sense that prostitution *per se* is not criminal, however, certain activities, which are associated with prostitution constitute criminal offences, such as kerb-crawling, brothel keeping, controlling prostitution for gain and soliciting.[103] Categorising these offences relating to prostitution is complex, especially in relation to the purpose of these laws. In this sense, some believe that the purpose of these laws is to eliminate prostitution, as it is perceived as a societal evil, similarly to the underpinning stance in Sweden.[104] Others think that the purpose of these laws is to protect the public from the public manifestation of prostitution, such as public solicitation.[105]

The current legislative framework for street prostitution can be found in Civic Government (Scotland) Act 1982. Here, section 46(1) states that it is an offence for

> a prostitute (whether male or female) who for the purposes of prostitution – a) loiters in a public place b) solicits in a public place or in any other place so as to be seen from a public place or c) importunes any person in a public place.

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[101] Ormerod, D., Criminal Law (Oxford: Oxford University Press, 2011) 616 et seq.
[102] Scotland Act 1998, c. 46.
[103] Criminal Law (Consolidation) (Scotland) Act 1995, c. 39, section 11; Prostitution (Public Places) (Scotland) Act 2007, asp. 11.
[104] S H Kadish, Blame and Punishment: Essays in the Criminal Law (New York: Macmillan, 1987) 25.
[105] Laura Graham, 'Governing Sex Work through Crime' (2017) 81 The Journal of Criminal Law, 202-205; Marina Della Giusta, Maria Laura Di Tommaso and Sarah Louise Jewell, 'Men Buying Sex. Differences between Urban and Rural Areas in the UK' (2016) 54 Urban Studies, 1-3, 19; Hazel Croall, Gerry Mooney and Mary Munro, *Criminal Justice in Scotland* (Willan 2010) 176.

Furthermore, under the Prostitution (Public Places) (Scotland) Act 2007, the offences of kerb crawling, soliciting in a public place and loitering are criminal offences.[106]

Although it is criminal to keep a brothel in England and Wales, the act of an adult selling sexual acts as an individual from their personal home is not criminal.[107] However, as soon as minor aspects change in this scenario the activities become criminal. In the event that more than one person offers commercial sex in the same property, regardless if this is taking place at the same time, or if rooms within a specific building are rented to more than one CSP, the properties would be considered brothels and would, thus, be deemed criminal.[108] This could even include a hotel, out of which more than one CSP works, in the event that there is proof that these CSPs work together.[109]

Under the amendments from the Sexual Offences Act 2003, which came into force in 2004, the brothel running provisions do not necessarily target the CSPs, as long as it can be proved that the CSP had no role to play in the management of the brothel.[110] Keeping or managing a brothel is an offence under the Criminal Law (Consolidation) (Scotland) Act 1995. According to section 5 owning or managing a brothel or being involved by, for example, being a tenant, occupier or landlord linked to a property used as a brothel can be guilty of this offence. This comes with similar issues as found in the Swedish and English and Welsh systems, whereby CSPs are more vulnerable as they are unable to live together. The legislation also poses the same risks of criminalisation for dependents. Accordingly, dependents or cohabitants of CSPs who use the home premises for prostitution can be penalised, leaving CSPs and their social network more vulnerable in the areas of security, finance and support.[111] Moreover, section 13 of the Act ensures that the provisions also include male prostitution, which in turn reinforces the idea that prostitution itself is an act understood to apply to women whereby men

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[106] Prostitution (Public Places) (Scotland) Act 2007, asp 11, s.1.
[107]Teela Sanders, Behind the personal ads: the indoor sex markets in Britain. *In* Rosie Campbell and Maggie O'Neill (ed.), *Sex Work Now* (Willan 2006) 92-115.
[108] The Crown Prosecution Service (n 82); Criminal Law (Consolidation) (Scotland) Act 1995, c. 39, s. 11.
[109] Karen Hindle, Laura Barnett and Lyne Casavant, Legal and Legislative Affairs Division 20 November 2003 – *Revised 19 November 2008, available at: http://www.parl.gc.ca/content/lop/researchpublications/prb0329-e.htm.*
[110] The Crown Prosecution Service (n 82).
[111] Also see discussions in chapter 7.

need to be specifically mentioned in order to be included. Similar to the situation in England and Wales, third party acts, such as procuring and living off the avails of prostitution or pimping are rendered illegal under section 7 and section 11 of the Criminal Law (Consolidation) (Scotland) Act 1995. A significant issue relating to gender stereotyping can be seen in both section 11 as well as section 12A(2) of this Act. Here, section 11 specifically refers to male persons who are living off the earnings of female prostitution, thereby manifesting the stereotype of CSPs being female, while men would constitute the people most likely to live off the earnings of prostitution. Moreover, section 12(A) of this Act states that "a homosexual act is an act of engaging in sexual activity by one male person with another male person." The specific mention of sexual acts between two men indicates that there is no intention of including sexual acts between people of other genders, most notably between two female persons, which according to biological understandings of "homosexuality" should be included.[112] This also indicates that legislation in this circumstance takes more of a social understanding of terminology rather than a scientific one. This may be an area in need of future in-depth research, in order to examine how far-reaching the distinction between scientific and social terminologies is within legislation in the UK.

However, although the previously mentioned legislation only addresses men, it has been held that this does not mean that women cannot be liable of committing the same offence. Accordingly, in *Reid v HM Advocate*[113] a female was charged of knowingly living off the earnings of prostitution under the Criminal Law (Consolidation) (Scotland) Act 1995 s.11(1)(a). On appeal, it was argued that this charge could not be applied against a woman. However, the conviction was upheld as it was clear that the provision was to also apply to women.

An issue in the English and Welsh system seems to be a lack of coherence in the area of enforcement. On the one hand, some communities, municipal governments and residents associations together with the police have pursued numerous strategies to reduce prostitution. These range from the introduction of automated prosecution policies

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[112] Richard E Jones and Kristin H Lopez, *Human Reproductive Biology* (Academic Press 2014) 149-151.
[113] *Reid v HM Advocate* [1999] JC 54.

to the naming and shaming of kerb crawlers or targeting the trade by limiting it though practices such as issuing mandatory purchase orders for properties used for the purpose of prostitution.[114] On the other hand, some communities take an approach under which the authorities turn a blind eye to particular forms of off-street prostitution. Others have considered introducing tolerance zones to restrict prostitution to particular areas.[115] This notion appears to support the ideas found in Scandinavian realism,[116] which suggest that the laws are not what is specifically written in legislation, but rather, how laws are enforced in practice. Thinking along this argument, there appears to be areas of the law in England and Wales in which the classification of the approaches to prostitution is not as clear cut as the legislation and case-law would suggest, as the lines can be blurred in practice due to variations in enforcement. However, this again, may be a subject matter for future research, as it would require an in-depth analysis of the variations of enforcement of the laws in several regions across the UK, which would extend beyond the scope of this particular research project. Nevertheless, it is worth noting that these inconsistencies have resulted in calls for reforms of both the actual regulation as well as its enforcement.[117]

Scotland can be considered to take a prohibitionist approach, due to the fact that it equally criminalises the supply as well as the demand of prostitution. In this sense, while most of the legislation targets the supply of prostitution services, the Prostitution (Public Places) (Scotland) Act 2007 specifically addresses the demand side of prostitution.[118]

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[114] J David Hirschel; William O Wakefield; Scott Sasse, Criminal justice in England and the United States (Sudbury, MA: Jones and Bartlett Publishers, 2007) 42-50; Vanessa Munro and Marina Della Giusta, *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Routledge 2016) Chapter 9.

[115] Hirschel, Wakefield, Sasse (n 114) 42-50; Geetanjali Gangoli and Nicole Westmarland, *International Approaches to Prostitution: Law and Policy in Europe and Asia* (Policy Press 2006) 38; David V Canter, Maria Iannou and Donna Youngs, *Safer Sex in the City* (Routledge 2016) 142; Lesley McMillan and Nancy Lombard, *Violence against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence, and Exploitation (Research Highlights in Social Work)* (Jessica Kingsley Publishers 2013) 89-90.

[116] See section 3.7.

[117] Hirschel, Wakefield, Sasse (n 114) 42-50.

[118] Prostitution (Public Places) (Scotland) Act 2007 asp 11, s. 1.

Although the Scottish and the English approaches are very similar, there are some areas in which one can still find crucial differences. In England and Wales, it is an offence to use a CSP for their services when the CSP is under the control of another person for gain.[119] The purchaser of the service is responsible for the verification of this fact prior to entering into any agreement for services. However, Scotland has still failed to introduce such legislation.[120] Yet, these differences touch upon the legislation concerning Trafficking in Human Being (THB) for the purpose of sexual exploitation, and will, thus, be discussed in more detail in chapter 10.

7.2.3 Prostitution in English and Welsh civil law

It is a common mistake to believe that when something is not illegal, it is automatically legal. This presumption comes from the confusion, as discussed in chapter 4, between illegal and criminal. However, in the area of prostitution this is not necessarily the case. In contract law, for example, there is the matter of *contra bonos mores* contracts. Accordingly, contracts that involve elements of immorality are deemed contrary to public policy, and, thus, invalid.[121] The perception and definition of what constitutes immorality has experienced a multitude of changed over the past century and has in the process narrowed significantly. In this sense, to name one example, agreements for the introduction of persons of the opposite sex in order to be married were unenforceable at the beginning of the last century. The same applied to agreements between cohabiting couples who were not married. In some cases, it becomes evident that the moral underpinning of a decision was at times so strong that it included third parties order to eradicate certain behaviours. In this sense, in *Upfill v Wright*, for example, the court denied a landlord the ability to enforce a lease and sue for rent because he knowingly was letting the premises to a woman who was the mistress of a married man.[122]

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[119] P R Ferguson & McDiarmid, Scots Criminal Law, A Critical Analysis (Dundee: Dundee Univ. Press, 2013) 437.
[120] Ibid.
[121] *Pearce v Brooks* (1866) LR 1 Exch 213.
[122] *Upfill v Wright* [1911] 1 KB 506.

Although developments in society have resulted in these behaviours no longer bearing legal consequences, there are still nonetheless, areas of the law that touch on sexual morality which are considered *contra bonos mores* in the eyes of the courts today. For example, in *Sutton v Mischon de Reya* it was held that a solicitor who had been tasked with drafting a "slavery agreement" between a male CSP and his voluntary "slave" had been correct to advise his clients that this kind of agreement would be unenforceable.[123] He was also held to have been justified to fail to figure out another way to devise an enforceable slavery arrangement. In *Sutton v Hutchinson* it was held that loans to lap-dancing CSPs were not to be tainted with illegality.[124] The reason for this was the fact that they were separate from the customer's other payments for commercial sex. Here one can recognise a significant shift in comparison to the situation approximately a century ago. Here, for example, it was held in *Pearce v Brooks*, that in the case that a CSP hired a carriage but returned it to the coachbuilder in a damaged condition the coachbuilder was not able to sue, because he had known of the immoral purpose or the CSP's activities and was, thus, was not entitled to recover.[125] This is a particularly strong example of "non-enforcement", that conflicts with the "merits" of a case. This judgement could be viewed as surprising as it could be argued that immorality was encouraged in this case, by permitting CSPs to avoid paying all of the hire instalments.[126] However, some, such as O'Sullivan argue that the courts may have presumably taken a wider view of the issue and thought that following the decision, carriage owners might be less likely to enter into contracts with CSPs.[127]

In *Knuller v DPP* the defendant had published a magazine with adverts placed by homosexuals who were seeking to meet other homosexuals for the purpose of engaging in sexual acts.[128] The decision followed *Shaw v DPP,*[129] which had deemed the commercial sale of advertising space for CSPs within a form of directory to be a

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[123] *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch) 22.
[124] *Sutton v Hutchinson* [2005] EWCA Civ 1773, 26.
[125] *Pearce v Brooks* (n 121) 213.
[126] Ibid*,* 213-214.
[127] Janet O'Sullivan, O'Sullivan & Hilliard's the Law of Contract (Oxford University Press 2020) W2.11.
[128] *Knuller v DPP* [1973] AC 435 (HL).
[129] *Shaw v DPP* [1962] AC 220.

conspiracy to corrupt public morals, and charged them with the same offence.[130] Interesting here was the fact that although the House of Lords had doubts about the correctness of *Shaw v DPP*, it refused to depart from the ruling.
Lord Reid explained that he disagreed in the case of Shaw[131] and that now after reconsidering he believed that the decision was wrong. Accordingly, the change in practice to no longer regard earlier decisions of the House of Lords as being absolutely binding “[did] not mean that whenever [the House of Lords thought] that a previous decision was wrong [they were to] reverse it. In the general interest of certainty in the law [the House of Lords] must be sure that there is some very good reason before [they] so act."[132]

7.3 The Northern Irish decision to change regulatory directions and implement an abolitionist approach to prostitution regulation

The situation before 2015 in Northern Ireland was similar to the current legal situations in Scotland, England and Wales in the sense that selling and buying sex acts was not *per se* criminal.[133] However, practices related to prostitution like soliciting and advertising prostitution services were dealt with under the Sexual Offences (Northern Ireland) Order 2008.[134] Furthermore, the Sexual Offences Act 2003 contained provisions against trafficking and the Policing and Crime Act 2009 prohibited the buying of sex acts from anyone who had been subject to force.[135]

It was not until approximately a decade ago that that academic attention started to focus on the issues of the sex industry and sexual exploitation, as prior to this time, the policing authorities in Northern Ireland did not consider THB for sexual exploitation to be

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[130] *Knuller v DPP* (n 128) 489-490.
[131] ([1961] 2 All ER at 446, [1962] AC 220.
[132] Knuller (n 128) 435, 455.
[133] Emma Hawthorne, 'Women in Northern Ireland Involved in Prostitution' (2011) 8 Irish Probation Journal.
[134] The Sexual Offences (Northern Ireland) Order 2008, 2008 No. 1769 (N.I. 2) part 5.
[135] Sexual Offences Act 2003, c. 42; Policing and Crime Act 2009, c. 26, s. 14.

a significant issue.[136] As prostitution was viewed as connected to THB for the purpose of sexual exploitation, it too moved into the focus of both public as well as political discourses in Northern Ireland, directed by a “powerful constellation of lobbying advocacy and faith groups” who worked at both community or national levels as well as being affiliated to international movements.[137]

Maurice Morrow a member of the Democratic Unionist Party and a member of the Northern Ireland Assembly, built on this constellation and presented a bill to the Assembly.[138] Interestingly if not unsurprising in light of the Northern Irish history pertaining to the Christian faith, the bill was heavily influenced by numerous Christian faith-based groups. For instance, the sponsor of this bill was the Christian Action Research Education (CARE). This is a conservative Christian lobby organisation which follows strict religious views, such as the opposition of abortion, divorce and same-sex marriages.[139] Moreover, the bill found support during the public consultation process from Women’s Aid (NI), which is an organisation running shelters for domestic abuse victims. Significantly, this organisation regards prostitution as a form of violence against women.[140] There was also support from south of the border, from neo-abolitionist activists from the Republic of Ireland. This included, for example, Ruhama, which is an organisation that assists CSPs to exit prostitution,[141] and the Immigrant Council of Ireland, which is most well-known for its anti-prostitution campaign Turn off the Red Light in the Republic of Ireland.[142]

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[136] Rebecca Gail Dudley, 'Crossing Borders: Preliminary Research on Human Trafficking in Northern Ireland' [2006] SSRN Electronic Journal.
[137] Ellison (n 11) 6.
[138] Susann Huschke, 'Victims Without a Choice? A Critical View on the Debate About Sex Work in Northern Ireland' (2016) 14 Sexuality Research and Social Policy.
[139] Christian Action Research Education (CARE), 'Causes | CARE' (*CARE*, 2020) <https://care.org.uk/cause> accessed 4 October 2020.
[140] Women's Aid Federation Northern Ireland, 'Women’S Aid Welcomes Trafficking and Exploitation Bill' (*Women's Aid Federation Northern Ireland*, 2013) <https://www.womensaidni.org/womens-aid-welcomes-trafficking-exploitation-bill/> accessed 4 October 2020; Northern Ireland Assembly, Committee for Justice, Official Report (Hansard), Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: Lord Morrow and Dr Dan Boucher, 20 March 2014, 5-13.
[141] Ibid; Ruhama, 'About Ruhama - Ruhama' (*Ruhama*, 2020) <https://www.ruhama.ie/about-ruhama/> accessed 4 October 2020.
[142] Eilis Ward, 'The Irish Parliament and Prostitution Law Reform: A Neo-Abolitionist Shoe-In?', *Feminism, Prostitution and the State: The politics of neo-abolitionism* (Routledge 2017) 86-102; Turn off the red light,

The bill introduced in the Northern Ireland Assembly by Lord Morrow was mostly uncontroversial. It sought to assist victims of THB for sexual exploitation by introducing a variety of support processes like Independent Guardians for children trafficked from other countries.[143] However, clause 6 of Lord Morrow's draft legislation has been noted as the most controversial part.[144] This part aimed at making the purchase of sex acts a criminal offence in line with the approach taken in Sweden.[145] In particular, the key reasons in favour of this proposed approach were firstly, that in Sweden, the sex purchase laws had resulted in a reduction of visible prostitution.[146] This reason is similar to the underpinning notions in England, Wales and Scotland in the sense, that the actual group of people sought to protect is the general public and public morality, as the main concern is the reduction of prostitution that is visible rather than the eradication of prostitution all together. Secondly, as many of the proponents supported the view that prostitution was synonymous to sexual exploitation or even THB for the purpose of sexual exploitation, any reduction of prostitution would also mean a reduction in sexual exploitation and THB.[147] Another reason for the proposed legislation was, in line with the Swedish abolitionist views that by targeting the demand for prostitution, supply would be adversely affected. In particular, CSPs would then need to find alternative ways to financially support themselves and people living off the proceeds of prostitution

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Submission to the Northern Ireland Justice Committee on the Human Trafficking and Exploitation Bill (Further Provisions and Support for Victims) 25th October 2013, <http://www.niassembly.gov.uk/globalassets/documents/justice-2011-2016/human-trafficking-bill/written-submissions/turn-off-the-red-light.pdf> accessed 4 October 2020; Turn off the Red Light, 'Home' (*Immigrant Council*, 2020) <https://www.turnofftheredlight.ie/#:~:text=The%20Turn%20off%20the%20Red,children%20in%20the%20sex%20industry.> accessed 4 October 2020.

[143] Northern Ireland Assembly, Committee for Justice, 'Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: Lord Morrow and Dr Dan Boucher' (*Niassembly.gov.uk*, 2014) <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/march-2014/human-trafficking-and-exploitation-further-provisions-and-support-for-victims-bill--lord-morrow-and-dr-dan-boucher/> accessed 5 July 2020.

[144] Susann Huschke and Ellis Ward, 'Stopping the Traffick? The Problem of Evidence and Legislating for the 'Swedish Model' in Northern Ireland' [2017] Anti-Trafficking Review, 1; Ellison (n 11) 1-5.

[145] Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill [As Introduced], clause 6.

[146] Huschke and Ward (n 144) 1; Ellison (n 11) 1-5.

[147] Northern Ireland Assembly, Committee for Justice (n 14) 30; this point is discussed in further detail in chapter 10.

would need to find new revenue streams.[148] Finally, that the sex purchasing laws within the Swedish abolitionist model criminalised mostly the predominantly male CSUs and CSPus and encourage the mostly female CSPs to exit prostitution and/or seek assistance via support programmes.[149] When looking at the reasons put forward in Northern Ireland for the introduction of the Swedish abolitionist approach to prostitution it is evident that the majority of reasons correlate more with the underpinning idea of prostitution constituting a public nuisance rather than a social harm. Only the last reason indicates that there are also some underlying views that indicate an understanding that prostitution is a social harm similarly to the views held in Sweden. This suggests that merely adopting another jurisdiction's regulatory approach does not necessarily mean that this will be implemented on the same philosophical ideals. However, this point will be discussed in more detail in the following section.

Since the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 was enacted on the 1st June 2015, Northern Ireland has diverged its approach more radically from the approaches to prostitution taken in Scotland and England and Wales, by moving away from a prohibitionist approach towards an abolitionist approach. However, when examining the current legal situation, it becomes apparent that, Northern Ireland has not managed to entirely move away from prohibitionist tendencies. Accordingly, section 15 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 has made it an offence to purchase sex acts in exchange for payment. Payment can either be the monetary payment, or the promise of payment by any person directly, or via a third party.[150] However, despite this new approach, CSPs are not entirely free of criminalisation, as they are still subject to the offence of "acting in a manner which consists of loitering in a public place for the purpose of offering his or her services as a

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[148] Laura McMenzie, Ian R Cook and Mary Laing, 'Criminological Policy Mobilities and Sex Work: Understanding the Movement of the 'Swedish Model' to Northern Ireland' [2019] The British Journal of Criminology, 1209 - 1210.
[149] Ibid 1204-1205.
[150] Section, 15, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland), c. 2.

prostitute"[151] under the Public Order Act 1994. Sex Worker Open University (SWOU) has stated in their written evidence on the new laws that "a Bill that claims to "shift the burden" has in fact increased the criminal burden on street-based sex workers".[152]

An issue with evaluating the Northern Irish approach, as is also the case in Sweden, is the size of the prostitution industry in Northern Ireland, which is quite small.[153] Thus, there is no significant evidence to suggest whether or not the new approach has been or will be successful to achieve the intended outcome.

Concerns about the new laws have been raised, amongst others, by the Northern Ireland Justice Minister, David Ford, who said in the Northern Irish Assembly that he was "concerned about the possibility of unwelcome implications: for example, an increase in problems for vulnerable women involved in prostitution; possible costs in justice terms to the flow of information to the police on trafficked victims; inability to enforce; an increase in crime; and a threat to the safety of those in prostitution."[154] As has been demonstrated in both the examination of the Swedish approach and the approaches taken in England and Wales and Scotland, it is clear that these concerns are not unfounded. However, without any more data, it will not be able to be determined at this point in time. Nevertheless, due to the size of the industry in Northern Ireland, it may in fact be a good platform for further research in terms of case studies, which could be utilised as a foundation to address some of the inefficiencies in other jurisdictions as well.

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[151] House of Commons, 'House of Commons - Prostitution - Home Affairs Committee' (*Publications.parliament.uk*, 2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/2607.htm> accessed 6 July 2020 citing Written evidence submitted by Sex Worker Open University.

[152] Sex Worker Open University, 'Written Evidence Submitted by Sex Worker Open University' (*Data.parliament.uk*, 2019) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/prostitution/written/29160.pdf> accessed 29 December 2019.

[153] Sarah C Armstrong, Jarrett Blaustein and Alistair Henry, *Reflexivity and Criminal Justice* (Palgrave Macmillan 2017) 299.

[154] Northern Ireland Assembly Official Report (Hansard) 24 September 2013, Tuesday 24 September 2013, Volume 87, No 6, (*Niassembly.gov.uk*, 2019) <http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2013-14/24-september-2013---revised.pdf> accessed 29 December 2019.

7.4 Significant differences between the Swedish and Northern Irish abolitionist approaches

Throughout the campaigning process, Morrow repeatedly referred to the situation in Sweden.[155] In this sense, Sweden and its approach to prostitution regulation was referred to as an inspiration and a "place that must be learnt from and emulated."[156] Following the vote within the Assembly to introduce the bill in October 2014, he still emphasised the associations with the Swedish approach. For example, he explained that "[T]he evidence clearly suggests that the approach modelled by Sweden is the best available. It recognises the abuses involved in the prostitution industry and seeks to reduce the core driver for prostitution — the demand for paid sex."[157]

As discussed in the section on the Swedish approach, it has been explained that a key strategy of the Swedish government has been to promote its prostitution approach globally. The adoption of an abolitionist approach in Northern Ireland can be taken as an example of a transfer of approaches from one jurisdiction to another. This issue was raised in the public consultation process of the proposed bill.[158] Accordingly, it was questioned whether this was appropriate considering the different legal frameworks in other jurisdictions, which would see the policy transferred onto different contexts than the original policy.[159] In particular, the different philosophical stances leading up to the implementation of the abolitionist approaches differ significantly between the two jurisdictions of Sweden and Northern Ireland. As seen in the previous section, there are a number of indications that suggest that the Northern Irish adaptation of the sex purchasing law was intended to eradicate prostitution, not due to its social harm, but more due to it constituting a public nuisance in accordance with the underpinning stance of the previous legal situation in Northern Ireland.

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[155] McMenzie, Cook and Laing (n 148) 1199-1203.
[156] Ibid 1199.
[157] Northern Ireland Assembly (2014), Official Report, 20 February.
[158] Ellis Ward, 'Knowledge Production and Prostitution Law Reform: The Case of Ireland North and South', *CSRNI Conference* (2016) cited in Huschke and Ward (n 144) 16-17.
[159] Huschke and Ward (n 144).

Another key difference in this respect between the Northern Irish approach and the Swedish approach can be found in the claims that the laws in Northern Ireland were specifically enacted with the intention to reduce THB for sexual exploitation.[160] When looking back at the case in Sweden, one recalls that the initial intention was to prevent violence against women.[161] In this sense, the understanding of prostitution as a form of violence against women, has morphed into an understanding of prostitution being a form of sexual exploitation which is synonymous with THB in the Northern Irish system.[162] A reason for this could be, as explained by Svanström,[163] that despite the Swedish sex purchasing law not having been initially regarded as a mechanism to eliminate THB for the purpose of sexual exploitation, it has been increasingly depicted as such in Sweden, in particular within the global marketing of the Swedish model.[164] A risk that this poses, is that the discourse on the topic of prostitution and THB for the purpose of sexual exploitation may change based on false understandings driven by organisations with biased agendas, which are not based on accurate legal information or knowledge from practice. The results are legal inaccuracies, in particular in the area of provisions seeking to prohibit THB for the purpose of sexual exploitation, which will be discussed in more detail in chapter 10.

Another significant contextual difference between the situation in Sweden and the situation in Northern Ireland is that Northern Ireland is a post-conflict society that faces ongoing community violence, which means that the Northern Irish police resources can be stretched.[165] The history of faith related troubles also makes the politics behind the policy less neutral. In this sense, the policy proposals saw a linking of secular radical

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[160] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, c. 2.
[161] See chapter 6.
[162] McMenzie, Cook and Laing (n 148) 1207.
[163] Yvonne Svanström, 'Prostitution in Sweden: Debates and Policies 1980–2004', *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006); Yvonne Svanström, 'From Contested to Consensus: Swedish Politics on Prostitution and Trafficking' [2017] Feminism, prostitution and the state.
[164] Susanne Dodillet and Petra Östergren, 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects' [2011] Conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges. The Hague, March 3 and 4, 2011, 2-7, 12.
[165] Huschke and Ward (n 144).

feminism and the Christian political right.[166] From a general philosophical stance, this is surprising, as the ideologies conflict in numerous areas, such as abortion, or same-sex marriage.[167] However, their stances overlap in the area of prostitution, as both philosophies regard this as a form of exploitation and as a problem that needs to be eliminated.[168] Accordingly, a key difference to the introduction of the sex purchasing law in Sweden, the Northern Irish Christian right were key drivers in the Northern Irish law reform on prostitution regulation.[169] This was stated by Morrow himself by saying that "taking action was very much motivated by my Christian faith and principles"[170] and by the DUP,[171] which has ties to the Free Presbyterian Church.[172] According to Huschke, this strategic aligning of the Christian right with radical feminists was selective and unequal.[173] She states that "[i]n Northern Ireland, the feminist rhetoric is merely used as a way of packaging sex-negative, repressive policy measures based on conservative Christian values, thereby rendering them more appealing."[174] Similarly, Ellison explains that this collaboration is more likely to be beneficial for the Christian right than for feminists and women in general.[175]

Nevertheless, there are also similarities between the Swedish and the Northern Irish approach to prostitution. For instance, the adoption prohibition of purchasing sex acts, the non-criminalization of loitering and solicitation, as well as a one-year maximum sentence for purchasing sex acts in Northern Ireland closely resemble the legal provisions in Sweden.[176] However, in the execution of penalties, there are some significant differences. In this sense, despite both systems making use of fines as a form of penalty, the way these are positioned and calculated has changed due to the

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[166] Armstrong, Blaustein and Henry (n 153) 303-310.
[167] Ibid.
[168] Graham Ellison, 'Who Needs Evidence? Radical Feminism, the Christian Right and Sex Work Research in Northern Ireland', *Reflexivity and Criminal Justice: Intersections of Policy, Practice and Research* (Palgrave Macmillan 2017) 289 – 314; Ellison (n 11).
[169] Ibid; Armstrong, Blaustein and Henry (n 153) 303-310.
[170] Northern Ireland Assembly, Offical Report, 20th February 2014.
[171] McMenzie, Cook and Laing (n 148) 21.
[172] Raul Gomez and Jonathan Tonge, 'New Members as Party Modernisers: The Case of the Democratic Unionist Party in Northern Ireland' (2016) 42 Electoral Studies, 66, 68, 73.
[173] Huschke (n 138) 201.
[174] Ibid, 201.
[175] Ellison (n 11) 208-2011.
[176] McMenzie, Cook and Laing (n 148) 21

legal context in which it is placed. In this sense, although fines are able to be given as alternatives to imprisonment in both systems, clients are able to be sentenced to a combination of both fines and imprisonment for a single offence in Northern Ireland, whereas this is not the case in Sweden.[177] Moreover, in Northern Ireland, the calculation process for fines does not consider the daily income of clients, which is a practice undertaken in Sweden.[178] In Northern Ireland, fines are set on the basis of the perceived seriousness of the offence.[179]

Another area that is quite different between the two systems relates to the provisions on exiting prostitution. According to Morrow, the inclusion of provisions on exiting prostitution

> was emphasised by [groups...] including Women's Aid and Ruhama. Other groups said that if the Bill did not have an exit strategy, there would be a fundamental weakness in the whole strategy [...] This [revised] strategy is designed to try to steer [CSPs] away from [prostitution] and to give them the support, self-esteem and confidence that they really need.[180]

Despite the Swedish approach being expressly followed in Northern Ireland, a key difference is that Sweden has not incorporated provisions on exiting prostitution into law, which Northern Ireland has. Instead, in Sweden, these are embedded in a broader and more comprehensive welfare state.[181] In contrast, Northern Ireland has sought to ensure these kinds of provisions within the statute.[182] Accordingly, the Department of Health is required to work together with other departments in order to create and provide non-compulsory exiting services.[183]

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[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Northern Ireland Assembly, Offical Report, 20th March 2014.
[181] Jay Levy, *Criminalising the Purchase of Sex* (Routledge 2015) Chapter 1.
[182] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, c. 2, s. 19.
[183] McMenzie, Cook and Laing (n 148) 22.

7.4.1 The role of public reason in the UK’s regulatory approaches to prostitution

It is clear from the examination of the situation in the three main UK jurisdictions that, in line with the ideas of prohibitionism, prostitution is regulated primarily under the assumption that prostitution is immoral and a threat to public order. These views are reflected both within the chosen form of regulation of prostitution as well as within explanatory notes and parliamentary and judicial debates.[184] However, in Northern Ireland, the move towards the Swedish Model has shifted the focus from these ideas towards the emphasis on the elimination of prostitution while protecting CSPs who are considered the victims within the transactions.

Without going into the specifics of the UK’s political system and electoral system, which are quite comprehensive and complex, the brief application of Rawls’ public reason ideas can be found in the fact that the UK populations who are eligible to vote in the general elections, vote for their members of parliament, who represent their ideas within the House of Commons.[185] Furthermore, the constituencies in the devolved areas also vote for their respective members of devolved parliaments.[186] It is via these processes that the ideas of the general public make their way into the law-making procedures. Furthermore, as the UK consists of common law jurisdictions, there is also judge made

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[184] UK Parliament, 'Search Hansard - Hansard' Search Terms: “Prostitution” Period: 01/01/2010 – 06/10/2020 (*Hansard.parliament.uk*, 2020) <https://hansard.parliament.uk/search?startDate=2010-01-01&endDate=2020-10-06&searchTerm=prostitution&partial=False> accessed 6 October 2020; House of Commons, Home Affairs Committee (n 95) 8, 37-39; Scottish Government, 'Exploring Available Knowledge and Evidence on Prostitution in Scotland via Practitioner-Based Interviews - Gov.Scot' (*Gov.scot*, 2020) <https://www.gov.scot/publications/exploring-available-knowledge-evidence-prostitution-scotland-via-practitioner-based-interviews/pages/20/> accessed 6 October 2020; Prostitution Law Reform (Scotland) Bill a proposal for a Bill to decriminalise activities associated with the buying and selling of sexual services and to strengthen the laws against coercion in the sex industry Consultation by Jean Urquhart MSP Member for Highlands and Islands 8 September 2015; Northern Ireland Assembly, Offical Report, 20th March 2014.

[185] Nancy Dickmann, *Democracy in the United Kingdom* (Raintree 2019) 12-30; Robert Blackburn, *The Electoral System in Britain* (Palgrave Macmillan Limited 2016) 27.

[186] Dickmann (n 185) 15-17; Martin Partington, *Introduction to the English Legal System 2014-2015* (Oxford University Press 2014) 32; For in depth information on the devolved election processes see: Deacon (n 2).

law, whereby the reasoning of the public filters through via the application of "reasonable person" tests and societal evaluations.[187]

Nevertheless, there is reason to suggest that there are inefficiencies within the political processes and the way public reason is filtered through this into law-making. In this sense, a number of national surveys suggest that the majority of the UK population is in favour of decriminalising prostitution. Accordingly, Ipsos-Mori conducted a national poll in June 2008 which revealed that 59% of the public agreed with the statement that "prostitution is a perfectly reasonable choice that women should be free to make." Interestingly, merely 27% disagreed.[188] In August 2008, a further survey by Ipsos Mori revealed that 51% of the UK population felt that the sale of sex should be legal, with only 42% thinking that it should be criminal.[189] Moreover, a YouGov survey carried out in August 2015 suggested that a majority of 54% of the adult UK population supported the decriminalisation of prostitution.[190]

Interestingly, these findings are similar to the survey results conducted by the German government, which suggests that the views on the regulation of prostitution do not differ as significantly as one would initially assume when reviewing the responses to prostitution within the national laws.

This suggests that there is a wider gap between the views of the British population and the views of the law-making representatives. This finding is significantly different from the findings of public opinion within Germany and Sweden. This finding is supported by findings from the Political and Constitutional Reform select Committee's fourth report on voter engagement in the UK, which was published in 2014.[191] Here is a significant

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[187] Ipsos Mori, 'GEO Survey: Prostitution 13 June 2008 Topline Results' (2008) <https://www.ipsos.com/sites/default/files/migrations/en-uk/files/Assets/Docs/Polls/poll-prostitution-topline-june.pdf> accessed 26 April 2020.

[188] Ibid.

[189] Ipsos Mori, 'GEO Survey: Prostitution 1 September 2008 Topline Results' (2008) <https://www.ipsos.com/sites/default/files/migrations/en-uk/files/Assets/Docs/Polls/poll-prostitution-topline-august.pdf> accessed 26 April 2020.

[190] YouGov, 'Yougov Survey Results' (2015) <https://d25d2506sfb94s.cloudfront.net/cumulus uploads/document/6vmbvopuh4/Opi_InternalResults_150812_Prostitution_W.pdf> accessed 26 April 2020.

[191] 'House of Commons - Voter Engagement in the UK - Political and Constitutional Reform' (*Publications.parliament.uk*, 2020)

finding was that a theme within the written evidence that had been submitted by members of the public suggesting that many members of the British general population felt that "there was no point in voting, or that their vote did not make a difference, particularly when they lived in a safe seat, where the party of the elected representative was unlikely to change."[192] The report also suggested that the First Past the Post (FPTP) voting system may have contributed to this perception and resulted in there being little incentive for the elected political parties to engage with voters.[193]

The differences in representation of public reason in the UK in contrast to the other two systems is an area which would benefit from an in-depth examination in future research. There are a number of differences between the systems, which could be contributing to the discrepancies, for instance the first-past-the-post system and the way this is impacted by Duverger's law,[194] or the electoral registration system within the UK which is said to have potential exclusionary effects for some categories of voters, which may result in a flawed representation within parliament.[195] Similarly, there are significant differences in the representation of the general public within the judiciary, which may impact on the regulation of prostitution. In Germany, for instance, there are now more female judges than male judges in the courts.[196] In contrast, only 32% of judges within the courts in the UK are female.[197] This would also warrant future research into the deficiencies of public reason filtering through into the laws in the UK.

<https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/232/23205.htm#note73> accessed 26 April 2020.

[192] Ibid.

[193] Ibid.

[194] Christopher D Raymond, 'In Defiance of Duverger: The Class Cleavage and the Emergence of District-Level Multiparty Systems in Western Europe' (2015) 2 Research & Politics, 1-2, 6; Shaun Bowler, André Blais and Bernard Grofman, *Duverger's Law of Plurality Voting* (Springer New York 2009) 27-45.

[195] Antoine Bilodeau, *Just Ordinary Citizens?* (University of Toronto Press 2016) 65; Julius Elster, 'Sarah Pickard: Politics, Protest and Young People' (2020) 3 Journal of Applied Youth Studies 181-183.

[196] Bernd Kiesewetter, 'Auf den Richterbänken sitzen jetzt mehr Frauen als Männer | Waz.De |' (*Waz.de*, 2020) <https://www.waz.de/staedte/bochum/auf-den-richterbaenken-sitzen-jetzt-mehr-frauen-als-maenner-id226466503.html> accessed 26 April 2020.

[197] 'Judicial Diversity Statistics 2019' (*Judiciary.uk*, 2020) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2019/> accessed 26 April 2020.

7.5 Summary of the findings: The UK's legal approach to regulating prostitution as a public nuisance

The examination of the UK's approach, including the jurisdiction of Northern Ireland, has revealed that the understanding of prostitution as a public nuisance has existed within the UK since the beginning of its laws on the matter, and is not something that has developed over time, as was the case in the jurisdictions of Germany and Sweden. Moreover, the more fragmented nature of the legal systems themselves, as common law jurisdictions, has made the stance on prostitution overall less clear in comparison to the civil law systems in Germany and Sweden. The reason for this can be found in the fact that common law systems do not follow the same kind of approach to legal codification in which all provisions in an area of law a collated together in one major code. Instead, there are numerous separate statutes on separate thematic matters. Thus, it was necessary to examine the UK systems in a more chronological manner.

A key point found within this chapter, is that the UK's approach, similarly to the Swedish one, is based heavily on ideas of morality and an understanding that prostitution is immoral. However, England and Wales and Scotland have not made prostitution itself criminal, related activities, in particular the ones that are visible in public, are criminal. This reinforces the idea that prostitution is a public nuisance rather than a social harm, as the laws mostly seek to protect the public, as the primary victim, from effects of prostitution. Nevertheless, the examination revealed, similarly to the Swedish system, that the immorality understanding linked to prostitution means that CSPs are not free from criminality or illegality. In this sense, the immorality element results in issues pertaining to enforcement of contracts as well as the ability to set up a business legally. Moreover, in England and Wales and Scotland, the criminal offences linked to prostitution activities also mean that CSPs, CSUs and CSPus are all similarly criminalised, thereby justifying the classification of their regulatory approach to prostitution as prohibitionist.

It is further apparent after examining the laws in England and Wales and Scotland, that the overall aim of the regulatory approach is not to eradicate prostitution all together, but

rather to remove it from view of the public. In particular, the Wolfenden report, which conducted an in-depth review of private immorality, can be considered significant in manifesting this stance.

In relation to the integration of moral views in form of public reason into the law-making dynamics in the UK, it is clear that the UK has similar structures in place as the jurisdictions of Germany and Sweden, however, there is an apparent rift between the views of the general population on prostitution and its regulation and the underpinning views of the government. Although an examination of the reasons for this is outwith the scope of this research project, it would be an area in need of further investigating in future research in order to clarify how public views on morality translate into legislation in the UK.

The examination of the current legal situation in Northern Ireland has been significant as it showcased a scenario in which the regulatory approach to prostitution in one jurisdiction has been transferred into another one. Northern Ireland openly adopted an abolitionist approach to prostitution by following the Swedish model. In doing so, Sweden was in fact involved by taking on an advisory function. Nevertheless, a review of the current situation in Northern Ireland has showed, that the transfer of regulatory approaches is not as simple as one would expect, as the approach is placed in an entirely different legal environment. The most significant difference here can be found in the understanding of prostitution in Northern Ireland. In this sense, there is more evidence suggesting that the understanding of prostitution as a public nuisance has not been removed by the change in approaches. Instead, Northern Ireland appears to use the same legal tools as Sweden, however, with a different philosophical underpinning and different overall goals.

Although it is still early to evaluate the effects of the new Northern Irish laws on prostitution regulation, there are some areas that may pose challenges that will need examining in future research. In particular, the differences in the Northern Irish criminal justice system and the approach to policing in contrast to Sweden may reveal differences in outcomes of the regulatory approaches in practice. Similarly, the differences in welfare provisions in Sweden and Northern Ireland will need to be

examined in the future in relation to their ability to support CSPs who wish to exit prostitution.

