



The Rights Approach: Which Regulatory Approach to Prostitution Should Canada Adopt in Order to Fully Protect Sex-Workers' Rights?

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ABSTRACT

Prostitution is present in every part of the world and is one of the oldest professions.¹ Data on the issue shows, that it is predominately women who are involved in prostitution and men who are buyers of these sexual services.² In this context, debate has shifted from whether or not prostitution should be abolished to how it should be regulated. While the issue of prostitution has been discussed and addressed in many ways, as being violence against women³, subordination of women⁴, liberation and empowerment of women⁵ Often regulation of prostitution has been developed in the fight against trafficking, for the purpose of sexual exploitation, as the assumption of either legalizing or abolishment of prostitution should decrease trafficking of women.

Moreover, different approaches on prostitution will evidently have different effects on the women involved in prostitution. Thus this research carries out a comparative analysis of two countries – Canada and the Netherlands focusing on cases with different legislations on prostitution. Through this comparison I will answer my research question of “which regulatory approach to prostitution should Canada adopt in order to fully protect sex-workers' rights”. Canada and the Netherlands differ greatly on their regulatory regimes relative to prostitution and both countries have pros and cons. We will extrapolate what regulatory approaches each country pursues and conclude with final findings on the future of Canadas regulation of prostituion.

¹ JN Drexler, Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States, (Dick. J. Int'l L. 15/201, 1996)

² Canada, Subcommittee on Solicitation laws, The Challenge of Change: A Study of Canada's Criminal Prostitution Laws, (Ottawa: Standing Committee on Justice and Human Rights, 2006) at 10

³ Janice G. Raymonda, Prostitution as violence against women: Ngo stonewalling in Beijing and elsewhere, (Women's Studies International Forum 21/01, 1998) pp1-9

⁴ Scott A. Anderson, Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution, (International Journal of Social, Political and Legal Philosophy 112/04, 2002)

⁵ Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, vol 72(Tex. L. Rev 1097, 1993-1994)

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-LIST OF ACRONYMS-

- APV-** Algemenn Platselijke Verordening (Translation: General Municipal By-law)
CCC – Canadian Criminal Code
DCC – Dutch Civil Cod
CEDAW- 1979 UN Convention on the Elimination of All Forms of Discrimination against Women
ECJ- European Court of Justice
EEA- European Economic Area
EOA- Economic Offences Act (Wet Econmische Delicten)
HIV- Human Immunodeficiency Virus
ICESCR- International Covenant on Economic, Social and Cultural Rights
ILO- International Labour Organisation
STI- Sexually Transmitted Infection
SWUAV – Sex Workers United Against Violence
UDHR- Universal Declaration of Human Rights
UNGA- United Nations General Assembly
UNSGB- United Nations Secretary General’s Bulletin
VAT- Value Added Tax
WRP - Rules concerning the regulation of prostitution and the fight against abuses in the sex industry’/law regulating prostitution and combating abuse in the sex industry”

-CHAPTER I-

INTRODUCTION

Having faced two recent constitutional challenges in the *SWUAV*⁶ and *Bedford*⁷ cases, Canada needs to revisit legislation and its effectiveness surrounding sex-work. The Canadian legislature and the judiciary refuse to recognize sex-work as a legitimate occupation⁸, but rather deem it a social nuisance⁹ or an avenue to exploitation¹⁰.

Canada, being a commonwealth country, inherited laws from the United Kingdom. The first recorded laws dealing with prostitution were in Nova Scotia, a maritime province, in 1759.¹¹ After Canadian Confederation in 1867, the laws were consolidated in the Criminal Code in 1892.¹² Criminalization dealt predominantly with pimping, procuring, operating brothels and soliciting sex. Most recent amendments have dealt with the latter (solicitation). Originally solicitation was classified as a *vagrancy*¹³ offence, amended to *soliciting*¹⁴ in 1972, and finally *communicating* in 1985. Since the Charter of Rights and Freedoms became law, the constitutionality of Canada's prostitution laws have been challenged on a number of occasions, most successfully in 2013, the aforementioned *Bedford* case- leading to a new regulatory approach – partial decriminalization-

⁶ 2012 SCC 45[hereinafter *SWUAV*]

⁷ 2013 SCC 72[hereinafter *Bedford*]

⁸ Sarah Beer, "The Sex Worker Rights Movement in Canada: Challenging the 'Prostitution Laws'" (2011). *Electronic Theses and Dissertations*. 500 <<http://scholar.uwindsor.ca/etd/500>> accessed May 16 2017

⁹ Jeffrey LA, "Prostitution as public nuisance: prostitution policy in Canada" in Outshoorn J (ed), *The politics of prostitution*. (Cambridge University Press, 2004)83–102

¹⁰ Rosemarie Tong, *Women, Sex, and the Law* (Totowa, New Jersey: Rowman and Allanheld, 1984), at pp 51-53 and 59-61; Priscilla Alexander, "Prostitution: A Difficult Issue for Feminists," in Frédérique Delacoste and Priscilla Alexander, eds., *Sex Work* (Pittsburgh and San Francisco: Cleis Press, 1987)184-214; Judith Kilvington et. al., "Prostitution Policy in Europe: A Time of Change?" *Feminist Review*, vol 67 (Spring 2001) 78-93

¹¹ Sheilagh O'Connell, "The Impact of Bill C-49 on Street Prostitution: 'What's Law Got to Do with It'", *Journal of Law and Social Policy*, vol 4 (1988) 109-145

¹² Legislation Revision and Consolidation Act (RSC, 1985, c S-20)

¹³ Canadian Criminal Code, RSC, 1985, c C-46

¹⁴ Canadian Criminal Code, RSC 1985, s 195(1): "Every person who solicits any person in a public place for the purpose of prostitution is guilty of a summary conviction offence."

introduced in 2014.¹⁵ While research in Canada on the impacts of the new legislation remains burgeoning, more research is emerging on the many negative effects of partial decriminalization.¹⁶ The act of selling sex in exchange for money is legal in Canada, yet all related activities are criminalized. This treatment of prostitution as a crime is directly linked to the stigmatization of sex-work¹⁷.