Chapter 8

8. The regulation of prostitution from the perspective of European Union (EU) Law

Following the examination of three EU member states[1] that are representative of the three different regulatory approaches to prostitution, regulationism, abolitionism and prohibitionism, and the three different understandings of prostitution (economic activity, social harm and public nuisance) the next chapter will explore the view of the European Union on the subject matter. This will be vital in order to examine how the regulatory approaches examined in the previous three chapters are linked within the supranational EU legal system. This will also reveal whether the link between the systems within the EU impacts on the internal national regulation of prostitution. In respect to the multi-level legal scenario to be examined, the following chapter seeks to explore and analyse the regulation of prostitution from the perspective of European Union (EU) law as the overarching transnational legal body responsible for the potential interconnection of the regulation of prostitution within the European Union. In particular, in light of the structuralist and hermeneutical elements of this study, it is important not merely to examine the status quo, but also to consider the significance and purpose of the relevant provisions in light of the rationales, goals and objectives of the EU in the development of the particular provisions in question. In particular, the efforts of the EU to increase welfare and the standards of living for all EU citizens, by enhancing the common market, ensuring fair competition and establishing minimum standards for the protection of the rights of all EU nationals are significant underpinning goals. Thus, particularly relevant provisions for this examination will include the EU's free movement provisions as well as the equal treatment and social protection provisions.[2]

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[1] Acknowledging that the UK will no longer be an EU member state by the time this research project is submitted.

[2] Jan Cremers, Jon Erik Dølvik and Gerhard Bosch, 'Posting of Workers in the Single Market: Attempts to Prevent Social Dumping and Regime Competition in the EU' (2007) 38 Industrial Relations Journal, 524-526; Fritz W. Scharpf, 'The European Social Model' (2002) 40 JCMS: Journal of Common Market Studies, 645-649; Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets' (2003) 37 Loy LAL Rev; OECD, *OECD Economic Surveys* (OECD Publishing 2014)

The EU does not have the explicit competence to regulate prostitution. However, it may have the authority to intervene in situations in which member states permit their own nationals to legally carry out prostitution related activities. In these situations, nationals of EU member states who are CSPs have the same entitlement to work in prostitution as any national of the permissive member state in accordance with the free movement of persons provision. Furthermore, under EU law all CSPs who are EU citizens should have the same social benefits and other rights as CSPs originally from the host member state. In relation to prostitution, this principle was confirmed in the joint cases of *Adoui and Cornuaille v Belgium*. Here, the Belgian authorities had refused two French nationals residence permits because they were "waitresses in a bar which was suspect from the point of view of morals,"[3] although both women denied that they were CSPs. On the basis of the public policy exception clause for the free movement or workers, the Belgian authorities had sought to deport the two women. The ECJ (now CJEU) held that Belgium would only be permitted to do this if "it took repressive measures or other genuine and effective measures intended to combat such conduct against its own nationals."[4] However, as Belgium merely "banned soliciting, incitement to debauchery, exploitation of prostitution, keeping a disorderly house and living on immoral earnings" but not prostitution,[5] it was not permitted to deport Adoui and Cornuaille on public policy grounds.

A similar matter came in front of the CJEU in which the Court confirmed its opinion two decades later. This was in *Jany and Others v the Netherlands* in 2001.[6] The case, however, involved Polish and Czech Republic nationals. However, Poland and the Czech Republic only joined the EU as members in 2004. The Association Agreements

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72-73; Article 2, Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002, 33–184.

[3] Joined cases 115–116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1665, 1668.

[4] Leo Flynn, The body politic(s) of EC law, in Sex equality law in the European Union, ed. Tamara K. Hervey and David O'Keeffe (Chichester: John Wiley & Sons.) 312.

[5] Heli Askola, Globalised sexual labour in the EU: Challenging domestic debates [2006] Paper presented at 2006 Biennial Conference of the European Community Studies Association – Canada, May 19-20, in Victoria, Canada, 53 – 54; Adoui and Cornuaille (n 3), [3].

[6] Case C-268/99 Jany Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001], ECR I-8615, [45].

between these countries and the EU expressly provided for their nationals the "right of establishment" in the EU if they intended to "take up an activity as a self-employed person."[7] The Netherlands argued, however, that due to sex work not being "socially acceptable," Jany and others were eligible for deportation.[8] The Court held that, due to the fact that the Netherlands did not prohibit its own citizens to undertake prostitution, the Netherlands was not able to legally act against these Polish and Czech nationals on the basis of the equal treatment provisions derived from the Association Agreements.[9] This decision confirmed that people working in prostitution or intending to work in prostitution are allowed to exercise their free movement rights in accordance with EU law within the EU's territory as providers of commercial sex, when the host member states regulate prostitution as either a legal activity or an activity that is not explicitly prohibited or tolerated in practice.

Despite the EU viewing prostitution as an economic activity, it is important to understand that certain provisions are in place which prevent the EU from being able to impose this view on member states via harmonisation. In particular, these provisions fall within the scope of the principle of attribution of powers. In this sense, articles 4 and 5 TEU state that any competences that have not been conferred upon the EU remain within the scope of the member states competencies.[10] Furthermore, article 72 TFEU states that the area of freedom security and justice shall not affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order in the safeguarding of internal security.[11] This is based on article 4(2) TEU, which explains that "national security remains the sole responsibility of each Member State."[12] Essentially, this means that the EU is unable to influence the regulation of prostitution in member states in which prostitution is regulated through domestic criminal laws. Article 83 TFEU allows the EU to establish minimum rules in areas of

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[7] *Jany* (n 6) [3].
[8] Askola (n 5) 53 – 54.
[9] *Jany* (n 6).
[10] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, *OJ C 326, 26.10.2012, p. 47–390,* Articles 4 and 5.
[11] Ibid Article 72.
[12] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 4(2).

criminal law in the member states when these are necessary to combat particularly serious crimes with a cross-border dimensions, such as THB for the purpose of sexual exploitation.[13] However, this would only apply in situations in which prostitution and THB for the purpose of sexual exploitation were legally regulated together within the jurisdiction of a member state, or, in the event that a necessary link could be established.

For the purpose of this section, however, the rules are straightforward, and do not require an in-depth discussion in this thesis. Instead, it is of a greater concern to examine the areas of the regulation of prostitution in which the limitations of the reach of EU law are less clear cut. Thus, the following sections will examine the areas in which the reach of the EU is either permitted due to prostitution being considered an economic activity, or the areas in which the EU's reach is not entirely blocked, yet limited on certain justified grounds by national provisions.

In light of the above, the regulation of prostitution is a complex subject, as the wide-ranging philosophical concepts and understandings of it, as seen in the previous three chapters, have resulted in diverse national regulatory approaches. At a first glance, this leads to the assumption, that the regulation of prostitution falls outside of the scope of EU harmonisation. However, when taking a closer look at the issue of prostitution from an EU law perspective, this does not seem as straightforward as one would assume at first. The reason for this is that the regulation of prostitution sits uncomfortably between the concept of supranationalization and competing concepts of public interest and public morality in relation to articles 26, free movement, and 72 TFEU, law and order and internal security.

Thus, the purpose of this chapter is to examine the way the regulation of prostitution within the member states is affected by EU law. This examination will take place in three stages: The first stage will consider areas of prostitution regulation within members states, which fall into the scope of harmonised EU law provisions; the second stage will

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[13] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Article 83.

present the elements of prostitution regulation which fall outwith the reach of EU law, which means that any interference of EU law is prohibited; and finally, the third stage will investigate areas within the national regulation of prostitution, in which EU law only has a limited scope of applicability. However, before embarking on this examination, a brief outline of the three levels of EU competence needs to be presented.

The levels of EU competence are laid out in Part I of Title I of the TFEU.[14] There are three key levels of EU competence, namely exclusive competence, shared competence and supporting competence.[15] As the term already suggests, exclusive competence covers areas which the EU is solely responsible for regulating.[16] However, as there is little relevance of these areas with the subject matter at hand, this will not form part of the examination within this chapter. The EU has a shared competence together with its member states in the areas in which the Treaties confer competences that are unrelated to the areas over which the EU either has exclusive or supporting competence.[17] Of particular relevance for this chapter, the principle areas of shared competence include the internal market including the four freedoms,[18] social policy,[19] economic, social and territorial cohesion,[20] and consumer protection.[21] Moreover, in particular in relation to the examination of provisions to combat THB for the purpose of sexual exploitation, the area of freedom, security and justice is of significance.[22] Finally, the third competence level involves the areas in which the EU merely has the competence to support, coordinate or supplement the actions of its member states.[23] However, although some of the areas, such as the protection and improvement of human health, culture, tourism, education and vocational training,[24] may at times touch upon subject matters related to prostitution, these will not form part of the examination within this thesis. Thus, the

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[14] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, *OJ C 326, 26.10.2012, p. 47–390,* Part I of Title I.
[15] Ibid.
[16] Ibid, Article 3.
[17] Ibid Article 4(1).
[18] Ibid Article 4(1)(a).
[19] Ibid Article 4(1)(b).
[20] Ibid Article 4(1)(c).
[21] Ibid Article 4(1)(f).
[22] Ibid Article 4(1)(j).
[23] Ibid Article 6.
[24] Ibid Article 6(a–e).

following will examine the previously mentioned EU competences and their relevance to the national regulation of prostitution within the member states in turn. Hereafter, the interconnectedness of these areas will be tested on hypothetical cross-border scenarios involving prostitution in order to test whether the competences of the EU interfere with the national approaches to the regulation of prostitution.

8.1 Areas of harmonisation of prostitution regulation: Prostitution as work - Drivers of the Europeanisation of labour law

In order to ensure the proper functioning of the EU, certain principles were established and provisions developed, such as the internal market, which is an area without internal frontiers within which goods, persons, services and capital can move freely.[25] The initial aim was the approximation of the living and working standards for everyone within the EU and the improvement thereof.[26] The theoretical basis for the creation of the internal market was the idea that the elimination of obstacles to the mobility within the internal market[27] would create a competitive environment, in which living standards would evolve on the basis of supply and demand.[28] Thus, the creation of a single economic space[29] and the establishment of free movement provisions,[30] as well as the guarantee of availability of labour,[31] together with minimum standards of consumer and worker protection would prevent a downward spiral of living standards which may occur in

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[25] Ibid Article 26(2).
[26] Ibid Article 151, 114; Article 2, Treaty establishing the European Economic Community (Rome, 25 March 1957) Article 2, Article 117.
[27] Preamble, Single European Act, OJ L 169, 29.6.198; European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Article 3(2); European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 4(2)(a), 20, 26 and 45-48.
[28] Fritz Scharpf, 'Community and Autonomy: Multi-Level Policy-Making in the European Union' (1994) 1 Journal of European Public Policy.
[29] European Commission, Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985), *COM (85) 310* final, 14 June 1985; European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 114, 115.
[30] European Union, *Consolidated version of the Treaty on the Functioning of the European Union,* Articles 45, 49 and 56.
[31] European Commission, Commission Recommendation *2008/867/EC* of 3 October 2008 on the active inclusion of people excluded from the labour market [Official Journal L 307 of 18.11.2008]; *Council Recommendation 92/441/EEC* of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems [Published in the Official Journal L 245 of 26.8.1992].

entirely liberal market dynamics based purely on supply and demand.[32] The continuous process of EU integration involves powers being transferred from the scope of domestic regulation within member states onto the European Union level is known as supranationalisation.[33] What follows from this process is an increase in legal harmonisation across the EU, which has predominantly been achieved in relation to establishing common standards across the EU internal market.[34] In particular, the regulation of prostitution can be affected in two key ways by these EU provisions, namely, as a form of work for CSPs, in relation to the Europeanisation of labour laws and the free movement of workers provisions; and as a form of service for CSUs or CSPus, which may fall within the scope of the EU free movement of services and establishment provisions.[35] These two areas will now be addressed in turn.

8.2 Prostitution as work

The following point is of importance to discuss, as prostitution is considered an economic activity and, as such work, in a number of EU member states, including Germany, as was established in chapter 5 of this thesis. The free movement of persons is one of four fundamental freedoms of the EU.[36] This includes the free movement of employed workers, the free movement of self-employed persons and the free

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[32] Günther Schmid, *Full Employment in Europe: Managing Labour Market Transitions and Risks* (Edward Elgar 2008) 9, 68, 226; Mark van Ostaijen, Ursula Reeger and Karin Zelano, 'The Commodification of Mobile Workers in Europe - A Comparative Perspective on Capital and Labour in Austria, The Netherlands and Sweden' (2017) 5 Comparative Migration Studies; Alexandre Afonso, 'Employer Strategies, Cross-Class Coalitions and the Free Movement of Labour in the Enlarged European Union' (2012) 10 Socio-Economic Review; European Parliament, Directorate-General for Internal Policies Policy Department Economic and Scientific Policy, 'EU Social and Labour Rights and EU Internal Market Law' (European Parliament 2015) 15- 23.

[33] Steffen Mau and Roland Verwiebe, *European Societies* (Policy Press 2010) 263.

[34] David Levi-Faur, *Oxford Handbook of Governance* (Oxford University Press 2014) 620; Stephen Weatherill, *Cases and Materials on EU Law* (Oxford University Press 2016) 597.

[35] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 45, 49 and 56.

[36] European Union, *Consolidated version of the Treaty on the Functioning of the European Union,* Article 26(2).

movement of establishments and services, as well as the more recent potential category of EU citizens.[37]

It is important to note at this stage of the examination, that the terminology used by the EU in the context of EU labour law and the free movement of workers differs from the national legal understandings of the same terms. In this sense, when referring to terms, such as “worker”, “employee” and “self-employed worker” in this chapter, the EU understandings will be intended, unless specifically stated otherwise. The question whether prostitution and the regulation thereof fall within the scope of the free movement of persons, in particular of workers, depends on whether a CSP can, under Article 45 TFEU, be considered a “worker.” It also depends on the types of restrictions member states are able to justifiably impose upon them as workers under EU law. In particular, the reason for this can be found in Article 45 TFEU which states that the freedom of movement for workers is to be secured in the EU. In the event that CSPs are considered workers in this respect, any national regulation would be subject to the EU’s abolition of discrimination on grounds of nationality amongst workers from EU member states in the areas of employment, remuneration as well as working conditions.[38] Moreover, certain rights could be granted, such as being able to move freely within the member states in which employment is offered,[39] the ability to accept offers of employment,[40] and the ability to remain within the member state during and after being employed there,[41] subject to limitations that are justified on grounds of public policy, public security or public health.[42] However, in order to examine whether or not this is applicable, or to what extent these provisions are applicable, it will need to be

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[37] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Regulation (EU) No 492/2011 on freedom of movement for workers within the Union; Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009; European Union, *Consolidated version of the Treaty on the Functioning of the European Union,* Articles 45-48, 56–62.
[38] European Union, *Consolidated version of the Treaty on the Functioning of the European Union,* Article 45 (2).
[39] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Article 45 (3) (b).
[40] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Article 45(3)(a).
[41] Ibid Article 45(3)(d).
[42] Ibid Article 45(3).

determined whether prostitution activities can be regarded as work (generally across the EU, parts of the EU, or in specific countries) and whether CSPs can consequently be regarded as workers. This requires a closer look at the EU definitions of “work” and “worker.”

Despite there being a wide range of secondary legislation from the EU dealing with employment and labour law, there is no definition for the term “worker” in either the treaty nor in other legislation. Instead, the term has been developed by the Court of Justice of the European Union (CJEU) (then the European Court of Justice) within its case law. In *Hoekstra v Bestuur der Bedrijfsvereiniging voor Detailhandel en Ambachten,*[43] for instance, the CJEU clarified that the EU and not national law was responsible for defining the term “worker”[44] in the context of free movement rights. In this respect, it was explained that:

> [i]f the definition of this term were a matter of the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of ‘migrant worker’ and to eliminate at will the protection afforded by the Treaty to certain categories of person [and that] Articles 48 to 51 [now 39-42] would therefore be deprived of all effect and the above-mentioned objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law.[45]

Thus, in order to be considered “work” and “workers” prostitution and CSPs will need to fit the definitions laid out by the EU, which has been defined in EU case law as any “person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.”[46] As indicated above, “workers” may be either employed or self-employed. Although both categories involve workers, the way these are determined varies substantially between

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[43] Case C-75/63*, Mrs. Hoekstra (nee Ungcr) v Bestuur der Com. Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, 184.
[44] Ibid.
[45] Ibid 184, at Grounds 1.
[46] Case C-337/97 *CPM Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, [13].

the two. Thus, the following will examine both forms of work separately in relation to their potential applicability to CSPs within the EU.

8.2.1 Essential criteria for CSPs as workers who are employees

As explained in *Meeusen v Hoofddirectie van de Informatie Beheer Groep,*[47] the "essential feature of an employment relationship is […] that for a certain period of time a person performs services for and under the direction of another person in return for which [this person] receives remuneration."[48] The second part of this quote is relevant in relation to the distinction between workers who are employees and self-employed workers. Accordingly, in order for CSPs to be considered workers who are employees, prostitution needs to be understood as an economic activity that takes place in a subordinate relationship, for instance, as is legally possible in Germany.[49] As employees are considered a form of worker, Article 45 TFEU would apply. Although these criteria form the basis of defining "worker" in accordance with the EU provisions, it needs to be recognised that workers may legally be placed in further categories of working persons. In particular, when considering the regulation of prostitution as a potential cross-border activity involving the application of the EU free movement provisions, the understanding of "migrant worker" is particularly significant for the free movement rights of CSPs.

Similarly to the general definition of "worker," the term "migrant worker" has been developed through the case law of the CJEU.[50] It was held in *Lawrie Blum*[51] that a migrant worker was "any person performing for remuneration, work the nature of which is not determined by [themselves] for and under the control of another, regardless of the legal nature of the employment relationship."[52] In both *Lawrie-Blum* as well as in the

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[47] Ibid.
[48] Ibid [1].
[49] See Chapter 5.
[50] *Hoekstra* (n 43) 184.
[51] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121.
[52] Ibid [12].

case of *Levin*[53] the CJEU emphasised that the work needed to be “genuine and effective.”[54] Genuine and effective means that the work undertaken cannot be purely marginal[55] or ancillary.[56] Bearing in mind the distinction between national and EU free movement related understandings of the term “worker”, a question that arises in relation to the definition provided in *Lawrie-Blum* and its applicability in relation to prostitution, is whether the statement “regardless of the legal nature of the employment relationship”[57] also includes situations in which CSPs are employed in member states in which prostitution and pimping is prohibited under criminal law. However, although there is no information expressly excluding this situation, the nature of the judgment in *Lawrie-Blum* and the facts of the case lead to the assumption that is it more likely that other situations were intended, such as there being no requirements of minimum working hours or an exchange of services for remuneration in so far as the economic content is not entirely negligible.[58]

8.2.2 Application of the criteria for prostitution as work

Having determined the necessary criteria for prostitution to constitute work as an employee, the next necessary step in this examination of prostitution as work, is to specifically apply these criteria to prostitution, to see whether prostitution could be considered work in accordance with the EU provisions in practice. For this, the first point to be examined would be, whether the sex act provided is remunerated. This can be in the form of monetary remuneration, however, for the purpose of this examination, the remuneration does not need to be monetary, but does need to be economically

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[53] Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1053, 17-23.
[54] *Lawrie-Blum* (n 51) [21]; *Levin* (n 53) [17].
[55] *Levin* (n 53)*; Case* C-139/85 *R. H. Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, [17].
[56] *Levin* (n 53)*; Kempf* (n 55) [17]; see also C*ase C-94/07*, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939; Case C-344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621.
[57] *Lawrie-Blum* (n 51) [21].
[58] For examples of cases in which this interpretation was the case, see: *Andrea Raccanelli* (n 56)*; Bettray* (n 56); *Levin* (n 53); Christina Heissl, *Basics on European Social Law* (Linde Verlag Wien 2012) 22.

relevant.[59] It was explained in *Steymann v Staatssecretaris van Justitie*[60] that work "aims to ensure a measure of self-sufficiency" within a community, when services are provided in return that can be "regarded as being an indirect quid pro quo for their work."[61] If the activity carried out by the CSPs is remunerated either by payment of money for the services, or in some other economically relevant form, the first criteria would be satisfied.

In relation to the subordination criteria, however, it is important to understand that these cannot be viewed as a fixed set of criteria, which need to be ticked, but, instead, are guidelines provided by the CJEU in order to direct the national courts within the member states. The reason for this is the fact that the competence to decide who is employed or self-employed lies within the scope of the member states.[62] Nevertheless, there have been some cases, which have resulted in certain characteristics of subordination being clarified across the EU. In relation to this factor, in *Asscher*, the CJEU rejected the view that a director of a company consisting of only one person can be considered an employee within their own company, as subordination was clearly not present.[63]

In order to be considered migrant employed workers, the CSPs would need to be free of any entrepreneurial risk linked to their undertaken activities.[64] In the event that a CSP provides their services under the instruction of another person, such as for instance the manager within a brothel, this is fairly straightforward. However, in other cases, in which the provisions of the services are linked more closely to the overall operations of the business, such as, for instance, if the CSP is remunerated a percentage of the profits

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[59] Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159.
[60] Ibid.
[61] Ibid [12 – 14].
[62] Case 431/01, *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, 2003; ECJ C-456/02, Trojani v Centre public d'aide sociale de Bruxelles, 2004; ECJ C-151/04 and C-152/04, Nadin, Nadin-Lux SA v Durré, 2005.
[63] *Case C–107/94 Asscher v Staatssecretaris van* Financiën [1996] ECR I–3089, [26].
[64] Nadim Ahmad and Richard Seymour, 'Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection' [2008] SSRN Electronic Journal, 2, 9; Maria Kontos and Ursula Apitzsch, *Self-Employment Activities of Women and Minorities* (VS Verlag für Sozialwissenschaften 2008) 83; Ngozi Okoye and Stuart Cross, *The Personality of Company Directors as a Behavioural Risk Contributor in the Corporate Governance Process* (Routledge 2015) 19; ECIE, *Proceedings of the 12Th European Conference on Innovation and Entrepreneurship: Novancia Business School Paris, France 21-22 September 2017* (Academic Conferences and Publishing International Ltd 2017) 567; Hiessl (n 58) 23.

made, this criterion becomes harder to determine. Although this situation may not necessarily constitute entrepreneurial risk, these kinds of situations have been subject of debates.[65] Currently, the leading way this is understood is tied to the question whether there is a fair balance between an entrepreneurial risk and the entrepreneurial chances.[66] In relation to CSPs, entrepreneurial chances in contrast to risks would entail the CSPs being able to act as entrepreneurs within the particular market and in this capacity make use of their chances to benefit.[67] If this is the case, they would not be considered employees (although still workers). However, in cases in which the CSPs contractually carry entrepreneurial risks, but are unable to operate freely as entrepreneurs and render the benefits, CSPs would be rendered employees. Nevertheless, it needs to be understood that this scenario is mostly theoretical. Thus, theoretically, there may be situations in which this could apply in practice, for instance in situations, in which the CSPs are required to invest in a brothel, for instance, as a requirement to work there, yet will not be paid more if the business does well.

The next point that would determine whether CSPs are considered employees or not relates to the question if they have the liberty to choose their own working time.[68] This

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[65] Lisa Gibson, 'Innocence and Purity vs. Deviance and Immorality: The Spaces of Prostitution in Nepal and Canada' (MA Thesis, Institute of Development Studies, University of Sussex, Brighton 2003) Annex 2; Ministry for Health, Equalities, Care and Age of the State of North Rhine-Westphalia, 'Round Table "Prostitution" North-Rhine Westphalia' (Ministry for Health, Equalities, Care and Age of the State of North Rhine-Westphalia 2014) 23 – 24 <https://broschueren.nordrheinwestfalendirekt.de/herunterladen/der/datei/finalreport-prostitution-2015-03-30-weblinks-pdf-1/von/abschlussbericht-runder-tisch-prostitution-nrw-englische-uebersetzung/vom/mhkbg/2015> accessed 18 February 2018; Adalberto Perulli, 'Economically Dependent/Quasi-Subordinate (Parasubordinate) Employment: Legal, Social and Economic Aspects' (2003) Brussels Study for the European Commission <http://www.europarl.europa.eu/hearings/20030619/empl/study_en.pdf> accessed 18 February 2018; see also Peter Urwin, *Self-Employment, Small Firms and Enterprise* (Institute of Economic Affairs 2011); Roger Blanpain, *Freedom of Services in the European Union* (Kluwer Law International 2006) 85 – 87; Farzana Chowdhury, Sameeksha Desai and David B Audretsch, *Corruption, Entrepreneurship, and Social Welfare* (Springer 2018) 25; Bert Floren, 'Fake Self-Employment in the European Union - A Comparison between the Netherlands and the United Kingdom -' (LLM International and European Labour Law, Tillburg University 2013); Juha Kansikas, 'Disguised Employment – The Nature of Forced Entrepreneurship' (2007) 12 Electronic Journal of Business Ethics and Organization Studies.
[66] Roger Blanpain, Freedom of services in the European Union: labour and social security law: the Bolkestein initiative (The Hague: Kluwer Law Internat., 2006) 86.
[67] Ibid.
[68] Uglješa Grušić, *The European Private International Law of Employment* (Cambridge University Press 2015) 72; Case C-55/94 *Gebhard v Consiiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] CER I-$165, [20].

criterion would be fulfilled if CSPs are contractually bound to certain working hours, or if they are instructed by another person, when they should be working. In particular, a question that arises here, is how control could be enforced in this respect, not just in relation to working hours, but more broadly in relation to engaging in sex acts as a commercial service in general, as there may be issues pertaining to consent in these matters. Accordingly, an issue in this regard may arise in later discussions on whether it is legal or ethical for someone to dictate when a person should engage in prostitution. However, interestingly, when comparing the employment situation of CSPs to other employed service providers, such as barbers, receptionists, waiters or mechanics, to name only a few, it can be suggested that the working hours may not directly mean that the services will be provided during the suggested times. All the examples named, will only be providing services during their dictated working times, when customers are seeking the specific services in question during the dictated times. Thus, all these service providers' wages are not necessarily dependent on the quantity of services they provide, but instead, are contingent on the number of hours these workers have been in place, prepared to offer the services when required. For the purpose of this examination, the term "prepared" to offer the service can be understood twofold. On the one hand, it can be understood, that a CSP would need to internally be prepared to offer prostitution services, thereby consenting to it. On the other hand, "prepared" can be understood as a requirement to work during this time, thereby, assuming that if a CSP was not prepared to do so, they could refuse to work during these dictated times. The second point here is crucial, as the absence of the option to refuse would amount to forced prostitution, and thereby to an aggregated form of rape. Thus, at this point of the examination, it is sufficient to say, that if the working times are determined by someone other than the CSP that this criterion for recognition as an employee would also be fulfilled.

The final point is whether the organisation of the service provision is integrated into an undertaking, and whether the CSPs carry out activities as their own employer. Accordingly, as established above, CSPs cannot be carrying out the running of a business while at the same time being employed within that said business, due to the

automatic lack of subordination requirement to be considered an employee.[69] Thus, the simplest form of this kind of scenario would involve CSPs simultaneously being the person providing the prostitution services as well as the person owning the business that provides these prostitution services. However, it is unlikely that this criterion will be relevant in itself, as, in light of the previously mentioned criteria, most of these kinds of situations would be excluded.

To conclude this point, it has become clear, that there are situations in which CSPs could be considered employed workers from the perspective of EU law.

8.2.3 Essential criteria for CSPs as self-employed workers

As explained earlier in this chapter, being an employed worker is not the only form of worker regulated by the EU. There are a number of aspects that are similar between the free movement of persons and the free movement of services. Some of these have now been incorporated in the treaty provisions regarding EU citizenship.[70] In *Van Binsbergen*,[71] Advocate General Mayras explained that the equal treatment on grounds of nationality provisions applied to workers, services, and establishments.[72] The provisions on the free movement of workers, services and establishments work similarly in requiring that nationals from other MSs are treated equally when they have settled within a member state after having exercised their free movement rights.[73] Accordingly, CSPs would theoretically be entitled to the same equal treatment provisions, regardless

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[69] *Asscher* (n 63) [26].

[70] See for example: European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5, Articles 9 to 12; 24 December 2002 and European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 18 - 25; P Craig and G De Búrca, *EU Law* (Oxford Univ Press 2011) 765.

[71] Case C-33/74 *Van Binsbergen v Berstuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

[72] Opinion of Mr Advocate General Mayras delivered on 13 November 1974 in Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Reference for a preliminary ruling: Centrale Raad van Beroep - Netherlands. Freedom to provide services. Case 33-74, European Court Reports 1974 -01299, 1316 – 1317.

[73] Case C-345/05 *Commission v Portugal* [2006] ECR I-10633, [1],[3],[13], [20]; Case C-104/06 *Commission v Sweden* [2007] ECR I-671, [15]; European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 45 and 49.

of whether they operate as employees, self-employed workers or within their own establishments. However, a key difference between the equal treatment provisions for the different categories of workers lies within the capacity in which they are working.[74]

The question of whether CSPs can constitute self-employed workers in accordance with the understanding of the EU is easier to establish, due to pre-existing case-law on the subject. Accordingly, the CJEU dealt with this question in *Lili Georgieva Panayotova and others v Minister voor Vreemdelingenzaken en Integratie*.[75] Here, the key issue to be decided was if it was possible for the Dutch authorities to deny non-nationals permanent residence permits, when they wanted to work in the Netherlands in a self-employed capacity without previously having held temporary residence permits. Although it was not discussed by the Court that the six plaintiffs from Bulgaria, Poland, and Slovakia wished to take up self-employment as CSPs,[76] the nature of their work was accepted by the Court without hesitation to constitute "work […] in a self-employed capacity",[77] and "with a view to establishment [in the Netherlands] as [...] self-employed person[s]".[78] This ruling indicates an expansion of the ECJ's previous ruling in *Jany*,[79] in which it had previously been held, that sex work, and more specifically prostitution, constituted an economic activity.

8.2.4 Essential criteria for prostitution as a service or establishment in relation to the EU free movement provisions

Establishments and services are similar in regards to the stage at which a person who is self-employed providing services regularly in a member state can be considered

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[74] AG Mayras in Case 2/74 *Reyners v Belgium* [1974] ECR 631, paras. 15-16 and the ECJ in *Asscher* (n 63) [25]; Case C-268/99 *Jany v Staatssecretaris van Justitie* [2001] ECR I-8615, paras. 68-70, in the context of the EU-Poland Association Agreement (This case dealt specifically with prostitution).
[75] C-327/02 *Lili Georgieva Panayotova and others v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055.
[76] See Opinion of General Advocate Poiares Maduro delivered on 19 February 2004, C-327/02 *Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie [2004]* ECR 2004 I-11055, paras 2, 17, 83.
[77] *Lili Georgieva Panayotova and others* (n 75) para 2 – 9.
[78] Ibid para 17.
[79] *Jany* (n 74).

sufficiently connected to that particular state in which it intends to be considered established, instead of only providing services in that territory.[80] Subsequently, the free movement of services may not necessarily require that the person providing the service is established, either habitually or via their business headquarters, within the member state in which the services are provided. A CSP could have an establishment within one member state, or live in one member state, and still be able to provide prostitution services within another member state, "where the provision of services is not subject to any special condition under the national law applicable."[81] Special conditions could involve, for the purpose of this examination, public order limitations, as will be discussed in section 7 of this chapter. In particular, this brings up questions related to distinguishing between this situation and situations in which CSPs use their free movement rights to establish their services in some form within another member state. To answer this, the case *Gebhard*[82] may be of assistance. Here the CJEU laid out the factors that distinguish a right of establishment from the mere temporary provision of services in a member state.[83]

It was held that:

> the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.[84]

However, when service providers moved to other MSs, the "third paragraph of Article 60, envisage[d] that [the providers are] to pursue [their] activit[ies] there on a temporary basis."[85] However, it was also made clear that "the temporary nature of the activities in

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[80] Case 205/84 *Commission v Germany* [1986] ECR 3755, para 22; *Van Binsbergen* (n 72) para 1 – Here it was explained that persons established in one member state can still provide services in other member states.
[81] *Van Binsbergen* (n 72) para 1
[82] Gebhard (n 68).
[83] Ibid [18 – 28].
[84] Ibid [25].
[85] Ibid [26].

question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity."[86] Accordingly, if a CSP lives in one member state, yet provides prostitution services in another regularly, periodically or continuously, the service provided may be considered established in some cases. In contrast to a number of other forms of services, prostitution can potentially be provided more easily, as it is assumed that there is demand for the service and there are often less entry requirements or necessary skills that may restrict access, such as language or qualifications.[87]

There has been a strong development in the view of the free movement of services and establishments over the past decades. Accordingly, it has been suggested that the priority of Articles 54 and 56 TFEU was initially the liberalization of the mobility of services in order to set up the single market.[88] Thus, this treaty provision was originally more closely related to the free movement of goods.[89] In contrast, the provisions on the free movement of workers was primarily concerned with the development of the principle of non-discrimination.[90] However, the focus later shifted within the development, towards a stronger focus on removing the obstacles of equal treatment, which has moved the laws on the free movement of services and establishment closer to the free movement of workers.[91]

In relation to prostitution, it is necessary for understanding the core difference between access to and provision of prostitution services in member states in which prostitution is regulated more strictly than in others. Accordingly, the case law on the free movement of goods established early on in the process of European integration that goods considered to be sold legally in one member state should also be recognised as such

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[86] Ibid [27].
[87] Assuming that the prostitution is legal in the country it is being offered in.
[88] AG Warner in Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, 872.
[89] Opinion of Advocate General Jacobs delivered on 21 February 1991 in Case C-76/90 *Saeger v Dennemeyer & Co Ltd*. [1991] ECR I-4221, 4234, para 24.
[90] *Case 36/74 Walrave* and *Koch* [1974] ECR 1405, paras 7, 28, 32; Case *C-214/94 Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253, paras 36, 64.
[91] Case C-212//97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459, para 24; *Gebhard (n 68)* 20 - 21; Case C-400/08 *Commission v Spain [*2011] ECR I-01915, para 59.

within another.[92] However, as the case law in both *Jany*[93] and *Lili Georgieva Panayotova and others*[94] have confirmed, there has been a clear move towards viewing services similarly to workers rather than goods. This is particularly the case, as it appears that prostitution services can only be provided in accordance with the national provisions of the host member state, regardless of the way they are regulated in other member states.

8.2.5 Summary: Prostitution as work within the EU's internal market

In order to ensure the effectiveness of the EU's internal market, which has the rationale to raise the living standards and working conditions across the territory of the EU, free movement provisions have been established. So far, this chapter has demonstrated that in accordance with EU law, prostitution can, in certain circumstances, fall within both the categories of work as a worker in the sense of an employee as well as work within the capacity of self-employment. It is also clear that prostitution can constitute services and establishments in accordance with the EU understanding as long as the national provisions regulating prostitution within a particular member state comply with the necessary EU law requirements. In particular, the case law that has contributed to the establishment of the EU's understanding of prostitution, which has made the previous examination necessary clearly made it clear that the EU understands prostitution to be an economic activity, which was first established in *Jany.*[95] This was extended in *Lili Georgieva Panayotova and others*[96] to confirm that, as an economic activity, prostitution can fall within the provisions of free movement of services and establishments, thereby falling under the protection of article 15 of the EU Charter of Fundamental rights. However, whether this is the case, will depend on the national provisions in the member

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[92] Case C-120/78, *Rewe-Zentral AG vs. Bundesmonopolverwaltung für Branntwein* [1979] ECR I-649, paras 6, 14, 15; P. J. G Kapteyn and others, *Introduction to the Law of the European Communities* (2nd edn, Kluwer Law International 1989) 443 - 452.
[93] *Jany* (n 74) [45], [52].
[94] *Lili Georgieva Panayotova and others* (n 75) [2] – [9].
[95] *Jany* (n 74) [45].
[96] *Lili Georgieva Panayotova and others* (n 75) [2] – [9].

state in question. As such, the reach of the EU into national regulatory approaches to prostitution depends on whether the member state shares the EU's understanding of prostitution being an economic activity or not. Thus, the next sections will showcase how EU law reaches prostitution regulation in member states in which prostitution is considered an economic activity, such as in Germany, and how this reach is blocked in member states in which prostitution is considered a social harm or public nuisance, such as in Sweden and the UK.

8.3 EU Harmonisation of prostitution regulation in member states in which prostitution is considered a legal form of work

As it has now been established that under certain circumstances prostitution can constitute an economic activity, and as such work, in accordance with EU law, the following will look into some of the consequences that would arise in member states in which this is also the case. In particular, this will be important to understand how far the EU provisions are able to reach into the national regulation of prostitution of its member states. It also will provide an understanding of how and why it is possible that workers can move between EU member states in order to work in prostitution.

8.3.1 Equal treatment regarding employment conditions (Art. 45(3)c TFEU) and self-employment in prostitution

One of the key consequences of prostitution being considered work under EU law is that it will fall under the EU's general principle of equal treatment.[97] This principle is a crucial aspect of EU harmonisation as it ensures that across the territory of the EU, the same situations must not be treated differently, as well as that situations that are significantly different, should not be treated the same way except in circumstances in

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[97] European Union, Treaty establishing the European Community Article 2.

which such treatment is justified objectively. In practice, in order for this to apply, there is a need to establish a comparable situation.[98]

If it can be established that similar situations are treated differently, it is viewed as discrimination, which means that the principle of equal treatment also falls within the term of non-discrimination. Consequentially, it was explained in the Joined Cases 117/76 and 16/77 *Ruckdeschel*[99] that "[t]he prohibition of discrimination laid down […] is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of [European Union] law."[100]

Before being able to understand how this applies to prostitution and its regulation within the various member states, it needs to be clear in which areas this principle is applicable in general. According to the TFEU, discrimination on a number of grounds is expressly prohibited, including nationality.[101] Thus, in relation to prostitution, within the territories of each individual member state, it needs to be ensured that however prostitution is regulated, the nationality of the workers or the consumers, when these are nationals of any EU member state, should not affect the way prostitution is dealt with. Although many CSPs in the EU are third country nationals, this is a separate matter outwith the scope of this examination. In particular, this is based on the assumption that third country nationals working in prostitution would be subject to the same regulatory deviations of inter-EU working provisions as in other sectors.[102] Apart

[98] Matthew Humphreys, Margot Horspool, European Union Law (Oxford University Press, 2014); Case T-10/93 A v Commission [1994] ECR II-179, [42]; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, [57]; Case C-227/04 *Lindorfer* [2007] ECR I-6767, [63]; Paul Craig; Grainne De Búrca, EU law: text, cases, and materials (Oxford, United Kingdom: Oxford University Press, 2015) 934.
[99] Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753.
[100] Ibid para 7.
[101] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Article 18.
[102] European Union, 'Work Permits' (*Your Europe - Citizens*, 2020) <https://europa.eu/youreurope/citizens/work/work-abroad/work-permits/index_en.htm> accessed 13 September 2020; European Commission, 'Intra-EU Mobility of Third-Country Nationals' (2013) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/immigration/docs/studies/emn-synthesis_report_intra_eu_mobility_final_july_2013.pdf> accessed 13 September 2020.

from these deviations, the same discussions in this chapter would apply to third country national CSPs as well.

The elimination of discrimination based on (EU) nationality has constituted a central objective of the EU since its foundation. Hence, EU workers' rights to freely move around the territory of the EU is and has been one of the main bases of the EU's legal order.[103]

As explained at the beginning of this chapter, the EU has no explicit competence to regulate prostitution, but it has the authority to intervene if a member state permits its own nationals to work in prostitution. Thus, in countries in which prostitution is considered an economic activity, such as Germany, EU nationals who are CSPs would be entitled to work in accordance with the free movement of persons. Moreover, CSPs who are EU nationals would be accorded equal rights and social benefits as nationals of the specific EU host member state.[104]

8.3.2 Cross-border situation related rights in legal prostitution

As discussed above, Art. 45(1) TFEU provides for the right of free movement of workers. Linked to the equal treatment provisions mentioned above, Article 45(3) TFEU ties the free-movement of workers with certain rights, including the right to be able to accept offers of employment that have been actually made, the right to move freely within the member states in question (for this purpose), the right to remain in the member state in question for the purpose of the employment, i.e. in this case prostitution, and the right to stay in the particular member state, even after the

[103] Article 3(2), European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C OJ 115/01; European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 4(2)(a), 20, 26 and 45-48*;* Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Regulation (EU) No 492/2011 on freedom of movement for workers within the Union; Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009.

[104] Adoui and Cornuaille (n 3) 1668; *Jany* (n 74) [3].

employment has ended.[105] This also comes with the right to leave their member state of origin, in order to enter into a different member state for the purpose of residing there and pursuing an economic activity there.[106]

There are no provisions that limit EU nationals from leaving their home country to enter another for any given reason, except for imprisonment, which is a situation that is outside the scope of this thesis. Accordingly, even if prostitution is not considered an economic activity in a CSP's member state of origin, their home member state cannot deny them the right to leave in order to take up this activity in another EU member state.[107] However, the free movement of a person can still be limited by the host member state by the right of member states to be able to deny people free movement for reasons of "public policy, public security, and public health."[108]

The free movement provisions have been held to be directly effective.[109] This means that the EU provisions directly affect the regulation of prostitution in the member states, as the individuals in these situations are able to directly rely on these EU provisions without the member state in question having implemented the provisions into their own domestic jurisdiction. In relation to Article 45 TFEU this was acknowledged for the first time by the Court in the case *French Merchant Seamen*.[110] Later this was also confirmed in the case *Van Duyn*, in which case it was ruled that, notwithstanding the derogations to the free movement rights contained within Article 45(3) TFEU, Articles 45(1) and (2) TFEU set out a sufficiently precise obligation in order to confer direct

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105 Commission, 'Proposal for a Directive of the European Parliament and of the Council of measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers' COM (2013) 236 final; M Vink, The Limits of European Citizenship (Palgrave McMillan, 2005), Case C-184/99 Grzelczyk [2001] ECR I-06193; Case C-292/89 *Antonissen* [1991] ECR I-00745; Joined Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-04585.
106 Case C-363/89 *Roux v Belgium* [1991] ECR I-273, [9].
107 With the exception of imprisonment.
108 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, Articles 52 and 65.
109 Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-463, [93]; Case 167/73 *Commission v France* [1974] ECR 359, [41].
110 *Commission v France* (n 109) [41].

effect.[111] Furthermore, in *Reyners*[112] and *van Binsbergen*[113] it was ruled that the provisions within Article 49 TFEU, dealing with the right of establishment, and Article 56 TFEU, dealing with services, were directly effective. CSPs who are crossing internal EU borders are able to rely on the provisions within Articles 45 (freedom of movement for workers), 49 (freedom of establishment), and 56 TFEU (freedom to provide services) directly against host member states as well as their home member state.[114] Thus, as long as there is a cross-border situation, such as a CSP moving from one member state to another for the purposes of prostitution, they can rely on these EU provisions regardless of the domestic laws within the specific member states. Accordingly, although it was initially assumed that the EU had no competence in the regulation of prostitution, it does, in cross-border circumstances, directly regulate the free movement of commercial sex and the rights of CSPs in the process.

An area in which the EU may contribute to the attractiveness of working as CSPs in member states in which prostitution is considered an economic activity can be seen in relation to the EU proscribed rights of entry and residence. As previously mentioned, the rights from Article 45 TFEU have been expanded within three secondary measures. These are Directive 68/360 on the rights of entry and residence (of EU nationals),[115] Regulation 1612/68 on the free movement of workers, which is now Regulation 492/2011,[116] and Regulation 1251/70 on the right to remain.[117] However, Directive 68/360,[118] Regulation 1251/70,[119] and two Union Directives on establishment and services, and the provisions on family rights from Articles 10 and 11 of Regulation

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[111] Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337 [8].
[112] Case C-2/74 *Jean Reyners v the Belgian State* [1974] ECR 631 [32].
[113] *Van Binsbergen* (n 72) [27].
[114] See for example, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, [30]; Case C-107/94 Asscher [1996] ECR I-3089, [32]; Case C-18/95 *Terhoeve* [1999] ECR I-345, [39].
[115]Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968, p. 13.
[116] Regulation 492/2011 of the Parliament and Council of 5 April 2011 on freedom of movement for workers within the Union OJ 2011 L141/1.
[117] Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right or workers to remain in the territory of a Member State after having been employed in that State, OJ L 112, 26.4.2006, p. 9–9.
[118] OJ [1968] SE (II) L257/13/485.
[119] Repealed by Commission Reg. 635/2006, OJ [2006] L112/9.

1612/68, have been incorporated in Directive 2004/38 on Citizens' Rights (CRD),[120] which applies to all EU citizens and not only to workers. The idea that underlies this directive is that the rights migrant workers enjoy, increase with the length of time a person has been resident within a host state. Accordingly, rights in relation to integration are divided into three levels, namely, the rights of people wishing to enter another EU member state for a period of up to three months,[121] the rights for people residing for a time period up to 5 years[122] and the rights of people residing in a host state for a time period longer than five years, which is also known as the right of permanent residence.[123] Although this does not change much in relation to the situation of workers, as they will enjoy the treaty rights from the first day of entry into the host state, it does have a significant impact on EU citizens who are not economically active and their family members.

Article 24 CRD sets out the general principle of equal treatment for EU citizens, however, the details of the principle in relation to workers remain in Regulation 492/2011.[124] This Regulation was set out to aid free movement of workers and their family members as well as their integration into the host state community.[125] The considerations by the Council included the importance for workers to have their families with them as well as the importance for both the workers and their families to be able to integrate into the community of the host state without being treated differently.[126] The EU not only regulates the free movement and equal treatment of workers entering a member state for the purpose of working in prostitution, but also for their family members, who are allowed to accompany the CSP into the host member state and enjoy the same equal treatment provisions.

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[120] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/ 360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
[121] Ibid Article 6.
[122] Ibid Article 7.
[123] Directive 2004/38/EC Article 16.
[124] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141/1 27.5.2011.
[125] Ibid Preamble.
[126] Ibid.

This may contribute to additional pressures on migrant CSPs, seeking access to other member states in which they wish to create a better life not just for themselves, but also for their families. Accordingly, "economic duress" which challenges the theoretical voluntariness of CSPs to work within prostitution may be enhanced in situations in which other family members depend on the CSPs. Moreover, the line between forced and voluntary prostitution may be blurred in situations in which CSPs may be encouraged by family members to take up prostitution in another member state in order to ensure they all can not only reside in the host member state, but also enjoy the rights that are linked to the worker status of the CSP. Moreover, the different classifications based on the length of time worked within a host member state, may further hinder some migrant CSPs from leaving prostitution, as this may affect their residency status. Other cases may also involve EU nationals, who may have entered into a member state other than their country of origin as family members of another EU national who entered into a host member state for work. However, if this family member loses their work prior to a qualifying time period to ensure that certain rights are guaranteed, and is unable to find another form of employment, the "economic duress" on the other family member may be increased to work in prostitution to ensure that the family does not have to leave their new home within the host member state.

8.4 Sub-conclusion: Areas in which the EU regulates prostitution

In November 2001, it was held by the ECJ (now CJEU) that prostitution constituted "a provision of services the remuneration of which […] falls within the concept of economic activities"[127] within the meaning of Article 2 of the then EC Treaty.[128] Moreover, the CJEU confirmed this in *Jany Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* by, amongst other things, highlighting that in "most Member States, prostitution is not prohibited as such, and prohibitions relate more to certain wider phenomena such as soliciting, white-slaving, prostitution of minors, procuring and the clandestine

[127] *Jany* (n 74) [45].
[128] Ibid.

residence of workers."[129] Thus, as prostitution is not prohibited in a number of member states, the court would have to treat prostitution as an economic activity within the meaning of the then EC Treaty and the Associated Agreements, and prostitution, from an EU perspective has to be classified as work, as the previous examination has determined. This is clearly already the case in member states in which prostitution is considered a recognised legal form of work. In light of the findings from chapter 5, 6 and 7 of this thesis, there are two predominant systems in which this could be the case, namely abolitionist and regulationist regulatory systems. However, there may even be forms of prohibitionist regulatory systems of prostitution, in which certain forms of prostitution may still be considered legal work.

In all these cases, EU law would apply to prostitution in relation to the regulatory elements of the work that are permitted under the laws of the member states in question. As such, prostitution could fall under the protection of Article 15 of the EU Charter on Fundamental Rights (EUCFR). This article seeks to protect professions and the rights to work of individuals.[130] In 2002, Laskowski argued that there is no doubt that voluntary prostitution would fall under the protection of Article 15 EUCFR. An important point to note is that he further explains, that if the decisions of the then ECJ have an influence on the provisions in the member states and their legal opinions in relation to prostitution, it will result in an increased rational view of the subject matter in the long term.[131] As was seen in the case of Germany in chapter 5, the judgements of the ECJ had a direct impact on the German decision wo remove the immorality element of prostitution, which resulted in the overall understanding of prostitution being an economic activity. This has already proved Laskowki's hypothesis to be true.

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[129] Ibid [52].
[130] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, OJ 326/02, Article 15; Steve Peers, Tamara K Hervey, Jeff Kenner, Angela Ward, The EU Charter of fundamental rights: A Commentary (Oxford: Hart, 2014) 424 – 426.
[131] Silke Ruth Laskowski, 'New German Prostitution Act-An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law' (2002) *Int'l J. Comp. Lab. L. & Indus. Rel.* 18, 479-492.

It has been established that in cases in which prostitution is legal within EU member states, that EU citizens are able to move freely into these host states in which prostitution is legal or legally tolerated. This is the case regardless of the domestic laws on prostitution in CSPs member state of origin. The free movement rights tied to prostitution as work in these situations, also becomes applicable to the workers' families. Furthermore, under the equal treatment provisions, CSPs and their families from other EU member states have to be treated the same way as nationals within the host territories, in the same situations, both within and outwith the work environment. Despite limitations being in place for host member states on the basis of public interest, these are not applicable in situations in which the domestic laws of the host member state indicate that the public interest reason provided is not valid, due to similar situations being treated differently in relation to similar matters.

Thus, this chapter has demonstrated that in member states in which prostitution is legal and/or legally tolerated, EU law will be able to reach into national regulatory approaches to prostitution in relation to working conditions, access to work, as well as other areas, such as access to relevant services such as health care, social benefits, and any other regulated area of citizens lives when working and living within the territories of other EU Member States to their own nationality.

As it has been shown that the EU already has a significant impact on the regulation of prostitution within its territory, another point in need of consideration is to understand in what circumstances member states are able to limit the reach of EU law in relation to the regulation of prostitution in member states.

8.5 Areas of Limitation to the regulation of prostitution: Market access restrictions and o*rdre public*

The previous section examined the situations in which the EU actively influences the regulation of prostitution and where EU law reaches into the national regulation of prostitution. As indicated at the beginning of this chapter, clarification is also required in

relation to the areas in which the reach of EU law into national regulations of prostitution is not entirely prohibited, yet limited due to certain legal provisions or concepts. In particular, restrictions of access to employment, the ability to offer services as well as access to services will need to be considered, in order to see where the reach of EU is able to limit CSPs entering member states to provide prostitution services and CSUs and CSPus accessing prostitution services in other member states.

8.6 Restriction of market access of migrant CSPs

In relation to CSPs accessing labour markets in other member states, it may be important to examine whether there are some non-discriminatory national measures that can potentially breach Article 45 TFEU, when they substantially impede market access in the EU and there is no objective justification. An example where this was the case can be found in *Bosman*.[132] In this case, a football player complained about the 3+2 rule laid down by the relevant sporting association as well as a further rule which stated that professional footballers who were nationals of one member state were not able to be employed by another club, after the contract had expired with the first club, unless the new club paid to the first club a transfer, training or development fee.[133] Since the provisions applied to transfers between clubs belonging to different national associations in the same member state as well, and that these were similar to the governing of transfers between clubs of the same national association, the provisions were not discriminatory *per se*. However, it was held these rules "directly affected players' access to the employment market in other Member States"[134] and that, thus, they were to be considered unjustified obstacles to the free movement of workers.[135]

[132] Bosman (n 109).
[133] Ibid [5].
[134] Ibid [103].
[135] Ibid [144 – 146].

However, in situations in which member states are able to objectively justify their measures which have the potential to restrict market access based on proportionality, they will be considered to be lawful.[136] There are a number of grounds, which have been developed though case law over the past decades which can apply in an employment context, to justify the restriction of market access. The most relevant for this investigation include, the prevention of social dumping or unfair competition,[137] as well as the prevention of abuses of the EU free movement provisions, the prevention of disturbances in the labour market, the protection of small and medium-sized undertakings, social protection of workers, and to combat illegal employment and the protection of workers.[138]

In relation to the free moment of workers, the EU Treaty provides for member states to refuse EU nationals the right to entry on the exceptional grounds of public policy, public security or public health. These measures in question have to be based on personal conduct of the concerned individuals.[139] Furthermore, as explained above, the conduct needs to be sufficiently serious and pose a threat to the member states' fundamental interests.[140] After the accession of member states and during the transitional period, there are a number of conditions, which may restrict the free movement of workers between these member states. However, in relation to prostitution, these restrictions do not concern providing services within prostitution in a self-employed activity, when this is considered legal within the territory of the member state in question.

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[136] Bosman (n 109); Case C-190/98 Graf v Filzmoser Maschinenbau GmbH [2000] ECR I-493.
[137] Case C-60/03 *Wolff & Müller* [2004] ECR I-9553.
[138] Thomas Eger and Hans-Bernd Schäfer, *Research Handbook on the Economics of European Union Law* (Edward Elgar Publishing 2012).
[139] European Union, Consolidated version of the Treaty on the Functioning of the European Union Article 45(3).
[140] Directive 2004/38/EC, Article 27(2).

8.6.1 The concept of *ordre public* as a limitation to the free movement of CSPs

In the previously mentioned cases of *Adoui and Cornuaille*, the matter of *ordre public* in relation to the free movement of workers who work in prostitution was discussed in detail. However, in the case it was made clear that any limitations to *ordre public* were merely limitations of what was forbidden and did not define the concept itself.[141] However, the concept of *ordre public* is not defined by national law either. In the discussions of the definition of the concept of *ordre public* from the perspective of the EU, the Dutch government suggested that "[i]t is not possible to give an all-embracing definition of the concept of *ordre public*, since it involves variable interests which the State or public executive bodies consider to be fundamental public interests which they must protect on their own initiative."[142] The UK presented the view that "it is neither necessary nor even possible to give a definition of *ordre public* as such. The term may be interpreted only in the circumstances of each individual case."[143] This would enable a balance between the aims and needs of the individual member states seeking to protect their legitimate interests within their borders, and the National and Community needs within the EU.[144] This demonstrates how the majority of the member states strongly tried to protect their freedom regarding their margin of appreciation by fighting further juridification in the area of immigration.

In the observations submitted by the Commission in relation to these cases, it was explained that there was no definition of *ordre public* that was common to all member states. However, it did refer to "the legal foundations on which such limits are based."[145] In relation to this specific case, the foundation referred to are the "fundamental principles of Community law"[146] of non-discrimination and proportionality.[147] Moreover, the Commission has specified the need to "strike a balance between the application of the principle of non-discrimination [. .] and the power accorded to Member States to

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[141] Adoui and Cornuaille (n 3) 1692-93.
[142] Ibid 1697.
[143] Ibid 1698.
[144] Ibid.
[145] Ibid 1699.
[146] Ibid.
[147] Ibid.

adopt *ordre public* measures".[148] This describes the principle of proportionality according to which legal values or legitimate interests that stand in contrast to one another, need to be balanced. Thus, "a comparison [is to be] made of the two interests involved, the protection of national *ordre public* on the one hand and the free movement of persons on the other."[149] Furthermore, it needs to be established "whether the measure […] is really necessary in order to uphold *ordre public*" and if "the threat is sufficiently serious to justify the measure envisaged."[150]

To summarise, the principle of proportionality requires generally a balancing of interests and values, and specifically, that measures that restrict rights are necessary to achieve a given end, and that the protected interest is sufficiently serious in light of the loss of the restricted rights of individuals.[151] According to Hurri[152] a strange factor in this judgement was the fact that although the Commission presented a model of the principle of proportionality within its reasoning that was more elastic than the general two-track model used in the majority of member states, which generally entails that non-discrimination provisions do not apply when there are special provisions present. It went on to assess how the Commission endorsed a two-track model, in the sense that it stated that non-discrimination "only applies subject to special provision laid down in the Treaty and the regulations and directives issued for its implementation."[153] Accordingly, it was explained that non-discrimination did not operate in matters of free movement, because for these matters special provisions are laid down, namely Article 48 TFEU and Directive 221/64.[154]

The Advocate General explained that in essence it needed to be "borne in mind that *ordre public* allows derogations from the principle of non-discrimination as well as from

[148] Ibid.
[149] Ibid 1700.
[150] S. Hurri, *Birth of the European Individual* (Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2014).
[151] Adoui and Cornuaille (n 3) 1700.
[152] Hurri (n 150) 182.
[153] Adoui and Cornuaille (n 3) 1700; Hurri (n 150) 182.
[154]Adoui and Cornuaille (n 3) 1700.

that of equality of treatment" and that the Treaty was clear in this respect.[155] In particular, in relation to *ordre public*, he explained that EU law did not provide or mean to provide an independent definition.[156] Instead *ordre public* was a concept, which has been derived from the jurisdictions of the member states, and which, thus, included individual interpretations and references to other principles, rules and concepts within those jurisdictions.[157] Accordingly, *ordre public* constitutes a concept that not only varies amongst member states, but which can also have different meanings within a single member state, depending on the area of law it is used in.[158]

The *van Duyn*[159] doctrine specifically looked at whether domestic law is valid in relation to *ordre public*. The facts of this case were that Ms Van Duyn, who was a Dutch national, had been denied entry into the UK on the basis of her intention to work for scientology. She claimed that by doing this, the British government had infringed what is now Article 45(3) TFEU (then Art 48(3) EEC). According to Article 3(1) of the Free Movement of Workers Directive 64/221/EC, a public policy provision needed to be "based exclusively on the personal conduct of the individual concerned."[160] In relation to *ordre public* and the discretion of each individual member state it was held that in the context of the community, when *ordre public* is used as a justification for derogating from the free movement of workers, it has to be interpreted strictly in order to prevent it from being determined unilaterally by the individual member states without controls by the EU.[161] However, in regards to the particular circumstances the

> justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the treaty.[162]

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[155] Advocate General, Opinion of Mr Advocate General Capotorti delivered on 16 February 1982 in Adoui and Cornuaille (n 3) 1718.
[156] Ibid 1716.
[157] Ibid.
[158] Ibid.
[159] *van Duyn* (n 111).
[160] Ibid [10].
[161] Ibid [18].
[162] Ibid.

Moreover, it was acknowledged in *Rutili* by the CJEU that "Member States continue to be, in principle, free to determine" *ordre public* "in the light of their national needs."[163] One case that came about in 2015, is an example of limitations that have been based on reasons that were not directly related to prostitution, yet have been influenced by the nature of prostitution and potential risks associated with the nature of the work. In *J. Harmsen v Burgemeester van Amsterdam*[164] a window prostitution business owner in Amsterdam had sought further authorisations to operate two further window prostitution businesses in Amsterdam. This was refused by the mayor on the basis that reports from his existing window prostitution business had revealed that Mr Harmsen, the owner, had rented out rooms to CSPs from Hungary and Bulgaria, who were not able to communicate in a language he could understand. Moreover, the existing window prostitution business was not considered to be managed in a way that would prevent potential abuse. Thus, it was assumed that the potential threats of abuse were likely to occur in any newly opened businesses by the same owner.

Although the main subject matter of this case concerned a solely internal member state matter, the interesting aspect for this examination can be found in the upholding of internal provisions which treated migrant CSPs differently by preventing them from accessing work in prostitution in the Netherlands. In this case the CJEU held that the refusal to grant the authorisation of new businesses based on the fact that Mr Harmsen had rented out spaces to CSPs who were not able to communicate in common languages of the member state was not discriminatory. In particular it was recognised that the Dutch provisions had been established in order to ensure public order and prevent criminal offences like sexual exploitation and human trafficking, which was understood to constitute a justified overriding reason related to public interest. Moreover, it was understood that there was no less onerous measure to achieve the same objective.[165] This means that national provisions that prevent CSPs from working in prostitution who cannot make themselves intelligible to operators and potentially

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[163] Case C-36/75 *Roland Rutili v Ministre de l'intérieur* [1975] 01219, [26].
[164] Joined Cases C-340/14 and C-341/14 R.L. *Trijber v College van Burgemeester en Wethouders van Amsterdam* (C-340/14), *J. Harmsen v Burgemeester van Amsterdam* [2015] ECR I-640.
[165]Ibid [67] – [77].

CSUs and CSPus in a language they understand, is considered “proportionate” in light of overriding reasons related to public interest.[166]

It is important to note that the CJEU judges do not factually determine what should be considered contrary to *ordre public*, but that instead the judges use the member states’ own reasoning on the basis of the provisions within their own jurisdiction. This way of dealing with the matter is derived through a form of veridiction.[167] This means the CJEU will look into the jurisdictional elements of the member state in question to see how the law applies, in this case for instance, to its nationals living within its territory. The idea of veridiction is that the Court is able to uncover what may constitute a social danger in the view of the member state in question, without the need to impose ideas of what would constitute such a social danger in their own view. It appears that the court had taken a different approach for *ordre public* considerations in relation to their arguments of how to define dangers in relation to limitations as the usual approach in other circumstances was to allow for limitations when these are genuine, sufficient, and necessary in a democratic society. A reason for this may be found in Article 72 TFEU, which prohibits the EU to interfere in matters of internal security.

8.7 Limitations placed on the EU freedoms of CSUs and CSPus accessing prostitution services

At this point it should be clear that EU law seeks to safeguard both the rights of its nationals to provide and receive services throughout the EU. In cross-border situations in which CSUs and CSPus seek to access prostitution services in member states other than the member states in which they are habitually resident, the general EU rules on the matter apply. Accordingly, when purchasing goods or services whilst visiting

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[166] Ibid [35], [77].
[167] Hurri (n 150) 182-186.

another EU member state, the specific laws of the visited member state in which the goods or services are being purchased will apply.[168]

The right of EU nationals to be able to freely move within the EU's territory for the purpose of receiving services was initially accepted in *Luisi and Carbone v Ministero del Tesoro*,[169] where it was explained that the right to access services in other member states constituted the necessary corollary to the freedom to provide services.[170] Despite claims that this right to access services in member states other than the ones people are habitually resident in could potentially undermine the ability of member states to restrict the provision of services to their nationals on ethical or moral grounds, the common practice appears to accept that nationals from member states in which certain services are prohibited may still travel to other member states in which these services are provided legally to access the services in question.[171] Examples of this can be found, for instance, in cases involving the provision of certain health care or medical provisions, such as abortions, certain conception practices and other reproductive technologies,[172] or euthanasia services.[173]

However, despite there being many instances in practice in which this is the case, there are a limited number of cases that suggest that there may be potential limitations to the

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[168] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, preamble; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, preamble.
[169] Case C-26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR I-337.
[170] Ibid [16].
[171] Although there are no examples relating to prostitution on the matter, there are many examples to be found in the areas of reproductive procedures. See for example: Guido Pennings, 'Reproductive Tourism as Moral Pluralism in Motion' (2002) 28 Journal of Medical Ethics; Guido Pennings, 'Legal Harmonization and Reproductive Tourism in Europe' (2004) 19 Human Reproduction; T. Hervey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies; Wannes Van Hoof and Guido Pennings, 'Extraterritoriality for Cross-Border Reproductive Care: Should States Act against Citizens Travelling Abroad for Illegal Infertility Treatment?' (2011) 23 Reproductive BioMedicine Online.
[172] *Attorney General v X and others* [1992] ILRM 401.
[173] Gabriella Berki, 'Cross-Border Patient Mobility: The Legal Framework of Obtaining Healthcare Abroad within the European Union–A Patient's Perspective' (PhD Thesis, Ghent University and the University of Szeged 2015); Glenn Cohen, 'Traveling for Assisted Suicide', Euthanasia and Assisted Suicide: Global Views on Choosing to End Life (Praeger 2017) 373-388; Adam McCann, 'Comparing the Law and Governance of Assisted Dying in Four European Nations' (2015) 2 European Journal of Comparative Law and Governance.

right to receive services when these have been deemed illegal in an EU national's country of origin. In *Marc Michel Josemans v Burgemeester van Maastricht*[174] the CJEU held that a ban on admitting non-residents of the Netherlands to Dutch coffee-shops was in accordance with EU law.[175] In part, the reasoning for this was based on the fact that marketing narcotic drugs was prohibited in all EU member states including the Netherlands due to their undesirability.[176] However, the Netherlands applies a policy of tolerance in relation to cannabis, whereby cannabis may be sold, purchased and consumed within designated coffee-shops, based on conditions established by local authorities.[177] In the *Josemans* case, municipal legislation had limited the access to these designated coffee-shops to only allow residents access. Josemans claimed that this provision discriminated against non-residents and was contrary to the freedom of services contained in article 56 TFEU (then article 49 EC).[178] However, the CJEU rejected this claim, stating that the purpose of the provisions, namely to combat drug tourism, was a proportionate justification for the restriction of the freedom of receiving services as well as accompanying public nuisance.[179]

It should be noted, however, that in *Josemans* the limitation was not issued by the country of origin of the EU nationals who were denied the service, but, again, from the country in which the services were provided. This is in accordance with the idea that the laws of the country in which the service is to be provided are the applicable ones in cross-border transactions within the EU. However, despite this consistency with the overall general principles, the judgement of the CJEU has been criticised for being inconsistent with previous CJEU judgements in relation to illegal services. De Witte states that[180] the logic applied in *Josemans* was based on the presumption that it is permissible to only allow residents to act in certain ways while foreign nationals were bound by the limitations set by their countries of origin. She continues to highlight the

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[174] Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastrich*t, [2010] ECR I- 13019.
[175] Ibid [82]-[84].
[176] Ibid [12].
[177] Ibid [15]-[18].
[178] Ibid [49]-[54].
[179] Ibid [55].
[180] Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 Common Market Law Review, 1564.

absurdity within this applied reasoning by transposing it to a number of other policy area examples, such as "that only German residents may drive 160 km/h on the autobahn" and "only Spanish residents can be a matador."[181]

Interestingly, in relation to the examination of the way EU law or limitations thereof may apply to prostitution, Advocate General Bot, explained in *Josemans* that exercising freedom of services in that case could result in the legitimisation of cross-border trade in narcotics, which he compared to trafficking in human beings, the prostitution of minors and child pornography.[182] Thus, this could be an indication of the severity placed on the nature of the service in question which resulted in the practices being deemed proportionate. Accordingly, it could be presumed that prostitution involving CSPs legally providing services would most likely not fall under the same level of scrutiny. This argument is substantiated, when considering that the CJEU has regarded any restrictions of intra EU migrant[183] CSPs accessing prostitution for the purpose of providing services, when the same is permissible for nationals, to be contrary to the freedom of services and the equal treatment and non-discrimination provisions.[184]

In relation to the EU's efforts to enhance and extend the provisions in the area of free movement of services, an important point to highlight is a clear prioritisation of consumer protection over the rights of the providers of goods and services. This could be considered one of the reasons why there is no case law related to permissible restrictions of access to commercial sex services, while there are a number of cases relating to restrictions of service provision. Specifically, in relation to commercial sex services, the feminist critique of societal double standards comes to mind here,[185] whereby it has been criticised that historically the CSPs carried the majority of the immorality burden while the CSUs/CSPus often still enjoyed good moral standings in society. These critiques have often also been associated with patriarchal power

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[181] Ibid.
[182] Josemans (n 174) [105-106].
[183] Third country migrants have been excluded from this examination as indicated at the beginning of this chapter.
[184] See Adoui and Cornuaille (n 3) 1700; *Jany* (n 74).
[185] See section 3.6.2.

dynamics, whereby CSPs, who in the majority of cases are female, are treated less favourably than CSUs, who in the majority of cases are male.[186]

Finally, there are no EU level cases that indicate the ability of an EU country of origin being able to limit their nationals from accessing services in other member states on the basis that these are considered illegal within their domestic jurisdictions.[187] However, there is one case that has demonstrated how the enforcement of cross-border contracts between member states in which the services are legal and members states in which the services are illegal may be limited by the member states in which the services in question are illegal. Although this case did not concern prostitution, but rather financial services, the consequences may affect CSPs when providing services to CSUs in cross-border situations. In *Société générale alsacienne de banque SA v Walter Koestler*,[188] a German resident had received banking services including stock-exchange transactions considered illegal in Germany from a bank in France, yet failed to pay for these services. However, as these services were considered illegal wagering contracts in Germany, Germany refused to allow the bank to sue for recovery of the money. The CJEU (then ECJ) held this restriction by Germany was a justified restriction of article 56, as the same rules were applied to banks in Germany.[189] The consequences could be significant when transposing this scenario into potential prostitution service contracts. In particular, this reasoning could be applied to scenarios in which a CSU from an EU member state in which prostitution services are illegal hypothetically visited a member state in which providing and receiving prostitution services is legal and failed to make the contractual payment for these services before returning to their country of origin. In

[186] Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18 Gender Issues, 27; Stephanie A. Limoncelli, 'International Voluntary Associations, Local Social Movements and State Paths to the Abolition of Regulated Prostitution in Europe, 1875–1950' (2006) 21 International Sociology, 37; Anne Summers, 'Introduction: The International Abolitionist Federation' (2008) 17 Women's History Review, 150; David J. Pivar, 'The Military, Prostitution, and Colonial Peoples: India and the Philippines, 1885–1917' (1981) 17 The Journal of Sex Research; Brian Harrison, 'Prostitution and Victorian Society: Women, Class, and the State. Judith R. Walkowitz' (1982) 54 The Journal of Modern History; Kamala Kempadoo, 'Prostitution and Sex Work Studies', *A Companion to Gender Studies* (Blackwell Publishing Ltd 2009) 255 - 256.
[187] This is not to say that there are no national cases dealing with these kinds of issues. See for example: *Attorney General v X* [1992] IESC 1, [1992] 1 IR 1 which involved abortion rights in Ireland.
[188] Case C- 15/78 *Société générale alsacienne de banque SA v Walter Koestler* [1978] ECR I-1971.
[189] Ibid [4]-[5].

this kind of situation, the CSP's ability to recover the payment could be restricted. If this hypothetical scenario is taken further, it could be argued that this could amount to state sanctioned theft or rape depending on the laws of the member state in which the service was provided. Although the *mens rea* or *actus reus* may be difficult to prove, in particular in relation to crimes of the state, this argument is intended to demonstrate the theoretical impact of these kinds of scenarios. In particular, this deduction is based on the assumption that in the member states of the EU, receiving services without paying the agreed price would potentially amount to theft or fraud, and having sex with someone who has consented on the basis of false pretences and deception would most likely amount to either sexual fraud or rape, depending on the legal system or the philosophical understanding of the differences between the two forms of offences.[190] This thought could be taken further still, by arguing that this could be considered sexual exploitation of the CSP. If this is the case, as will be discussed in chapters 10, it could be argued that when an element of travel is also present, all the necessary legal requirements of THB for the purpose of sexual exploitation would be present. This would need to be considered in the event that such a case was to come in front of the CJEU. Considering the potential for such a case to further blur the lines between prostitution and sexual exploitation, this kind of scenario could potentially open the floodgates for the EU to take a more hands-on involvement in the national regulation of prostitution on the basis of article 83 TFEU.

According to section 2 of this provision, cases in which an "approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of" EU policies to combat trafficking, the EU can establish minimum rules for definitions of criminal offences as well as sanctions in relevant policy area through directives. However, considering the previously mentioned prohibition of EU

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[190] For supporters of the idea that this would constitute a form of rape, see: Christine Boyle, 'What Makes "Model" Sexual Offenses?' (2000) 4 Buffalo Criminal Law Review; Emily Finch and Vanessa E. Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16 Social & Legal Studies; For supporters of the notion of "rape by fraud" or "sexual fraud" see: James Slater, 'HIV, Trust and the Criminal Law' (2011) 75 The Journal of Criminal Law; Donald A. Dripps, 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent' (1992) 92 Columbia Law Review.

involvement in internal security matters as outlined in article 72 TFEU, it is evident that this justification would be a significant stretch and highly unlikely in reality.

8.7.1 Areas of limitation to the regulation of prostitution

This section considered areas in which the free movement rights may be limited by member states in relation to providing and receiving prostitution services in cross-border situations. It has been found that in situations in which member states can objectively justify potentially restrictive measures in this area by demonstrating that these measures are proportionate, they will be considered lawful. Apart from the general grounds for these kinds of restrictions,[191] a significant area of justified limitations can be derived from the principle of *ordre public*, in particular on the exceptional grounds of public policy, public security or public health. In relation to *ordre public* and the discretion of each individual member state it has been established that is can only be *used as a* justification for derogating from the fundamental freedoms when interpreted strictly, to prevent it from being determined unilaterally by the individual member states without controls by the EU. Limitations to *ordre public* are merely limitations of what is forbidden and does not define the concept itself.[192] Nevertheless, there are certain indirect discrimination scenarios which have been considered justified in this respect, such as language requirements for CSPs, to ensure they are able to communicate effectively in a host member state, as this is considered “proportionate” in light of overriding reasons related to public interest.[193]

Although there is no case law concerning limitations placed on CSUs from receiving prostitution services when visiting member states in which prostitution is considered legal, restrictions in relation to access to services deemed illegal in member states of

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[191] Such as the prevention of social dumping or unfair competition as well as the prevention of abuses of the EU free movement provisions, the prevention of disturbances in the labour market, the protection of small and medium-sized undertakings, social protection of workers, and to combat illegal employment and the protection of workers.
[192] Adoui and Cornuaille (n 3) 1692-93.
[193] *Trijber (n 165)* [35], [77].

origin of CSUs could result in CSPs being denied the ability to recover payments.[194] Thus, if the *Koestler* judgement were to be applied in a cross-border prostitution service contract, it could result in state sanctioned sexual exploitation of CSPs.

In light of the discussions in this chapter, it has become clear that the coexistence of the examined regulatory approaches to prostitution within the EU's single market can have a number of consequences, such as the free movement of CSPs to provide services in systems in which it is legal, such as in Germany. Moreover, CSUs and CSPus are able to do the same, even when being residents of prohibitionist or abolitionist member states, in which purchasing sex may be prohibited under criminal law. There are, in fact, some figures that support this. For instance, research carried out by the UK House of Commons Home Affairs Select Committee in 2014 states that amongst men having paid for sex in the UK, 62.6% have reported paying for sex outside of the UK, with Europe and Asia being the most often named locations of the transactions.[195] Thus, the following section will need to examine these kinds of cross-border scenarios in practice in order to see how EU law, in particular the free movement provisions and limitations to it, operates in these situations.

8.8 What does this mean in practice in relation to potential cross-border prostitution situations?

As the overall aim of this research project is to examine how national regulatory approaches to prostitution are affected by their situation under the supranational legal organisation of the EU, it is now vital to place the different regulatory systems into hypothetical cross-border contexts. The approaches, as determined for the purpose of this research project are regulationism, prohibitionism, and abolitionism. However, as seen in chapters 5-7 of this thesis, these approaches may be quite nuanced and involve

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[194] *Koestler* (n 188) [4]-[5].
[195] 'House of Commons - Prostitution - Home Affairs Committee' (*Publications.parliament.uk*, 2014) <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/2605.htm#footnote-086> accessed 26 April 2020.

many areas touching upon the regulation of prostitution. Thus, for the sake of simplicity, this practical test of cross-border situations will be based on four simple hypothetical forms of regulation:

Member state type A: Prostitution is legal and regulated

Member state type B: Prostitution is illegal and criminal

Member state type C: Prostitution is legal to sell but illegal to purchase

Member state type D: Prostitution is not *per se* criminal, but it is also not legal, and in particular, many situations closely linked to prostitution are criminal

It is clear that the hypothetical scenarios have been based on the jurisdictions examined in chapters 5 to 7 of this thesis, which the exception of the hypothetical member state type B. In the absence of a clear representative of an entirely prohibitionist model in practice, this hypothetical form has been included in order to be able to discuss the implications of men’s cross-border situations when criminal law provisions are involved with more clarity.

<table>
<tr><th>Country in which service is provided / Country of residence of CSU/CSPu</th><th>Member State Type A</th><th>Member State Type B</th><th>Member State Type C</th><th>Member State Type D</th></tr>
<tr><td>Member State Type A</td><td>• Free Movement (+)
• Equal Treatment (+)
• Social Protection (+)
• Ordre Public (-)
• Article 72 TFEU (-)</td><td rowspan="3">• Free Movement (-)
• Equal Treatment (-)
• Social Protection (-)
• Ordre Public (+)
• Article 72 TFEU (+)</td><td>• Free Movement (-)
• Equal Treatment (-)
• Social Protection (-)
• Ordre Public (+)
• Article 72 TFEU (+)</td><td rowspan="3">• Any criminal elements would be dealt with similarly to the provision in member state type B scenarios
• Any legal elements would be dealt with similarly to the provision in member state type A scenarios
• Uncertain areas would need to have ordre public assessed on a case-by-case basis</td></tr>
<tr><td>Member State Type B</td><td>• Free Movement (+)
• Equal Treatment (+)
• Social Protection (+)
• Ordre Public (-)
• Article 72 TFEU (-)
• Possibility of criminal sanctions when returning to home country, depending on extraterritoriality provisions in national law.</td><td>• Free Movement (+)
• Equal Treatment (+)
• Social Protection (+)
• Ordre Public (-)
• Article 72 TFEU (-)
• Poss bility of criminal sanctions when returning to home country, depending on extraterritoriality provisions in national law.</td></tr>
<tr><td>Member State Type C</td><td>• Free Movement (+)</td><td>• Free Movement (-)</td></tr>
</table>

	• Equal Treatment (+) • Social Protection (+) • *Ordre Public* (-) • Article 72 TFEU (-) • Possibility of criminal sanctions when returning to home country, depending on extraterritoriality provisions in national law.		• Equal Treatment (-) • Social Protection (-) • *Ordre Public* (+) • Article 72 TFEU (+)	
Member State Type D	• Free Movement (+) • Equal Treatment (+) • Social Protection (+) • *Ordre Public* (-) • Article 72 TFEU (-)			

<table>
<tr><th>Country in which service is provided / Country of origin of CSP</th><th>Member State Type A</th><th>Member State Type B</th><th>Member State Type C</th><th>Member State Type D</th></tr>
<tr><td>Member State Type A</td><td rowspan="4">• Free Movement (+)
• Equal Treatment (+)
• Social Protection (+)
• Ordre Public (-)
• Article 72 TFEU (-)</td><td rowspan="4">• Free Movement (-)
• Equal Treatment (-)
• Social Protection (-)
• Ordre Public (+)
• Article 72 TFEU (+)</td><td rowspan="4">• Free Movement (+)
• Equal Treatment (+)
• Social Protection (+)
• Ordre Public (-)
• Article 72 TFEU (-)</td><td rowspan="4">• Any criminal elements would be dealt with similarly to the provision in member state type B scenarios
• Any legal criminal elements would be dealt with similarly to the provision in member state type A scenarios
• Uncertain areas would need to have ordre public assessed on a case-by-case basis</td></tr>
<tr><td>Member State Type B</td></tr>
<tr><td>Member State Type C</td></tr>
<tr><td>Member State Type D</td></tr>
</table>

8.8.1 Scenario 1: Cross-border situations between two type A member states

To begin this hypothetical test, let's assume that a CSP from a member state type A, in which prostitution is legal and regulated, goes to provide commercial sex in another member state that also follows this hypothetical regulatory approach of a member state type A, in which prostitution is legal and regulated, as we saw is the case in Germany.[196] In this scenario, the EU fundamental freedoms, in particular the free

[196] See chapter 5.

movement provisions would allow for this person to enter the host member state in question and would ensure that they could provide commercial sex services within the host member state. Here, the equal treatment provisions of the EU would ensure that the intra EU migrant CSP could offer prostitution services under the same conditions as national CSPs within this host member state. Moreover, the EU provisions on social protection will also ensure that the CSP and their family members could equally benefit from any state provisions provided by the host member state, such as health care, social security, education etc.

In situations in which a CSU from a member of state type A, in which prostitution is legal and regulated, goes to buy commercial sex within another member state type A in which prostitution is legal and regulated, the result is similar. Here, the EU's free movement provisions will allow the CSU to leave the member state of origin and enter the other member state type A without any restrictions. Moreover, the equal treatment provisions of the EU will allow the CSU to access commercial sex under the same conditions as any other resident of this member states type A in which the commercial sex is provided. Moreover, EU consumer protection provisions would protect the CSU the same way as any other resident CSU within this host member state type A.

This hypothetical example shows that situations in which CSPs want to leave member states in which prostitution is legal and regulated to provide commercial sex in member states following similar regulatory approaches, the provision of commercial sex would be straightforward and would be regulated by EU law via the principle of supremacy of EU Law, in particular through the areas of free movement of workers and services, equal treatment and social protection. The same would apply to CPUs if they went from a member state type A to another member state type A, in which prostitution was legal and regulated for the purpose of purchasing commercial sex services. These two scenarios are straightforward, and the application of EU law cannot be questioned.

8.8.2 Scenario 2: Cross-border situations between two type B member states

A similar situation arises when CSPs originating from a member state type B, in which prostitution is illegal and criminal, enter another member state type B for the purpose of providing commercial sex. Here, the concept of *ordre public* and the notions of the harm principle or other underlying reasons for prohibiting commercial sex within this approach would apply, which would result in article 72 TFEU taking effect. As sovereignty has not been transferred over to the EU for national criminal law matters, any EU law involvement in these situations would be ultra vires and, thus, struck down. Thus, any transactions would be regulated under the national criminal laws within the host member state and potentially within the country of origin of the CSP, depending on how that member state operates its criminal law extraterritorially.

In this situation it is clear that article 72 TFEU, on the basis of the principle of the attribution of powers and potentially the concept of *ordre public* would prevent any involvement of EU law. A similar outcome would come about in situations in which a CSU or CSPu from a member state type B, in which prostitution is illegal and criminal, sought to purchase commercial sex within another member state type B. Here, the principle of attribution of powers and/or the concept of *ordre public* would also apply, thus resulting in EU law being inapplicable in this scenario and the national criminal laws of potentially both the member state of origin and the member state of destination of this transaction being applied without involvement of any EU intervention. This example shows that the regulation of prostitution and the responsibility thereof is straightforward both in scenarios in which transactions occur between CSPs and CSUs/CSPus from member states in which prostitution is regulated the same way.

8.8.3 Scenario 3: Cross-border situations between type A and type B member states

In contrast to the cross-border situations between member states following similar regulatory approaches to prostitution, the situation becomes less straightforward in

cross-border scenarios involving commercial sex between member states with different regulatory approaches.