The *SWUAV* case¹⁸ set the groundwork for change when the highest Court in Canada, the Supreme Court, ruled that a former sex-worker and a sex-worker advocacy group should be granted public interest standing. Effectually this gave them standing to challenge the laws related to adult prostitution. Ms. Kiselbach and SWUAV had filed a constitutional challenge to prostitution laws on the basis that the regulations made sex work dangerous.¹⁹ Later, new laws came in response to the *Bedford*²⁰ ruling. *Bedford* directed challenged sections 210-213 of the Canadian Criminal Code and allowed sex-workers and their advocates to assert their public interest standing. *Bedford* found to be unconstitutional: the laws prohibiting brothels²¹, public communication for the purpose of prostitution²² and living on the profits of prostitution²³. On 6 December 2014, legislation made the purchase of sexual services illegal,²⁴ essentially penalizing johns, not sex-workers. Despite evidence that legislators were against criminalization²⁵ it seems that has been the path most traveled. Even in the 80's the subcommittee recognized that

¹⁵ *The Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25 [Bill C-36][hereinafter the Protection of Communities and Exploited Persons Act]

¹⁶ See, for example: Manpreet Abrol, *The Criminalization of Prostitution: Putting Women's Lives at Risk* (Prandium - The Journal of Historical Studies, 3/1, Fall 2014); J Pitcher and M. Wijers, *The impact of different regulatory models on the labour conditions, safety and welfare of indoor-based sex workers*, (Criminology and Criminal Justice, 14/ 5)pp 549-564

¹⁷ See: Sujata Gothoskar and Apoorva Kaiwar. "Who says we do not work?." *Economic and Political Weekly* 49/46, (2014)

¹⁸ *supra* note 5

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

²² *R v Hutt*, [1978] 2 S.C.R. 476

²³ *supra* note 12

²⁴ *supra* note 13

²⁵ Fraser Committee, "*Special Committee on Pornography and Prostitution 1985*", Pornography and Prostitution in Canada (Ottawa, Appvisionnement et Services, 1985)

criminalizing prostitution was not the answer²⁶, yet three decades later and we are still not listening.

The Bill that became an Act on November 6th, 2014 sought to “reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible.” To clarify, the *Act* added five new provisions to the *Criminal Code* to meet these objectives, which are²⁷:

1. Purchasing Offence (clients are criminalized)
2. Advertising Offence (third-party advertisers are criminalized)
3. Material Benefit Offence (commercial enterprise is criminalized but legitimate business relations—security, secretary, babysitters—are allowed)
4. Procuring Offence (pimps are criminalized)
5. Communicating Offence (selling services near children is criminalized)

The government also pledged \$20 million to fund services that help sex workers exit the sex trade.²⁸

By criminalizing the activity of all clients and pimps, the federal government completely failed to take into account the needs of the “victims” they were trying to protect that were so clearly articulated in *Bedford*.²⁹ The legislation avoids accepting the existence of diversity and freedom of choice within the sex industry by placing the whole industry in the context of exploitation and coercion.³⁰ Moreover, aggressive tactics that single out clients have led to increased risk and experience of violence in Canada when occasional

²⁶ *ibid*

²⁷ *supra* note 21

²⁸ *supra* note 21

²⁹ *supra* note 5

³⁰ Teela Sanders, Maggie O’Neill and Jane Pitcher, *Prostitution Sex Work, Policy and Politics* (Sage Publication, 2014)

police sweeps occurred.³¹ Sex workers are forced to work in secluded, poorly lit, industrial areas where purchasers are more likely to evade detection and arrest.³² Thus, while the *Act* sought to ameliorate the conditions of sex workers, it actually compounds the violence sex workers face.³³ It certainly speaks volumes that the government recognizes the precariousness of the relationships sex workers have with pimps and johns, but the effects were not well thought out. The nature of sex-work does not mesh with anonymity, more seclusion, and less communication. Domestic and international human rights obligations, as well as labour law standards call for changing the regulatory approach to sex-work in Canada.

My research begins from the perspective that sex-work ought to be recognized as a legitimate form of work.³⁴ It will focus on international obligations to uphold and ensure human rights as a basic tenet of domestic laws. These domestic laws are directly linked to the international obligations that entail upholding human rights, prevention of exploitation and recognition of autonomy.³⁵ Sex-workers, as autonomous beings, have the right to choose their profession, as well as have said profession protected by the civil liberties at the disposal of other working class peoples. Present-day international obligations in regulating sex-work demonstrate that the criminalization of consensual sex between two consenting adults is not an option.³⁶ As such, we must ask ourselves which regulatory approach Canada should adopt in order to protect and uphold sex-workers'

³¹ Statcan, Gender Differences in Police-reported violent Crimes in Canada, 2008 <<http://www.statcan.gc.ca/pub/85f0033m/2010024/part-partie1-eng.htm>> accessed 1 July 2017

³² Lauren Sampson, "The Obcenities of this Country": Canada v. Bedford and the Reform of Canadian Prostitution Laws", (Duke Journal of Gender & Law Policy, 22/1, 2914)137

³³ Irina Samborski, "Models Needed: Reviewing Prostitution laws Since Candad v. Bedford" (December 3 2016) <<http://www.thecourt.ca/models-needed-reviewing-prostitution-laws-since-canada-v-bedford/>> accessed 20 August 2017

³⁴ See: Noah D. Zatz, "Sex work/sex act: Law, labor, and desire in constructions of prostitution." *Signs: Journal of Women in Culture and Society* 22/2, 1997) 277-308; Gothoskar, Sujata, and Apoorva Kaiwar. "Who says we do not work?." (*Economic and Political Weekly* 49(46) , 2014)

³⁵ Beth Stephens, Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, (Yale J. Int'l L., 27/01 2002)

³⁶ J. R. Broughton, The Criminalization of Consensual Adult Sex after Lawrence, (Notre Dame J.L. Ethics & Pub. Pol'y 28/125, 2014)

(domestic and international) rights. The full decriminalization of adult prostitution would enable sex-workers to carry out their business with access to protections provided by employment standards and occupational health and safety standards.³⁷ My research will investigate whether or not the full decriminalization of prostitution can effectuate sex workers' human rights, as well as create labour law rights.