If hypothetically a CSP from a member state type A, in which prostitution is legal and regulated, enters a member state type B, in which prostitution is illegal and criminal, in order to provide commercial sex, the question arises of which provisions apply. Based on the findings of previous sections, it is clear that the criminal law provisions of the member state type B could invoke a justification on the basis of the principle of attribution of powers and potentially *ordre public.* This would result in article 72 TFEU taking effect, which would prevent any involvement of EU Law within the regulation of these kinds of transactions. The same would apply if a CSU/CSPu from a member state type A, in which prostitution is legal and regulated, entered a member state type B, in which prostitution is illegal and criminal for the purpose of purchasing commercial sex. Here again, the member state in which the service is sought to be purchased could argue that the EU is prohibited from intervening in the transaction on the basis of Article 72 TFEU and/or *ordre public*.

The outcome is different in situations in which a CSP from a member state type B, in which prostitution is illegal and criminal enters a member state type A, in which prostitution is legal and regulated for the purpose of providing commercial sex. Here, the free movement provisions of the EU would allow the CSP to enter the member state type A for the purpose of providing a service. However, here criminal law from their country of origin may operate extraterritorially, and there may be a prosecution for criminal activity in their home state on their return home. Moreover, the equal treatment provisions from the EU would ensure that the CSP could offer these services in country type B under the same conditions as a national CSPs within the host member state. The equal treatment provisions would also apply in relation to the CSP and their family members accessing social protection and other benefits.

Similarly, in situations in which CSUs/CSPus from a member state type B, in which prostitution is illegal and criminal, entered a member state type A, in which prostitution is legal and regulated. Here, the free movement provisions would provide for access in

member state B to the member state and the equal treatment and free movement of service provisions would ensure equal access to the same services as any resident of the host member state type A. Again, the reaction of member state type A to this development would depend on the extra-territoriality of the criminal laws of member state A. Moreover, the CSUs consumer rights in member state B would be protected under the provisions of the EU.

Although these last two scenarios appear rather straightforward when viewed in the simplified hypothetical form, the findings of this chapter have shown that these scenarios may come with certain enforcement issues. When a CSU/CSPu from a member state type B, in which prostitution is illegal and criminal, purchases commercial sex in a member state type A, in which prostitution is legal and regulated, some national criminal law provisions may still result in criminal sanctions for the CSU/CSPu upon returning to their home country.

However, in situations in which hypothetically a CSPu from a member state type B, in which prostitution is illegal and criminal, were to enter a member state type A, in which prostitution is legal and regulated, and purchase commercial sex yet fail to pay for these services before returning to their home member state, the *Koestler* judgement[197] suggests that there may be enforceability issues for the CSP to retrieve the payment. This could result in more severe consequences than merely the loss of payment for the CSP, as these situations may fulfil the legal requirements to be considered theft, fraud or rape, and in some instances even THB for the purpose of sexual exploitation.

8.8.4 Scenarios 4 and 5: Cross-border situations involving at least one type C member state or one type D member state

In cross-border situations involving type C member states, in which prostitution is legal to sell but illegal to purchase, such as Sweden or Northern Ireland, it can be assumed

[197] Case C- 15/78 *Société générale alsacienne de banque SA v Walter Koestler* [1978] ECR I-1971, [4]-[5].

that the result would be a hybrid of the scenarios found in the previous 3 sections. Accordingly, any situations pertaining to the regulation of CSPs would follow similar patterns as found in the scenarios involving member states type A. Thus, CSPs would be able to freely enter a member state type C for the purpose of providing commercial sex services and could be expected to be treated the same way as resident CSPs within the member state in question regardless of the CSPs member state of origin. However, as was seen in chapter 6, there may be some complications in practice due to the issue of CSPs needing to register a false form of work for the purpose of taxation.[198] Moreover, a CSP from a member state type C could equally be able to work in prostitution in a member state type A and would equally be prohibited from providing commercial sex services in a member state type B.

CSUs and/or CSPus in this scenario would be dealt with in the same way as they would in member states type B. Accordingly, they would be prohibited from purchasing commercial sex services in a member state type C and equally in a member state type B, yet would most likely be able to purchase commercial sex in a member state type A without any repercussions in practice. However, there is a potential issue here, which will be discussed in more detail in chapter 10. In this sense, despite a lack of case law to showcase the reality of these kinds of scenarios, the situation in Northern Ireland's anti-trafficking laws show potential for severe legal consequences for CSUs and CSPus, who could legally be charged with THB for the purpose of sexual exploitation.[199]

In relation to the enforcement issues regarding the retrieving of failed payments, it is not clear whether this could constitute an issue or not, as the service provided is not considered illegal, yet the transaction itself would probably be deemed immoral or illegal, and thus, unenforceable. However, from the information available in this scenario and due to there being no cases to clarify the matter, it is not possible to know how this kind of hypothetical scenario would be solved. In the cases of Sweden and Northern Ireland, as seen in chapter 6, and chapter 7, there has been some indication

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[198] See section 6.4.1.2.
[199] See chapter 10.

that the contract would not be enforceable in these situations due to the understanding of commercial sex being both immoral and illegal. Similarly, in Scotland and England and Wales the immorality element could have a similar result.

In situations involving type D member states, in which prostitution is not *per se* criminal, but it is also not legal, and in particular, many situations related to prostitution are criminal, the outcomes in each scenario would need to be determined on a case-by-case basis. However, it is clear that any criminal elements would be dealt with similarly to the member state type B scenarios, and any elements considered legal would be treated similarly to the scenarios involving a member state type A. In particular in relation to the elements of prostitution which are not *per se* criminal, but also not considered legal, the principle of *ordre public* would need to be examined in relation to the proportionality in the individual cases. In particular, when using the example jurisdictions of England and Wales and Scotland in this scenario, there would not only be an issue here pertaining to legally permitted and criminal conduct, but the issue that commercial sex is not considered an economic activity would also result in complications. In this sense, CSPs entering these two jurisdictions for the purpose of working by providing commercial sex would not be able to use prostitution as their legitimate work. Employment in this sector would fall into the remit of the criminal offense of brothel keeping and self-employment would be illegal due to the perceived immorality of the activity. Thus, in order to demonstrate work for the purpose of free movement, CSPs would need to register under a false form of business, which would constitute fraud.[200] However, for temporary stays in these jurisdictions of under three months, commercial sex services could be provided by CSPs from other member states regardless of the national provisions in their home member state, as long as the service provision does not violate any related criminal laws. Again, from the example jurisdictions of England and Wales and Scotland, this would most likely only apply to situations in which the transactions are undertaken entirely autonomously in private settings, out of the visibility of the public.[201]

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[200] See for example chapter 6.
[201] See chapter 7.

8.9 Conclusion

In conclusion, this chapter sought to explore and analyse the regulation of prostitution from the perspective of EU law as the overarching transnational legal body responsible for the interconnection of the regulation of prostitution within the EU. It has become clear that prostitution sits uncomfortably between article 26 and 72 TFEU. As an economic activity it is subject to the free movement provisions and any EU law related to the internal market and labour law. However, as some member states view prostitution as either a social harm or a public nuisance, the EU, at the same time, lacks any regulatory competence in this area and EU law does not apply in these member states.

In purely national situations this tension within the EU's competence has little to no effect. However, in light of the overall aim of this thesis, this chapter sought to examine the applicability of EU law and potential consequences in cross-border situations involving prostitution. Not only has this showcased the dynamics one could expect in various cross-border settings, thereby clarifying when EU law would apply and when free movement can take place, but it has also become evident, that in some cross-border situations, there are a number of harmful consequences for CSPs and in some cases also for CSUs and CSPus. In this sense, inter-EU cross-border situations between member states that follow different regulatory approaches to prostitution may result in contract enforcement issues, whereby CSPs are unable to retrieve failed payments from CSUs or CSPus. The ease of access to work in prostitution may result in CSPs deciding to work in prostitution in order for them and any potential dependent family members to settle in a member state in which prostitution is considered an economic activity, such as Germany.

Moreover, CSPs in this situation may then rely on prostitution in order to continue to reside in the member state in which prostitution is considered an economic activity for up to 5 years before they qualify for permanent residence.[202] Especially when family members also rely on the work in prostitution to remain in the host member state, CSPs

[202] Directive 2004/38/EC, Article 16.

may not be in a situation in which they are realistically able to leave this line of work. CSUs and CSPus may further be charged with criminal offenses relating to prostitution on their return to their home member states, due to potential extraterritorial reach of domestic criminal laws. This is exacerbated by the fact that some national approaches conflate prostitution with THB for the purpose of sexual exploitation.

This conflation between prostitution and THB for the purpose of sexual exploitation in some national jurisdictions within the EU results in further blurring of the lines between the competences of the EU and the applicability of EU law.

Thus, this research project would not provide a complete overview of the issue without a more in-depth examination of the national approaches to tackling THB for the purpose of sexual exploitation. Accordingly, the next section of this thesis will be addressing the complex dynamics of national regulatory approaches to prostitution in light of the national laws on THB for the purpose on sexual exploitation and the applicability of EU law in this area.

Section D: The Impact of Conceptual Diversity of Prostitution Regulation within the EU on National Legal Frameworks Tackling Trafficking in Human Beings for the Purpose of Sexual Exploitation

Chapter 9

9. The effects of national prostitution regulation on legislation seeking to combat trafficking in human beings for the purpose of sexual exploitation in the EU

Both from a philosophical stance as well as in relation to national regulatory approaches to prostitution it has become apparent that the distinction between prostitution and Trafficking in Human Beings (THB) for sexual exploitation is not clear. Accordingly, there are opposing views whether prostitution and THB for the purpose of sexual exploitation are to be conflated or not. The Swedish view, as seen in chapter 6, for instance, defines both prostitution and THB for the purpose of sexual exploitation as forms of sexual exploitation. In Northern Ireland prostitution is included within the legal provisions seeking to combat Trafficking in Human Beings, as seen in chapter 7. In stark contrast, the German approach, which is based on the idea of preserving CSPs' autonomy, claims that one must not conflate prostitution and THB for the purpose of sexual exploitation, as this sets a dangerous precedent that would undermine the autonomy of CSPs.

However, due to the interconnectedness of the member states within the common market and, more significantly, the competence of the EU to regulate in the areas of freedom, security and justice, consequences will already be apparent as soon as at least one member state conflates the two areas in law.

Thus, any examination of the interconnectedness of national prostitution regulatory approaches within the EU cannot be separated from an examination on the legal provisions seeking to combat THB for the purpose of sexual exploitation.

9.1 Understanding of trafficking in human beings for the purpose of sexual exploitation within the literature

The purpose of this section is to provide a relevant overview of the concepts of THB and related themes to prostitution. This will include looking into some of the theoretical concepts of and approaches to THB for the purpose of sexual exploitation, in particular from a Eurocentric perspective in light of the focus of this project.

At this point one is reminded that for the purpose of this research project, CSPs are understood to constitute people who accept remuneration for the performance of sexual acts.[1] Here, the word "accept" is interpreted in the wider context of this research, as an indication of voluntariness. Thus, as soon as there is an element of force present, the person would not be considered a CSP, and any forced commercial sex provision could not fall under the term "prostitution." Accordingly, the term "sexual exploitation" will be used. Although it is understood that this term, similarly to the voluntary term "sexual services" or "sex work," could include a wider range of activities than merely the sale of sexual intercourse, it is assumed, for the purpose of this work, that, especially when any of these activities occur involuntarily that they similarly diminish the dignity of the victim, and hence, can be, without distorting the intention of this thesis, be contributed to the same category of sexual exploitation.

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[1] See section 1.4.

9.1.1 Defining trafficking in human beings

In contrast to the discussions relating to the definition of prostitution in chapters 3 and 4 of this thesis, which involved a wide range of different concepts and understandings, the situation relating to THB for the purpose of sexual exploitation is less complicated, in particular from a Eurocentric viewpoint. The definition of THB for the purpose of sexual exploitation is defined in a number of legal instruments. This means that within this chapter, based on the contexts in which discussions are placed, the relevant legal instruments and the specific definitions can be referred to whenever necessary. For instance, the first international instrument seeking to punish THB was the UN Anti-Trafficking Protocol that was signed in Palermo in 2000,[2] and thus, is usually referred to as the Palermo Protocol. In Europe,[3] the definition of Human Trafficking was determined in *Rantsev v Cyprus and Russia*[4] as constituting the definition found in the Palermo Protocol[5] and it was also held that the Anti-Trafficking Convention[6] was within the scope of Article 4 of the Palermo Protocol.[7] In this regard, the European Court of Human Rights (ECtHR) explained that despite there not being an express mention of trafficking within its texts, the circumstances had changed as the Convention was "a living instrument which must be interpreted in the light of present-day conditions."[8]

Accordingly, it stated that THB as a global phenomenon

> has increased significantly in recent years […]. In Europe its growth has been facilitated in part by the collapse of former Communist bloc […] The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also

[2] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.
[3] Meaning the 47 member states of the Council of Europe.
[4] *Rantsev* v *Cyprus and Russia*, 51 E.H.R.R. 1 (2010) Application no. 25965/04.
[5] Ibid 149, 163, 283.
[6] Council of Europe Convention against Trafficking in Human Beings 2005.
[7] *Rantsev* (n 4) 200, 253.
[8] Ibid 227.

elsewhere […] It is […] the modern form of the old worldwide slave trade […] [and takes] place under a regime of modern slavery.[9]

Annex I and II of Art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is attached to the UN Convention against Transnational Organised Crime,[10] provides a tripartite definition of THB that includes three key elements, namely, the *action element* ("the recruitment, transportation, transfer, harbouring, or receipt of persons"), the means element ("by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person") and the purpose element ("for the purpose of exploitation").[11]

Despite the legal definitions of THB for the purpose of sexual exploitation appearing at first reading to be clearly defined under the law, there are still issues in relation to the understanding of THB that are subject to scholarly debate, or stereotyping. For instance, there is still wide scholarly debate surrounding the necessity of force or travel within the definition, as well as matters relating to victim identification.[12] Consequentially, the situation and characteristics of victims and traffickers and the

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[9] Ibid.
[10] UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25.
[11] Serena Bressan, 'Criminal Law against Human Trafficking within the EU: A Comparison of an Approximated Legislation?' (2012) 20 European Journal of Crime, Criminal Law and Criminal Justice, 137–163; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 29–41; National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings* (Bureau of the Dutch National Rapporteur 2010) 7; Louise I Shelley, *Human Trafficking: A Global Perspective* (Cambridge University Press 2010) 8–12; U.S. Department of State, Trafficking in Persons Report. Tenth Edition (Washington, DC: U.S. Department of State, 2010) 5; Marta Iñiguez de Heredia, 'People Trafficking: Conceptual Issues with the United Nations Trafficking Protocol 2000' (2007) 9 Human Rights Review, 299–300.
[12] See for example: Liz Kelly, 'The Wrong Debate: Reflections on Why Force is not the Key Issue with Respect to Trafficking in Women for Sexual Exploitation' (2003) 73 Feminist Review, 139; Amy M. Russell, 'Embodiment and Abjection' (2013) 19 Body & Society, 82-85; Vanessa E Munro, A tale of two servitudes: Defining and implementing a domestic response to trafficking of women for prostitution in the UK and Australia [2005] *Social & Legal Studies*, *14*(1), 91-114; A Choi-Fitzpatrick, in plain sight? Human trafficking and research challenges [2006] *Human Rights & Human Welfare*, *6*, 63-73.

circumstances surrounding THB for the purpose of sexual exploitation are diverse and cannot be generalised into stereotypes.

THB for the purpose of sexual exploitation as a subject matter is often linked with issues such as prostitution, serious and organised crime and irregular migration, in particular, in political and scholarly debates.[13] One of the reasons that the stereotype of victims of THB for sexual exploitation are women or children, may be a result of the fact that women and girls are estimated to constitute the majority of the victims at a global level.[14] The first time that the issue of THB for the purpose of sexual exploitation was reported on in its contemporary sense was in the 1993 Human Rights Watch report on trafficking in women between Burma and Thailand.[15] Here, it was explained that trafficking was a form of gender-based human rights violations[16] and that an important contributor could be found in corruption[17] and the involvement of state officials.[18] These descriptions of THB for the purpose of sexual exploitation have remained prevalent within academic literature[19] as well as governmental and non-governmental organisations' reports.[20] However, some studies challenge the necessity of organised crime involvement within THB. It is explained that although organised crime may be

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[13] See for example: Gerben Bruinsma and Wim Bernasco, 'Criminal Groups and Transnational Illegal Markets' (2004) 41 Crime, Law and Social Change; Bhavna Batra, 'Illegal Immigration: A Socio-Legal Analysis with Special Reference to Human Trafficking' (2017) 5 International Journal of Advanced Research; Vincenzo Ruggiero, 'Trafficking in Human Beings: Slaves in Contemporary Europe' (1997) 25 International Journal of the Sociology of Law.
[14] United Nations Office on Drugs and Crime (UNODC), 'Trafficking in Persons: Global Patterns' (United Nations Office on Drugs and Crime 2006) 90 – 95, <http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf> accessed 25 November 2017.
[15] Human Rights Watch, 'A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand' (Human Rights Watch 1993).
[16] Ibid 1, 9, 75.
[17] Ibid 19 – 28.
[18] Ibid 19 – 20, 28, 104.
[19] John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 38 International Migration; Kathy Richards, 'The Trafficking of Migrant Workers: What are the Links Between Labour Trafficking and Corruption?' (2004) 42 International Migration.
[20] Equality and Human Rights Commission Scotland, 'Inquiry into Human Trafficking in Scotland - Report of the Equality and Human Rights Commission' (Equality and Human Rights Commission 2011); International Bar Association, 'Human Trafficking and Public Corruption a Report by the IBA'S Presidential Task Force against Human Trafficking' (The International Bar Association (IBA) 2016); Expert Group Meeting on "Trafficking in women and girls", 'Trafficking in Persons: A Gender and Rights Perspective' (United Nations 2002); United Nations Office on Drugs and Crime (UNODC), 'The Role of Curruption in Trafficking in Persons' (United Nations Office on Drugs and Crime 2011) <http://www.unodc.org/unodc/en/human-trafficking/> accessed 25 November 2017.

involved in THB in some occasions, this is not a necessity, and that THB can also take place through other entities. These other entities may include for instance small and loose networks,[21] social contacts known to the victims,[22] individuals utilising legitimate employment for trafficking purposes as well as corrupt government officials or other people with certain powers.[23]

When researching THB, it needs to be highlighted that there are significant flaws within the statistics used in most of the available literature, which makes it problematic to find reliable sources. This does not only apply to figures of THB, but also in relation to finding information on practical data, such as routes of THB, countries of origin, profits or target markets.[24]

In contrast to the stereotypical “innocent victims” of THB for sexual exploitation,[25] it is currently assumed within the literature, that a significant number of victims who cross borders illegally initially were “willing” migrants,[26] rather than people who migrated due to physical force.[27] However, in particular due to vulnerabilities related to their gender, economic status, migration status, or other personal situations, certain groups of initially

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[21] United Nations Office on Drugs and Crime (UNODC) (n 14) 34, 71-74; Boudewijn De Jonge, 'Eurojust and Human Trafficking: The State of Affairs' (2005) 46 Produced for Eurojust, under auspices of the Dutch Desk at Eurojust.
[22] Nathalie Siron and others, *Trafficking in Migrants through Poland* (Maklu 1999) 29; Sharvari Karandikar, Lindsay B. Gezinski and Jacquelyn C.A. Meshelemiah, 'A Qualitative Examination of Women Involved in Prostitution in Mumbai, India: The Role of Family and Acquaintances' (2011) 56 International Social Work; Adriana Piscitelli, 'Revisiting Notions of Sex Trafficking and Victims' (2012) 9 Vibrant: Virtual Brazilian Anthropology; Venla Roth, *Defining Human Trafficking and Identifying its Victims* (Brill 2011) 3.
[23] Osita Agbu, 'Corruption and Human Trafficking: The Nigerian Case' (2003) 4 West Africa Review; Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2001/73 (23 January 2001) 59, 60; Anderson Annelise, 'Organised Crime, Mafia and Governments' [1995] The economics of organised crime; Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government* (Cambridge University Press 2016) 34, 294, 297, 314.
[24] Roth (n 22) 5.
[25] Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18 Gender Issues; Rutvica Andrijasevic, 'Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns' (2007) 86 Feminist Review.
[26] Richards (n 19); May-Len Skilbrei and Marianne Tveit, 'Defining Trafficking through Empirical Work' (2008) 12 Gender, Technology and Development; Mike Kaye, 'The Migration-Trafficking Nexus: Combating Trafficking through the Protection of Migrants' Human Rights' [2003] London: Anti-Slavery International.
[27] Kaye (n 26); Mohamed Mattar, 'Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act' (2011) 19, 1247 Am. UJ Gender Soc. Pol'y & L; Roth (n 22) 6.

willing migrants are more vulnerable to becoming victims of THB for the purpose of sexual exploitation.[28]

Despite the legal definition of THB for the purpose of sexual exploitation being provided within international, transnational and national law, there are a number of uncertainties that contribute to differences in the understanding of THB for the purpose of sexual exploitation. This can result in discrepancies in reported figures, as well as the identification of victims of THB for the purpose of sexual exploitation by the relevant authorities. In particular, these uncertainties stem from certain elements within the definitions of THB for the purpose of sexual exploitation not being defined, such as the elements of harm, consent, will and choice.[29] These terms are especially relevant in relation to the legal and legal theoretical distinctions between forced and voluntary prostitution, the former often been understood to be a significant part of THB for the purpose of sexual exploitation. Thus, the following section will look into these terms, as well as other notions of the distinction between forced and voluntary prostitution.

9.1.2 Distinguishing between voluntary and forced prostitution

There are a number of elements within contemporary scholarship on THB for sexual exploitation, which have blurred the lines between the understanding of forced prostitution and voluntary prostitution.[30] In order to understand this blurring of the line, it is important to understand that opinions surrounding prostitution and THB for the

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[28] EU Expert Group on Human Trafficking, The Report of the Experts Group on Trafficking in Human Beings (European Commission, 2004) 150; International Council on Human Rights Policy, ICHRP, 'Enhancing Access to Human Rights' (2004) <https://ssrn.com/abstract=1551193> accessed 20 September 2020, 1-6, 24, 25; The Office of the United Nations High Commissioner for Human Rights; Recommended Guidelines on Human Rights and Human Trafficking (UNHCHR, 20 May 2002), UN Doc. E/2002/68/Add. 1; Sharron A. FitzGerald, 'Biopolitics and the Regulation of Vulnerability: The Case of the Female Trafficked Migrant' (2010) 6 International Journal of Law in Context, 279; Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007) 87.
[29] Roth (n 22) 5.
[30] Laura Agustín, 'The Disappearing of a Migration Category: Migrants Who Sell Sex' (2006) 32 Journal of Ethnic and Migration Studies; L. Agustin, 'Migrants in the Mistress's House: Other Voices in the "Trafficking" Debate' (2005) 12 Social Politics: International Studies in Gender, State & Society; Teela Sanders, Maggie O'Neill and Jane Pitcher, *Prostitution* (Sage 2009) 150.

purpose of sexual exploitation can be placed within two key prisms, which are often used to classify the key motives to entering prostitution, namely, the empowerment paradigm and the oppression paradigm.[31] These paradigms place the perceived entry routes into prostitution on a theoretical spectrum, and may influence the way ideas relating to prostitution and THB for sexual exploitation and the way these are covered in law are formed.

According to the empowerment paradigm, prostitution can be understood as an economic activity. The key focus of this paradigm lies on concepts such as human agency and the way prostitution, or more specifically, the free agency to decide for oneself to work in prostitution could be potentially empowering for CSPs.[32] The oppression paradigm is understood to focus more on factors such as victimisation and abuse.[33] These paradigms serve as tools to understand where to place the causes of prostitution and whereabouts harm is to be perceived. The characteristics designated to each of the paradigms include a number of elements which range across a multitude of disciplines, such as sociology, gender studies, psychology and social work, and take numerous forms of prostitution occurrences into consideration.[34] On the one hand, supporters of the oppression paradigm in relation to prostitution challenge the notion of voluntariness within voluntary prostitution, whereas, on the other hand, victims of forced prostitution may have agreed to elements of trafficking.

However, despite a number of theoretical understandings of prostitution, such as the theoretical idea of voluntariness within prostitution being debated within the literature,[35] there are still clear distinctions between forced prostitution as sexual exploitation and

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[31] Ronald John Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (NYU Press 2012) 7.
[32] Elizabeth J. Clifford, 'Policing Pleasure: Sex Work, Policy, and the State in Global Perspective' (2013) 42 Contemporary Sociology: A Journal of Reviews; Leslie Ann Jeffrey and Gayle MacDonald, '"It's the Money, Honey": The Economy of Sex Work in the Maritimes' (2006) 43 Canadian Review of Sociology/Revue canadienne de sociologie; Alexandra K. Murphy and Sudhir Alladi Venkatesh, 'Vice Careers: The Changing Contours of Sex Work in New York City' (2006) 29 Qualitative Sociology.
[33] See for example: Melissa Farley, '"Bad for the Body, Bad for the Heart": Prostitution Harms Women Even If Legalized or Decriminalized' (2004) 10 Violence against Women; Lars O. Ericsson, 'Charges against Prostitution: An Attempt at a Philosophical Assessment' (1980) 90 Ethics, 335-340; Carole Pateman, 'Defending Prostitution: Charges against Ericsson' (1983) 93 Ethics, 561-565.
[34] Weitzer (n 31) 7 - 21.
[35] See chapters 3 and 4.

voluntary prostitution. In the purely theoretical meaning of the terms, forced prostitution involves an element of force, which limits the choices available to make, or negates any real ability to refuse, such as for example subjugation to violence, in particular with the absence of consent.[36] In contrast, voluntary prostitution describes merely the provision of commercial sex following consent which has been provided lawfully, even if this consent may be philosophically challenged by some scholars. This provision in voluntary prostitution is presumed to be a choice which has been made freely in accordance with the understanding of agency within a specific jurisdiction. However, this decision was not made freely when the service is provided under some form of unlawful force.[37]

Furthermore, some, such as Morehouse explain that forced prostitution sees the profit going to the traffickers, whereas CSPs voluntarily providing their services will keep their profits.[38] However, it could also be argued that it is not necessary for the exploiting parties to keep all the profit for themselves. It becomes apparent from the available literature, that a financial gain is usually derived from the exploitation in favour of the exploiter.[39] It has also been argued that voluntary prostitution as a theoretical concept will also involve the ability of the CSPs to choose or refuse to provide services to their own CSPus, whereas forced prostitution will not have this ability.[40] Finally, people forced into prostitution will not be able to freely change their profession, whereas people involved in voluntary prostitution are not bound to providing the services and are, thus, free to change professions if they want to.[41]

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[36] Christal Morehouse, *Combating Human Trafficking* (1st edn, VS Verlag für Sozialwissenschaften 2009) 88.
[37] Ibid 88.
[38] Ibid; Here profits are seen as the money received by the prostitute after any deductions, including rent for facilities, any payments made to other people involved such as brothel managers, security personnel, etc.
[39] See for example: Patrick Belser, 'Forced Labour and Human Trafficking: Estimating the Profits' [2005] SSRN Electronic Journal; Rebecca Surtees, 'Traffickers and Trafficking in Southern and Eastern Europe' (2008) 5 European Journal of Criminology; Kelly E. Hyland, 'Protecting Human Victims of Trafficking: An American Framework' (2001) 29 Berkeley Women's LJ; Stephanie Hepburn and Rita J. Simon, 'Hidden in Plain Sight: Human Trafficking in the United States' (2010) 27 Gender Issues.
[40] Morehouse (n 36) 88.
[41] Ibid.

However, in particular from the legal philosophical discussions surrounding voluntary prostitution in chapter 3, and the ideas from the oppression paradigm, this distinction between voluntary and forced prostitution is less clear, particularly in light of the wide definition of exploitation of someone in a vulnerable position. For instance, the theoretical concepts of prostitution from the viewpoint of radical feminists, such as Barry,[42] Dworkin,[43] MacKinnon,[44] Millet,[45] and Pateman[46] is that it constitutes a form of violence against women regardless of the surrounding circumstances. According to this idea, prostitution would amount to sexual exploitation in itself.

Other theoretical concepts which blur the lines between voluntary prostitution and forced prostitution include the ideas from Marx[47] and Engels,[48] who viewed all wage labour relationships as a result of socio-economic inequality based on capitalism, and prostitution, as a continuation of these dynamics, as sex-oppression.[49] On the basis of these ideas, people who work in prostitution for economic reasons as they are unable to find similar wage labour due to, for instance, sex discrimination or other forms of inequalities, could be arguably economically coerced into prostitution. Following these theoretical arguments in combination with the wide definition of exploitation of a vulnerable position, this would again mean that prostitution would in most cases also amount to THB for the purpose of sexual exploitation.

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[42] See: Kathleen Barry, *Female Sexual Slavery*. (Englewood Cliffs, NJ: Prentice-Hall, 1979); Kathleen Barry, *The Prostitution of Sexuality*. (New York: New York University Press, 1995), Jane Scoular, The Subject of Prostitution (2011) *Feminist Theory* 2004; 5; 343, 345.

[43] Andrea Dworkin, *Intercourse*. (New York: Free Press, 1987); Dworkin, A., *Pornography: Men Possessing Women*. (New York: Plume, 1989).

[44] Catharine A. MacKinnon, 'Feminism, Marxism, Method and the State' (1982) 7 Signs, 515–44; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law. (*Cambridge, MA: Harvard University Press, 1987); Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1991); Catharine A. MacKinnon, Confronting the Liberal Lies about Prostitution, (1990) in Dorchen Leidholdt and Janice G Raymond, *The Sexual Liberals and the Attack on Feminism* (Pergamon 1990); Catharine A. MacKinnon, 'Prostitution and Civil Rights' (1993) 1 Michigan Journal of Gender and Law, 13–31.

[45] Kate Millet, *The Prostitution Papers*. (St. Albans: Paladin, 1975).

[46] Pateman (n 33) 561–65; Carole Pateman, *The Sexual Contract* (Polity Press 1988).

[47] Karl Marx, Economic and Philosophic Manuscript of 1944, printed in Robert C Tucker, Friedrich Engels and Karl Marx, *The Marx-Engels Reader* (University of Simon Fraser Library 2013) 83, 96.

[48] Friedrich Engels, *The Origin of the Family, Private Property, and the State* (1st edn, Pathfinder Press 1979) 742.

[49] Alison M Jaggar, *Feminist Politics and Human Nature* (Rowman & Littlefield Publishers 1988) 221.

When applying these ideas to certain circumstances in practice, the blurred lines between forced prostitution and voluntary prostitution become more apparent. For example, in situations in which people have voluntarily entered into prostitution, yet face violence or other forms of exploitation during the provision of prostitution services.[50] Similarly, in situations in which people leave their home countries due to high degrees of poverty or other inhumane circumstances and start working in prostitution merely for the purpose of escaping these conditions.[51] In these two hypothetical circumstances, the distinction between voluntary and forced prostitution is not as clear as assumed on the basis of the theoretical definitions. These hypothetical circumstances also exemplify how, according to the definition of THB, voluntary prostitution could be elevated to THB for the purpose of sexual exploitation by certain intervening exploitative actions.

A similarly difficult distinction in practice can be found between "smuggling" of human beings (SHB), and THB. According to Annex III of Article 3 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, "smuggling" is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident."[52]

Accordingly, the key distinctions between THB and SHB are that THB is a violation of human rights whereas SHB is a violation of state border controls and immigration laws.[53] THB is a crime against the trafficked person, whereas SHB is a crime against a

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[50] European Commission - Directorate-General for Justice, 'Attitudes Towards Violence against Women in the EU' (Publication Office of the European Union 2015) available online at: http://ec.europa.eu/justice/gender-equality/files/documents/151125_attitudes_enege_report_en.pdf [accessed: 1st February, 2017].

[51] Alexis A. Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organisations that Promote it.' (2001) 9 European journal on criminal policy and research, 163-195.

[52] UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Annex III of Article 3.

[53] International Centre for Migration Policy Department, 'Regional Standard for Anti-Trafficking Police Training in SEE: Training Manual' (International Centre for Migration Policy Department 2003) <http://www.undp.ro/governance/Best%20Practice%20Manuals/docs/Police_Manual_Final.pdf> accessed 14 February 2017.

state.[54] In SHB the defining element is the crossing of a border, whereas in THB the defining element is exploitation, which in essence is based on the presence of consent in SHB and the lack thereof in THB.[55] As SHB merely deals with the crossing of the border, whereas THB constitutes the continuous exploitation of the victim for profit, the wide definition of exploitation of a position of vulnerability may result in a situation of SHB becoming THB if exploitative circumstances occur. Accordingly, a person may have started off consenting to being smuggled. However, if in the smuggling process, they have then been exposed to a form of exploitation in accordance to the wide definition, such as for instance, violence, psychological traumas, coercion based on the threat of exposure of their illegal migration status, or other forms of exploitation, it would result in the situation then falling under the THB definition rather than SHB.[56]

9.1.3 The notion of harm in prostitution and THB for sexual exploitation

As it has become evident in the previous discussions, one of the main elements which contributes to the distinction between perceived voluntary and forced prostitution is the understanding of harm. However, harm also constitutes a factor that distinguishes between what is perceived as voluntary and what is perceived as forced prostitution. The different understandings of harm in relation to prostitution have been discussed in chapter 3. Thus, the purpose of this section is not to understand the different understandings of harm, but rather to understand how these understandings factor into the conflation of prostitution and THB for the purpose of sexual exploitation, or the distinction between the two subject matters.

In support of the former statement, the notion of harmfulness of prostitution for women is sometimes derived from the idea of prostitution being a form of "bad sex" because it is understood to be commercial, transitory, promiscuous, recreational and

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[54] See for example: Morehouse (n 36) 86.
[55] See for example: Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective* (Nijhoff 2006) 25.
[56] Claudia Aradau, *Rethinking Trafficking in Women* (Palgrave Macmillan 2014) 23-26; Obokata (n 55) 26.

unemotional.[57] This understanding of prostitution as harmful *per se* is one of the reasons why THB for the purpose of sexual exploitation is viewed as inherently different to other forms of THB.[58] Some scholars explain these arguments and the causes and effects thereof through the theory of moral crusade.[59] From a social constructionist view, certain social situations develop into problems due to the process of claims-making, regardless of whether these claims are true reflections of reality or not. Some argue that putative claims about certain conditions may have more serious consequences than the conditions the claims are made about *per se*.[60] Moral crusades constitute forces which can transform certain conditions, such as prostitution into problems, which are promoted as being evil, moral wrongs, which need to be fought.[61] The intention is to symbolically transform and strengthen normative restrictions and standards, as well as instrumentally promote relief for victims and penalties for the people who have committed the moral wrongs.[62]

In relation to prostitution and THB for sexual exploitation, the theory of moral crusades explains that the often found conflation of THB for the purpose of sexual exploitation

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[57] Merri Lisa Johnson, 'Way More Than a Tag Line: HBO, Feminism and the Question of Difference in Popular Culture' (2005) 3 The Scholar and the Feminist Online; Erin O'Brien, Belinda Carpenter and Sharon Hayes, 'Sex Trafficking and Moral Harm: Politicised Understandings and Depictions of the Trafficked Experience' (2013) 21 Critical Criminology.
[58] Charlotte Watts and Cathy Zimmerman, 'Violence against Women: Global Scope and Magnitude' (2002) 359 The Lancet; Melissa Farley, Kenneth Franzblau and Alexis Kennedy, 'Online Prostitution and Trafficking' (2014) 77 Albany Law Review http://www.albanylawreview.org/Articles/Vol77_3/77.3.1039%20Farley%20Franzblau%20Kennedy.pdf 1039-1094, 1055; Marsha A Freeman, Christine M Chinkin and Beate Rudolf, *The UN Convention on the Elimination of all Forms of Discrimination against Women* (Oxford University Press 2013) 172; Liz Kelly (n 12) 73; Erin O'Brien, Sharon Hayes and Belinda J Carpenter, *The Politics of Sex Trafficking* (Palgrave Macmillan 2013) 1.
[59] Jon Spencer and Rose Broad, 'The 'Groundhog Day' of the Human Trafficking for Sexual Exploitation Debate: New Directions in Criminological Understanding' (2011) 18 European Journal on Criminal Policy and Research; Ronald Weitzer, 'Moral Crusade against Prostitution' (2006) 43 Society; Erich Goode and Nachman Ben-Yehuda, 'Moral Panics: Culture, Politics, and Social Construction' (1994) 20 Annual Review of Sociology.
[60] Malcolm Spector and John I. Kitsuse, 'Social Problems: A Re-Formulation' (1973) 21 Social Problems, 146; Jeffrey S. Victor, 'Moral Panics and the Social Construction of Deviant Behavior: A Theory and Application to the Case of Ritual Child Abuse' (1998) 41 Sociological Perspectives; Sean P Hier, *Moral Panic and the Politics of Anxiety* (Routledge 2011) 37.
[61] Stanley Cohen, *Folk Devils and Moral Panics* (Routledge 2002) 1, 7, 27; Frances M. Shaver, 'The Regulation of Prostitution: Avoiding the Morality Traps.' (1994) 9 Canadian Journal of law and society; Teela Sanders, 'Kerbcrawler Rehabilitation Programmes: Curing the `Deviant' Male and Reinforcing the `Respectable' Moral Order' (2009) 29 Critical Social Policy.
[62] Ibid.

and prostitution is based on the objective of crusaders to eliminate the complete sex industry.[63] An example that explicitly states this is in Hughes, for example, who calls for "re-linking trafficking and prostitution, and combating the commercial sex trade as a whole."[64] Furthermore, in her guest comment "Accommodation or Abolition? Solutions to the problem of sexual trafficking and slavery"[65] she claims "that most 'sex workers' are — or originally started out as — trafficked women and girls."[66] However, despite the issue of statistics and figures on the subject matter of THB for the purpose of sexual exploitation being unreliable, as discussed in chapter 1, the available literature does not confirm this claim either. This is particularly evident when following the definition of THB as found within the Palermo Protocol.[67] In particular, there is no evidence that suggests that the majority of CSPs are also victims of THB. Furthermore, the conflation between THB and prostitution can be challenged in itself, considering the different natures of the terms. It would have made more sense theoretically, if following a radical feminist approach or an oppression paradigm, to conflate prostitution and sexual exploitation, as this conflation could be justified on the basis of the understanding that prostitution is a form of harm in itself. However, conflating prostitution and trafficking demonstrates a lack of understanding of the nature of THB in itself, which opens statements up, such as the ones made by Hughes, to be criticised.[68]

This example also highlights another issue of moral crusaders. Cohen explains, for example, that moral crusaders have a "tendency to exaggerate grossly and over

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[63] Farley (n 33) 1087 – 1125; Dorchen A. Leidholdt, 'Prostitution and Trafficking in Women' (2004) 2 Journal of Trauma Practice, 167 - 183; Janice G. Raymond, 'Prostitution on Demand' (2004) 10 Violence against Women.
[64] Donna Hughes, 'Wolves in Sheep's Clothing' [2002] National Review Online, 2.
[65] Donna Hughes, 'Accommodation or Abolition? Solutions to the Problem of Sexual Trafficking and Slavery' (2003) 1 National Review Online, available online: <http://www.academia.edu/download/31193885/solutions.pdf>.
[66] Ibid.
[67] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.
[68] See for example: Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35 Politics & Society; Ronald Weitzer, 'Sex Trafficking and The Sex Industry: The Need for Evidence-Based Theory and Legislation' (2011) 101 The Journal of Criminal Law and Criminology; Ronald Weitzer, 'The Mythology of Prostitution: Advocacy Research and Public Policy' (2010) 7 Sexuality Research and Social Policy; Jacqueline Berman, 'The Left, the Right, and the Prostitute' (2005) 14 Tul. J. Int'l & Comp. L..

simplify" matters.[69] Adams further explains, that in relation to prostitution and THB for the purpose of sexual exploitation, "[m]odern social reformers and commentators are currently utilising this archetype as the basis to confront the spread of [CSPs]…to the West."[70] Adams further explains that the harm found in relation to the claims made by moral crusaders is not the issue of the content of the claims, but rather the harm caused by these claims. He further explains that challenging the moral crusaders views, which are often in line with the oppression paradigm, does not mean that the existence of coercive prostitution or exploitative sex is denied. Instead, he explains, that the stereotypes and myths spread by these kinds of moral crusaders hinder the development of a deeper understanding of THB for the purpose of sexual exploitation and prostitution.[71]

There are also a number of other arguments which involve the notion of harm in relation to the need to distinguish between forced and voluntary prostitution. In particular, these involve the idea that a conflation of the two concepts results in a hierarchy of victims. This has the ability to diminish the severity of the human rights violations faced by victims of forced prostitution by placing their suffering on equal terms with CSPs who have chosen to work within prostitution without unlawful force or coercion.[72] Moreover, harm is also thought to exist on the other side of the equation, namely, that the conflation of forced and voluntary prostitution deprives CSPs of their right of decision, in other words fails to recognise their agency to consent to providing sex for remuneration.[73] In particular this argument is often made in relation to migrants, as the moral crusaders often deny the existence of "benign migration"[74] for the purpose of sex work due to their understanding of prostitution being exploitative and oppressive *per se*.