In order to extrapolate the answer to this question I will challenge the compatibility of Canadian law with international standards and obligations. I will then contrast the Dutch approach of full legalization with the full decriminalization suggested for Canada. The Netherlands was one of the first countries to make prostitution a legal act, eventually having prostitution be fully legal, yet strictly regulated by other facets of administrative and labour law. We can thus extrapolate how full legalization affects sex workers, clients and the perception and rights of sex workers themselves. I ask what labour rights can do for sex-workers. I argue that, whilst current legal prospects offer a guise of human rights protection, there are several limitations and there is a need for reform to include labour law rights. I ask whether the Dutch model can deliver the protections sought for Canadian sex-workers. Along these lines, I will demonstrate that Canada is still in the midst of working out how to regulate sex-work. As such, three major themes emanate: (1) full legalization versus full decriminalization of prostitution, (2) the prevailing regulatory approaches tied to human rights and labour law, and (3) exploitation. These three themes will purport that Canada is, indeed, in the midst of a gradual positive change regarding the regulation of sex-work. In the interest of clarity, a few key terms must be elaborated

³⁷ Tamara O' Doherty, *Criminalization and Off-Street Sex Work in Canada*, vol 53 (Canadian Journal of Criminology and Criminal Justice, 2011)

upon and distinguished between, so as to prevent confusion and to offer perspective within the context of sex-work.

1.1 What is Prostitution?

Prostitution is taken to mean “sex for money”- for some “sex work” and “sex worker” are preferred terms over stigmatizing terms like “prostitute: or “whore”.³⁸ For the sake of this dissertation sex-workers are “people who sell sex for money in direct/indirect interaction with their clients”³⁹, and will still be linked to prostitution as work as well as “sex-work”. Prostitution is not defined in Canadian statute law, but its legal meaning has emerged over the years, based on case law, purported by the common-law nature of the Canadian system. On the basis of such case law which, three elements are deemed necessary to establish that prostitution is taking place: (i) provision of sexual services, (ii) the indiscriminate nature of the act (soliciting rather than choosing clients), and (iii) the necessity for some form of payment.⁴⁰

There is no explicit definition of prostitution in International Law.⁴¹ However, drawing upon different nations’ legal definitions of prostitution, Capaul derived a simplified definition of the offense based on three characteristics. For prostitution to occur there must be the following elements: level of engagement, sexual activity, and a fee.⁴² This is a more broad means of using the Canadian criteria. For both jurisdictions the sexual act, fee payment and some form of “engagement” (which we can liken to sollicitation) are

³⁸ Melissa Hope Ditmore, (ed.) *Encyclopedia of Prostitution and Sex Work: AN.*, 1 (Greenwood Publishing Group, 2006)

³⁹ Hannah Koski, *The Effects of Space on Sex Worker Experience: A Study of Amsterdam’s Red Light District* (2007) Independent Study Project (ISP) Collection. 224

⁴⁰ Canadian HIV/AIDS Legal Network, *Sex, work, rights: changing Canada's criminal laws to protect sex workers' health and human rights*, (2005) <www.aidslaw.ca> accessed 30 August 2017

⁴¹ Allison J. Capaul, "An Examination of Prostitution and Sex Trafficking Laws within the United States", vol 8(Departmental Honors Projects, 2013) <http://digitalcommons.hamline.edu/dhp/8> accessed 30 August 2017

⁴² *ibid*

key. In the Netherlands, since prostitution in its colloquial meaning has never been criminalized, the definition of prostitution is limited to its voluntary/forced forms.⁴³ Article 273f⁴⁴ makes it an offence to exploit another person for the purpose of prostitution and outlaws other forms of sexual exploitation. It also prohibits labour exploitation and slavery.⁴⁵ This is in line with the broader view in International law. Canada and the Netherlands recognize prostitution as some sort of sexual act performed in exchange for monetary compensation.

International law focuses on defining sexual violence and sexual exploitation, both linked to sex-work. More precisely, International human rights law recognizes prostitution as a violation of human rights *vis a vis* potential for exploitation in the form of sex trafficking. International law, therefore, is focused on one facet of prostitution – exploitation. This perception of prostitution is in line with the Canadian perspective especially. As such, we see an intersection for international and domestic law on what prostitution is, but diverging stand-points on which forms are focused on and/or differentiated between.

1.2 (Sexual) Exploitation

The term “sexual exploitation”, according to a UN brief, means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.⁴⁶

⁴³ Jo Doezeema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation*, (Sage Social & Legal Studies 14/01, 2005)

⁴⁴ Art 273f (Sr.)

⁴⁵ *ibid*

⁴⁶ UNSGB, *Special Measures on Protection From Sexual Exploitation and Sexual Abuse* (9 October 2003) UN Doc. ST/SGB/2003/13

An important distinction international law and domestic law will make is that between voluntary and forced prostitution. Voluntary prostitution is the by-product of self-employment and/or financial independence, recognition of autonomy, and free-will (though confounding factors may force a person to enter the sex trade, ie. addiction, unemployment, and/or the need to support their family). Forced prostitution is distinguished by coercion and a lack of free-will, trickery and, often, a threat of violence- exploitation. Forced Prostitution is when an individual, by any means, forces or coerces another individual to engage in prostitution.

Before we progress further, we need to make important distinctions between full legalization (in the Netherlands), partial decriminalization (in Canada today), and full decriminalization (my suggestion for future regulation).

1.3 Full Legalization

Full legalization encompasses the regulation of prostitution through laws regarding where, when, and how prostitution can take place.⁴⁷ This means that the state regulates the sex industry and can declare certain kinds of sex work to be legal, under strict conditions.⁴⁸ This model is currently utilized in New Zealand and Australia.⁴⁹ The full legalization of prostitution frees all those who participate in, sell, buy, or facilitate the selling of sex from criminal liability and responsibility.⁵⁰ This can mean having criminal law regulate the sexual exploitation of sex-workers and forced prostitution, but largely other legislation is at the forefront (labour law, zoning, health and licensing etc.).

⁴⁷ *supra* note 1

⁴⁸ C. Benoit and L. Shumka *Sex Work in Canada* (2015) <<http://www.understandingsexwork.com>> accessed 1 September 2017

⁴⁹ Seo-Young Cho and others, 'Does legalized prostitution increase human trafficking?' (World Development 41/01, 2013) 67-82

⁵⁰ DM Hughs, 'The demand for victims of sex trafficking' Chicago Alliance Against Sex Trafficking", (June 2005)

1.4 Partial Deriminalization

Conversely, partial decriminalization entails criminalizing only certain acts or persons relative to sex-work. There are a few different models in which this may apply. For example, in Sweden, the sellers of sex are decriminalized, however the buyers of sex, in addition to pimps and traffickers, are not. This contrasts greatly from the model in New Zealand in 2003, when all parties involved in the buying, selling, and facilitating of sex were decriminalized.⁵¹ As such, New Zealand is an example of full decriminalization, while Sweden is an example of partial decriminalization. Moreover the restrictive rules about zoning, for example, have the effect of putting sex-workers in a precarious position between legality and illegality, and making them very vulnerable to exploitation. We will discuss the latter in greater depth in Section (4.5). In this model, sex workers are generally viewed as ‘victims’ and are generally not criminalised under partial decriminalisation laws.⁵² As such sex-work is not criminalized, but it makes it more difficult for them to be fully recognized as workers.

1.5 Full Decriminalization

Full decriminalization eliminates criminal penalties for sex work and prohibits the state and law-enforcement officials from intervening in any prostitution-related activities or transactions, unless other laws apply.⁵³ This is the case in New Zealand, as mentioned in Section 1.3. This, for all intensive purposes, would require being subjected to laws which

⁵¹ LS Wyler and A Siskin, 'Trafficking in persons: US policy and issues for Congress' (2010) Congressional Research Service <<https://www.fas.org/sgp/crs/row/RL34317.pdf>> accessed 12 August 2017

⁵² *ibid*

⁵³ *ibid*

apply to all employees and operating under no specific regulatory regime.⁵⁴ Decriminalization of sex work does not mean the total absence of any regulation of sex work. With a decriminalisation model, sex workers are more empowered to make decisions about the way they would like to work.⁵⁵ Under decriminalisation, consensual activity between an adult sex worker and client would not be illegal; under legalisation it could be.⁵⁶

1.6 Human Rights & Labour Law Approaches

Correlated to the legislative approach comes further regulatory division between the human rights approach and the labour law approach. From decriminalization and legalization two approaches emerge, as previously mentioned: the human rights approach and the labour law approach. These are, by no means, established academic terms within the context of regulating prostitution, but rather amount to what I argue to be the general basis to the regulatory approach(es) taken from different countries. The prevalent approach utilized ultimately dictates the legal position taken by the country.

1. (6.1) The Human Rights Approach

The human rights approach focuses on fundamental human rights as a basis for lawmaking, prevention of stigmatization and exploitation. The human rights approach is based on the notion that human rights are universal and indivisible by virtue of being

⁵⁴ Giandomenico Majone, *'The regulatory state and its legitimacy problems'*, (Western European Politic 22/01, 2005) 1-24

⁵⁵ The Lawyers Collective, *Legislating an Epidemic: HIV AIDS in India*, (New Delhi Universal Publishing Co. PVT Ltd, 2003)

⁵⁶ L. Jeffrey and B. Sullivan, *Canadian Sex Work Policy for the 21st Century: Enhancing Rights and Safety, Lessons from Australia*, Canadian Political Science Review 3/01, 2009)

human, sex-workers deserve to enjoy all the rights that are conferred to all people.⁵⁷ The basic tenet is that decriminalization would suffice and focus shifts to protection from abuse, violence, and/or exploitation.

The human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.⁵⁸ This is generally used in the context of economic development and I have used these terms and adapted them to fit the framework of sex-work. A human rights-based approach identifies the sex-workers as rightsholders, as well as their entitlements and corresponding duty-bearers and their obligations. The human rights approach works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.⁵⁹

1. (6.2) The Labour Law Approach

The labour law approach, on the other hand, ties more directly to the full legalization of prostitution. Labours laws are the laws that deal with legal rights of working people and the organizations they work for.⁶⁰ They protect employees' rights and set forth employers' obligations and responsibilities. As such the labour law approach is tied to accepting prostitution as a legitimate occupation. Labour laws (like all other laws) are means to an end; we need them, and use them, to advance societal goals.⁶¹ A labour law approach emphasizes autonomy, safe sex and sexual health, as well as the acceptance of

⁵⁷ Human Rights Council, A/HRC/17/31

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ Cambridge University Press. (2008). *Cambridge online dictionary*, Cambridge Dictionary online.

⁶¹ Guy Davidov, *A Purposive Approach to Labour Law*, (Oxford, 2016) 4

prostitution as an occupation. Essentially, it refocuses the law away from stigmatizing sex workers and tackles acts of exploitation, abuse and trafficking.