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[69] Cohen (n 61) 109.
[70] James Adams, 'Alien Animals and American Angels: The Commodification and Commercialization of The Progressive-Era White Slave' (2004) 28 CONCEPT.
[71] Ibid 2.
[72] Sharon Morley, Karen Corteen and Paul Taylor, *A Companion to State Power, Liberties and Rights* (Policy Press 2017) 136; Rochelle L Dalla and others, *Global Perspectives on Prostitution and Sex Trafficking* (Lexington Books 2011) 4 – 6.
[73] Ivan Y Sun and others, *The Routledge Handbook of Chinese Criminology* (Routledge 2013) 198; Rachel Masika, *Gender, Trafficking, and Slavery* (Oxfam Publishing 2007) 4; Wendy S Hesford and Wendy Kozol, *Just Advocacy?* (Rutgers University Press 2005) 168.
[74] Weitzer (n 68) 453.

These arguments in relation to harm overlap with the other two important elements influencing the distinctions between voluntary and forced prostitution, namely consent and agency, which will be discussed in the following section.

9.1.4 The notion of consent in prostitution and THB for sexual exploitation

It has become apparent from the previous discussion on the conflation of THB for the purpose of sexual exploitation and prostitution, that a major issue is the way consent and voluntariness are viewed in relation to prostitution. It has been established that consent can be a significant factor in determining THB for the purpose of sexual exploitation. However, under EU law, for example, the consent of a THB victim is irrelevant when any exploitative or coercive means have been used in the process.[75] Thus, in order to understand where and how the lines between the theoretical distinctions are blurred it is important to understand how the absence of consent works in relation to THB for the purpose of sexual exploitation, in contrast to the presence of consent in prostitution.

Fletcher states that "[n]o idea testifies more powerfully to individuals as a source of value than the principle of consent."[76] In order for consent to be legally regarded as valid it needs to be considered a "procedural justification" for someone else to do something to someone else or someone else's property.[77] The general definition of consent as a theoretical concept involves consent being an agreement which is genuine and free in relation to the acts in question.[78] Hence, consent needs to be a free and genuine agreement to a certain act in order to be valid. Thus, the issues of consent for the further discussion at this point will need to consider consent in relation to THB for

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[75] Article 2(4) Directive 2011/36/EU of European Parliament and of the Council of 5th April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Official Journal of the European Union, L. 101/1 of 15.4.2011.
[76] George Philip Fletcher, *Basic Concepts of Legal Thought* (1st edn, Oxford University Press 1996) 109.
[77] Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (1st edn, Hart 2007) 125.
[78] See for example: Satnam Singh Gulshan and others, *Law, Ethics and Communication* (New Age International Ltd 2008) 7; Alan Reed and others, *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 198; Antonio Cassese and others, *International Criminal Law: Cases and Commentary* (Oxford University Press 2010) 197.

the purpose of sexual exploitation by examining the key elements of consent. These elements include: consent being freely given, consent being informed, the consenting agents' capacity and understanding of the activity being consented to, and the time the consent was given in relation to the act being consented to.

Although technically an impossibility in light of the definition of THB, a hypothetically "consensually trafficked" person would have to have clearly given un-coerced consent, by exercising autonomous agency, which is free from any influences of pressure, like violence, threats, or any other force by traffickers. According to Abramson,[79] the existence of free consent in relation to THB "ignores the real difference in choices between rich and poor, male and female, and educated and uneducated."[80] This statement reflects the ideas of opponents of the oppression paradigm, and involves socio-economic considerations of an absence of consent in light of the narrower approach to forms of coercion, which would only relate to force. Subsequently, "economic coercion of circumstances"[81] means that consent cannot morally be accepted if the consenting agent is solely motivated by extreme poverty. Some take this argument further, and state that people who are more affected by poverty, due to a lack of opportunities for economic gain, such as a larger quantity of women than men, will be less capable of truly exercising free agency.[82]

In relation to prostitution, this argument is often used to question the free choice to work in prostitution, due to a lack of other options.[83] A counter argument in relation to this point, however, is that in the majority of EU member states, there are numerous social provisions, such as monetary or housing benefits, which prevent most cases of severe poverty, which would render this argument obsolete in relation to prostitution which can

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[79] Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003) 44 Harv. Int'l LJ.
[80] Ibid 475.
[81] Jessica Elliott, *Role of Consent in Human Trafficking* (Routledge 2015) 142.
[82] Ibid.
[83] See for example: Annette Jolin, 'On the Backs of Working Prostitutes: Feminist Theory and Prostitution Policy' (1994) 40 Crime & Delinquency; Janice G. Raymond, 'Ten Reasons for not Legalizing Prostitution and a Legal Response to the Demand for Prostitution' (2004) 2 Journal of Trauma Practice; J. O'Connell Davidson, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1 Migration Studies; Albert Rocio, Fernando Gomez and Yanna Gutierrez Franco, 'Regulating Prostitution: A Comparative Law and Economics Approach' (2007) 30 Documento de Trabajo 2007.

be consented to. Nevertheless, it is clear that this argument only holds, when all CSPs have access to these benefits. In relation to THB for the purpose of sexual exploitation, the argument becomes more substantial, as traffickers will often use the economic or social vulnerability of potential victims to recruit them.[84] Moreover, once a trafficking victim has been recruited, they will no longer be considered free, which means that any consent following, which was given under the influence of the traffickers, will not be considered "free", as the victim was not in a position to give consent.[85] Regardless of where and from whom the freedom impeding element was derived, any invalidation of the freedom to give consent will require positive action from another agent, even if this is not the actual trafficker.[86]

Beyleveld and Brownsworth bring up the question of whether consent, when related to exploitation may require higher thresholds, in light of the necessary protection of "person's most basic interests" in contrast to situations in which "lesser interests are at stake."[87] A reason for this may be traced back to the concept of informed consent. In THB, any consent involved in the individual elements of the THB situation poses the question of what the victim believes they are consenting to. In particular, in situations in which a person may have consented to smuggling, but then faces exploitation, it is clear that the victim's consent will not have been adequately informed, as there will not have been adequate knowledge of the conditions they would be facing, either in the smuggling process, or, in some cases in relation to the conditions within the prostitution sector.[88] This could mean that even in situations in which consent has been given to

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[84] Gergana Danailova-Trainor and Frank Laczko, 'Trafficking in Persons and Development: Towards Greater Policy Coherence' (2010) 48 International Migration; Stephanie A. Limoncelli, 'The Trouble with Trafficking: Conceptualizing Women's Sexual Labor and Economic Human Rights' (2009) 32 Women's Studies International Forum; Kevin Bales, 'What Predicts Human Trafficking?' (2007) 31 International Journal of Comparative and Applied Criminal Justice; Jacqui True, *The Political Economy of Violence against Women* (Oxford University Press 2012) 63 - 78.
[85] Maria De Angelis, *Human Trafficking* (Cambridge Scholars Publishing 2016) 16, 36, 137; Vincent Chetail and Céline Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2015) 139; Marc Cools and others, *European Criminal Justice and Policy* (Maklu 2012) 210.
[86] Elliott (n 81) 169.
[87] Beyleveld and Brownsword (n 77) 11.
[88] P. M Nair and Sankar Sen, *Trafficking in Women and Children in India* (Orient Longman 2007) 141; William Frank McDonald, *Immigration, Crime and Justice* (Emerald JAI 2009) 110; Gallagher (n 11) 28.

work in prostitution, without adequate provisions to change one's mind and leave, this will negate any consent given.

According to Rook and Ward, a person "will not have had the capacity to agree by choice where their understanding and knowledge were so limited that they were not in a position to decide whether or not to agree."[89] In relation to prostitution, and being smuggled for the purpose of working in prostitution, Jordan states that "A woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money. However, if the defendant intended actually to hold the woman in forced or coerced sex work, then there is no consent."[90]

Nevertheless, this point of informed consent in THB also requires there to be valid consent in entering prostitution. If consent to sell sex is generally not considered valid, as was seen in the abolitionist case approach in Sweden,[91] then the consent of CSPs to engage in the transaction of selling sex acts for remuneration will not constitute a justification for a CSPu to use the service. However, in these circumstances, the question comes about, as to how consent is established for the purposes of determining THB.

Consent can theoretically be restricted by certain recognised inabilities to give valid and informed consent on the basis of capacity.[92] This usually relates to mental capacity, which requires a consenting agent to be in a physical and mental position to understand the matter being consented to.[93] The most obvious form of absence of legal capacity to

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[89] Peter F Rook and Robert Ward, *Rook & Ward on Sexual Offences* (Sweet & Maxwell, Thomson Reuters 2016) 1.94.
[90] Ann D Jordan, *The Annotated Guide to the Complete UN Trafficking Protocol* (International Human Rights Law Group 2002) 11.
[91] See chapter 6.
[92] Grzegorz Mazur, *Informed Consent, Proxy Consent, and Catholic Bioethics* (Springer Science+Business Media BV 2012) 43; Hilary Brown, *Safeguarding Adults and Children with Disabilities against Abuse* (Council of Europe Publishing 2004) 94; Helena Leino-Kilpi, *Patient's Autonomy, Privacy, and Informed Consent* (IOS Press 2000) 22; Penelope Weller, *New Law and Ethics in Mental Health Advance Directives* (Routledge 2015) 6; Oonagh Corrigan, *The Limits of Consent* (Oxford University Press 2009) 145; David C Ormerod, Brian Hogan and John C Smith, *Smith and Hogan's Criminal Law* (Oxford Univ Press 2011) 719 - 722 .
[93] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000; Obi N. Ignatius Ebbe and Dilip K Das, *Global Trafficking in Women and*

give consent is found in age restrictions. A person who is below the age of 18 years, is unable to provide valid and informed consent, even if this has been given freely, as by law, it is assumed that people below this age are incapable of consenting for these purposes.[94] Other forms of incapacity are found in the areas of certain disabilities.[95]

In relation to the element of understanding, it can be said that this is closely related to the element of "informed" mentioned above. A good explanation of this requirement can be found in the Explanatory Report to the Council of Europe Trafficking Convention, which states that:

> [t]he question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.[96]

This brings up the question of where to draw the line in relation to consent in light of coercion. In the context of THB, it needs to be emphasised that it is a common misconception that there are merely two options regarding consent, i.e., that consent is either valid, and thus, present, or that consent is not valid, due to the presence of coercion or force. Instead, consent and coercion and force form two ends of a spectrum.[97] Munro, for instance, explains that the ambiguities within consent "means

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Children (Internation Police Executive Sysmposium 2008) 8; Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik, *Trafficking and Prostitution Reconsidered* (Routledge 2015) 116.

[94] Ibid.

[95] Alan Soble, *Sex from Plato to Paglia* (Greenwood Press 2006) 233; Teela Sanders, *The Oxford Handbook of Sex Offences and Sex Offenders* (Oxford University Press 2017) 173; Andrea Hollomotz, *Learning Difficulties and Sexual Vulnerability* (Jessica Kingsley Publishers 2011) 62.

[96]Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings* (Documents and Publications Production Department (SPDP), Council of Europe Publishing 2013) 58.

[97] Sundari Anitha and Aisha Gill, 'Coercion, Consent and the Forced Marriage Debate in the UK' (2009) 17 Feminist Legal Studies; Stuart Hall, 'Authoritarian Populism: A Reply' (1985) 151 New Left Review; Sarah DeGue and David DiLillo, '"You Would If You Loved Me": Toward an Improved Conceptual and Etiological Understanding of Nonphysical Male Sexual Coercion' (2005) 10 Aggression and Violent

that it is simply not useful in the delineation of the law itself."[98] In situations in which individuals' autonomy can be potentially limited, such as it is the case in potentially exploitative sex work environments, there may be an appearance of the presence of valid consent, which can, however, be obscuring a situation in which the consent has actually been given under coercion. Some argue that power imbalances, as found in hierarchical dynamics of CSC and CSP, trafficker and trafficked, and in some circumstances even the power dynamic within personal relationships or societies, blur the lines between what constitutes valid consent and consent provided under a form of coercion.[99] An example of this kind of situation was highlighted by Mariner from Human Rights Watch in relation to prisons and sex that takes place within prisons. Here it was explained that in situations in which a

> victim makes little apparent effort to escape the abuse, both prisoners and prison authorities often fall into the trap of viewing non-consensual […] sexual activity as consensual, ignoring the larger context in which the activity takes place.[100]

There will be many situations in which the consent to sell sex services may be questionable. As seen in chapter 3, there are two competing views in relation to the way consent to prostitution is perceived. The first one is the view of autonomy and empowerment, which is often supported by liberal feminists as well as supporters of

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Behavior; Karen J Maschke, *Pornography, Sex Work, and Hate Speech* (Garland 1997) 232; Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press 1989) 189.

[98] Vanessa Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron L. Rev., 940.

[99] João Paulo Orsini Martinelli, 'Trafficking in Human Beings for Sexual Exploitation in the Brazilian Criminal Law and the Consent of the Victim.', *The illegal business of human trafficking* (Springer International Publishing 2015) 29 – 42; J. Swanson, 'Sexual Liberation or Violence against Women? The Debate on the Legalization of Prostitution and the Relationship to Human Trafficking' (2016) 19 New Criminal Law Review: An International and Interdisciplinary Journal; Swanee Hunt, 'Deconstructing Demand: The Driving Force of Sex Trafficking' (2012) 19 Brown J. World Aff; Beverly Balos, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' (2004) 27 Harv. Women's LJ.

[100] Joanne Mariner and Human Rights Watch (Organisation), *No Escape: Male Rape in U.S. Prisons* (Human Rights Watch Print 2001) 84.

other liberal theories, whereas the other view is based on the ideas of paternalism and protectionism,[101] as supported by radical feminists.[102]

9.1.5 The notion of autonomy and paternalism in prostitution and THB for sexual exploitation

Without repeating the theoretical arguments within the autonomy versus paternalism debates, the main point to be made here is that in relation to consent in THB for sexual exploitation, it is important to understand whether a legislator believes there can realistically be willing CSPs. Supporters of autonomy views argue, that the recognition of free choice and diversity would automatically suggest that there can be people who willingly sell commercial sex. Particular, this would be the case when the consent to take part in such transactions was given under circumstances in which the sector is regulated the same way as any other working environment, in which the service provider enjoys the same protection and freedoms as any other worker.[103] In these situations, the free and un-coerced choice cannot be disregarded, as that would be an unjustified violation of their right to self-determination.[104] However, supporters of paternalist views argue that legalised prostitution makes it harder to prosecute traffickers, as the blurring of the lines between coercion and consent provide opportunities for traffickers to legally defend their positions by claiming that the trafficked person had been informed and aware of the conditions within prostitution.[105] The supporters of autonomy also argue that there will always be a demand for prostitution, which provides the opportunity for CSPs to use this demand for their own

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[101] Michael Goodyear and Ronald Weitzer, 'International Trends in the Control of Sexual Services' [2011] Policing Pleasure: Sex Work, Policy, and the State in Global Perspective.
[102] See section 3.6.2.
[103] Clifford (n 32); Jeffrey and MacDonald (n 32); Murphy and Venkatesh (n 32).
[104] Outshoorn (n 21); Christine Overall, 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) 17 Signs: Journal of Women in Culture and Society.
[105] Vanessa E Munro, 'New Coalitions against Trafficking in Women?' (2009) 76 Criminal Justice Matters; Iris Yes, 'Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand through Educational Programs and Abolitionist Legislation' (2007) 98 J. Crim. L. & Criminology; Svitlana Batsyukova, 'Prostitution and Human Trafficking for Sexual Exploitation' (2007) 24 Gender Issues.

personal financial gain.[106] Based on this assumption that a demand for prostitution will always be present, it could even be argued that permitting CSPs to voluntarily enter the commercial sex sector would provide a voluntary supply to cover this demand, and, thus, reduce the demand for THB for the purpose of sexual exploitation.[107] Supporters of paternalism, on the other hand, argue, that it is the supply that fuels the demand, and that accepting consent to sell commercial sex enhances the demand side, which in turn requires more supply and, thus, makes THB more necessary.[108] These different views are closely related to the different concepts of THB for the purpose of sexual exploitation, which will be discussed in further detail in section 9.2.

Supporters of autonomy argue that economic imbalances and injustices, including discrimination and unequal opportunities, which result in people becoming vulnerable and more likely to become victims of THB.[109] This approach advocates the elimination of these inequalities and any other economic and social disparities in order to prevent THB. In the same fashion, the supporters of autonomy in relation to consenting to work in prostitution argue that consent should be considered valid, and instead of seeking to question this valid consent by prohibiting prostitution, these inequalities, which may affect the ability to freely choose prostitution as work, should be tackled and removed.[110]

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[106] Graham Scambler and Annette Scambler, *Rethinking Prostitution* (Routledge 1997) 3; Jody Freeman, 'The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im) Possibility of Consent' (1989) 5 Berkeley Women's LJ; Pasqua Scibelli, 'Empowering Prostitutes: A Proposal for International Legal Reform' (1987) 10 Harv. Women's LJ.
[107] Roth (n 22) 37; Anne Coles, Leslie Gray and Janet Henshall Momsen, *The Routledge Handbook of Gender and Development* (Routledge 2015) 338; Bridget Anderson and Julia O'Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (International Organization for Migration 2003) 10; Diana T Meyers, *Poverty, Agency, and Human Rights* (Oxford University Press 2014) 163; Kathryn Cullen-DuPont, Jessica Neuwirth and Taina Bien-Aimé, *Human Trafficking* (Facts on File 2009) 74; Morehouse (n 26) 198.
[108] Gergana Danailova-Trainor and Patrick Belser, 'Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand' [2006] Geneva: ILO http://natlex.ilo.ch; Weitzer (n 68).
[109] A. Yasmine Rassam, 'International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach' (2004) 23 Penn St. Int'l L. Rev.; True (n 84) 72; Francine Pickup, Suzanne Williams and Caroline Sweetman, 'Ending Violence against Women: A Challenge for Development and Humanitarian Work' [2001] Oxfam; Jacqueline Oxman-Martinez, Andrea Martinez and Jill Hanley, 'Human Trafficking: Canadian Government Policy and Practice' (2001) 19 Refuge: Canada's Journal on Refugees.
[110] Elliott (n 81) 234 – 236.

Finally, a short point to be made in relation to consent, is whether consent to exploitation can be valid if it was made without any form of coercion. This is particularly relevant in relation to niche markets within the sex services sectors, such as bondage and discipline, dominance and submission, sadism and masochism (BDSM). This argument does not only apply in the sex services industries, but also within the private settings of consensual practices between adults without there being a commercial transaction involved. Accordingly, although there are certain legal requirements of reasonableness,[111] consent to all forms of exploitation should not automatically be presumed to have come about due to false consciousness. Accordingly, Schulhofer explains people "cannot simply dismiss as "false consciousness" the perceptions of women themselves."[112] Moreover, Hernandez-Truyol and Larson explain in relation to perceptions of exploitation in sex work, and the inability to consent to it, that "[l]abor measures the legitimacy of work not by the presence of contract or worker consent, but rather by substantive ethical and moral standards of what conditions of work accord with the dignity, health, and liberty of the worker"[113] which can also be subjectively decided by the worker.

9.2 Theoretical concepts of the causes of THB

There are a number of theoretical concepts on what constitutes and causes THB which shed light on the underpinning ideas and reasons behind laws and policies seeking to tackle THB. In essence, the most prevalent theoretical concepts of what constitutes THB view THB as a human rights violation, a form of slavery, prostitution, a migration issue or a form of organized crime.

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[111] Alex Dymock, 'But Femsub is Broken too! On the Normalisation of BDSM and the Problem of Pleasure' (2012) 3 Psychology and Sexuality; Cheryl Hanna, 'Sex is not a Sport: Consent and Violence in Criminal Law. 42, 239.' (2000) 42 BCL Rev; Devin Meepos, '50 Shades of Consent: Re-Defining the Law's Treatment of Sadomasochism' (2013) 43 Sw. L. Rev.
[112] Stephen J Schulhofer, *Unwanted Sex* (Harvard University Press 2000) 56.
[113] Berta E. Hernández-Truyol and Jane E. Larson, 'Sexual Labor and Human Rights' (2005) 37 Colum. Hum. Rts. L. Rev., 432.

As a violation of human rights, it was explained in the OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking that "[v]iolations of human rights are both a cause and a consequence of trafficking in persons."[114] It is not difficult to establish violations of human rights when looking into the issue of THB. A quick look at the definition already reveals this. The use "of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability" to have control over another person for "the purpose of exploitation" already indicates violations of human rights. These violated rights range from the rights relating to human dignity,[115] such as to be free from torture,[116] or the right to be free from slavery,[117] over the rights relating to freedoms,[118] such as the right to free movement,[119] personal integrity and privacy,[120] to citizens' rights, such as the right to vote.[121] In the EU, the Charter of Fundamental Rights of the European Union (the Charter), which entered into force in 2000, included the prohibition of slavery, forced labour, compulsory labour, as well as THB.[122] Particularly significant for this research, was the formulation found in Article 3, which prohibited "making the human body and its parts as such a source of financial gain."

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[114] UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, 3.
[115] General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 1 UN.
[116] European Convention on Human Rights, Article 5 UN General Assembly, Universal Declaration of Human Rights, Article 3.
[117] Ibid, Article 4; UN General Assembly, Universal Declaration of Human Rights, Article 4.
[118] UN General Assembly, Universal Declaration of Human Rights, Article 3.
[119] UN General Assembly, Universal Declaration of Human Rights, Article 13.
[120] European Convention on Human Rights, Article 8; UN General Assembly, Universal Declaration of Human Rights, Article 12.
[121] UN General Assembly, Universal Declaration of Human Rights, Article 21; European Union, Consolidated version of the Treaty on European Union, Article 22; European Union, EU Charter of Fundamental Rights of the European Union, Articles 39 and 40.
[122] European Union, Charter of Fundamental Rights of the European Union, Article 5.

THB is at times conceptualized as a form of slavery, and is often referred to as a form of modern slavery,[123] or white slavery.[124] Bales,[125] for instance explains that "human trafficking is the modern term for a phenomenon—that of forcing and transporting people into slavery—which has been a part of civilization since the beginning of human history."[126] Although slavery is legally defined separately from THB,[127] supporters of this concept, such as Aronowitz[128] view THB as merely an alternative process with which persons are brought into slavery. Accordingly, she explains that "[h]uman trafficking is not a condition or a result of a process, but the process of enslavement itself."[129] Similarly, Piotrowicz highlights that legally THB is not the same as slavery on the basis that there cannot be a legal ownership of another person, which is a defining characteristic of slavery.[130] He explains, however, that despite this fact, THB involves treating human beings as commodities which nonetheless resembles the dynamics of slavery.[131]

Many still argue that prostitution is in itself THB, and vice versa, that THB is prostitution. Arguably, this can be traced back to the historic approach to THB in its early stages in law, at the end of the 19th and beginning of the 20th centuries. In the early stages of the development of THB as a crime, it was understood as "white slave trade"[132] of women into prostitution. Accordingly, THB was initially understood to solely take place for

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[123] See for example: Kara Siddharth, *Sex Trafficking* (Columbia University Press 2010); S Scarpa, *Trafficking in Human Beings* (1st edn, Oxford University Press 2008); Davidson (n 83).
[124] See for example: Doezema J, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18 Gender Issues; Joyce Outshoorn, 'The Political Debates on Prostitution and Trafficking of Women' (2005) 12 Social Politics: International Studies in Gender, State & Society.
[125] Kevin Bales, *Understanding Global Slavery* (1st edn, University of California Press 2005).
[126] Ibid 126.
[127] Jean Allain, *Slavery in International Law* (1st edn, Martinus Nijhoff Publishers 2013) 142; see for instance Article 5, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.
[128] Alexis A Aronowitz, *Human Trafficking, Human Misery* (1st edn, Scarecrow Press 2013).
[129] Ibid 28.
[130] Ryszard Piotrowicz, 'States' Obligations under Human Rights Law Towards Victims of Trafficking in Human Beings: Posititve Obligations' (2012) 24 Int'l J Refugee L 181, 196.
[131] Ibid.
[132] Eva Morawska, *International Migration* (1st edn, Malmö Institute for Studies of Migration, Diversity and Welfare (MIM), Malmö University 2007) 93; Maggy Lee, *Human Trafficking* (1st edn, Routledge 2012) 4, 93.

prostitution and/or sexual exploitation.[133] Another reason for this concept of THB as being synonymous with prostitution is argued to be due to the fact that THB for the purpose of sexual exploitation is a form of forced prostitution, which is also the most prevalent area of THB.[134] An issue within this concept of THB is the fact that it fails to acknowledge other forms of THB, such as for forced labour or organ exploitation.[135]

THB is often viewed as a migration issue. This is based on the fact that THB often occurs in this context, in particular as part of irregular migration, regardless whether taking place within national borders, such as migration from rural to urban areas, or between states, such as from less developed to more developed countries. In practice, illegal migrants are more vulnerable to exploitation due to the absence of legal protection within the host state.[136] Other contributing factors may include the inability to communicate effectively in the native language of the host state, or fear of being exposed as an illegal migrant.[137]

In regards to THB as a form of organised crime, it is believed that THB constitutes one of the most profitable activities of organised crime, together with drugs and weapons smuggling.[138] Obokata explains that THB as well as other areas of organised crime are a result of globalisation and a global economy.[139] This view is also supported by Shelley.[140] However, Shelley also emphasises a further potential reason for the growing popularity of THB in relation to other organised crimes, namely, the growing risks faced by narcotics traffickers.[141] In contrast to drug trafficking, THB allows traffickers to sell

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[133] Maggy Lee, *Human Trafficking* (1st edn, Routledge 2012) 93; Obokata (n 55) 13.
[134] Morehouse (n 36) 88.
[135] Lee (n 133) 4.
[136] Aronowitzv (n 128) 6-9.
[137] Morehouse (n 36) 84-85.
[138] F Bovenkerk, & B A Chakra, Terrorism and organized crime. in *Forum on Crime and Society [2004]* Vol. 4, No. 1-2, 3 - 15; Europol, socta 2013 EU Serious and Organised Crime Threat Assessment, European Police Office, 2013, available online at: https://www.europol.europa.eu/sites/default/files/documents/socta2013.pdf [accessed: 14th February, 2017].
[139] Obokata (n 55) 29.
[140] Louise Shelley, *Human trafficking as a form of transnational crime, i*n: M Lee, (ed). *Human trafficking* (Portland: Willan Publishing, 2007) 116.
[141] Louise Shelley, *Human Trafficking* (1st edn, Cambridge University Press 2010) 83.

their commodities more than once and are able to earn continuous and extensive profits.[142]

As to the theoretical concepts of the causes of THB, the key components involve identifying push and pull factors. “Push factors” is a term used to describe the determining factors which direct people away from their previous circumstances, towards a life of exploitation and victimization through THB.[143] Examples of push factors, on the one hand, have been identified within the EU to include unemployment, inequality, discrimination, poverty, the desire to escape inhumane circumstances as well as a lack or collapse of social infrastructure in the state of origin. “Pull factors”, on the other hand, describe the motivations and reasons which attract people into THB. Pull factors, as determined by Europol[144] include the desire for a better quality of life, better access to education, employment opportunities, higher wages, better working conditions, a demand for cheap labour as well as the enforcement of rights.[145]

Especially in the context of the EU, there are a number of theoretical concepts of the causes of THB. In the opinion of Europol, a significant cause is the absence of border controls due to the Schengen Convention.[146] In particular, the Eastern enlargement contributed significantly, as it made the EU’s external borders adjoining to countries from which high numbers of victims originate.[147]

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[142] Shelley (n 140) 116 – 117.

[143] Rianne Mahon and Fiona Robinson, Feminist ethics and social policy: towards a new global political economy of care (Vancouver: UBC Press, 2011) 142; Ine Vanwesenbeeck, Prostitution push and pull: Male and female perspectives [2013] *Journal of Sex Research*, *50*(1), 11-16; Bales (n 84) 269-279; Carolyn Hoyle, Mary Bosworth and Michelle Dempsey, Labelling the victims of sex trafficking: Exploring the borderland between rhetoric and reality [2011] *Social & Legal Studies*, *20*(3), 313-329.

[144] Europol: *Trafficking in Human Beings in the European Union,* Hague: European Police Office, 2011. URL: https://www.europol.europa.eu/sites/default/files/publications/trafficking_in_human_beings_in_the_european_union_2011.pdf.

[145] Ibid.

[146] European Union, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement"), 19 June 1990.

[147] Europol: *Ten years of Europol, 1999-20009*, Hague: European Police Office, 2009. URL: https://www.europol.europa.eu/sites/default/files/publications/anniversary_publication.pdf.

9.2.1 Theoretical approaches to dealing with THB for the purpose of sexual exploitation in the EU

In relation to the characterization of EU anti-THB policies, there are three theoretical approaches often referred to in order to understand the reasons behind and the intention of the policies in place. For the purpose of this research, these categories have been called a border security approach, a human rights based approach and an economic approach. In particular, the characterisation of these approaches has been laid out and developed by the research of scholars such as Buzan, Wæver and de Wilde,[148] Huysmans,[149] Kempadoo,[150] Rijken and de Volder,[151] and Shelley.[152]

The border security approach touches on the concept of THB as a migration issue as well as THB as a form of organised crime in the sense that it is associated with a security risk and a threat to national security, in particular due to the close links between THB and organised crime. Buzan, Wæver and de Wilde[153] support this approach to THB in order to prevent these forms of transnational crimes from affecting not only internal security but also affecting the effectiveness of governments. Huysmans, in support of this approach, has argued that THB as well as other threats to internal security are a result of migration.[154] He describes migration as "[a] phenomenon that can be referred to as the cause of many problems."[155] This approach has been reflected in a number of EU provisions, such as the European Security Strategy (2003) in which it states that:

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[148] Barry Buzan, Ole Wæver, and Jaap de Wilde, Securit: A new Framework for Analysis (*Lynne Rienner Publishers Inc.*, 1997).
[149] Jef Huysmans, The European Union and the Securitization of Migration [2000] *Journal of Common Market Studies* 38 (5), 751-77.
[150] Kamala Kempadoo, Global Sex Workers. Rights, Resistance, and Redefinition (*Routledge, 2000)*.
[151] Conny Rijken, and Eeffe De Volder, The European Union's struggle to realize a human rights-based approach to trafficking in human beings [2009] *Conn. J. Int'l L.* 25, 49.
[152] Shelley (n 11).
[153] Buzan, Wæver and de Wilde (n 148).
[154] Huysmans (n 149) 751-777.
[155] Ibid 761.

> Europe is a prime target for organised crime. This internal threat to our security has an important external dimension: cross-border trafficking in drugs, women, illegal migrants and weapons accounts for a large part of the activities of criminal gangs. It can have links with terrorism.[156]

Supporters of this approach to THB argue for strengthened external border controls and restrictions on immigration.[157] According to Huysmans, this kind of approach shows how patterns have emerged that allow the EU to lay down migration policies and in so doing identify internal threats.[158] Chou, however, explains that this approach to THB by the EU prevents them from effectively tackling any underlying causes of THB.[159] The objective of safeguarding the security of the EU member states by focussing on keeping illegal migrants from entering the territory, the EU fails to focus on the victims and the way they are affected by THB.[160]

Within the border security approach, the victims of THB are understood to predominantly constitute third country nationals. Thus, they are perceived as not only a risk to the internal welfare systems within the EU in the event of their discovery,[161] but also as a threat to the European identity.[162] The border security approach has been highlighted in regards to EU policies in relation to the EU's exclusion of strangers and Europeanization, as well as the building of a European fortress,[163] which is predominantly referred to by critics as "fortress Europe" in academia.[164] However, a strong criticism of these kinds of practices in the fight against THB, is that they, in

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[156] European Union, European Security Strategy, A Secure Europe in A Better World, Brussels, 12 December 2003, page 4, available online at: https://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf [accessed: 14th February, 2017].
[157] Cornelius Friesendorf, Strategies against Human Trafficking: The Role of the Security Sector, (Vienna and Geneva, *National Defence Academy and Austrian Ministry of Defence and Sports, 2009)*.
[158] Huysmans (n 149)751-77.
[159] Meng Hsuan Chou, The European Union and the Fight against Human Trafficking: Comprehensive or Contradicting? [2008] *Stair* 4 (1), 76-95.
[160] Friesendorf (n 157).
[161] Huysmans (n 158) 751-77.
[162] Kurt Wolff, (Trans.) (1950), The Sociology of Georg Simmel (*New York: Free Press*, 1950) 402 - 408.
[163] Sinikukka Saari, Balancing between inclusion and exclusion: The EU's fight against irregular migration and human trafficking from Ukraine, Moldova and Russia (*London: London School of Economics,* 2006); Rahit Malpani, Legal Aspects of Trafficking for Forced Labour purposes in Europe [2006] *Working Paper 48. Geneva: ILO.*
[164] See for example: Yosefa Loshitzky, Journeys of hope to fortress Europe [2006] *Third Text*, *20*(6), 745-754.

practice, encourage THB from third countries, as people are left more vulnerable to criminal acts when trying to enter the EU illegally in order to escape their living circumstances outwith the EU in the hope for a better life within the EU's borders.[165]

As its name suggests, the human rights based approach, is based on the notion that THB is a violation of human rights. The approach gained popularity following the initial emphasis of the border security approach in the last decades of the 20th century in the EU and the perceived issues from this kind of approach. The border security approach was criticised because "[t]he protection of victims has been a secondary goal, and the causes and consequences THB have mostly been neglected thus far."[166] Moreover, the EU and its member states were thought to have determined the concept of THB from a fixed and restricted perspective that merely focused on the criminal side of the activity at the level of internal, national and border security. The counter side of this approach was that EU anti-human trafficking policies and legislation did not sufficiently concentrate on the victims' rights and needs and failed to tackle the underlying causes and the exploitative aspects of THB.[167]

Thus, this approach refocuses on the component of THB that constitutes a violation of the victims' fundamental rights. It is argued that it is in member states' interests to have the victims of THB cooperate with the authorities. However, these then fall short in protecting the victims adequately or to effectively provide them a protected legal status.[168] A reason for this can be found in Rijken and Koster's research which states, that a significant reason why a human rights-based approach currently is not being applied is that both of the disciplines of migration and criminal law are concerned with the fight against THB.[169] They further explain that a lack of collaboration amongst these law disciplines in anti-human trafficking measures is "jeopardizing an adequate

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[165] Friesendorf (n 157).
[166] Rijken and De Volder (n 151) 49-50.
[167] Ibid; Liz Kelly, "You can find anything you want": A critical reflection on research on trafficking in persons within and into Europe [2005] *International Migration* 43, no. 1-2, 235-265; Malpani (n 163).
[168] Saari (n 163).
[169] Conny Rijken, and Dagmar Koster, A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice [2008] SSRN 1135108.

response to THB."[170] As the disciplines are intertwined in a way which obstructs a position that is more centralised upon the needs of the victims of THB.[171] The issue that arises here is that when victims of THB have been found, they find themselves in a state of uncertainty. This is often due to their situations clashing with provisions within the member states' national legislation, for instance on forced labour or sexual exploitation, or the specific laws dealing with prostitution, in particular, when this falls under the criminal law provisions, which means that authorities may treat these victims of THB as criminals.[172]

The human rights based approach to THB is in line with the EU's humanitarian ambitions,[173] as well as the European norms and values. In particular, many aspects of the welfare systems within the member states could enhance the ability of victims to cooperate with authorities and ensure their basic fundamental rights are protected. However, it can be argued the welfare system itself may be counterproductive, as it is one of the pull factors which contribute to THB in the first place, as previously mentioned. Moreover, there is a widespread fear of third country nationals being trafficked into the EU member states to take advantage of the welfare provisions. Saari refers to this as a threat of "floods of willing victims."[174] Others argue that it is exactly this fear that limits the effectiveness of a Human Rights Based Approach.[175]

According to the economic approach, economic factors and globalisation are viewed as the main causes of THB.[176] Kempadoo argues along the lines of an economic

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[170] Ibid 8.
[171] Ibid 7 – 8.
[172] Weitzer (n 68) 15-29; Vladislava Stoyanova, Complementary protection for victims of human trafficking under the European Convention on Human Rights [2011] Goettingen J. Int'l L., 3, 777; Greggor Mattson, Governing Loose Women: The New Politics of Prostitution, in the *Cultural Politics of European Prostitution Reform* (Palgrave Macmillan US, 2016) 1 -25.
[173] Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission
OJ C 25, 30.1.2008, p. 1–12; Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Article 209.
[174] Saari (n 163) 19.
[175] See for example: Jacqueline Berman and Cornelius Friesendorf, EU Foreign Policy and the Fight against Human Trafficking: Coercive Governance as Crime Control [2008] *Eur. Foreign Aff. Rev.* 13, 189; Maggie Ibrahim, The Securitization of Migration: A Racial Discourse [2005] *International migration* 43, no. 5, 163-187.
[176] Oxman-Martinez, Martinez and Hanley (n 109).

approach, which also reflects many of the theoretical ideas found in Marxism and many schools within critical jurisprudence. What she refers to as the new "white man's burden"[177] has been reinforced by contemporary western and neoliberal views seeking to sustain the boundaries between the "have" and "have nots."[178] These ideas match the concepts put forward which claim that THB is caused by inequality. Economic inequality, of which women are predominantly affected, make women more vulnerable to falling victim of THB. In line with these underpinning ideas, the Economic Approach to THB suggests, that measures need to be taken in the economic sphere in order to tackle THB. For instance, by promoting equal pay as well as access to financial possibilities, victimization can be prevented.[179]

Many scholars looking into the economic factors of THB argue that globalisation is a key cause. In this sense globalisation enhances movement of goods, people, services and money, which in turn increases competition, which then pushes prices down to remain competitive. These dynamics then risk inequalities to be further enhanced if there are no strict social provisions to counter this. Bales and Shelley highlight in this regard, that THB as a business also works within these economic currents.[180] These globalized economic factors do not exclude the business of human trafficking. On a global scale, these dynamics become apparent when considering the most common countries of origin and destination. A clear distinction can be seen between developed and developing countries, with people most commonly being trafficked from developing into developed countries.[181] This dynamic fits into the economic principles of supply and demand. Vulnerable victims hoping for a better life constitute the supply side,[182] whereas the demand for cheap labour, such as found in forced prostitution, in order to

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[177] Kempadoo, Kamala. "The Modern-Day White (Wo) Man's Burden: Trends in anti-trafficking and anti-slavery campaigns [2015] *Journal of Human Trafficking* 1, no. 1, 8, 13, 14.
[178] Ibid 8-20.
[179] Brittany Nolan, "A Rights-Based Approach to Trafficking? The Trafficking of Women for Forced Labour in the European Union and the United Kingdom" (PhD Thesis, University of Conterbury, 2015); Aradau (n 56).
[180] Bales (n 125) 18-21, 88-89, 115 – 121; Shelley (n 141) 28-32, 47, 112.
[181] Shelley (n 141) 203.
[182] Kevin Bales, Ending slavery: how we free today's slaves (Berkeley: University of California Press, 2007) 12, 42, 177.

achieve higher profits or meet consumer demand constitutes the demand side of the equation.[183]

At first sight, it appears that the different approaches contradict each other fundamentally. The Border Security Approach views trafficked people as threats whereas the Human Rights Based Approach views them as victims. The Economic Approach views THB as a cause of inequality, whereas the Border Security Approach views the provisions taken by an Economic Approach as a pull factor which enhances trafficking. The Human Rights based Approach views the Border Security Approach as a root cause of THB, as it not only increases the vulnerability to become a victim of trafficking, but also insufficiently addresses the victims' needs. The Economic Approach views the Human Rights Approach as a threat to the welfare achieved for EU citizens within the EU's borders, whereas the Human Rights based approach views the Border Security Approach as maintaining the standards achieved by the Economic Approach at the expense of potential victims.

However, these contradictions also reveal that each approach individually can have no significant impact on THB, as each approach on its own merely tackles an element of THB, while simultaneously attracting THB in other areas. Nevertheless, when used in parallel, the approaches also create a balance which seeks to address THB more holistically. Accordingly, an Economic Approach taken by the EU,[184] on the one hand attracts THB, yet tackles it at the same time by seeking to tackle the economic pull factors, such as inequality.[185] Although the Border Security Approach tries to shield the

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[183] Sally Cameron and Edward Newman, *Trafficking in humans: social, cultural and political dimensions* (United Nations University Press, 2008).

[184] This includes essentially any actions taken that can be based on article 3(3) TEU, such as all inter-EU provisions seeking to eliminate economic vulnerability within the EU, including the fundamental freedoms, non-discrimination provisions, strengthening of access to social security for workers, and any minimum standards set by the EU to prevent a downward spiral of standards despite the free movement provisions, as well as the targets for member states set by the EU for inter-EU economic growth as contained in the EU2020 strategy: European Commission, 'Communication from the Commission, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (European Commission 2010).

[185] See for instance European Pillar of Social Rights: European Commission, 'European Pillar of Social Rights' (*European Commission - European Commission*, 2020) <https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en> accessed 4 October 2020.

internal EU territory and the citizens from illegal migration,[186] it also seeks to prevent people from becoming victims of trafficking from outside the EU, despite being attracted to the economic provisions, by controlling the EU's borders. Similarly, although a Human Rights Based Approach may not fix the root causes of THB, the provisions do seek to protect the rights of victims, when the Economic Approach and Broder Security Approach provisions have fallen short and people have nonetheless fallen victim.[187] Although this predominantly concentrates on trafficking from outwith the EU, trafficking inside the EU would still be covered by the approaches, yet in a different manner and from a different perspective. Thus, as EU citizens already have full citizenship rights within the EU, their human rights would not need to be enhanced and ensured in the same way as third country nationals who are in the EU illegally. Bringing the interrelation of the approaches around in a full-circle, the economic approach would then come to play again by seeking to prevent internal trafficking by eliminating internal inequalities which contribute to THB.