1.7 Research Question & Sub Questions

In order to answer the main question: which regulatory approach to prostitution should Canada adopt in order to fully protect sex-workers' rights - I will answer several sub-questions in the upcoming chapters. Instead of asking ourselves whether or not sex-work should be regulated, we must ask ourselves how sex-work should be regulated. I will use International law provisions in order to provide evidence that national governments are obligated to protect sex-workers' human rights and prevent all forms of (sexual) exploitation. Decriminalization of adult prostitution would enable sex-workers to carry out their business and grant access to protection provided by employment standards and occupational health and safety standards.⁶² All the while, human rights are upheld. This is especially true given the shift away from outlawing prostitution and instead outlawing exploitation.

In the second chapter, I will further elaborate on international obligations. More concretely, this research will provide evidence that national governments are under obligation to protect sex-workers' human rights and prevent all forms of exploitation. This is necessary to be able to get more insight in the regime of international human rights law, and to be able to understand the importance of decriminalizing prostitution. At the end of chapter 2, the importance of the human rights approach and international advocacy of decriminalization will be affirmed. As this research will show, ensuring

⁶² See, for example: Amnesty International, World Health Organization, UNAIDS, International Labour Organization, the Global Network of Sex Work Projects, Human Rights Watch, and more.

access to human rights and civil liberties is necessary to depict the situation regarding the perils of the criminalization of prostitution. If sex-work is criminalized liberties and basic needs are effectually infringed upon.

In chapter 3, I will elaborate on the Canadian legislative approach and its utilization of the human rights approach. I will challenge disconnect between the intended purpose of international obligations and their actual application. What's more I will address the missing link between human rights and labour law in present-day Canada. In order to do so, I will look to relevant case law, common practices and legislation.

In the fourth chapter, the Dutch full legalization approach will be examined with emphasis on the labour law approach. The recognition of prostitution as a legitimate occupation underpins the labour law approach. However, does the Netherlands really deem sex-work legitimate work? Following the legal framework, different measures will be reviewed and their practical application will be looked at in greater depth. At the end of chapter 4, a conclusion will be drawn whether or not labour law rights are enough and if the Dutch approach has been effective in ensuring said rights.

Chapter 5 will present final conclusions of the research. At the end of this chapter, the main research question will be answered accompanied by concluding remarks.

-CHAPTER II-

LEGISLATIVE TREATMENT OF PROSTITUTION IN INTERNATIONAL LAW

There is no denying that the sex industry has taken on international proportions and is recognized as an economic engine for several countries. According to Havocscope, a consumer group, prostitution worldwide is a \$186 Billion industry.⁶³ Countries around the world debate the merits of legalizing or decriminalizing prostitution⁶⁴ and international obligations must shape the domestic legal regime⁶⁵ regulating prostitution.

International legal instruments have focused on prostitution as a whole, not distinguishing between forced and voluntary prostitution,⁶⁶ honing in on only its exploitative potential. One of the main drawbacks is that “foreign” women who are often un-documented are restricted in their access to human rights.⁶⁷ These concerns have generated all types of scholarly positions.⁶⁸ The aim of this chapter is to focus on the minimum standards set by international law, as well as the gaps that need to be filled with regards to human rights and labour rights for sex-workers. What’s more, I will examine Canada’s compliance with international obligations in order to contemplate both the potential and consistency of pursuing alternate avenues of regulation. By looking to the protocols, conventions and

⁶³Havocscope, 'Prostitution Revenue by Country' (*Havocscope*, nd)<<http://www.havocscope.com/prostitution-revenue-by-country/>> accessed 10 August 2017

⁶⁴ See: SY Cho, Does Legalized Prostitution Increase Human Trafficking? , vol 41 (Elsevier, Jan 2013); R Weitzer, *Legalizing Prostitution from illicit vice to lawful bliss*, 2012

⁶⁵ *supra* note 34

⁶⁶ Joyce Outshoorn, The Political Debates on Prostitution and Trafficking of Women, (Social Politics:International Studies in Gender State and Society 12/01, 2005)

⁶⁷ L. Gulkur, The “Natasha” experience: Migrant sex workers from the former Soviet Union and Eastern Europe in Turkey, (Elsevier 2002)

⁶⁸ *ibid*

laws we determine common practices, values, and paths. What are the standards set by international law and is Canadian law in line with these standards? How about Dutch Law? What's more, what needs to change? I will start by elaborating on international obligations.

2.1 International Obligations Explained

Since the rise of the contemporary sex worker rights movement in the mid-1970s, people working in the sex industry⁶⁹ across the globe have demonstrated discontent and distress with the legal prohibition and stigmatization of sex work.⁷⁰ In the past 10 years laws and policies on sex work have been reformed in Australia, New Zealand, Germany, Sweden, and The Netherlands, varying from the Nordic model of abolition to criminalization and, on the other side of the spectrum, complete decriminalization.

Looking to the evolution of International law pertaining to prostitution, we see a changing tide. In general, prostitution is largely prohibited, but now women have more autonomy and we see a shift from using criminal law sanctions to also including human rights law, immigration law, and administrative law.

International Law sets the minimum standards for obligations and responsibilities of states. Through conventions and protocols, states are forced to assume responsibility for

⁶⁹ *supra* note 8

⁷⁰ Valerie Jenness, *Making It Work: The Prostitutes' Rights Movement in Perspective*, (Hawthorne, NY: Aldine de Gruyter 1993); Deborah Brock, *Making Work, Making Trouble: Prostitution as a Social Problem*, (Toronto: University of Toronto Press, 1998)

the upholding of civil liberties and human rights. The Nations' position in prostitution can be likened to that of an enforcer and mitigator, because they are able to stop rights infringement by criminally punishing impugners, yet they also act as a stepping-stone for change and aid. The obligations are centered on human rights. As a result of this developing regime, states have been forced to re-evaluate their own practices.

2.2 Relevant International Conventions & Protocols

The **1949 United Nations (UN) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others**⁷¹ acts as a good starting point and emphasizes the trials and tribulations of prostitution and procurement. Signatories must criminalize anyone who brings another person into prostitution⁷², even if said person did so with that person's consent. The important distinction to make here is that the Convention outlaws pimping and not the person(s) who sells their services. In principle, international law is in line with Canadian law- the sale of sexual services remains legal, while johns and pimps are outlawed. The consenting party is not criminally penalized. Article 16 states that all parties must agree to take measures for the prevention of prostitution, as well as foster rehabilitation and socialization of victims of prostitution.⁷³ Several groups and advocates for the rights and support of sex-workers exist in Canada,⁷⁴ such as Sex Professionals of Canada, Sex Workers Alliance of Vancouver, Prostitutes' Empowerment Education and Resource Society and an umbrella coalition known as The Canadian Alliance for Sex Work Law Reform.

⁷¹ UNGA Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (2 December 1949) UN Doc A/RES/317

⁷² *ibid.*, art 1

⁷³ *ibid.*, art 16

⁷⁴ See for Example: PACE Society, Sex Professionals of Canada (SPOC), Amnesty International

Article 6 strictly prohibits any kind of state regulation of prostitution.⁷⁵ The 1949 convention introduced a broad recognition of the issue of prostitution as a **human rights** concern at the international level, and represents a strong assertion of protecting women from sexual exploitation, trafficking or prostitution.⁷⁶ There is a double-edged sword in the Convention, relative to Canadian law, in that the Convention outlaws trafficking in persons, but also condemns all forms of prostitution. Prostitution is deemed a violation of individual dignity and welfare, whether that prostitution is voluntary or not.⁷⁷ The 1949 Convention cannot truly be reconciled with the law in Canada, since prostitution itself is legal and only offences associated with it are criminalized. The Canadian government did not condemn all forms of prostitution in such an absolute manner, therefore they never became signatory to the 1949 Convention. To sign this convention would take one step back in the revolution towards giving women more autonomy over their own bodies and digress back to an even more stigmatizing perception of prostitution.

The **1979 UN Convention on the Elimination of All Forms of Discrimination against Women**⁷⁸ (CEDAW) is another international Convention that touches on the issue of prostitution, though focuses broadly on women's equality rights. Article 6 specifies that states parties must take all appropriate measures to suppress trafficking in women and the "exploitation of prostitution of women."⁷⁹ Thus, condemning exploitation rather than prostitution itself. Canada ratified CEDAW in January 1982 and exemplifies the

⁷⁵ *supra* note 1, art 6

⁷⁶ Frank Laczko and Elzbieta Gozdzik (ed), Data and Research on Human Trafficking: A Global Survey *International Migration* 43/1/2, 2005)

⁷⁷ Diane Lavallée, "La prostitution: profession ou exploitation?" (*Éthique publique*, Revue internationale d'éthique sociétale et gouvernementale 5/02, 2003)

⁷⁸ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

⁷⁹ *ibid*, art 6

foundation of outlawing exploitation rather than prostitution. This is an important shift in the international arena. Sex trafficking and prostitution do not always overlap, however. Sex trafficking requires exploitation of one person by a third party and is a serious crime under the Criminal Code in Canada⁸⁰ (as well as the Netherlands). A human rights based approach identifies rights-holders (including both those trafficked and those accused of trafficking) and their entitlements as well as duty-bearers (typically states) and their responsibilities.⁸¹ As such, it is the right of sex-workers to not be trafficked or coerced and it is the duty of the state to outlaw exploitation and suppress trafficking.⁸² Both the Netherlands and Canada have ratified CEDAW, as well as implemented separate legislation pertaining to trafficking and exploitation.⁸³

In 1989, the **UN Convention on the Rights of the Child**⁸⁴ was put in place to protect the human dignity and status of children, emphasizing the fundamental rights and best interests of children under 18. In particular, article 34⁸⁵ states that signatories must protect all children from sexual abuse and exploitation by taking appropriate measures to prevent them from being forced into unlawful sexual activity and from being exploited through prostitution. Canada ratified the convention in December 1991. This convention is complemented by the Optional Protocol to the Convention on the Rights of the Child

⁸⁰ Criminal Code, s 279

⁸¹ See: Anne Gallagher & Nicole Karlebach, *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice* (Geneva: United Nations Office of the High Commissioner for Human Rights, 2011) at 5; Office of the UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (Geneva: United Nations Publication, 2010) at 49-50

⁸² *ibid*

⁸³ See: IRPA, s 118(Canada); Criminal Code of the Netherlands, art 273f

⁸⁴ Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3

⁸⁵ *ibid*, art 34

on the sale of children, child prostitution and child pornography.⁸⁶ Article 1 of the optional protocol calls on all parties to prohibit child prostitution, defining the term as “the use of a child in sexual activities for remuneration or any other consideration.” States are required to penalize, under criminal law, the offering, obtaining, or providing of a child for child prostitution. Thus, this Protocol explicitly outlaws any form of child prostitution and lays the emphasis on prosecuting those who exploit children rather than the children involved in prostitution themselves. Canada ratified the Protocol in September 2005. With this Convention, it is important to emphasize that there is a difference between women and children. Children are vulnerable peoples who we must protect. Women have the right to make their own choices. In order to not be exploited we need an autonomous subject that consents to provide sex work and that is the reason why international law treats women differently from children.