9.3 Summarising the chapter findings

Similarly to the subject matter of prostitution, THB for the purpose of sexual exploitation and how to tackle it divides opinions. In particular, considering that the entirety of the arguments presented stem from European- and Western centric perspectives, which are based on shared "common values," puts this into perspective. The complexity and wide-ranging differences in relation to the subject matter within fundamentally similar systems points towards the wider issue of regulation of prostitution and THB for the purpose of sexual exploitation. When reviewing the approaches to the regulation of

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[186] This includes, for instance, any provisions and actions taken by the EU to tackle irregular migration into the EU, such as the Schengen Borders Code, see: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) L 77/1, the Eu's action plan against migrant smuggling: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Action Plan against Migrant Smuggling (2015 - 2020)' (European Commission 2015).

[187] The most prominent example of the EU's human rights based approach to THB can be found in the Eu Anti-Trafficking Directive itself, including provisions for the non-prosecution or non-application of penalties to THB victims, assistance and support for THB victims, THB victim protection and the prevention of THB.

prostitution[188] and the approaches to the regulation of THB for the purpose of sexual exploitation,[189] it has become clear that there exist a number of contradictions between the theoretical bases and consequences of the individual models, in particular between the THB models and the prostitution related theoretical models. Furthermore, there are also areas of overlap, for instance, as could be seen between the economic based approaches and the security based approached. Due to this entanglement of the various components of the theoretical approaches, it is clear, that the situation needs further examination in practice.

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[188] Abolitionism, Regulationism and Prohibitionism.

[189] Border security Approach, Human Rights Approach and Economic Approach.

Chapter 10

10. The regulation of trafficking in human beings for sexual exploitation in Germany, Sweden and the United Kingdom

Chapter 8 has shown that the EU has more influence than initially presumed on the internal regulation of prostitution, in particular in light of EU labour law provisions as well as the anti-discrimination provisions and free movement rights. In the case of Germany, EU law was even fundamental in the national move to the understanding of prostitution being an economic activity. However, it has also been found that the applicability of EU law within the national regulations of prostitution and the impact of EU law in related areas depend largely on the initial approach to prostitution regulation in individual member states. In this sense, EU law applicability in the areas of commercial sex provisions is reciprocal and dependant on the commercial sex laws falling within the scope of EU competence in related areas. The reason for this, as discussed in chapter 8, is found within the limitations of EU competence, as set in articles 4 TEU and 72 TFEU. Yet, this only focusses on the distinction between commercial sex provision as a legal activity and commercial sex provision as an illegal activity which is punishable under criminal law, and therefore internal security provisions. However, there is also another key distinction in relation to the national regulation of prostitution and the way this is understood in relation to trafficking in human beings (THB) for the purpose of sexual exploitation. In light of the focus of this research project, this is a significant differentiation within domestic jurisdictions, as it may cause unintended consequences both in relation to the fight against THB for the purpose of sexual exploitation as well as cross-border situation concerning commercial sex. Thus, it will be important to examine the EU's legal framework in relation to THB and the way this impacts national jurisdictions, and how it interacts with national approaches to prostitution regulation.

Due to the focus of this investigation, this chapter will solely be focussing on the areas of THB for the purpose of the sexual exploitation of adults, and where necessary, and where this overlaps with THB for the purpose of labour exploitation. In this sense,

provisions on trafficking of children (people under the age of 18 years) or THB for purposes other than sexual exploitation will not be addressed.

10.1 Significance of the area of freedom, security and justice in relation to the regulation of prostitution and EU competence

Chapter 8 not only laid out the areas of EU law which apply within the national regulations of prostitution, but also explained that these were limited by the areas of competence conferred on the EU. In this sense, the key underlying reason for the inability of harmonisation of national prostitution regulation across the EU is the express lack of EU competence over internal security matters. The idea of harmonising any criminal law across the EU has long been controversial,[1] in particular as criminal law was considered to be entirely a matter of national sovereignty of individual member states.[2] This was also the reason for the Schengen Agreements specifically excluding any direct intervention of the EU in criminal law.[3]

However, the past decades have seen some changes in this area, in particular, with the passing of the Maastricht Treaty, the Amsterdam Treaty, and latterly the Treaty of Lisbon. The removing of internal border controls within the EU has also *inter alia*, led to increased transnational criminal activity within the EU.[4] However, the scope for criminal

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[1] See for example: Steve Peers, Mutual recognition and criminal law in the European Union: Has the Council got it wrong [2004] *Common Market L. Rev.* 41, 5; Francesco Calderoni, Organized crime legislation in the European Union: harmonization and approximation of criminal law, national legislations and the EU framework decision on the fight against organized crime (Springer, 2010) 21; Joe Sim, Vincenzo Ruggiero and Mick Ryan, "Punishment in Europe: Perceptions and commonalities." *Western European Penal Systems. A Critical Anatomy,* (Sage: 1995): 1-23.

[2] Valsamis Mitsilegas, EU Criminal Law (1st edn, Oxford and Portaland 2009) foreword; Maria Bergström and Anna Jonsson, European Police and Criminal Law Co-Operation (1st edn, Hart Publishing 2014) 1.

[3] Neagu Norel, “European (Criminal) Law v. National (Criminal) law – A Two Way Street” (2015) Law Revie vol. II, issue 2, July – December 2015, 46-66; M. Cherif Bassiouni, *International Criminal Law, Volume 2 Multilateral and Bilateral Enforcement Mechanisms* (Brill, 2008); Didier Bigo and Elspeth Guild, Policing at a distance: Schengen visa policies [2005] *Controlling frontiers: Free movement into and within Europe,* 233-63.

[4] Louise Shelley, Transnational organized crime: an imminent threat to the nation-state? [1995] *Journal of international affairs* (1995): 463-489; Phil Williams, Phil, Transnational criminal organisations and international security [1994] *Survival* 36.1, 96-113; Sandra Lavenex and Nicole Wichmann, The external governance of EU internal security [2009] *European Integration* 31.1, 83-102; Maria Fletcher, Robin Lööf

law approximation remains limited to the crimes enumerated in article 83(2) TFEU, on the basis of article 4(2) TEU. In particular, this article refers to the broader requirement of the EU to respect essential state functions, such as “maintaining law and order and safeguarding national security.”[5] This reference is also found in Article 72 TFEU.[6] The key difference between the two provisions can be found in the nature of the obligations within each article, namely in article 4(2) TEU to “respect” State functions whereas in article 72 it is more extensive by requesting the EU not to “affect” internal security responsibilities.[7]

The specific competence of the EU to potentially impact on the criminal regulation of prostitution can be found in article 83 TFEU. Accordingly, the EU is able to adopt directives in order to set minimum rules on certain definitions of criminal offences.[8] This applies to so-called “Euro crimes,”[9] which are considered particularly serious crimes that involve cross-border elements.[10] In relation to the regulation of prostitution under criminal law, the relevant areas of EU competence are “trafficking in human beings and sexual exploitation of women.”[11] A particularly relevant provision, which may directly affect the regulation of prostitution or different but related crimes, can be found in article 83(2) TFEU. Here it is stated that the EU could have the potential competence to establish minimum rules in the national criminal law definitions of criminal offences and sanctions in the area concerned when the approximation in these areas is essential to guarantee the implementation of EU policies in harmonised areas, such as in this case, provisions aiming at combatting trafficking in human beings for the purpose of sexual exploitation.[12]

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and William C Gilmore, EU Criminal Law and Justice (1st edn, E Elgar 2008) 25; Howard Abadinsky, Organized Crime (1st edn, Thomson/Wadsworth 2007) 1. 13.
[5] Article 4(2), Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[6] Article 72, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.
[7] Ibid.
[8] Ibid Article 83(1).
[9] 'Criminal Law Policy - European Commission' (Ec.europa.eu, 2017) <http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm> accessed 5 June 2017.
[10] Ibid.
[11] European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Article 83(1).
[12] Ibid Article 83(2).

Although it is clear from chapter 8 that within the EU prostitution is understood as an economic activity it is important to understand that the conflation of THB for the purpose of sexual exploitation with prostitution nationally within any member state of the EU, once again, blurs the lines between the separate competences of the EU in these areas as well as any applicability EU law has here. Thus, this blurring of the lines results in a potential unintended interconnectedness between the EU anti-trafficking provisions and the impact these have on the regulation of prostitution. Thus, the following will examine the relevant EU anti-trafficking provisions and the way these have been implemented in Germany, Sweden and the three main UK jurisdictions, and how this may affect the national regulations of prostitution.

10.2 Trafficking of human beings for the purpose of sexual exploitation in the EU

From the perspective of the European Union, THB for the purpose of sexual exploitation, as any other form of THB is a serious human rights violation.[13] The preamble of the Directive 2011/36/EU[14] lays out the understanding of THB from the EU's perspective. In this sense, it is explained that THB constitutes a serious crime that is often committed under the wider framework of organised crime, which is a gross violation of fundamental rights, and as such expressly prohibited under article 5 of the Charter.[15] Thus, the EU has determined that preventing and combating THB should be a priority for all its member states.[16]

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[13] European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, Preamble.
[14] Ibid.
[15] Ibid.
[16] Ibid (1); Although outwith the scope of the focus of this examination, it is also important to note that all EU member states are members of the Council of Europe. Thus, this is also covered via this route following the judgements of Siliadin v France (Siliadin v France, ECHR Application no. 73316/01, Judgement of 26 July 2005) and Rantsev v Cyprus and Russia (Rantsev v Cyprus and Russia, ECHR Application no. 25965/04, Judgment of 7 January 2010).

Due to the severity of THB as a transnational crime, there have been many different provisions seeking to combat it through international, transnational and supranational laws. The contemporary understanding of THB was first defined in international law in 2000. In this sense, according to Annex I and II of Art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is attached to the UN Convention Against Transnational Organised Crime,[17] trafficking is defined as "the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."[18] This constitutes a tripartite definition of human trafficking, as it includes three key elements, namely, the action element,[19] the means element[20] and the purpose[21] element.[22] Accordingly, contrary to common belief, it is not the trafficking in the sense of the transportation of persons, which is the defining characteristic of THB, but rather the exploitation of someone in a position of vulnerability.[23]

This internationally recognised concept of THB was specifically addressed on a regional level within international law in 2005, when the Council of Europe adopted the Convention on Action against Trafficking in Human Beings, which entered into force on 1 February 2008. All EU member states and the United Kingdom have ratified the

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[17] UN General Assembly, *United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25.
[18] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime,* Article 3.
[19] "the recruitment, transportation, transfer, harbouring, or receipt of persons."
[20] "by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."
[21] "for the purpose of exploitation."
[22] Bressan (n 11) 137–163; Gallagher (n 11) 29–41; National Rapporteur on Trafficking in Human Beings, Human Trafficking – ten years of independent monitoring (The Hague: BNRM, 2010) 7; Shelley (n 11) 8–12; U.S. Department of State (n 11) 5; de Heredia (n 11) 299–300.
[23] International Labour Office, The cost of coercion: global report under the follow-up to the ILO Declaration on Fundamental Practice and Rights at Work: report of the Director-General (Geneva: ILO, 2009) 7.

convention.[24] This convention is a regional treaty aimed at preventing trafficking, protecting the human rights of victims and prosecuting traffickers. It should be noted that its scope is broader than that of the UN Protocol, as it applies to both national and transnational processes, whether or not related to organised crime, whereas the UN Protocol applies to crimes of a transnational nature and requires the involvement of an organised criminal group.[25]

The most recent EU legislative measure within the process of combatting THB is the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.[26] It replaced the Framework Decision 2002/629/JHA on combatting trafficking in human beings, which was criticised by the Council of the European Union and the Commission of the European Communities for being weak in the area of victim protection.[27] The 2011 directive takes a holistic and human rights based approach to THB that includes a strong gender focus. Following the criticism of the 2002 framework decision, which was more law enforcement in focus, the aim of the 2011 Directive was to ensure a more coherent EU framework for tackling human trafficking and to address the existing loopholes in the intra EU transnational legal framework to protect victims of THB.[28] This directive provides for minimum rules in relation to the definition of criminal offences and sanctions for THB and related offences. In addition to this, it includes common provisions that take gender perspectives into account in order to strengthen the prevention of the crime, especially in the area of THB for sexual exploitation, and the protection of the victims.[29] EU member states are expected to take any necessary measures to ensure the intentional acts listed within the definition of human trafficking, which is the same as the one laid

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[24] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 197' (*Council of Europe - Treaty Office*, 2020) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures?p_auth=C8VCXTSf> accessed 1 October 2020.
[25] UN General Assembly, *United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25, Article 3.
[26] European Union: Council of the European Union, *Directive 2011/36/EU (n 13).*
[27] Council of the European Union and the Commission of the European Communities, Accompanying document to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, Brussels, 25.3.2009 SEC(2009) 359, 8151/09 ADD 2.
[28] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* preamble 11-12.
[29] Ibid Article 1.

out in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, are punishable.[30] According to the directive, exploitation, as a minimum, includes "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs."[31] Part of this definition is directly relevant to this thesis. Moreover, inciting, aiding and abetting or attempting THB is also punishable according to the directive.[32] According to its Article 22, the directive was to be transposed into national law by 6 April 2013. The focus of the forthcoming analysis is on the tensions between the EU directive and the national jurisdiction's legislative provisions on prostitution.

10.3 Definitional Issues within the implementation of Directive 2011/36/EU in Germany, Sweden and the three main UK jurisdictions

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (anti-trafficking directive) lays out a number of minimum standards, which should be applied in the EU member states in order to prevent and combat THB and protect victims of THB as well as provide a more comprehensive definition of THB than what is found in the Palermo Protocol and the Council of Europe Convention.[33] A key attribute of this directive is the stronger focus on following a human rights approach to THB, and, in particular, a stronger focus on gender issues in relation to THB.[34]

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[30] Ibid Article 2(1)(2).
[31] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2(3).
[32]Ibid Article 8; John Winterdyk, Benjamin Perrin, Philip L Reichel, Human trafficking: exploring the international nature, concerns, and complexities (Boca Raton, Fla.: CRC Press, 2012).
[33] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2.
[34] Letschert, Rianne, and Conny Rijken, Rights of Victims of crime: Tensions between an integrated approach and a limited legal basis for harmonisation [2013] *New J. Eur. Crim. L.* 4, 226; Gema Fernández Rodríguez de Liévana and Viviana Waisman, *Human Beings from a Gender Perspective Directive 2011/36/EU* [2016] EPRS | European Parliamentary Research Service, PE 581.412: 213;

In relation to the implementation of THB definitions, Germany[35] and Scotland[36] have introduced definitions for THB which follow the Palermo protocol and are unproblematic in relation to the wider scope of the EU's definition. However, a potential issue in relation to the THB definition can be found in the English provision. In this sense, the Modern Slavery Act 2015 states in section 2 (1) that Human trafficking as an offence is the arranging or facilitating of the travel of another person for the purpose of exploitation.[37] The provision in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 contains a similar reference to travel.[38] This focus on travel may be problematic. Despite the fact that that travel may refer to arriving in, entering, and departing from any country, as well as travelling within a country, the strong focus on the travel element places this at the heart of the offence, rather than the exploitative element, which is the crucial part of the offence, as this is where the harm caused to the victim lies.[39] In particular, as England is a prohibitionist country, this may result in a number of victims being prosecuted for prostitution related crimes rather than being identified as victims of THB.[40] In Northern Ireland, this situation is less severe, due to the fact that they follow an abolitionist approach to prostitution regulation. In this sense, the non-classification as a victim of THB for the purpose of sexual exploitation would not prevent the victims from accessing certain support services, which are offered to victims of THB for the purpose of sexual exploitation and CSPs alike.[41]

Antonina Bakardjieva Engelbrekt and others, The EU's Role in Fighting Global Imbalances (1st edn, Edward Edgar Publishing Limited 2015) 109.

[35] §232 and §232a StGB (Strafgesetzbuch – German Criminal Code).

[36] Human Trafficking and Exploitation (Scotland) Act 2015, 2015 asp 12, s 1.

[37] Modern Slavery Act 2015 c. 30, S. 2(1): "(1) A person commits an offence if the person arranges or facilitates the travel of another person ("V") with a view to V being exploited."

[38] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, 2015 c. 2, S. 2.

[39] Crown Prosecution Service Strategy and Policy Directorate, CPS Policy for Prosecuting Cases of Human Trafficking, May 2011, available at < https://www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf> accessed 5th June, 2017.

[40] Although separate from the argument being made here, it is important to note that in all three UK jurisdictions it is possible for CSPs to be identified as victims of THB for forced labour if sexual exploitation cannot be identified, as long as the working conditions are severe enough.

[41] See part 3, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, 2015 c. 2.

When looking at the implementation of the definition of THB within the Swedish Penal Code, another issue is revealed. In this regard, the definition found in chapter 4, section 1(a) of the Swedish Penal Code states that the offence of THB has been committed when the relevant criteria are met and the offences committed do not fall within the offences "referred to in Section 1 (Kidnapping)."[42] Apart from this insertion, the Swedish definition matches the definition in article 2 of the EU's anti-trafficking directive. At first sight, this insertion appears to be of little significance. However, considering that the provision on THB is subsidiary to the offence of kidnapping, which states that

> a person who seizes and carries off or confines a […] person with intent to […] force him or her into service, or to practice extortion, shall be sentenced for kidnapping to imprisonment for a fixed period of at least four and at most eighteen years, or for life.[43]

Moreover, it states that if the conditions for application of the offence of kidnapping are fulfilled, that this provision is to be applied as it involves a more severe scale of penalties. The issue here relates to article 2(4) of directive 2011/36/EU, which states that "[t]he consent of a victim of trafficking in human beings to the exploitation" is to be irrelevant when the other means of the definition have been used. Although the Swedish provision does not explicitly mention this, the Swedish authorities have explained that the criminal provision on THB within the Swedish criminal code merely requires a purpose of exploitation, and, thus, that the consent of victims to the exploitation would be irrelevant.[44]

Moreover, in relation to serious crimes under Swedish criminal law, such as THB, the consent of the victim would not exclude any liability for the act in relation to any injury, violation or danger which it may involve in accordance with chapter 24 s. 7 of the

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[42] 4 ch. 1a § Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700, archived at https://perma.cc/SMG4-TYDR (all translations by author); see also RH 2010:34 [Svea Appellate Court Case on Human Trafficking], https://lagen.nu/dom/rh/2010:34, archived at https://perma.cc/6CN6-AZK4.
[43] Chapter 4, Section 1 Penal Code, Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700, *archived at* https://perma.cc/SMG4-TYDR
[44] See for instance in the report submitted to the Committee of the Parties in response to their recommendation CP(2014)12 on the implementation of the Council of Europe Convention on Action against Trafficking in Human received on 23 June 2016, 2.

Swedish penal code.[45] However, in practice the reference to the kidnapping provision inserted into the Swedish THB definition results in the consent of the victim in many cases to become relevant, as the offence would otherwise fall under the offence of kidnapping. On the one hand, this may not seem much of an issue, as the committed offence would still be punishable, even with a possibility of a more severe sentence. However, on the other hand, this will also have an effect on the reporting mechanisms and THB statistics, as well as potential victim support provisions. In this sense, the new international emphasis on victim support within the human rights focus within anti-trafficking policies may not be applicable for some THB victims, as they will be classified as victims of kidnapping instead.[46]

In particular, in light of the philosophical discussions surrounding CSPs and vulnerability, the EU's anti-trafficking directive defines this in Article 2(2) as "a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved."[47] It is clear from reading this definition itself, that the EU has left the scope of vulnerability particularly wide, in order to cover numerous different forms of vulnerability. The same applies to the international understanding of vulnerability in Europe in relation to THB. In this sense, in the Explanatory Report, the Council of Europe has provided more insights into this definition by pointing out that such vulnerability can involve any form, such as "physical, psychological, emotional, family related, social or economic."[48] It continues to provide examples such as involving insecurity or illegality of the victim's administrative status, fragile health or economic dependence.[49] In this sense, the explanatory notes state that exploitation may include any form of hardship which results in a human being impelled to accept exploitation.[50] It appears that this definition is particularly wide, in order to include any potential victims.

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[45] Chapter 24 Section 7 Swedish Penal Code, 24 ch. 7 § Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700).
[46] Chapter 4, Section 1 Penal Code, Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700.
[47] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2(2).
[48] Ibid.
[49] Ibid.
[50] Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series - No. 197Warsaw, 16.V.2005, para. 83.

A question that comes up in this regard, however, is whether it results in the lines being blurred between voluntary prostitution and THB for the purpose of sexual exploitation, which according to Europol, remains the most prevalent form of THB within the EU.[51]

However, in practice this may blur the lines between prostitution and THB, in particular in relation to the different understandings of vulnerability and harm in relation to CSPs as seen in the variations between the examined jurisdictions.[52] Thus, the consequential issue here is that the wide definition within the anti-trafficking directive leaves room for idealistic generalisations. In this sense, Sweden recognises economic vulnerability.[53] In theory, this leaves room for many CSPs to be classified as THB victims when they offer commercial sex for economic reasons. Further research would need to be undertaken in this area to assess whether this is also happening in practice. As seen in chapter 7, Sweden does not recognise people's choices to offer commercial sex as valid, as these will always be a result of vulnerability. However, case law has nonetheless determined that there exists a level of consent which is acceptable in order to distinguish between THB victims and CSPs.[54] This requirement can be understood when considering the significant difference in penalties between the crimes relating to THB and sex purchasing, which could mean a difference between a minimum sentence of 4 years imprisonment for THB or a maximum sentence of 1 year imprisonment for purchasing commercial sex.[55]

However, it is still not clear where the line is to be drawn and when economic vulnerability becomes a determining criterion for THB and when it is still enough to be considered irrelevant in this regard, and for a CSP to be identified as merely a victim of prostitution. In Germany, the fact that someone is in a foreign country is viewed as a

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[51] Europol, Situation Report. Trafficking in human beings in the EU. The Hague, February 2016. Document Ref No: 765175, p. 19.
[52] See chapters 6 to 8.
[53] Chapter 4, Section 1a Penal Code, Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700,
[54] Nytt Juridiskt Arkiv [NJA] [Scania & Blekinge Ct. App.] 2001-07-09 pp. 527, 532, aff'd id. p. 533 [Supreme Court] (Swed.).
[55] See Chapter 4, Section 1a and Chapter 6 section 11, Penal Code, Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700,

form of vulnerability, which may be taken into account in individual circumstances.[56] This is a unique criterion, which is based on the idea, that being in a foreign country comes with a number of difficulties that make a person more susceptible to exploitation, such as language barriers, lack of social support, or any other additional vulnerabilities that can be derived from being in a foreign country. The issue, which may come about here, is that the emphasis on victims from foreign countries, may remove emphasis on internal German victims. In this sense, although §232a (2) StGB refers to any people, the fact that §232a(1) StGB solely refers to vulnerability due to being in a foreign country or under the age of 21 years may overly point towards victims from foreign countries. Germany also makes reference to economic vulnerability. However, in contrast to Sweden, the term "*Zwangslage*" is used. This word translates to predicament or plight, and, thus, may be understood as a more severe form of economic vulnerability, such as debt, for instance.[57]

In contrast to the wide interpretations of vulnerability, the UK jurisdictions have adopted a narrower understanding. In this sense, the English legislation refers to being a child, being mentally or physically ill or being disabled as being especially vulnerable, as well as having a family relationship with a particular person involved.[58] Similarly, the Northern Irish legislation makes reference to the same list of options, however, by listing these after the term "for example" the scope is opened for other forms of vulnerability.[59] Similarly, although the Scottish act specifically lists the same forms of vulnerability, the list adds "old age or any other reason" at the end, which leaves a wider scope for interpretation and, thus, could encompass other forms of vulnerability.[60]

In relation to the criterion of exploitation and the definition thereof, sexual exploitation as a purpose has been specifically expressed within Sweden, Germany and all 3 UK jurisdictions. This is in accordance with the anti-trafficking directive's provision, which

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[56] §232a s. 1 StGB (Strafgesetzbuch – German Criminal Code).
[57] §§ 232, 232a s. 1 StGB (Strafgesetzbuch – German Criminal Code).
[58] Section 3 (6), Modern Slavery Act 2015 c. 30.
[59] Section 1 (4) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, 2015 c. 2.
[60] Section 3(8) Human Trafficking and Exploitation (Scotland) Act 2015, 2015 asp 12.

states that "exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation […]."[61] The English and Welsh,[62] and the Scottish[63] legislation include this as a specifically listed form of exploitation. The German criminal code, sought to include this in a more comprehensive way, by creating a specific individual offence of THB for the purpose of forced prostitution.[64] Although the format of these two vary considerably, there are no serious issues with the implementation. However, the two abolitionist systems, Northern Ireland and Sweden, do not specifically make reference to sexual exploitation or prostitution in the same manner. Instead, Northern Ireland and Sweden both refer to their more specific provisions on sexual crimes. In this sense, the Swedish THB provision states that exploitation may include when a person is "subjected to an offence under Chapter 6, Section 1, 2, 3, 4, 5 or 6,[[65]] exploited for casual sexual relations or in another way exploited for sexual purposes […]."[66] Although pimping and procurement are specifically listed within later sections of chapter 6 of the Swedish penal code, the reference made to commercial provisions of sex would fall under the "exploited for causal sexual relations or in another way exploited for sexual purposes" part of the Swedish THB provisions, as the specific sections of chapter 6 refer to rape, sexual exploitation as well as sexual abuse as a result of various capacity issues.[67] Despite the wide scope of sexual exploitation under the Swedish provisions, there are still areas, such as purchasing services from CSPs, which are not classified as elements of THB under the Swedish law. However, the same cannot be said for the Northern Irish legislation.

Accordingly, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 states that sexual exploitation involves something

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[61] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2(3).
[62] Section 3(3) Modern Slavery Act 2015 c. 30.
[63] Section 3(3) Section 3(8) Human Trafficking and Exploitation (Scotland) Act 2015, 2015 asp 12.
[64] Zwangsprostitution, §232a StGB (Strafgesetzbuch – Criminal Code of Germany).
[65] All offenses relating to sexual abuse including rape, gross rape, sexual coercion, gross sexual coercion, sexual exploitation of a person in a position of dependency, gross sexual exploitation of a person in a position of dependency, rape of a child, gross rape of a child, sexual exploitation of a child, sexual abuse of a child, gross sexual abuse of a child.
[66] Chapter 4, Section 1a, Sweden Penal Code, Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700.
[67] Chapter 6 Sweden Penal Code, Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700,

having been done to a person that involves committing an offence under either article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 or any provision of the Sexual Offences (Northern Ireland) Order 2008 (sexual offences).[68] In relation to CSPs, the latter element would apply. However, as the definition makes reference to “any provision” this will also include the procurement of sex services. In this sense, as the overall trafficking definition in Northern Ireland requires some form of participation in travel[69] for the purpose of exploitation, a person who picks up a CSP in a car in order to purchase commercial sex, would also, per this definition, not only be committing the offence of purchasing sex, but also of THB for the purpose of sexual exploitation.

A significant issue, however, is that all three UK jurisdictions have implemented definitions of THB for the purpose of sexual exploitation, which do not explicitly mention the means of “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power”[70] in the actual definitions of THB. Instead, the Modern Slavery Act 2015 only mentions the use of force, threats or deception in section 3(5) in relation to “securing services etc by force, threats or deception.”[71] Although some may wish to argue that commercial sex may fall under services in this regard, the issue is that sexual exploitation is defined separately in 3(3) within the list of acts which may constitute exploitation. This means that the two are clearly listed as two separate categories. This wide drafting becomes more problematic in relation to distinguishing between CSPs and victims of THB for the purpose of sexual exploitation when considering the same provisions in the Human Trafficking and Exploitation (Scotland) Act 2015.[72] Accordingly, the definition in this piece of legislation involves recruiting, transporting, harbouring or receiving another person, exchanging or

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[68] S. 3(3) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, 2015 c. 2, PART 1.
[69] According to the definitions in all three UK jurisdictions, travel means arriving in, or entering, any country, departing from any country or travelling within any country. See: S. 2(4) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, 2015 c. 2, s2(4); Section 2(5) Modern Slavery Act 2015, c. 30; Section 2(3) Human Trafficking and Exploitation (Scotland) Act 2015 2015 asp 12 (although here the term transportation or transfer is used).
[70] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2.
[71] Section 3(5) Modern Slavery Act 2015, c. 30.
[72] Human Trafficking and Exploitation (Scotland) Act 2015 2015 asp 12.

transferring control over another person, or arranging or facilitating of any these actions, for the purpose of exploitation.[73]

What exploitation means in relation to this definition is laid out in section 3 of the act. In particular, in relation to THB for the purpose of sexual exploitation within prostitution, the act lists prostitution and sexual exploitation together in subsection 3, under which it states that in relation to prostitution, exploitation constitutes another person exercising control, direction or influence over "prostitution by the person in a way which shows that the other person is aiding, abetting or compelling the prostitution."[74] However, the absence of force, threat or deception within the overall definition of THB, in conjunction with section 1(3) which adds that it is irrelevant whether the victim consents to any part of the trafficking offence, would mean that any involvement in the travel of a person for the purpose of aiding, abetting or compelling commercial sex arguably could automatically render the person committing this action as a human trafficker. Accordingly, a black-letter law interpretation of this widely drafted statutory provision would mean, for instance, that any person facilitating the travel of a CSP for the purpose of aiding the engagement in commercial sex would be committing a THB offence for the purpose of sexual exploitation. Hypothetically, this could even involve knowingly helping a CSP purchase a public transport ticket. Similarly, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015[75] defines THB almost the same way as the Modern Slavery Act 2015. The only significant difference can be found in the definition of exploitation for the purpose of sexual exploitation. The reason for this is the reference to any offence under the Sexual Offences (NI) Order 2008, in particular due to the changes made to this piece of legislation by section 15 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. Section 15 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 amends the Sexual Offences (Northern Ireland) Order 2008 by inserting the offence of

[73] Section 1, Human Trafficking and Exploitation (Scotland) Act 2015 2015 asp 12.
[74] Section 3(3) Human Trafficking and Exploitation (Scotland) Act 2015 2015 asp 12.
[75] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 2015 c. 2 schedule 4, part 1.

paying for sexual services of a person. Accordingly, section 64A of the order now states that a person commits an offence if they obtain sexual services in exchange for payment.[76] According to this provision, someone committing this offence could face a penalty of imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum, or both.[77] However, due to the reference made to this provision by the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the combination of this offence with any form of travel or facilitation of travel of the CSP arguably could mean that instead of being liable for the offence of purchasing commercial sex, the perpetrator would have committed the offence of THB for the purpose of sexual exploitation, with up to life imprisonment.[78]

It would appear that this wide drafting and the results of a black-letter law interpretation of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the Human Trafficking and Exploitation (Scotland) Act 2015 as well as the Modern Slavery Act 2015 was not what was initially intended when these acts were drafted by the legislatures. Thus, it is necessary to examine what may have been the actual intention of these definitions of THB in the UK jurisdictions. However, as the provided guidance on the three THB acts are equally wide and vague, it is not possible to provide further insight into the matter.[79]

In relation to determining the purpose of UK legislation when a black-letter interpretation does not appear to result in logical outcomes, a purposive approach[80] would seek to give effect to the purpose of legislation by looking at extraneous material, which sheds light on the background against which the legislation was enacted.[81] Thus, an indication

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[76] Section 64A Criminal Justice (Northern Ireland) Order 2008, No. 1216 (N.I. 1).
[77] Ibid.
[78] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 2015 c. 2, s 1.
[79] See Scottish Government, The Human Trafficking and Exploitation (Scotland) Act 2015 – A Guide (2016) Available online at <http://www.gov.scot/Resource/0051/00514770.pdf> [accessed 1st June, 2017]; UK Government, Modern Slavery Act 2015 2015 CHAPTER 30, Explanatory Notes, available online at http://www.legislation.gov.uk/ukpga/2015/30/notes [accessed 1st June 2017]; 'Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 - Explanatory Notes' (Legislation.gov.uk, 2020) <https://www.legislation.gov.uk/nia/2015/2/notes> accessed 21 October 2020.
[80] *Pepper v Hart* [1992] 3 WLR 1032 House of Lords.
[81] Ibid.

of the meaning of the definitions may be seen in the expressed intensions to comply with the CoE Convention and the EU anti-trafficking directive,[82] which would be the same in all examined jurisdictions in this thesis.

The issue here is closely related to the fact that according to article 2(4) of the EU's anti-trafficking directive the consent of a victim of THB to exploitation, whether intended or actual, is to be irrelevant when any of the means laid out in the THB definition from article 2(1) of the directive have been used. While there are no implementation issues in this respect within the German, Northern Irish or Scottish legislation, which have all implemented this specific statement, the UK, predominantly English and Welsh Modern Slavery Act 2015 appears to have misunderstood the irrelevance element. In this sense, section 2(2) specifically states that it is irrelevant if the victim consents to the travel rather than the exploitation.[83] In practice, this may mean that even when a person has not consented to being trafficked, their consent to provide commercial sex could theoretically still be taken into consideration.

The issue in relation to the irrelevance of consent as adopted in Sweden, has already been discussed in relation to the definition of THB above. However, an issue still comes about when looking at the issue of consent in relation to commercial sex provision in, for instance, Sweden. Here the irrelevance, or more specifically the invalidity of consent in relation to the provision of commercial sex appears to be made relevant through its distinction from THB, thereby challenging its entire philosophical stance underpinning its approach to regulating prostitution. However, prior to addressing the issue of consent in further detail, the different approaches to understanding prostitution as either connected

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[82] See for example: UK Government, Modern Slavery Act 2015 2015 CHAPTER 30, Explanatory Notes, available online at http://www.legislation.gov.uk/ukpga/2015/30/notes [accessed 1st June 2017]; Scottish parliament, Human Trafficking and Exploitation (Scotland) Bill, SPICe Briefing, (2015) available online at: http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-12_Human_Trafficking_and_Exploitation_Scotland_Bill.pdf [accessed 10th June, 2017]; Northern Ireland Department of Jusitce, Northern Ireland Human Trafficking and Modern Slavery Strategy 2016/17, available online at < http://www.octf.gov.uk/OCTF/media/OCTF/documents/publications/Human%20Trafficking/Final-NI-Human-Trafficking-and-Modern-Slavery-Strategy-2016-17.pdf?ext=.pdf> [accessed 15th June, 2017].

[83] Section 2(2) Modern Slavery Act 2015, c. 30.

or inherently separate from THB for the purpose of sexual exploitation need to be discussed.

10.4 Different approaches to prostitution and THB – conflation or a need for a clear distinction.

When commercial sex is provided under force, in form of the threat or use of force or other means listed in the definition of THB, it is often referred to as forced prostitution,[84] or involuntary prostitution,[85] which involves prostitution, which takes place due to coercion, usually by a third party.[86] In contrast to other forms of forced labour, THB for the purpose of sexual exploitation is often viewed in relation to the social phenomena surrounding forced prostitution and commercial sex provision more generally, and it is, thus, often argued, that THB for forced prostitution and commercial sex provision overlap in many areas.[87]

Although it should be noted that CSPs and victims of THB for the purpose of sexual exploitation can be people of all genders, as is also the case for traffickers, many of the current scholarly arguments have been based on a particular focus on women as victims and men as the perpetrators. In this sense, many scholars who focus on the

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[84] See for example: Johanna Kantola, and Judith Squires, Discourses surrounding prostitution policies in the UK [2004] *European Journal of Women's Studies* 11.1, 77-101; Judith Kilvington, Sophie Day, and Helen Ward. "Prostitution policy in Europe: a time of change?." *Feminist Review* 67.1 (2001): 78-93; Nick Davies, Prostitution and trafficking–the anatomy of a moral panic [2009] *The Guardian* 20, 6-7; Sanders, Teela, and Rosie Campbell. "Why hate men who pay for sex? Exploring the shift to 'Tackling Demand'in the UK." *Demanding sex: Critical reflections on the regulation of prostitution* (2008): 163-180; see in particular: the German provisions of §1ProstG – which makes specific reference to prostitution as the voluntary conduct, and §232a StGB, which specifically uses the term "Zwangsprostitution" (Engl: forced prostitution) for CSP which isundertaken under force.

[85] See for example: Thozama Mandisa Lutya, An integrated theoretical framework to describe human trafficking of young women and girls for involuntary prostitution [2012] *Intech*; Kilvington, Day, and Ward (n 84) 78-93; Kelly (n 12) 139-144; Nilanjana Ray, Looking at trafficking through a new lens [2005] *Cardozo JL & Gender* 12, 909.

[86] Although forms of sexual exploitation may also be performed by the traffickers themselves, the lack of a commercial nature would not suffice to fall under the category of prostitution or commercial sex. Instead, this would be a form of rape.

[87] Ernesto U Savona, and Sonia Stefanizzi, Measuring human trafficking: Complexities and pitfalls. (Springer Science & Business Media, 2007) 1-3; Željko Dj Bjelajac, Prostitution as a Controversial Social Phenomenon from History to Modern Age [2011] *The Review of International Affairs*, 48.

situation of women base this argument on feminist notions of commercial sex provision constituting sexual exploitation in itself. In this sense, Farley,[88] Hughes[89] and Dempsey[90] argue that prostitution and THB for the purpose of sexual exploitation are linked phenomena, as both are a result of women's oppression by men. However, other scholars, such as Weitzer[91] and Chuang[92] have criticised this view by explaining that this oppression paradigm is based on the idea that all forms of prostitution are coercive by nature because they constitute a practice, which essentially subordinates women to men.[93] It can be argued that this is problematic because it assumes that women cannot make genuine choices regarding their bodies, and, thus, that legislation protecting them could be classified at patriarchal and equally oppressive. Accordingly, the oppression paradigm would categorise all forms of prostitution as a form of THB. Weitzer explains further, that this paradigm builds on the notion that male domination and the consequent exploitation of women are an ontological element of prostitution. Weitzer, in contrast, does not disregard these elements *per se*, but instead classifies them as variables, which may occur in prostitution but may not always do so.[94] Chuang argues more from a postmodern perspective by acknowledging that there will be a wide range of different working arrangements, power relations and experiences of CSPs.[95] Weitzer argues from a more liberal feminist perspective, by stating that, despite there being abuse within the sector, there will still be a number of people working in prostitution, who have decided to enter this field of work as an expression of their self-determination and

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[88] Melissa Farley and others, 'Prostitution and Trafficking in Nine Countries' (2004) 2 Journal of Trauma Practice; Melissa Farley, 'Prostitution Harms Women Even if Indoors' (2005) 11 Violence against Women.
[89] Donna M Hughes, "Best practices to address the demand side of sex trafficking." (2004); Hughes (n 64).
[90] Michelle Madden Dempsey, 'Decriminalizing Victims of Sex Trafficking' [2014] SSRN Electronic Journal; Michelle Madden Dempsey, Rethinking Wolfenden: Prostitute-use, criminal law, and remote Harm (2005); Michelle Madden Dempsey, Sex trafficking and criminalization: in defense of feminist abolitionism [2010] *University of Pennsylvania Law Review* 158.6, 1729-1778.
[91] Weitzer, Ronald. "Sex trafficking and the sex industry: The need for evidence-based theory and legislation." *The Journal of Criminal Law and Criminology (1973-)* 101.4 (2011): 1337-1369; Ronald Weitzer, New directions in research on prostitution [2005] *Crime, Law and Social Change* 43.4, 211-235; Ronald John Weitzer, Sex for Sale (1st edn, Routledge 2010) 332.
[92] Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13 Indiana Journal of Global Legal Studies.
[93] Ibid.
[94] Weitzer (n 91) 3-6.
[95] Janie Chuang, "Redirecting the debate over trafficking in women: Definitions, paradigms, and contexts." *Harv. Hum. Rts. J.* 11 (1998): 65; Chuang (n 92).

agency.[96] Another critique of the oppression paradigm relates to the involvement of organised crime. Due to the underlying assumptions of this paradigm, organised crime is viewed as the sole cause of THB, which marginalises any other factors, such as socio-economic dynamics, which may contribute to THB by constituting push factors within THB, as well as contributing to the emergence of organised crime.[97] Both Weitzer and Chuang, thus argue, that by focussing solely on the direct involvement in THB, i.e. the traffickers, pimps, clients and victims, in particular, solely looking at female victims, THB is not viewed as a complex phenomenon, which is closely tied to fundamental economic disparities, not only amongst countries and regions, but also more generally between people in a society.[98] In light of the discussions in chapter 9, it can be said that this narrow view of THB in light of commercial sex provisions fails to view the economic approaches taken by the EU and its member states into consideration, which may influence THB and contribute to the elimination of THB. In this sense, many of the economic approaches taken to combat commercial sex provision by seeking to eliminate social, economic and labour injustices, may also similarly contribute to the fight against trafficking, as both THB and commercial sex can arguably share some of these root causes.[99]

Sweden is a country that strongly identifies with the ideas of radical feminism in relation to prostitution.[100] Thus, it is not surprising that they also argue along the lines of the oppression paradigm in relation to prostitution and THB. However, in contrast to the strict application of these ideas, Sweden also includes an economic element in their argument. In this sense, prostitution is viewed as the source of demand for THB. Specifically, the demand side of prostitution transactions is seen to simultaneously fuel the demand for THB for sexual exploitation.[101] Thus, THB for the purpose of sexual

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[96] Ronald John Weitzer, Legalizing Prostitution (1st edn, New York University Press 2013) 12 - 18.
[97] Rosalee Sylvia Dorfman, A Foucauldian Analysis of Power and Prostitution: Comparing Sex Tourism and Sex Work Migration [2011] *Polis Journal* 5 (2011): 1-23.
[98] Chuang (n 95) 65; Chuang (n 92); Weitzer (n 91) 1337-1369; Weitzer (n 91) 211-235; Weitzer (n 91) 332.
[99] See section 9.2.1.
[100] See chapter 7.
[101] Nicolle Zeegers and Martina Althoff, 'Regulating Human Trafficking by Prostitution Policy?' (2015) 2 European Journal of Comparative Law and Governance.

exploitation has been included within the provisions regulating prostitution, in form of an aggravating element within the sex purchasing offences.[102]

Germany, on the other hand has argued for a strict separation of THB for the purpose of sexual exploitation and prostitution. In this sense, it is stated that under the German principles of criminal law, prostitution does not equate to THB, and thus, it is necessary to clearly distinguish between the two.[103] However, this does not mean that any links between the two areas are entirely rejected. Instead, it is emphasised that it is legally important to distinguish these subject matters, as distinctively different, even if there are correlations between the two in practice.[104] KOK[105] argues that a conflation of the two subject matters results in a false representation of THB and generalisations, which in turn, result in further stigmatisation of people working in prostitution.[106]

Accordingly, Germany has taken a clear stance in rejecting the abolitionist position of radical feminism, as promoted by Sweden, as well as other organisations, such as the European Women's Lobby.[107] It opposes the idea that voluntariness and consent to work in prostitution has to be considered invalid due to the exploitative patriarchal

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[102] Section 3, Chapter 6 Swedish Criminal Code; Section 12, Chapter 6, Swedish Criminal Code.
[103] Dorothea Czarnecki, et al. "Prostitution in Germany-A comprehensive analysis of complex challenges." (2015); Rahel Herrmann and Barbara Seiler, Sexarbeit Gewalt im Fokus. Eine Analyse der Hilfsangebote für gewaltbetroffene Outdoor Sexarbeiterinnen in der Stadt Bern [2013]; Bundesministerium für Familie, Senioren, Frauen und Jugend (Federal Ministry of Family Affairs, Senior Citizens, Women and Youth), 'Regulierung von Prostitution Und Prostitutionsstätten – Ein Gangbarer Weg zur Verbesserung der Situation der Prostituierten Und zur Nachhaltigen Bekämpfung Des Menschenhandels? – Möglichkeiten Und Grenzen Des Gewerberechts; Schnitt Stellen Zwischen Gewerbe- Und Polizeirecht –' (DMC Druckcenter Meckenheim GmbH 2012) <https://www.bmfsfj.de/blob/95214/3aefa6a5331be6c1d6a5094c74d1f8c1/prostitutionsregulierung-data.pdf> accessed 1 June 2017.
[104] Bundesministerium für Familie, Senioren, Frauen und Jugend (Federal Ministry of Family Affairs, Senior Citizens, Women and Youth) (n 103).
[105] Bundesweite Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess – KOK e.V, 'Information Zum Gesetz zur Umsetzung der Richtlinie 2011/36/EU Des Europäischen Parlaments Und Des Rates Vom 5. April 2011 zur Verhütung Und Bekämpfung Des Menschenhandels Und Zum Schutz Seiner Opfer Sowie zur Ersetzung Des Rahmenbeschlusses 2002/629/JI Des Rates (BT-Drs. 18/9095 Vom 06.07.2016)' (KOK 2016) <https://www.kok-gegen-menschenhandel.de/fileadmin/user_upload/medien/Publikationen_KOK/KOK_Information_zum_Gesetz_zur_Umsetzung_der_EU-RiLi_gegen_MH_13_10_16__2_.pdf> accessed 1 June 2017.
[106] Ibid.
[107] European Parliamant, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, 'Sexual Exploitation and Prostitution and its Impact on Gender Equality' (EU Publication Office 2014) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf> accessed 1 June 2017.

nature of commercial sex.[108] Instead, they support a number of counter arguments in favour of a clear distinction between THB for sexual exploitation and prostitution.