Focusing on women’s rights, in 1995 the Fourth World Conference on Women resulted in the **Beijing Declaration and Platform for Action**.⁸⁷ Paragraph 113(b) of this document catalogues prostitution as a form of violence against women, omitting the reference to voluntary prostitution characteristic to the 1949 convention.⁸⁸ The declaration outlined its strategic objective of eliminating trafficking in women and assisting victims of violence arising from prostitution and trafficking.⁸⁹ Signatories were called upon to support UN efforts to prevent and eradicate child prostitution, by enacting and enforcing legislation to protect girls from all forms of violence, including child

⁸⁶ UNGA, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (2000) UN Doc A/RES/54/263

⁸⁷ A/CONF.177/20 1995 and A/CONF.177/20/Add.1 1995 (Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995)[hereinafter Beijing Declaration]

⁸⁸ *ibid*, para 113(b)

⁸⁹ *ibid*, para 130

prostitution.⁹⁰ The declaration recognized the element of choice involved in adult prostitution, focusing its attention, instead, on forced prostitution and child prostitution.⁹¹ Canada committed itself to the Beijing Platform in September 1995, again reiterating the difference between children and adults. Voluntary prostitution is not explicitly condemned, outlawed or frowned upon. This is also the case in the Netherlands, where child and forced prostitution are not tolerated. What's more the age of participating in prostitution willingly was raised to 18 in the Netherlands (we will discuss this fact later in Chapter 4).

Finally, in 2000 the international community put forward the **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime**.⁹² Article 5 calls upon states parties to criminalize trafficking, with the exploitation of the prostitution of others included in the definition of "trafficking in persons."⁹³ In this way, trafficking in human beings, which is often integrally linked to the exploitation of the prostitution of others, was forcefully condemned in international law. Canada ratified the protocol in May 2002 so as to show international support and outlaw forced prostitution.⁹⁴ Parliament also passed Bill C-11, the Immigration and Refugee Protection Act⁹⁵. This act replaced the former Immigration Act and created a new offence to deal with trafficking in persons. Later, Parliament, in 2004, introduced Bill

⁹⁰ Ibid., paras. 230(m); 283(d).

⁹¹ Wendi J. Adelson, "Child Prostitute or Victim of Trafficking?", (University of St. Thomas Law Journal 6/1), 2008)

⁹² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementary to United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000), UN Doc A/RES/55/25 hereinafter UN Protocol]; Annex II, art. 3(a),

⁹³ ibid, art 5

⁹⁴ *supra* note 87

⁹⁵ The Immigration and Refugee Protection Act (IRPA) (S.C. 2001, c. 27) [Bill C-11]

C-42, The Public Safety Act⁹⁶, which includes a new offence — trafficking in persons — with very high maximum penalties. In the Netherlands special legal status was also given to women who were victims of trafficking and awaiting persecution of their traffickers.⁹⁷

Though not an international law instrument, the World Charter for Prostitutes' Rights (1985) declares to protect the rights of sex-workers worldwide,⁹⁸ and makes the following statement:

“Decriminalize all aspects of adult prostitution resulting from individual decision. Decriminalize prostitution and regulate third parties according to standard business codes...Prostitutes should have the freedom to choose their place of work and residence.”⁹⁹

This World Charter was born out of the two “World Whores Congresses” that were held in Amsterdam (1985) and Brussels (1986) which set the ground-work for a human rights approach and the sex-workers rights movement. This is certainly important to note, in order to exemplify the fact that free will and autonomy are pivotal proponents of decriminalization, which have already been explored and urged for over three decades. The decriminalization is not directly binding but is consistent with the purpose of human rights legislation. It also inadvertently calls for a labour law approach in order to guarantee these rights and autonomy.

⁹⁶ The Public Safety Act, 2002 (S.C. 2004, c. 15) [Bill C-42]

⁹⁷ Eefje de Volder, Trafficking in the Domestic-Work Sector in the Netherlands: A Hidden Phenomenon. (Journal of Immigrant & Refugee Studies 15/2) 140-154

⁹⁸ World Charter for Prostitute Rights, 1985

⁹⁹ *ibid*

2.3 Why Decriminalization Fits International Legal Obligations

As we have seen in section(s) 2.2 and 2.3: international laws can be quite complex and lend to disconnects between domestic and international obligations, because they depend on states whose purpose is to do what's best for their own people as a whole. Throughout this, constitutional rights may change to be aligned with international obligations, while other rights are pushed aside (autonomy and labour rights).

An article was published in the "Humanist", observing the fact that the World Charter had become a template that is being utilized by Human Rights groups across the globe.¹⁰⁰ The World Charter for Prostitutes' Rights calls for the decriminalization of "all aspects of adult prostitution resulting from individual decisions"¹⁰¹ and also supports that prostitutes should be guaranteed "all human rights and civil liberties".¹⁰²

Human rights obligations are addressed to States, whereas trafficking *per se* involves criminal acts carried out by private actors. The State has obligations under human rights law to have in place adequate measures – legislative or otherwise – to ensure that individuals are protected from human rights abuses which may occur as a result of being or having been trafficked, such as being subjected to inhuman or degrading treatment.¹⁰³

International conventions avoid condemning all forms of adult prostitution in order to focus attention on criminalizing the exploitation of women through trafficking and forced

¹⁰⁰ Kimberly Klinger, 'Prostitution humanism and a woman's choice — Perspectives on Prostitution'(Humanist, 1January)<[https://www.thefreelibrary.com/Prostitution+humanism+and+a+woman%27s+choice.+\(Perspectives+on...-a096417149](https://www.thefreelibrary.com/Prostitution+humanism+and+a+woman%27s+choice.+(Perspectives+on...-a096417149)> accessed 8 August 2017

¹⁰¹ Kamala Kempadoo, "Introduction: Globalizing Sex Workers' Rights." In K. Kempadoo & J. Doezema (eds.), *Global Sex Workers: Rights, Resistance, and Redefinition* (New York, NY: Routledge, 1998) 1-28

¹⁰² *ibid*

¹⁰³ Jessica Elliott, *The role of consent in human trafficking*, (Routledge, 2014)

prostitution. We see a shift from criminal law to emphasis on human rights, empowerment and the autonomy of the individual. All forms of child prostitution, however, continue to be criminalized (rightly so). As such, the evolution towards a better recognition of women's autonomy is tied to the attitude towards prostitution of women in international law. This is exemplified by a move from strong condemnation of all forms of prostitution to a condemnation of exploitation. This means that only forced prostitution and trafficking are prohibited.