Firstly, that the oppression paradigm solely follows a heteronormative theory of prostitution, which disregards male, transsexual and transgender as well as homosexual service providers as well as clients.[109] Moreover, according to the abolitionist position, people who are engaged in sex work are basically denied the ability to voluntarily choose this activity. Thus, the theory has a tendency towards paternalism and the paternalisation of sex workers. The paternalisation is taken so far, that sex workers, in some cases, are not invited to discussions on sex work legislation. In this sense, both Sweden, and the jurisdictions in the UK have been criticised for similar occurrences.[110] Paternalism in this form, is argued to result in an exclusion from the political and democratic processes of those who are most affected by it.[111] It is argued that supporters of the oppression paradigm historically have supported the criminalization of CSPs.[112] Thus, the moral stance taken in abolitionism is called into question, as the abolitionist model, on the one hand appears not to have a moral problem with CSPs. However, ultimately, on the other hand, the abolition of prostitution also means the abolition of CSPs, which contradicts the claimed absence of moral issues.[113] Due to the severe human rights violations faced by victims of human trafficking for the purpose of sexual exploitation, the conflation of THB and prostitution also means that the severity of the rights violation is marginalised, which may lead to reduced empathy and help

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[108] Silke Ruth Laskowski, 'New German Prostitution Act-An Important Step to a More Rational View of Prostitution as an Ordinary Profession in Accordance with European Community Law' (2002) *Int'l J. Comp. Lab. L. & Indus. Rel.* 18, 479; Czarnecki (n 103); Emelie Christiansson, Prostitution and sexual exploitation–inherent bedfellows?: Contrasting Sweden with Germany." (2013).
[109] Laskowski (n 108) 479-492.
[110] Diana Tietjens Meyers, Feminism and sex trafficking: Rethinking some aspects of autonomy and paternalism [2014] *Ethical Theory and Moral Practice* 17.3 (2014): 427-441; Mechthild Nagel, Trafficking with abolitionism: An examination of anti-slavery discourses [2015]; Kari Kesler, Is a feminist stance in support of prostitution possible? An exploration of current trends. [2002] *Sexualities* 5.2, 219-235; Janet Halley, et al. "From the international to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: Four studies in contemporary governance feminism [2006] *Harv. JL & Gender* 29, 335.
[111] Kempadoo (n 93) Chapter 1.
[112] Weitzer (n 91) 1337-1369; Ronald Weitzer, Sociology of sex work [2009] *Annual Review of Sociology* 35, 213-234; Chuang (n 95) 65.
[113] Hubbard, Phil, Roger Matthews, and Jane Scoular. "Regulating sex work in the EU: prostitute women and the new spaces of exclusion." *Gender, Place & Culture* 15.2 (2008): 137-152.

mechanisms for the most vulnerable people within prostitution, namely, those who are forced into it.[114] Finally, it is argued that when the choice to work in prostitution is entirely voluntary, a human being should still be protected from harm, such as abuse, stigmatisation or social and political exclusion. It is argued that prostitution is not the problem, but the circumstances under which the abuse occurs. Thus, conflating THB for the purpose of sexual exploitation with commercial sex provision uses commercial sex activities as the scapegoat for the actual crimes that have been committed. By placing the liability on prostitution, the person committing the violence or the abuse is, at the same time, freed from the responsibility for their actions. It is argued that all human beings should be free from harm, including people who have voluntarily decided to enter prostitution as a means to make a living.[115] By strictly separating THB and prostitution under the legal provisions, it clearly places criminal liability on the specific relevant perpetrators in abuse and exploitation cases, including procurers who abuse CSPs as well as organised crime gangs or any other people involved in trafficking offences and sexual exploitation.[116]

The stances taken in relation to the different understandings of conflating or separating THB for sexual exploitation and commercial sex by the different countries, may be related to the different understandings of harm in relation to commercial sex.[117] Thus, it becomes apparent that the application of the various notions of harm which ultimately influence the choice of regulatory approach to prostitution also determine whether THB and prostitution are conflated within a jurisdiction.

Prohibitionist and abolitionist approaches will be more favourable towards legally conflating THB for the purpose of sexual exploitation and prostitution as the harm is understood in prostitution practices themselves, with women generally being the victims of it. Whereas regulationist approaches see the harm caused in the loss of agency - In THB the loss of agency is an inherent part of the crime itself, however, by conflating THB and prostitution, one is also removing the agency of people voluntarily making

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[114] Joanna Phoenix, Regulating Sex for Sale (1st edn, 2009) 7.
[115] Balos (n 99) 137; Hernández-Truyol and Larson (n 113) 391; Abramson (n 79) 473.
[116] Ibid.
[117] See in particular: Chapters 4 – 7.

decisions about their sexual acts. Although this has not been reviewed in depth within this project, this may include the agency and self-determination of persons wishing to purchase sex acts. However, this may be a subject matter for future research outwith the scope of this thesis. In practice, the same tendencies can be found in England and Wales, Germany, Northern Ireland, Scotland and Sweden. Chapter 6, found that Germany, as a regulationist country, views the harm caused within the regulation of commercial sex to be more severe in relation to the loss of personal autonomy of the individual than the harm that may occur due to abuse within commercial sex. These ideas are equally represented in their views on the need for a clear distinction between forced prostitution and other forms of THB for sexual exploitation. In Sweden, as found in chapter 7, the harm within prostitution was seen to primarily lie in the patriarchal structural abuse of women under male domination, resulting in the understanding of prostitution in itself constituting exploitation. In Sweden, although THB for sexual exploitation is dealt with separately from the offences of purchasing sex, procurement and gross procurement,[118] the subject matters are nevertheless viewed as part of the same issue. In this sense, Sweden has argued that they comply with international and EU obligations to combat trafficking for the purpose of sexual exploitation through demand reduction by means of their neo-abolitionist approach to commercial sex regulation.[119] Northern Ireland appears to have taken a step further in this direction. With their move to an abolitionist system of commercial sex regulation and the introduction of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, their laws on THB for the purpose of sexual exploitation now explicitly refer to the Criminal Justice (Northern Ireland) Order 2008,[120]

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[118] For THB for the purpose of sexual exploitation see: Section 1a, Chapter 4, Swedish Penal Code; for purchasing sex and procurement related offences see: Sections 11 & 12, Chapter 6, Swedish Penal Code.

[119] Max Waltman, Prohibiting sex purchasing and ending trafficking: The Swedish prostitution law [2011] *Mich. J. Int'l L.* 33, 133; Katee Stahl, Addressing Demand for Sex Trafficking in Sweden and the United Kingdom: An Interpretive Policy Analysis of Demand Reduction Policies, in Consideration of the Principles of Deterrence Theory." (2015); Council of Europe, G R E T A Group of Experts on Action against Trafficking in Human Beings, 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden First Evaluation Round' (Council of Europe 2014) <https://polisen.se/PageFiles/162940/GRETA%20SWE_2014.pdf> accessed 1 June 2017.

[120] Criminal Justice (Northern Ireland) Order 2008, No. 1216 (N.I. 1).

which places the purchase of sex within the exploitation criterion of THB.[121] England and Wales with their prohibitionist approach to regulating commercial sex appear to view the predominant harm caused by prostitution onto society and public order. This makes it difficult to determine whether they view THB for the purpose of sexual exploitation or commercial sex as inherently separate or conflated issues. Although commercial sex is referred to in part as a form of sexual exploitation by referring to the Sexual Offences Act 2003,[122] specifically s. 52 (Causing or inciting prostitution for gain) and s. 53 (Controlling prostitution for gain), the provision of commercial sex is not specifically referred to as purchasing commercial sex in England and Wales is in itself not prohibited.[123] However, no reference is made regarding commercial sex without the element of travel, or by force, threats or deception. In Scotland, the element of force, threat or deception has been left out of the Human Trafficking and Exploitation (Scotland) Act 2015. Thus, in s. 3(3) of the Scottish act someone exploits another person if they exercise "control, direction or influence over prostitution by the person in a way which shows that the other person is aiding, abetting or compelling the prostitution." The wide drafting of this provision conflates prostitution and THB for the purpose of sexual exploitation in a way, which views prostitution as a form of exploitation within the definition of section 1 of the act.

These differences in relation to the conflation or distinction between CSP and THB for the purpose of sexual exploitation between the five jurisdictions and the three approaches to CSP, bring about questions regarding the role of consent in relation to CSP as opposed to THB. In particular, when looking at the definition within the EU Anti-trafficking directive, there is an element of confusion in itself. In this sense, on the one hand, the definition clearly states that the offence of THB is fulfilled when it has been conducted "by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits" which is in itself indicative of an

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[121] S. 3(3) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.
[122] Sexual Offences Act 2003 (c. 42).
[123] See section 7.2.

absence of consent.[124] However, on the other hand, it is stated in subsection 4 of this Article that a victim's consent to the exploitation, "whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1" of the Article have been used.[125] At first sight one may think that these two aspects of the THB definition are in contradiction, however, when considering that first elements in Article 2 (2) of the directive, such as threats or coercion, it is clear that these constitute elements, which already suggest an absence of consent, which would automatically render any consent given irrelevant.

Although the question of consent may now be clear in relation to the EU provisions, the differences between the jurisdictions in relation to the way this has been implemented into national law comes with further questions. Thus, the following point will examine the notion of consent in relation to commercial sex and THB for sexual exploitation and the way this is applied in each jurisdiction.

10.5 The issue of consent between commercial sex and THB for sexual exploitation in Germany, England and Wales, Northern Ireland, Scotland and Sweden

It has become apparent from the previous discussion on conflation of THB for the purpose of sexual exploitation and prostitution that a major issue is the way consent and voluntariness are viewed in relation to commercial sex. Accordingly, it has been established, that consent can be a significant factor in determining THB for the purpose of sexual exploitation, in particular in Germany and Sweden, in which the absence of consent remains a requirement for THB for sexual exploitation.[126] As explained above, within the provisions in the anti-trafficking directive, the consent of a THB victim is irrelevant when any exploitative or coercive means have been used in the process.[127]

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[124] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2(2).
[125] Ibid Article 2(4).
[126] In the UK the legislation on trafficking in Human Beings has been drafted particularly wide which removes any questions of consent in relation to THB.
[127] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2(4).

However, when there is little evidence for other means in this sense, or the forced prostitution constitutes this element in itself, the consent becomes a relevant element in determining whether a person is a victim of THB for the purpose of sexual exploitation.[128] Thus, it is important to understand how the absence of consent works in relation to THB, in contrast to the presence of consent in commercial sex.

According to Fletcher, "[n]o idea testifies more powerfully to individuals as a source of value than the principle of consent."[129] In order for consent to be legally regarded as valid, it needs to be considered a "procedural justification" for someone else to do something to someone else or someone else's property.[130] In practice, this principle is straightforward, in all five jurisdictions.[131] However, there are variations in relation to the scope of consent and where reasonable limits are placed, as well as its validity in cases of vulnerability and exploitation.

In essence, all of the five examined legal systems follow a similar definition of consent, as the theoretical concept by Beyleveld and Brownsword[132] of consent being a procedural justification for something being done to someone or someone's property.[133] Hence, consent needs to be a "subsisting, free and genuine agreement to the act in question" in order to be valid.[134] In light of this, the issues of consent will be discussed further in order to look at consent in relation to THB under the points of consent being freely given, consent being informed, the consenting agents' capacity and understanding of the activity being consented to, and the time the consent was given in relation to the act being consented to.

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[128] See for example 3(3) Human Trafficking and Exploitation (Scotland) Act 2015; §232a StGB (Strafgesetzbuch – German Criminal Code); Section 3 Law 1998:393, Swedish Criminal Code.
[129] Fletcher (n 76) 109.
[130] Beyleveld and Brownsword (n 77) 125.
[131] See part 2, Sexual Offences (Scotland) Act 2009. 2009 asp 9; section 74, Sexual Offences Act 2003 c42; Section 3, The Sexual Offences (Northern Ireland) Order 2008 No. 1769; § 177 StGB (Strafgesetzbuch – German Criminal Code; Sweden has no explicit definition, instead a common sense understanding of the word is taken, which is said to encompass similar notions: 24 kap. 7 § brottsbalken (Swedish Criminal Code) – Kommentar (Commentary).
[132] Beyleveld and Brownsword (n 77) 125.
[133] Ibid.
[134] The Law Commission, Consent in Sex Offences: A Report to the Home Office Sex Offences Review (1998), para 2.12.

10.5.1 The extent of freely given consent in relation to commercial sex in contrast to THB in the five jurisdictions

In THB, in order to hypothetically be "consensually trafficked," a person would have to have clearly given un-coerced consent, by exercising autonomous agency, which is free from any influences of pressure, like violence, threats, or any other force by traffickers.[135] As discussed above, however, in the three UK jurisdictions, this is not as straightforward due to the failure to implement the threat, force and coercion elements of the EU's definition. However, in relation to this argument, it will continue to be assumed that the intention of the UK's THB legislations was to meet the requirements of the Council of Europe and the European Union's provisions.

According to Abramson,[136] the existence of free consent in relation to THB "ignores the real difference in choices between rich and poor, male and female, and educated and uneducated."[137] This statement reflects the ideas of opponents of the oppression paradigm discussed above, and involves socio-economic considerations of an absence of consent in light of the narrower approach to forms of coercion, which would only relate to force. In this sense, "economic coercion of circumstances,"[138] which is a term developed by Elliott[139] to describe situations in which people appear to consent to doing something for remuneration, purely because they have no other economic choice on the basis of economic necessity, means that consent cannot morally be accepted if the consenting agent is solely motivated by extreme poverty. However, in relation to this examination, only Sweden and Germany address economic coercion within their THB provisions.[140] In this sense, some take this argument further, and state that people who are more affected by poverty, due to a lack of opportunities for economic gain, such as a larger number of women than men, will be less capable of truly exercising "free agency." This argument could be extended when considering the fact that women are

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[135] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 2.
[136] Abramson (n 79) 475.
[137] Ibid.
[138] Elliott (n 81).
[139] Ibid.
[140] See §232a StGB (Strafgesetzbuch – German Criminal Code); Section 3 Law 1998:393, (Swedish Criminal Code).

more likely to carry the additional burden of children who need to be cared and financially provided for.[141] In relation to prostitution, this argument is often used to question the free choice to work in prostitution, due to a lack of other options.[142] A theoretical counter argument in relation to this point, however, is that in countries, such as the UK, Sweden, and Germany, there are numerous social provisions, such as monetary or housing benefits, which prevent most cases of severe poverty, which would render this argument obsolete in relation to prostitution which can been consented to.[143] Nevertheless, this would only guarantee assistance and help for qualifying residents, such as citizens of the specific countries, or people who have lived or worked in the individual countries long enough to be entitled to these kinds of benefits.[144] In this sense, certain categories of migrants, most significantly irregular migrants, for instance, may not be able to enjoy these governmentally provided securities.

In relation to other categories of people who may be entitled to benefits, yet are unable to apply for reasons of vulnerability, such as drug addiction, or mental illnesses or

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[141] Rebecca Jayne Stack and Alex Meredith, 'The Impact of Financial Hardship on Single Parents: An Exploration of the Journey from Social Distress to Seeking Help' (2017) 39 Journal of Family and Economic Issues, 234-240; Mia Hakovirta, Daniel R. Meyer and Christine Skinner, 'Does Paying Child Support Impoverish Fathers in the United States, Finland, and the United Kingdom?' (2019) 106 Children and Youth Services Review; Jane Millar, 'Self-Responsibility and Activation for Lone Mothers in the United Kingdom' (2018) 63 American Behavioral Scientist, 85-99; Kelly Musick, Megan Doherty Bea and Pilar Gonalons-Pons, 'His and Her Earnings Following Parenthood in the United States, Germany, and the United Kingdom' (2020) 85 American Sociological Review, 645-650.

[142] See chapters 3 and 9.

[143] However, although outwith the scope of this research project, there is a need to see how this translates into practice, as there may be significant differences relating to the ease-of-access to social security and other benefits within the different countries being investigated. Future research into the ability of citizens to access security benefits would add significant weight to this potential counterargument.

[144] See Sozialgesetzbuch (SGB) Zwölftes Buch (XII) - Sozialhilfe - (Artikel 1 des Gesetzes vom 27. Dezember 2003, BGBl. I S. 3022) § 19 Leistungsberechtigte (Social Welfare (SGB) Twelfth Book (XII) - Social Welfare - (Article 1 of the Law of 27 December 2003, Federal Law Gazette I, p. 3022) § 19 Persons entitled to benefits); Sozialgesetzbuch (SGB) Zwölftes Buch (XII) - Sozialhilfe - (Artikel 1 des Gesetzes vom 27. Dezember 2003, BGBl. I S. 3022) § 23 Sozialhilfe für Ausländerinnen und Ausländer (Social Welfare (SGB) Twelfth Book (XII) - Social Welfare - (Article 1 of the Law of 27 December 2003, Federal Law Gazette I, p. 3022) § 23 Social assistance for foreigners); Swedish Government Bill 2009/10:60; In the UK, EEA nationals who come to the UK and want to claim particular means-tested benefits, might need to meet the conditions of the habitual residence test. In a number of cases this test may also appy to British nationals returning to the UK after having spent time abroad: See citizens Advice: available online at: https://www.citizensadvice.org.uk/benefits/coming-from-abroad-and-claiming-benefits-the-habitual-residence-test/eea-nationals-and-the-habitual-residence-test/eea-nationals-claiming-benefits-as-a-jobseeker/ [accessed 13th June, 2017]; UK Government, Jobseekers' Allowance (JSA), available online at: https://www.gov.uk/jobseekers-allowance/eligibility [accessed: 13th June, 2017].

disabilities, it needs to be noted, that these vulnerabilities in themselves would negate any potential consent. In relation to THB for the purpose of sexual exploitation, the argument of economic vulnerability becomes more substantial, as traffickers will often use the economic or social vulnerability of potential victims to recruit them.[145] Moreover, once a trafficking victim has been recruited, and sometimes conditioned,[146] they will no longer be considered free, which means that any consent following, which was given under the influence of the traffickers, will not be considered "free", as the victim was not in a free position to give consent.[147] Regardless of where the and from whom the freedom impeding element was derived from, it needs to be highlighted, that there seems to be an indication, that any invalidation of the freedom to give consent will require positive action from another agent, even if this is not the actual trafficker.[148]

10.5.2 'Informed' consent in relation to commercial sex and THB in Germany Sweden and the UK

Beyleveld and Brownsworth pose the question whether consent should require higher thresholds when involving exploitation, as the necessary goods requiring protection in these circumstances as a "person's most basic interests" are at stake.[149] In light of the

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[145] Frank Laczko, and Marco A. Gramegna. "Developing better indicators of human trafficking. [2003] *The Brown Journal of world affairs* 10.1, 179-194; Conny Rijken and Renée Römkens, Trafficking for sexual purposes as a globalized shadow economy: human security as the tool to facilitate a human rights based approach [2011] *The New Faces of Victimhood*. Springer Netherlands, 2011. 73-98.

[146] See for example conditioning related to the Stockholm Syndrome: Karen Egu, 'Stockholm Syndrome in Commercial Sexual Exploitation of Young Women: An Exploration of the Impact of Trauma Bonding in the Transition out of Sexual Exploitation' (Doctorate, the Wright Institute 2018) 20-37; M. Schouler-Ocak, 'Women Mental Health and Trafficking' (2017) 41 European Psychiatry, S9; Rafaela Pascoal, *Motherhood in the Context of Human Trafficking and Sexual Exploitation* (Springer Nature Switzerland AG 2020) 80; John Winterdyk and Jackie M Jones, *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan 2020) 1266; Kendra Doychak and Chitra Raghavan, '"No Voice or Vote:" Trauma-Coerced Attachment in Victims of Sex Trafficking' (2018) 6 Journal of Human Trafficking, 340, 351-352.

[147] Rebecca Surtees and Anette Brunovskis, Doing No Harm—Ethical Challenges in Research with Trafficked Persons [2016] *Ethical Concerns in Research on Human Trafficking*. Springer International Publishing, 137-154; Ryszard Wilson Piotrowicz and Liliana Sorrentino, Human Trafficking and the Emergence of the Non-Punishment Principle [2016] *Human Rights Law Review* 16.4, 669-699; Ahmed Mahfuz, and Kristina Baghdasaryan. "The Age of Free Will and Human Values: Sex Tourisms Evolution and its Impact." (2015).

[148] Elliott (n 81) 212.

[149] Beyleveld and Brownsword (n 77) 11.

definitions of THB adopted in the 5 examined jurisdictions, this appears to already be the case, as any form of coercion or force will render consent irrelevant, as informed consent would be impossible.[150] In THB, any consent involved to engage in the individual elements of the THB situation poses the question as to what the victim believes to be consenting to. In particular, in situations in which a person may have consented to smuggling, but then faces exploitation, it is clear that the victim's consent will not have been adequately informed. The reason for this is the assumption that there will not have been adequate knowledge of the conditions they would be facing, either in the smuggling process, or, in some cases in relation to the conditions within the prostitution sector.[151] Thus it can be argued that even in situations in which consent has been given to work in prostitution, the absence of adequate provisions to change one's mind and leave, will negate any consent given, presumably at the latest point in time when a CSP wishing to leave finds themselves unable to do so.

According to Rook and Ward a person "will not have had the capacity to agree by choice where their understanding and knowledge were so limited that they were not in a position to decide whether or not to agree."[152] In relation to prostitution, and being smuggled for the purpose of working in prostitution, Jordan[153] states that "[a] woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money. However, if the defendant intended actually to hold the woman in forced or coerced sex work, then there is no consent."[154] However, it can be argued that in accordance with the actual definition of THB in the Germany, Sweden

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[150] See part 2, Sexual Offences (Scotland) Act 2009. 2009 asp 9; section 74, Sexual Offences Act 2003 c42; Section 3, The Sexual Offences (Northern Ireland) Order 2008 No. 1769; § 177 StGB (Strafgesetzbuch – German Criminal Code; Sweden has no explicit definition, instead a common sense understanding of the word is taken, which is said to encompass similar notions: 24 kap. 7 § brottsbalken (Swedish Criminal Code) – Kommentar (Commentary).
[151] Nourhan Abdel Aziz, Paola Monzini, and F. Pastore, The changing dynamics of cross-border human smuggling and trafficking in the Mediterranean [2015] *Rome: IAI*; Oona A Hathaway, et al., Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict (2016).
[152] Rook and Ward (n 89) 1.94.
[153] Jordan, A D, Annotated Guide to the Complete UN Trafficking Protocol (May 2002, Updated August 2002), Initiative against Trafficking in Persons, International Human Right Law Group, 11.
[154] Ibid 11.

and the UK, that any changes in circumstances or misinformation would equate to a form of deception, which would automatically render the consent invalid.[155]

Nevertheless, this point of informed consent in THB for the purpose of sexual exploitation also requires there to be valid continuing consent in entering prostitution. The reason for this is that in any cases in which consent to sell sex is not considered valid, regardless of the circumstances, the consent of CSPs to engage in the transaction of selling sex for remuneration will not constitute a justification for a client to use the service.[156] This means, that for instance in Sweden, where the consent to sell commercial sex is deemed invalid, the question comes about as to how consent is established for the purposes of determining THB.[157]

10.5.3 The capacity and understanding to give consent to sell sex in relation to THB in Germany Sweden and the UK

In all five jurisdictions, the laws on consent cover restrictions to the ability to give valid and informed consent on the basis of capacity. This usually relates to mental capacity, which requires a consenting agent to be in a physical and mental position to understand the matter being consented to.[158] The most obvious form of absence of legal capacity to give consent is found in age restrictions. In this sense, a person who is below the age of 18 years, in unable to provide valid and informed consent, even if this has been given freely, as by law, it is assumed that people below this age are incapable of consenting

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[155] Please note that in relation to the UK jurisdictions, this is based on the assumption that the definitions implemented should match the EU directive's definition of THB.
[156] See chapter 6 and 7.
[157] See section 6.4 and 6.5.
[158] See part 2, Sexual Offences (Scotland) Act 2009. 2009 asp 9; section 74, Sexual Offences Act 2003 c42; Section 3, The Sexual Offences (Northern Ireland) Order 2008 No. 1769; § 177 StGB (Strafgesetzbuch – German Criminal Code; Sweden has no explicit definition, instead a common sense understanding of the word is taken, which is said to encompass similar notions: 24 kap. 7 § brottsbalken (Swedish Criminal Code) – Kommentar (Commentary).

for these purposes.[159] Other forms of incapacity are found in the areas of certain disabilities.[160]

In relation to the element of understanding, it can be said that this is closely related to the element of "informed" mentioned above. A good explanation of this requirement can be found in the Explanatory Report to the Council of Europe Trafficking Convention.[161] Here it is explained that due to the complexity of the issue of consent it is difficult to establish "where free will ends and constraint begins."[162] Thus, as CSPs will not consent to be "subjected to abuse of all kinds,"[163] it is established that THB will occur regardless whether or not the victim has consented to be exploited.[164]

10.5.3.1 Consent in light of coercion: where to draw the line

In the context of THB it needs to be emphasised that it is a common misconception that there are merely two options regarding consent, i.e. that consent is either valid, and thus, present, or that consent is not valid, due to the presence of coercion or force.[165] Instead, there appears to be a spectrum of consent whereby consent and non-consent form the two ends, with factors such as coercion or force contributing to the shifting across this spectrum.[166] The means of coercion or force, as well as any other listed within the individual THB definitions in Germany, Sweden and the UK are understood as impairments of the quality of consent, often to the extent that consent is negated

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[159] See § 180 StGB (Strafgesetzbuch – German Criminal Code) Förderung sexueller Handlungen Minderjähriger; Swedish Penal Code, chapter 6: Sexual Crimes, section 9; Under the Sexual Offences Act 2003, s. 48-50.
[160] Ibid.
[161] Council of Europe (2005) Council of Europe Convention on Action against Trafficking in Human Beings: Explanatory report. Available at: http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm. [accessed 13th June, 2017].
[162] Ibid at para 97.
[163] Ibid.
[164] Ibid.
[165] Kathleen Kim, The coercion of trafficked workers [2010] *Iowa L. Rev.* 96, 409; Samuel Vincent Jones, Human trafficking victim identification: Should consent matter [2011] *Ind. L. Rev.* 45, 483.
[166] However, it is acknowledged that this idea of a spectrum of consent to sexual activity may be problematic in relation to other crimes, such as rape.

entirely.[167] In situations in which individuals' autonomy can be potentially limited, such as it is the case in potentially exploitative sex work environments, there may be an appearance of the presence of valid consent, which, however, may be obscuring a situation in which the consent has actually been given under coercion.[168] Some argue that power imbalances, as found in hierarchical dynamics of pimp and CSP, trafficker and trafficked, and in some circumstances even the power dynamic within personal relationships or societies, blur the lines between what constitutes valid consent and consent provided under a form of coercion.[169] In this sense, there will be many situations in which the consent to sell sex services may be questionable, for instance when conditioning has been involved.[170] A government led study on initiatives to support the exit from prostitution conducted by the German government between 2011 and 2015 revealed that many migrant CSPs do not consider themselves THB victims for the purpose of sexual exploitation and emphasise their voluntary participation.[171] However, in some cases, there is an apparent indication of a lack of agency, in particular, in relation to migrant women who state that they have been sent to Germany by their families, in order to work in prostitution to make money for their families back home. Particularly problematic is the fact that there is a clear indication that the migrants do not really voluntarily wish to work in prostitution, but they still perceive their consent to be voluntary. The consent provided in these cases are a result of many different factors, such as for instance economic necessity due family poverty, hierarchical structures within their homes, for instance as a result of a parent-child

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[167] As implemented in all five jurisdictions on the basis of Article 2, Directive 2011/36/EU of European Parliament and of the Council of 5th April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Official Journal of the European Union, L. 101/1 of 15.4.2011.

[168] The Anti Trafficking Monitoring Group note that "In many cases, victims may *appear* "free". Sometimes, they might get paid some money. However, often these appearances merely mask the coercion: debt bondage, control over people's identity or immigration status, threats and other psychological pressures are very real factors that control behaviour as much as any physical imprisonment. These forms of coercion leave serious psychological consequences." See: The Anti Trafficking Monitoring Group, 'Wrong Kind of Victim' (London: June 2010) 17.

[169] Elliott (n 81) 88.

[170] See section 10.5.1.

[171] Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Abschlussbericht der Wissenschaftlichen Begleitung Zum Bundesmodellprojekt - Unterstützung Des Ausstiegs aus der Prostitution' (2015) 109-114.

power dynamic, or the societal obligation not to question authority figures within the family. In these situations, it is questionable how to evaluate the given consent.[172] This exemplifies the spectrum of consent referred to in section 9.1.4, which shows how certain factors influence the strength of consent. It also highlights that the complexity of the issue of consent can result in a number of potential victims not identifying as such, thereby making is harder to support them.

10.5.3.2 Autonomy and paternalism in sex work and THB

In relation to the debates regarding the exploitative nature of THB, there is a clear distinction between sexual exploitation, including forced prostitution, and other forms of exploitation, such as forced labour, that can be found in the various definitions themselves, as well as other provisions within the three countries. The *ratio legis* as well as other elements related to this discussion are to a large extent, linked to the question of whether a country deems people capable of consenting to selling commercial sex.

As already addressed in chapters 3 and in section 1.2. of this chapter, there are two competing views in relation to the way consent to prostitution is perceived. The first one is the view of autonomy and empowerment, which is often supported by liberal feminists as well as supporters of other liberal theories.[173] The other view is based on the ideas of paternalism and protectionism,[174] as supported by radical feminists.[175]

With reference to the discussion on autonomy and paternalism above at point 1.2., the main point to be made here is that in relation to consent in THB for the purpose of sexual exploitation, it is important to understand whether a legislator believes there can

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[172] §232a StGB (Strafgesetzbuch – German Criminal Code); Section 3, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015; Section 3, Modern Slavery Act 2015; Section 3, Human Trafficking and Exploitation (Scotland) Act 2015; Chapter 24 Section 7 Swedish Penal Code, 24 ch. 7 § Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700).
[173] See Sections 3.6.2 and 9.1.2.
[174] Abramson (n 79) 473.
[175] See Chapter 3, in particular 3.6.2.

realistically be “willing CSPs.” Supporters of autonomy views, such as Germany, argue, that the recognition of free choice and diversity would automatically suggest that there can be people who willingly sell commercial sex, in particular, when the consent to take part in such transactions was given under circumstances in which the sector is regulated the same way as any other working environment, in which the service provider enjoys the same protection and freedoms as any other worker.[176] In these situations, the free and un-coerced choice cannot be disregarded, as that would be an unjustified violation of their right to self-determination.[177] However, supporters of paternalist views argue legalised prostitution makes it harder to prosecute traffickers, as the blurring of the lines between coercion and consent provide opportunities for traffickers to legally defend their positions by claiming that the trafficked person had been informed and was aware of the conditions of the prostitution.[178]

10.5.3.3 Consenting to exploitation

Finally, a short point to be made in relation to consent, is whether consent to exploitation can be valid if it was given without any form of coercion. This is particularly relevant in relation to niche markets within the sex industry, such as bondage and discipline, dominance and submission, as well as sadism and masochism (BDSM). This argument does not only apply in the sex services industries, but also within the private settings of consensual practices between adults without there being a commercial transaction involved. Accordingly, although there are certain legal requirements of reasonableness,[179] consent to all forms of exploitation should not automatically result in the consent provided to be traced back to an assumption of “false consciousness.” In this sense, Schulhofer explains that “[w]e cannot simply dismiss as ‘false

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[176] Abramson (n 79) 473; Jo Doezema, Now you see her, now you don’t: Sex workers at the UN trafficking protocol negotiation [2005] *Social & Legal Studies* 14.1, 61-89.
[177] Joyce Outshoorn, "The political debates on prostitution and trafficking of women." *Social Politics: International Studies in Gender, State and Society* 12.1 (2005): 141-155; Laskowski (n 108).
[178] Donna M Hughes, The ‘Natasha’ Trade: The Transnational Shadow Market of Trafficking in Women’ [2000] *Journal of International Affairs*, Vol. 53, No. 2, 625 – 651, 633.
[179] Dymock (n 111); Hanna (n 111); Meepos (n 111).

consciousness' the perceptions of women themselves."[180] Moreover, Hernandez-Truyol and Larson explain in relation to perceptions of exploitation in sex work, and the inability to consent to it that "[l]abor measures the legitimacy of work not by the presence of contract or worker consent, but rather by substantive ethical and moral standards of what conditions of work accord with the dignity, health, and liberty of the worker"[181] which can also be subjectively decided by the worker in question.

10.5.4 Issues related to prohibition and penalties in relation to THB for the purpose of sexual exploitation

Article 1 of Directive 2011/36/EU lays out minimum rules and highlights that member states should take gender perspectives into account when dealing with THB. In particular, the reason for this can be found in the article itself, namely, to enhance the prevention of THB as well as to protect the victims.[182] In relation to the prohibition and penalties, the EU anti-trafficking directive demonstrates a clear difference to the provisions contained in the CoE Convention on Action against Trafficking in Human Beings in relation to the protection of victims from penalties. In this sense, the convention specifically refers to "not imposing penalties,"[183] whereas the EU's anti-trafficking directive makes reference to "non-prosecution" or "non-application of penalties."[184] In this sense, it is clear that the function of this provision within the EU directive is to constitute a defence for victims to any crimes they may have committed in relation to having been trafficked.

Although there are no issues to be found in relation to the implementation to the corresponding defences when victims have been identified, there may be an issue in England and Wales on the basis of victim identification. Here, issues may arise in

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[180] Schulhofer (n 112) 56.
[181] Berta E Hernandez-Truyol and Jane E Larson, Sexual Labour and Human Rights [2006] 37 *Columbia Human Rights Law Review*, 391 – 445, 395.
[182] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 1.
[183] Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, CETS 197, Article 26.
[184] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 8.

relation to the narrow definitional scope of THB found in England and Wales, in relation to the strong focus on travel,[185] as potential victims may not be identified as such and, thus, still be convicted. This is less likely to be the case in the other four jurisdictions that have a less narrow scope. In contrast, the wide definition of THB for the purpose of sexual exploitation found in Northern Ireland, may result in a potential blanket defence for prostitution related crimes, regardless of whether there was any consent negating element, such as force, threat or coercion.[186] In contrast to Sweden, the potentially wide scope of identifying CSPs as victims of THB for the purpose of sexual exploitation, may result in CSPs not being prosecuted for certain prostitution related crimes that still exist within the abolitionist systems, such as tax fraud, brothel keeping and solicitation.[187] In Germany, the fact that prostitution is considered an economic activity comes with a reduced risk of criminal liability merely due to there being no criminal offenses directly linked to prostitution. However, the wide understanding of vulnerability found in §232a of the German Criminal Code (StGB – Strafgesetzbuch) ensures that THB victims for the purpose of sexual exploitation would still be identifiable as such for the non-criminalisation requirement, in particular based on the general duress defence contained in §35 StGB as well as §§153 and 153a of the Code of Criminal Procedure (Strafprozessordnung-StPO) which provides for the dispensing of prosecution when the guilt element is of a minor nature without any public interest in pursuing prosecution. However, this may be one of the reasons why the German lawmakers will have assumed their compliance to be sufficient with the non-criminalisation requirement. Thus, following recommendations made my GRETA in their first report,[188] an amendment was made to §154c StPO which now makes specific reference to victims of

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[185] See section 3 of this chapter.
[186] See chapter 7.3.
[187] See chapters 6 and 7.
[188] Group of Experts on Action against Trafficking in Human Beings (GRETA), 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany First (Evaluation Round)' (Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings 2015)<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631c3b> accessed 21 October 2020, 48-49.

THB. Although GRETA still deems this provision insufficient to protect all victims of THB, the issues remain directed to THB for purposes other than sexual exploitation.[189]

On the issue of punishment, article 4 of the EU's Anti-trafficking directive states that the offences of THB should be punishable by a maximum penalty of at least five years of imprisonment, and in aggravated circumstances, up to a maximum penalty of at least 10 years of imprisonment. However, although all 5 jurisdictions have followed this provision, issues may come about in relation to links with other crimes, such as kidnapping, rape or assault. Accordingly, in some cases, crimes committed in connection with the THB offence, are at times more likely to be pursued in court, especially, as some of the related crimes are easier to prove. An example for this can be found in the kidnapping offence in Sweden, which can nonetheless come with a life-long prison sentence.[190] Similarly in Germany, if forced prostitution cannot be established, the general offence of "Menschenhandel" (Human Trade) or "Ausbeutung der Arbeitskraft" (Labour Exploitation) may be easier to establish[191] or in the UK jurisdictions the general offense of slavery, servitude and forced or compulsory labour may apply.[192] Although from a moral stance it may be less relevant for which element of the crime the perpetrator is punished, from the viewpoint of documentation and monitoring, this may result in distorted figures of THB in the relevant countries, which will impact the future development of provisions to fight THB for the purpose of sexual exploitation.

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189 Group of Experts on Action against Trafficking in Human Beings (Greta), 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany' (Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings 2019) <https://rm.coe.int/greta-2019-07-fgr-deu-en/1680950011> accessed 21 October 2020, 50-51.

190 4 ch. 1a § Brottsbalken [BRB] [Criminal Code] (Svensk Författningssamling [SFS] 1962:700), https://lagen.nu/1962:700, archived at https://perma.cc/SMG4-TYDR (all translations by author); see also RH 2010:34 [Svea Appellate Court Case on Human Trafficking], https://lagen.nu/dom/rh/2010:34, archived at https://perma.cc/6CN6-AZK4.

191 §232 and §233 Strafgesetzbuch (StGB) – German Criminal Code.

192 See in England and Wales: Modern Slavery Act 2015, c30, section 1; in Scotland: Human Trafficking and Exploitation (Scotland) Act 2015, asp 12, section 4; in Northern Ireland: Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, c2, section 1.

Another issue which is closely linked to liability can be found in Article 6 of the EU's anti-trafficking directive, which states that sanctions on legal persons are to be proportionate and dissuasive sanctions, including criminal or non-criminal fines as well as potentially other sanctions like exclusion from entitlement to public benefits or aid or the temporary or permanent disqualification from the practice of commercial activities, or the temporary or permanent closure of establishments that have been used to commit THB offences. Although these provisions can apply to several forms of commercial businesses which may be linked to THB offences, such as taxi companies, hotels, beauty parlours and saunas to only name a few, specifically in relation to prostitution and companies legally offering commercial sex, the latter two forms of sanctions would only be of any relevance in the German commercial sex industry. The reason for this is Germany's regulationist approach to commercial sex, which results in brothels or other commercial sex businesses to be considered legitimate under German law.[193]

Accordingly, Germany is the only jurisdiction, which has specifically regulated for these forms of sanctions to be applied within the sex industry. Germany's CSP protection legislation, which was introduced in July 2017, has introduced obligatory checks intended to ensure, for instance, that people who have previously been convicted of human trafficking offences will no longer be permitted to operate brothels.[194] It will also ensure that there is an evaluation of reasonableness of operating concepts and business models prior to the start-up of prostitution businesses. This can be interpreted as a direct response to the consequences of capitalist market forces in Germany following the particularly liberal regulation of prostitution, which resulted in new business models, such as flat rate brothels being introduced, as well as an increasing demand for harmful or dangerous sex acts, such as group sex or gangbangs. Any breaches would

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[193] See chapter 5.4.
[194] Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) Federal Ministry of Family Affairs, Senior Citizens, Women and Youth [Germany], 'Rahmenbedingungen Für Die Legale Prostitution Schaffen (Framework for Legal Prostitution)' (2016) <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/rahmenbedingungen-fuer-die-legale-prostitution-schaffen/83928> accessed 31 March 2017.

result in the operators being subject to sanctions, such as the loss of authorisation as well as penalties.[195]

In relation to jurisdictional questions, article 10 of the anti-trafficking directive states that member states are to establish jurisdiction over THB offences when these have been committed at least partially within their territories or the offenders are nationals of their countries.[196] Germany and Sweden are both civil law countries, which follow the Germanic legal codification traditions. In this sense, the jurisdiction of THB offences follows the general rules of criminal law applicability. In this sense, there are no issues in this area, as both legal systems govern jurisdiction through the principles of territoriality and active and passive personality.[197] However, in England and Wales, Northern Ireland and Scotland, jurisdiction is specifically addressed in the individual trafficking acts. In relation to the definitions of THB within the Modern Slavery Act 2015, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, and the Human Trafficking and Exploitation (Scotland) Act 2015 there are elements, which cause confusion in relation jurisdictional questions. Although the Modern Slavery Act 2015 refers to “a person” under s. 1, which deals with slavery, servitude and forced or compulsory labour, in relation to THB, s. 2 uses the term “UK national” and “not a UK national.” By stating that this applies regardless of where any element of the travelling or facilitating takes place, this means that the Modern Slavery Act 2015 would apply to UK nationals anywhere in the world. The jurisdiction only covers offences committed by non-UK nationals, when some part of the arranging or facilitating has taken place within the UK, or “the travel consists of arrival in or entry into, departure from, or travel within the United Kingdom”.[198] However, the Act does not include any situations in which a non-UK national, who is habitually resident in the UK, has committed a part of the offence outwith the UK borders. Although, the Northern Irish and Scottish Acts make reference to non-UK nationals who are habitually resident in Northern Ireland or Scotland respectively, both acts still use the term “UK

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[195] Section 6, §33 Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen.
[196] European Union: Council of the European Union, *Directive 2011/36/EU (n 13).*
[197] See for example: §3 StGB (German Criminal Code); Section 2:2 Swedish Penal Code.
[198] S. 2(7) Modern Slavery Act 2015 c. 30.

national" in relation to the active and passive personality principles. This provides a basis for a number of conflict of law issues. For instance, s. 2(6) Modern Slavery Act 2015 states that the provision applies to UK nationals who commit THB offences regardless of the location where the arranging, facilitating or travel has taken place. As the term "UK national" not only applies to English and Welsh nationals, but also to Scottish and Northern Irish nationals alike, jurisdictional questions may arise when Scottish or Northern Irish nationals are involved in THB offences outside the English and Welsh borders, including in countries outside the UK as well as in Scotland and Northern Ireland. Thus, even if a UK national resident in Scotland committed a Trafficking offence within the Scottish territory, questions could arise whether the Human Trafficking and Exploitation (Scotland) Act 2015 or the English Modern Slavery Act 2015, or even the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 were to apply, as all three acts claim jurisdiction over UK nationals anywhere in the world.[199] It could be argued at this point that this would be clarified by agreement between the relevant prosecutors.[200]

When solely examining the provisions in relation to THB offences, it may be argued that due to the similarity between the Northern Irish and English/Welsh THB legislation, the use of the Crown Prosecution Service's conflict of laws guidelines could be applied in order to resolve the matter in each individual case. However, issues may be harder to resolve, when they concern prostitution.[201] Accordingly, the introduction of an abolitionist approach by Northern Ireland may blur the lines between the three UK jurisdictions in relation to the use of commercial sex services and THB offences, in particular in the areas concerning the definition of victim and vulnerability due to jurisdictional overreach. Sexual exploitation, under section 3 of the Northern Irish act occurs when "[s]omething is done to or in respect of the person— (a)which involves the commission of an offence under— […] (ii) any provision of the Sexual Offences

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[199] Modern Slavery Act 2015, c. 30, s2(6); Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, c. 2, Part 1, S. 2(8); Human Trafficking and Exploitation (Scotland) Act 2015 2015 asp 12, s.2.
[200] The Crown Prosecution Service, 'Jurisdiction | The Crown Prosecution Service' (Cps.gov.uk, 2020) <https://www.cps.gov.uk/legal-guidance/jurisdiction> accessed 21 October 2020.
[201] Ibid.

(Northern Ireland) Order 2008 (sexual offences), or (b) which would involve the commission of such an offence if it were done in Northern Ireland." considering, that the same act amends the Sexual Offences (Northern Ireland) Order 2008 (sexual offences) by inserting the purchase of sexual services, regardless of the voluntariness of the service provision, this would mean, that any UK national, regardless of where they live, or where they are in the world, and regardless of the laws within their country of residence, could be found guilty of sexual exploitation if they were to purchase commercial sex services.[202] As the form of travel within the definition of THB is not specified, even short travel, such as travelling to a particular location for the provision of commercial sex services would suffice for the offence of trafficking of human beings for the purpose of sexual exploitation to become applicable.

When considering this issue from the perspective of the EU, this brings further confusion with it. In this sense, it has been found in chapter 8 that the free movement of services and establishment allow for nationals of member states in which the purchase of commercial sex is criminalised and illegal, to purchase it in countries in which these services are legitimate legal services. However, the trafficking laws in Northern Ireland suggest that when UK nationals[203] or people who at the time of the offence are habitually resident in Northern Ireland[204] were to purchase commercial sex in Germany, which involves some form of travel, such as going to a nearby location, even when these services are provided legally and legitimately, the client would be considered to have committed THB for the purpose of sexual exploitation. This is a clear example of jurisdictional overreach which can result in a situation in which someone is convicted for committing THB for sexual exploitation without there being a legally recognised victim. When seeking to assess whether the CSP could be regarded as a victim in practice one would need to follow the laws in Germany. However, the German criminal code has no provision that covers this kind of situation, and the German Victim Compensation Code merely stipulates that anyone who has sustained a health injury as a result of an

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[202] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, PART 2, 15.
[203] Over whom the Northern Irish Act applies.
[204] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s2(8).

intentional, unlawful assault against his or another person or his / her legal property will be compensated for the detrimental health and economic consequences on the basis of the application of the provisions of the German Federal Law on Compensation.[205] It is evident that in this hypothetical scenario, the CSP could not be considered a victim, as according to the German understanding of prostitution, no harm would have been caused.[206]

Victim protection, as another key element in the human-rights-based approach taken by the EU, is provided for in article 12 of the EU's Anti-Trafficking directive. The key elements within the articles covering victim protection can broadly be placed into four categories, namely, providing a duty for the state to establish measures to identify and support victims, setting minimum standards of support and assistance, establishing timeframes for the provision of support as well as key principles and safeguards for the support provision, such as that assistance provided to a victim is not conditional on their willingness to act as a witness, that services are provided on a consensual and informed basis and that the support provided takes into account the special needs of victims.[207] As indicated earlier in this chapter, the narrow scope of victim identification in England and Wales can result in the protection of victims being much weaker than in the other jurisdictions. In contrast, the wide scope in Northern Ireland has the reverse effect. In particular, a move can be noticed in Germany and Sweden, towards combining victim support facilities for CSPs as well as victims of THB for the purpose of sexual exploitation.[208] The result is that even if CSPs are not identified as victims of THB for the purpose of sexual exploitation in these countries, they will have access to a certain amount of support facilities, which, at the very least will include provisions, which will help them leave commercial sex by providing a wide range of services. These

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[205] Gesetz über die Entschädigung für Opfer von Gewalttaten (Opferentschädigungsgesetz – OEG – German Victim Compensation Act) § 1 Anspruch auf Versorgung.
[206] See chapter 6.
[207] European Union: Council of the European Union, *Directive 2011/36/EU (n 13)* Article 12.
[208] European Commission, 'Germany - Together against Trafficking in Human Beings European Commission' (Together against Trafficking in Human Beings - European Commission, 2020) <https://ec.europa.eu/anti-trafficking/member-states/germany_en> accessed 13 October 2020; European Commission, 'Sweden - Together against Trafficking in Human Beings European Commission' (Together against Trafficking in Human Beings - European Commission, 2020) <https://ec.europa.eu/anti-trafficking/member-states/sweden_en> accessed 13 October 2020.

services are provided for by both non-governmental organisations as well as the local or national governments.[209] However, in contrast, in relation to adults, the National Referral Mechanism, as introduced in the United Kingdom, applies solely to THB.[210] In this sense, as soon as the victim status of a presumed THB victim is disproved, the provision of support seizes.[211] Although there is no mention of supporting CSPs within the English and Welsh Modern Slavery Act 2015 or the Scottish Human Trafficking and Exploitation (Scotland) Act 2015, Northern Ireland specifically makes reference to the obligation to provide support services for CSPs, thereby ensuring access to support in the event that the requirements for victim status of THB for the purpose of sexual exploitation are not met.[212]

10.6 Summarising the chapter findings

A continuously reoccurring theme throughout this thesis has been the express lack of EU competence over member states' internal security matters. However, there remains limited scope for criminal law approximation in relation to the crimes listed within article 83(2) TFEU, which amongst other things, specifically mentions THB. As was previously demonstrated in chapter 9, lines can be blurred in theory between the areas of prostitution and THB for the purpose of sexual exploitation, when they are conflated, mostly in relation to the understanding that prostitution is in itself an exploitative activity. This chapter has shown, that this blurring of the lines between prostitution and THB for

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209 Ibid.

210 Northern Ireland Department of Health, 'Leaving Prostitution - A Programme of Assistance and Support' (Department of Health 2019) 7; 'National Referral Mechanism Guidance: Adult (Northern Ireland and Scotland)' (GOV.UK, 2020) <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/national-referral-mechanism-guidance-adult-northern-ireland-and-scotland> accessed 21 October 2020; https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales.

211 Ibid.

212 Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, PART 2, s19.

the purpose of sexual exploitation is also present in practice, which, can result in further potential unintended consequences.

In particular, this chapter has shown, that the conflation of prostitution, or prostitution related offenses and THB for the purpose of sexual exploitation in some member states ultimately may impact not only the internal member state regulation of prostitution, but in some instances the regulation of prostitution and THB throughout the EU.

It has been clear throughout this thesis, that THB is a gross violation of fundamental rights, and as such expressly prohibited under article 5 of the Charter. Accordingly, the EU has determined that preventing and combating THB should be a priority for all its member states. However, as per article 83(2) TFEU, the EU only has the competence to drive approximation in this area, which it has sought to do via policy strategies and most notably via the Directive 2011/36/EU. However, as is the function of directives, this merely directs member states to implement certain goals, but does not specify how this is meant to be done. Thus, even minor differences in approaches between the member states have the potential to create further tensions in both the legal areas addressing THB for sexual exploitation and prostitution.

In particular, issues were found in the areas of definitions, the understanding of consent, victim identification and prosecution, both internally within member states as well as in cross-border situations. In all circumstances, these issues could result in harm to the individuals involved, including CSPs, CSUs, CSPus and victims of THB for the purpose of sexual exploitation. In light of the focus of this thesis, most of these issues were a result of the unintended interconnectedness of the laws regulating prostitution and the laws seeking to combat THB for sexual exploitation. It has become particularly apparent, that many of these issues could have been avoided, if not only the areas of law, but also the entire jurisdiction had not merely been viewed in isolation by policy makers. Due to the interconnectedness of the EU member states EU, even in areas presumed to be outwith the EU's regulatory competence, such as prostitution regulation, national policy makers need to operate under the presumption that one's jurisdiction is never entirely isolated and, thus, should always try to take any potential connections to other jurisdictions into consideration.

Section E: Key Findings and Concluding Remarks

Chapter 11

11. Conclusion

This research project sought to examine the issue of the current diversity of national regulatory approaches to prostitution within EU member states in light of their potential interconnectedness under the supranational legal framework of the EU. In particular, the diversity of national conceptual views on prostitution and the question of whether or not it needs to be conflated with Trafficking in Human Beings (THB) for the purpose of sexual exploitation has resulted in prostitution sitting uncomfortably between the remits of article 4 TEU and articles 72 and 83(2) TFEU.

In terms of the nature of this particular investigation, there is a significant unusual quality, which needs to be highlighted. Due to the nature of the research project, it has been necessary to consider and examine many separate elements, taking into account philosophical spheres, jurisdictions, hierarchies of legal sources as well as different areas of laws. This has contributed to an unusual, yet necessary, fragmented appearance of the thesis from the outset. Unusual, due to the majority of doctoral research within the legal realm generally focussing on relatively small areas with the intention of contributing to knowledge expansion, while this project has required a reversal of this approach. Thus, the root of the examined issue in this thesis was found in the interplay of a multitude of individual elements and the fact that these are generally assumed to operate in isolation. Accordingly, the intension of this project has had to be to examine a large body of information from numerous separate areas with the intention of reduction and synthesis to obtain an understanding of the potential interconnectedness of said areas. This reversal has allowed for vital contributions to knowledge in the areas of EU law, prostitution regulation and laws seeking to combat THB. In particular, it has been shown that the neglect by legislators to consider the wider structures into which laws are placed, such as supranational or international legal frameworks, other areas of national law, philosophical foundations or even societal

understandings of terminology, has the potential to result in significant harm, most notably for CSPs or potential victims of THB for the purpose of sexual exploitation.

In particular, the most significant findings of this thesis can be placed within four overarching categories:

1) Effects of the diversity of philosophical stances underpinning matters relating to prostitution
2) Consequences pertaining to the interconnectedness of jurisdictions via EU membership
3) Potential harmful ramifications of internal inconsistencies in the areas of prostitution regulation and laws seeking to tackle Trafficking in Human Beings for the purpose of sexual exploitation
4) Findings relating to variations of views on morality and harm, idealism and pragmatism and the way these are incorporated within the law via public reason processes.

These overarching categories will form the subsections of this concluding chapter, which intends to bring some structure into the various findings of this thesis and bring some of the more pressing conclusions to the foreground, which have the potential to cause harm if not addressed by legislators.

11.1 Effects of the diversity of philosophical stances underpinning matters relating to prostitution as addressed within the law

The starting point of this thesis was to explore the causes of the current diversity in regulatory approaches to prostitution across EU member states. As stated in article 2 TEU, all member states share the values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.” However, many of these values are interpreted and applied differently within individual member states in relation to the approaches selected for the regulation of prostitution. This required an in-depth investigation into the European philosophical stances surrounding prostitution and the regulation thereof. Accordingly, chapter 3 set out a philosophical roadmap to assist in the placing of views on prostitution, which underpin the regulatory approaches. The

metaphor of a “roadmap” used here proved itself fitting in light of the findings in this area. In this sense, minor philosophical discrepancies pertaining to individual elements of the understanding of prostitution, such as morality, harm or the preference for either autonomy or paternalism could result in an entirely different road being taken, thereby leading up to opposing regulatory approaches in practice. In particular, it was found that the cumulative philosophical turns taken by individual jurisdictions on their journeys across this philosophical roadmap concluded at one of three destinations of conceptual understandings of prostitution. These were the understandings of prostitution amounting to an economic activity, a social harm or a public nuisance.

Each of these stances have a tendency to result in a preference for a particular regulatory model, both in theory and in practice. Accordingly, the philosophical journey leading to the understanding of prostitution to constitute an economic activity also has the consequence of a preference for a regulationist approach to prostitution regulation. Similarly, the perception of prostitution being a social harm correlates with abolitionism. Finally, the understanding of prostitution as a public nuisance fits well within a prohibitionist regulatory approach.[1]

It has also become apparent, that despite the various commonalities which connect the EU member states, as expressed for instance in article 2 TEU as well as the preambles of the TEU and TFEU, each member state has had various unique historical experiences, which have shaped the way their legal systems operate as well as their underpinning philosophical stances. The laws in Germany, for instance, have been strongly shaped by the experiences surrounding the two world wars. In particular, based on the human rights atrocities witnessed in the Third Reich, and the constitution that was put in place thereafter, all laws are drafted under the priority of safeguarding human dignity and with that ensuring the highest possible degrees of personal autonomy. Sweden’s jurisdiction has been strongly shaped by its radical feminist women’s movement, which although taking place later in time than in many other EU member states, was more radical and, thus, has a stronger impact on the regulation of

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[1] See section 4.3.

prostitution and THB for the purpose of sexual exploitation. In particular, the targeted influence by some of the most prevalent radical feminist academics of the time resulted in a powerful ideological underpinning stance that still significantly influences the Swedish legislators today. The jurisdictions in the UK have all, albeit to varying degrees, been influenced by a historic feudal system and the consequences this has had on the importance of social class and public order perceptions. These various experiences, amongst others, ultimately shaped the philosophical directions of the legislators in the examined jurisdictions, thereby resulting in the different understandings of prostitution, whereby Germany views prostitution as an economic activity, Sweden understands it to be a social harm and all three UK jurisdictions understand prostitution to be a public nuisance. Interestingly, Northern Ireland can still be found to view prostitution as a public nuisance, despite having transferred the Swedish approach to prostitution regulation into their laws.[2]

11.2 Consequences pertaining to the interconnectedness of the jurisdictions via their EU membership

Whilst each philosophical understanding and choice of regulatory approach to prostitution in isolation does not appear to pose many issues, a significant intercession has been found in the fact that the EU has openly expressed its understanding of prostitution to amount to an economic activity. Consequently, the analysis in chapter 8 demonstrated that EU law can, in a number of circumstances, be applied to the regulation of prostitution, in particular in relation to cross-border situations involving at least one member state following a similar understanding of prostitution.

In particular, the most notable original contribution of this thesis can be found in chapter 8. This chapter not only explored and analysed the regulation of prostitution from the perspective of EU law, which in itself was an original contribution to knowledge, but also applied the findings to a number of hypothetical cross-border situations between EU

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[2] See sections 7.3 and 7.5.

member states following the various conceptual regulatory approaches to prostitution. The chapter showcased how, as an economic activity, prostitution is not only subject to the free movement provisions, but also any related EU provisions pertaining to the internal market and labour law. However, at the same time, the links to immorality and public policy within the national understandings of prostitution as either a social harm or a public nuisance result in strict barriers to EU law applicability, as prostitution regulation then falls outwith the scope of EU competence.

In particular, it has been found that the different degrees of EU law applicability in different member states can result in a number of harmful consequences for CSPs and in some cases also CSUs and CSPus in cross-border situations. These consequences may include contract enforcement issues, whereby CSPs are unable to retrieve failed payments from CSUs or CSPus. Moreover, the ease of access to work in prostitution in some member states may attract CSPs from other member states who would otherwise not volunteer to work in this employment sector, due to a lack of other employment alternatives, in particular when the standard of living is higher than in their countries of origin. Although the CSPs are, of course, free to choose this if they wish to do so on the basis of their own autonomy, there is a risk of blurring the lines of voluntariness, in particular, when other family members or dependants rely on the workers' rights of the CSP. In particular, the question which arises here, is whether the continuation to work as a CSP can still be considered voluntary, when the CSP would need to be required to continue to work and reside in the member state in which prostitution is considered an economic activity for up to 5 years before they qualify for permanent residence. Especially when family members also rely on the work in prostitution to remain in the host member state, CSPs may not be in a situation in which they are realistically able to leave this line of work.

This last argument became more significant in light of the analysis in chapter 9. Here an evaluation of consent in relation to sexual exploitation, prostitution and THB found that consent cannot be truly given or assumed to be given, if there is no option to leave prostitution. Noteworthily, member states such as Germany and Sweden have

introduced wide understandings of vulnerability for the purpose of exploitation.[3] In light of this, future research into the impact of article 16 of the EU's citizenship directive to the choice of CSPs to continue working in prostitution would be advisable in order to examine if this is negating consent to work in prostitution.

An examination of the complex dynamics of national regulatory approaches to prostitution in light of the national laws on THB for the purpose on sexual exploitation and the applicability of EU law in this area, revealed a number of issues. These issues could mostly be traced back to two drafting deficiencies. The first deficiency was that regulators viewed THB for the purpose of sexual exploitation and prostitution in isolation when drafting laws in each of these two areas. The second deficiency was that regulators would view their jurisdictions as isolated in these areas throughout the drafting process. One exception to this could also be found in the case of Northern Ireland, whereby drafting issues were found based on the attempt to transfer a regulatory approach from one jurisdiction into another, without accounting for the entirely different structures within their own system, such as welfare provisions, policing strategies and budgets, as well as other areas of the law.

Due to the inability of the EU to interfere in member states' internal security matters, the EU is unable to specifically regulate in the areas of prostitution, as a result of this falling within the scope of criminal law in some member states. The EU can, however, seek to aid the approximation in the area of THB for the purpose of sexual exploitation. Yet, in the absence of actual harmonisation possibilities, EU member states remain free to determine the legal specifics. These specifics can, thus, involve the incorporation of idealism, and in particular, the potential conflation of prostitution and THB for the purpose of sexual exploitation. The result is a further blurring of the lines between various concepts related to both prostitution and THB for the purpose of sexual exploitation. These concepts include, for instance, the role of or validity of consent, the understanding of vulnerability, the identification of victims, the support facilities offered to CSPs or victims of THB for the purpose of sexual exploitation, and the offenses for

[3] See section 10.3.

which offenders are ultimately prosecuted and the penalties that are then determined. Issues here were found both internally within member states as well as in cross-border situations. In all circumstances, these issues could result in harm to the individuals involved, including CSPs, CSUs, CSPus and victims of THB for the purpose of sexual exploitation.

A final note to be made in relation to the interconnectedness of the member states via the EU relates to the example used in the introduction of this thesis. In this sense, Germany is often referred to as the Bordello of Europe, which is a fact that is often traced back to its liberal approach to prostitution regulation. Within academic literature, this is also often used as an argument to showcase how legal prostitution increases THB for the purpose of sexual exploitation, by increasing demand. However, based on the findings of this study these arguments could be challenged. Although more research into this area is advisable, this thesis suggests that the issue is not in itself that Germany chose a regulationist approach, but rather that other member states have selected opposing approaches. This combined with the free movement provisions and variations of social welfare provisions and other securities provided across the member states, it is more likely, that Germany is attracting more CSPs based on push factors from other member states, including their regulatory approaches to prostitution. Qualitative research into the push and pull factors into prostitution by CSPs in Germany would shed more light on this matter.

11.3 Potential harmful ramifications of internal inconsistencies in the areas of prostitution regulation and laws seeking to tackle trafficking in human beings for the purpose of sexual exploitation

This research project sought to examine numerous areas of law, which are generally viewed in isolation, by placing these within a potentially interconnected wider legal framework. While many problems were found specifically related to the interconnection of the systems, such as in cross-border situations, there were also a number of internal issues that were found based on the fact that there were other connections than merely

geographical ones, which had not been taken into account. In this sense, there were connections between the underpinning philosophies of prostitution regulation and the laws seeking to tackle THB for the purpose of sexual exploitation. There were also connections between national regulations of prostitution and THB for the purpose of sexual exploitation, both theoretically and in practice, there were connections between the prostitution regulation and other areas of national law. The main issue here was always the fact that connections had not been assumed or considered.

For instance, in Sweden, the ideological paternalist notion that CSPs are unable to consent to provide commercial sex due to its inherent exploitative nature, resulted in problems when viewed in connection with Sweden's laws seeking to combat THB for the purpose of sexual exploitation. Accordingly, the conflict between ideology and the need to identify victims of THB for the purpose of sexual exploitation negated the entire underlying philosophical premise, thereby creating various levels of consent, from valid, over invalid, to non-existent. At the same time, the wide understanding of vulnerability further contributed to difficulties distinguishing between victims of THB for the purpose of sexual exploitation and CSPs. However, at the same time, the interconnectedness of the decriminalisation of prostitution activities and other areas of law, resulted in CSPs still being subject to criminalisation, however, in other areas, such as brothel keeping, taxation or potentially even trafficking offenses. Similar issues were also found in Northern Ireland.[4]

Both England and Wales and Scotland revealed similar additional areas of criminalisation. This finding, in combination with the unintended connection to the laws seeking to combat THB, could result in deficiencies within the area of victim protection. In particular, the narrow understanding of vulnerability together with the overtly strong focus on travel rather than exploitation within the definition of THB for the purpose of sexual exploitation could result in many victims being prosecuted and penalised for prostitution related crimes, including brothel-keeping and tax fraud.

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[4] See sections 6.4, 7.2.3 and 7.3.

11.4 Findings relating to variations of views on morality and harm, idealism and pragmatism and the way these are incorporated within the law via public reason processes

It already became clear in chapter 3, that varying ideas of morality and harm were fundamental within the different understandings of prostitution and the way it is sought to be regulated. In light of the legal philosophical influences relating to morality and harm which have shaped the individual examined legal systems in practice, this research has revealed a stark divide between idealism and pragmatism. Accordingly, the German approach to prostitution regulation is heavily based on the ideas of liberalism and personal autonomy. As such, it is understood that laws can only interfere in the areas of private morality if there is clear evidence of harm, which is worse than the harm of loss of autonomy. The implementation of this into actual legal provisions is then found within the remits of pragmatism, most notably found in the German 5-year evaluation of the German Prostitution Act (ProstG).[5] Here it was explained that in light of a lack of evidence and slow uptake of the social security entitled employment options by CSPs, further paternalistic elements would need to be introduced to ensure the safeguarding of CSPs when working in prostitution. In Sweden, in contrast, the abolitionist approach to prostitution regulation is based on ideas of radical feminism and paternalism. As such, prostitution is viewed as a social harm which threatens sex equality and constitutes exploitation which no CSP could consent to if they were truly free to choose. However, there are also indications that the Swedish approach is more focussed on the way it is perceived than the practical results it achieves. In this sense, although the introduction of criminal measures against CSUs and CSPus was stated in the *travaux preparatoires* to constitute a tool to empower CSPs, there are elements within the setup of the legislation which contradict this notion. In particular the disregard, if not complete denial, of autonomy of CSPs. This is particularly evident in two

[5] German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 'Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)' (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth – BMFSFJ 2007) <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf> accessed 6 March 2020, 12.

situations, namely, the exclusion of the voices of CSPs in the consultation processes leading up to the introduction of the laws as well as the portrayal of CSPs to constitute victims regardless of their own views on the matter. As such, the absence of recognition of autonomy of CSPs may be justified from the perspective of radical feminism, which challenges the autonomy of CSPs based on the influences they are under by operating in a patriarchal society, liberal feminists would argue the opposite here and claim that this absence of autonomy in itself would be contrary to female empowerment.[6]

It can also be argued that the idealistic underpinning of the Swedish approach has contributed to a number of other consequences related to the regulation of prostitution in Sweden, such as the extraterritorial scope of offences, the national and international evaluation and marketing of the regulatory approach as well as the rise in support for the approach within the Swedish population after it was introduced. The extraterritorial scope of the offence of sex purchasing can be based on the idealistic understanding of prostitution being a social harm. As the concept of social harm in itself is normative, and as such based heavily on the Swedish understanding of morality, it would not suffice to deal with the issue merely within the national boundaries of the Swedish jurisdiction. Instead, the ideal of prostitution being a social harm, means that it is a social evil which needs to be fought at all costs, which explains why Sweden seeks to legally deter its nationals or residents from causing this kind of harm, even when outside of Sweden.

In this sense, numerous contradictions within the Swedish system cast doubt on the idealistic intentions claimed to be at the heart of the regulatory approach. These contradictions include the finding that despite selling sex being decriminalised, CSPs will often nonetheless have to undertake illegal or even criminal acts when offering commercial sex. Moreover, the fact that the law cannot intervene in commercial sex transactions prior to them having taken place means that there is an important preventative component missing within the model. On a related note, it has also been seen that CSUs and CSPus appear to mostly receive relatively mild sanctions if their cases make it in front of a judge in court, which affects the deterrence capability of the

[6] See section 3.6.2.

sex purchase law in practice. In particular, when viewed from the perspective of Scandinavian realism, which claims that laws are not what is written in the legal texts but rather how these legal texts are applied in practice,[7] this fact challenges the effectiveness of the Swedish regulatory approach to prostitution and its classification more generally. Finally, there is a contradiction in itself in the claim that the Swedish model is intended to empower women, by invalidating their autonomy to consent to commercial sex.

Despite these contradictions, the implementation of the Swedish regulatory approach to prostitution remains heavily underpinned by idealism. This idealism extends beyond national borders. As a result, Sweden has not only included extraterritorial reach of its sex purchasing laws, but has also sought to market its regulatory approach across the globe. When contrasting the 5-year evaluation of the Sweden sex purchasing laws with the German evaluation,[8] it is apparent that the Swedish government hailed its laws to be a success despite a lack of evidence, which was based on the idealistic objectives of the law.[9] The marketing of its approach has extended beyond its original focus on prostitution regulation, to now also sell the abolitionist model as a tool to tackle THB for the purpose of sexual exploitation. This is in itself an issue, as the narrative is deviating away from the practical application of the laws as well as the factual realities of the situation in Sweden, presumably in order to push the radical feminist agenda originally put in place by MacKinnon and Dworkin towards a global application.

Northern Ireland is one of these global jurisdictions to have bought into the Swedish approach and implemented its version of it. However, it has become apparent, that although the legal mechanisms have been kept as close to the original Swedish model as possible, with the assistance of Swedish representatives, that the approach is still built upon the original idea of prostitution constituting a public nuisance, which is the

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[7] See section 3.7.
[8] The Swedish Government, Swedish government report SOU 2010:49, The Ban against the Purchase of Sexual Services. An evaluation 1999-2008, 5, available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_ban_against_the_purchase_of_sexual_services._an_evaluation_1999-2008_1.pdf accessed: 19th November, 2019; German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (n 5).
[9] The Swedish Government (n 8).

same across all three UK jurisdictions. It is harder to place the UK jurisdictions between the polar opposite principles of idealism and pragmatism. On the one hand, it has become evident that the systems in England and Wales and Scotland have strong roots in the notions of public morality, whereby the general society needs to be protected from the social harms of visible prostitution. This focus on morality would suggest a tendency towards idealism. However, when examining the implementation in practice, there appears to be varying degrees of pragmatism, especially in light of the fact that prostitution is only criminal if connected to the public view. Overall, however, it seems that without a clear stance and a reform within this area of law, England and Wales as well as Scotland struggle to navigate a legal approach, which has developed over hundreds of years across different areas of the law. In contrast, Northern Ireland has reformed its legal approach to prostitution. However, by transferring a legal model from another jurisdiction, it has not been able to adapt the legal specifics to the rest of its body of laws. This is particularly noticeable, when looking into the area of enforcement, as well as issues arising from its stated links to its general sexual offenses, which has created a situation in which a CSU can at the same time be a human trafficker, as soon as there is any form of travel involved, as well as clear issues relating to jurisdictional overreach.

To sum up the stances relating to harm and morality, this thesis has shown that the approaches to prostitution taken in Sweden and the three UK jurisdictions have all been strongly based on the notion of protecting public morality from the immoral activities related to prostitution. In contrast, Germany saw a significant change in its regulatory approach when the subject matter was removed from its underlying *contra bonos mores* perception. A significant finding relates here to the way the public ideas of morality pertaining to commercial sex filter through the law-making processes within the jurisdictions.

The moral component linked to prostitution regulation can be explained with the help of various branches of normative jurisprudence. However, this does not explain how the ideas relating to morality filter through the analytical jurisprudential concepts of valid law making. Accordingly, the ideas of Rawls on public reason have been utilised as a tool to

analyse the processes used in the individual jurisdictions to embed the moral views of the general public within the laws on prostitution.[10] Here it was found that all three EU member states have legal mechanisms to allow for public reason to filter through the law-making processes. In Germany, the past decades have seen developments in the German understanding of the importance of public reason in shaping the laws, which go beyond the political structures described by Rawls. In this sense, apart from the legislature constituting a representative collective of the German population, put in place via elections, the judiciary has also established provisions regarding the reasonable person test, which seek to enhance the inclusion of public reason.[11] Accordingly, a reasonable person assessment of prostitution must now be based on some form of empirical evidence to ensure that the personal moral opinions of a judge do not influence the assessment. In this sense, Germany took survey results into consideration which indicated that the majority of the German general public thought prostitution should be legal,[12] and then laws were drafted accordingly. In contrast, the UK follows more of the classical processes of public reason as described by Rawls. Nevertheless, similar surveys as the ones carried out in Germany, were conducted in the UK, which revealed similar results to the surveys undertaken in Germany as well.[13] However, despite the ideas of the general public being relatively similar, the laws on prostitution have not changed significantly. In relation to the integration of moral views in form of public reason into the law-making dynamics in the UK, it is clear that the UK has similar structures in place as the jurisdictions of Germany and Sweden, however, there is an apparent cleft between the ideas of the general population of prostitution and its regulation and the underpinning views of the government. Although an examination of the reasons for this is outwith the scope of this research project, it would be an area in

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[10] See sections 3.5.1, 5.6, 6.5.4, 7.4.1.
[11] See section 5.6.
[12] Ibid; section 5.3; Urteil des VG Berlin (Verwaltungsgericht Berlin) (Judgement of the Berlin Administrative Court) NJW (Neue juristische Wochenschrift) 2001, 893, 988; Rechtsprechung, VG Berlin, 01.12.2000 - 35 A 570.99, NJW 2001, 983, [986], Para. III.
[13]Ipsos Mori, 'GEO Survey: Prostitution 1 September 2008 Topline Results' (2008) <https://www.ipsos.com/sites/default/files/migrations/en-uk/files/Assets/Docs/Polls/poll-prostitution-topline-august.pdf> accessed 26 April 2020; YouGov, 'Yougov Survey Results' (2015) <https://d25d2506sfb94s.cloudfront.net/cumulus uploads/document/6vmbvopuh4/Opi_InternalResults_150812_Prostitution_W.pdf> accessed 26 April 2020; see section 7.4.1.

need to further investigating in future research in order to clarify how public views on morality translate into legislation in the UK.

In contrast, in Sweden, the laws were created based on public opinions as portrayed via the media and public outcry. This was more idealistic and did not review the wider opinions of the general public. Later, surveys were carried out after the fact which revealed widespread public support for the regulatory approach in Sweden.[14] However, this can be seen as a classic chicken and egg situation, in that one needs to ask oneself, what was there first, the laws or the public opinion. In particular, it could be argued that Sweden's extensive marketing of their abolitionist approach to prostitution not only had effects on other countries, but also on the opinions of their general public.

It can further be argued that the media attention given to the Swedish regulatory approach following its introduction, alongside its strong idealistic underpinning of prostitution being a social harm that the sex purchasing law fights by criminalising the perpetrators while protecting the victims, may also have contributed to the rise in support for the law by the Swedish population following its introduction. This not only supports the ideas of Scandinavian realism, which suggests that laws can affect opinions and behaviours in society, but also shows the attractiveness of the idealistic tone portrayed by the Swedish approach to prostitution regulation.

The final conclusion relates to the ability to monitor and compare the various jurisdictions in relation to both their ability to effectively regulate prostitution as well as tackle THB for the purpose of sexual exploitation. In this sense, the fact that the jurisdictions have created their laws on prostitution as well as THB for the purpose of sexual exploitation in isolation of other jurisdictions, it has been found that even minor differences can have significant long-term impacts on the way prostitution and THB for the purpose of sexual exploitation are dealt with throughout the EU and beyond. In this sense, differences relating to definitions, such as variations to the breadth of the understanding of vulnerability or exploitation have cumulative effects, which can have a

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[14] Socialstyrelsen, 'Kännedom Om Prostitution 1998–1999' (Socialstyrelsen 2000) 2; Swedish Ministry of Industry, Employment and Communications, 'Prostitution and Trafficking in Women' (Regeringskansliet 2004) 1.4

significant impact on the reported figures, which are used, in turn, to evaluate the effectiveness of the national laws. Accordingly, the evaluations of the national laws cannot be compared like-for-like, as the numerous conceptual differences are not reflected within the reports. As such, it remains impossible to have a true comparison of the effectiveness of the legal approaches to THB for the purpose of sexual exploitation and prostitution. Yet, these flawed reports are used to evaluate and compare the various legal approaches in order to determine future developments of the laws in these areas. Without further objective research into the comparability of terminology and evaluation tools used in different jurisdictions, this trend will not only continue, but also foster the furtherance of subjective and potentially purely idealistic approaches by moral crusaders at the expense of vulnerable individuals affected in practice.

11.5 Final concluding remarks

This thesis examined the legal tensions that arise when different national regulatory models for prostitution are placed under a supranational legal framework, such as that of the EU. In particular, the differing theoretical understandings have resulted in EU law applicability depending on whether the national approaches regard prostitution as an economic activity, which would fall within the area of EU law application, or a public nuisance or a social harm, which would limit EU law applicability based on public order limitations. Thus, a comparative study of the prostitution laws in Germany, Sweden and the UK in light of the EU single market dynamics as well as the efforts to combat organised crime and human trafficking was undertaken. It is important to note, however, that within this examination, only the entirely inter-EU situations were examined. Thus, any situations involving third countries, including third country nationals was outside of the scope of this examination. Similarly, any potentially relevant international law was only addressed in a limited scope, and only when this was necessary to understand the EU's legal provisions. This was not based on the view that the subject matter would not be of relevance for situations involving third country nationals or international laws. It is acknowledged that in many cases, particularly related to THB for the purpose of sexual

exploitation, victims from countries outside of the EU are particularly vulnerable, due to the absence of the same free movement rights and stricter immigration restrictions. However, this would need to be considered in future research.

Overall, this thesis has demonstrated that the perception of national regulations of prostitution and THB for the purpose of sexual exploitation being isolated matters, merely due to the lack of regulatory competence of the EU in these areas, is incorrect. The law, as a subject matter that touches all aspects of a society's workings, will, almost certainly be similarly connected to other societies within a world which is increasingly interconnected and interdependent. In particular, this thesis has shown that ignoring this interconnectedness when regulating within the areas of prostitution and THB for the purpose of sexual exploitation can have serious consequences, most notably for already vulnerable groups of people. Although some of the problems arising from this situation could be reduced with a more equal distribution of wealth and living standards across the EU, the future of the regulation of prostitution will depend on closer collaboration by the member states to ensure that national legal approaches do not lose their intended impact. Most importantly, EU member states cannot ignore the fact that the EU understands prostitution to be an economic activity and solely rely on public order limitations to enforce moral views without considering the wider impact this can have in cross-border situations.

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Appendices

Alicia Danielsson

Matriculation number: [redacted]

Programme: PhD in Law

Project Title: **The principle of subsidiarity and police and judicial cooperation in the fight against sexual exploitation: Prostitution in a diverse EU common market.**

Project Reference Number: DBS_R_2014-15_22

Supervisor: Dr Maria O'Neill

Dear Alicia

You have been granted Full Ethical Approval for the above project.

Standard Conditions:

i You must remain in regular contact with your project supervisor.

ii Your supervisor must see a copy of all materials and your procedure prior to commencing data collection.

iii If you make any substantive changes to your proposed project, you must submit a new ethical approval application to the Committee. Application forms and the accompanying explanatory document are on the Intranet. Completed forms should be resubmitted through the Research Ethics Blackboard course.

iv Any changes to the agreed procedures must be negotiated with your supervisor.

Additional Conditions:
None

Failure to comply with these conditions will result in your ethical approval being revoked by the Ethics Committee.

Should you have any queries please contact your Supervisor.

Yours sincerely

Research Ethics Committee