States have thus not lost sight of the intent to uphold the rights and liberties of people. In fact, international sanctions show that the intentions are there, but we must explore their application. The rights of all sex workers to participate without discrimination in decisions affecting their lives must be respected.¹⁰⁴ States have obligations under international law to provide an adequate social safety net and to address intersectional discrimination and structural inequalities in order to ensure that people do not have to rely on sex work as their means of survival. The right of everyone to social security is recognized in international law, including in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁵.

Already early on in International Law, we see emphasis on labour rights. The International Labour Organisation (ILO) was established in 1919 as part of the Versailles Treaty ending World War I, with the principal role of setting international labour standards. The labour standards were designed to eliminate unjust and inhumane labour

¹⁰⁴ For example, the UN Committee on Economic, Social and Cultural Rights has stated that the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12", General Comment No. 14: The right to the highest attainable standard of health, para. 54.

¹⁰⁵ ICESCR, art 9

practices with the main purpose to “promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues”.¹⁰⁶ In 1946, after the formation of the United Nations, the ILO became a specialised agency of the UN.¹⁰⁷ After many years of lobbying from the sex industry, the ILO has begun to indirectly advocate for the legal recognition of sex work by calling on governments for its recognition as an economic sector and “a legal occupation with protection under labour law and social security and health regulations”.¹⁰⁸

In countries whose legal systems criminalise sex work, despite international labour standards, sex workers are unable to exercise protection from labour laws, occupation laws or health and safety laws. As a result, many sex workers say they feel ‘incapacitated by the state and not respected’¹⁰⁹ They are unable to demand basic working conditions or legal work contracts.

2.4 The Sex Worker as a Victim (Rights Violations)

The reality is that victims of sex trafficking often overlap with people in sex-work. States need to actively fight trafficking and exploitation, not sex-work as a whole. The evolving need for combatting human trafficking comes with responsibilities, meaning not only human rights need to be considered, but also labour rights. The primary and secondary evidence gathered by Amnesty International demonstrates that criminalization and

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

¹⁰⁸ Janice Raymond, Legitimizing Prostitution as Sex Work: UN Labour Organization (ILO) Calls for Recognition of the Sex Industry, (Coalition Against Trafficking in Women, July 12 1999)

¹⁰⁹ P. Östergren, *Sexworkers' Critique of Swedish Prostitution Policy*, (2010)<

http://www.petraostergren.com/pages.aspx?r_id=40716> accessed 19 Feb 2017; The Economist, *Sex is Their Business*, (The Economist, September 2nd 2004)< http://www.economist.com/opinion/displaystory.cfm?story_id=3151258> accessed 19 Feb 2017

penalization of sex work have a foreseeably negative impact on a range of human rights.¹¹⁰ These include: the rights to life, liberty, autonomy and security of person¹¹¹; the right to equality and non-discrimination¹¹²; the right to be free from torture or cruel, inhuman or degrading treatment or punishment¹¹³; the right to privacy; the right to the highest attainable standard of health¹¹⁴; the right to information and education¹¹⁵; the right to freedom of opinion and expression¹¹⁶; the right to just and favourable conditions of work¹¹⁷; the right to family life and to found a family¹¹⁸; and the right to remedy for human rights abuses.¹¹⁹

2.(4.1) Violation of the Right to Sexual & Reproductive Health

A sub-section of human rights is called sexual and reproductive health rights. This is an umbrella term for entitlements such as the right to choose who one has sex with, when and where, and whether one wants to have sex at all. This means that all governments should protect the right of people to engage in sex between consenting adults and that the state should not interfere with people's sexual choices. Criminalizing consensual adult sexual activities has been recognized as violating states' obligation to respect the right to sexual and reproductive health in that it impedes access to sexual and reproductive health services.¹²⁰ The UN Committee on Economic Social and Cultural Rights has confirmed

¹¹⁰ Amnesty International Policy on State Obligations to Respect, Protect, and Fulfil The Human Rights of Sex Workers (26 May 2016) POL 30/4062/2016 26 May 2016

¹¹¹ UDHR, art 3

¹¹² UDHR, art 7

¹¹³ UDHR, art 5

¹¹⁴ UDHR, art 25

¹¹⁵ UDHR, art 26

¹¹⁶ UDHR, art 19

¹¹⁷ UDHR, art 23

¹¹⁸ UDHR, art 16

¹¹⁹ UDHR, art 8; *supra* note 110

¹²⁰ See CESCR, General Comment 22 Right to sexual and reproductive health (Article 12)), (2016)UN Doc E/C.12/GC/22), para. 57

that states must specifically ensure that sex workers have access to the full range of sexual and reproductive health care services.¹²¹

2.(4.2) Violation of the Right to Security of Person, Housing & Health

Where sex workers are required by law to operate alone and/or are prohibited from securing an area for themselves, it diminishes their capacity to ensure a safe work environment. Sex workers are forced to operate covertly and limits actions that sex workers take to manage their safety and, in doing so, violate sex workers' human rights, including their rights to security of person, housing and health.¹²²

2. (4.3) Violation of the Right to Non-Discrimination

The criminalization of sex work also frequently works to exclude sex workers from protections available to other people under labour laws, as well as health and safety laws, and can impede or prohibit them from forming or joining trade unions to secure better working conditions and health and safety standards. This, in turn, can render sex workers at greater risk of exploitation by third parties.¹²³ Criminalization of sex work also undermines the right to privacy, which includes individuals' freedom to make autonomous decisions with regard to their bodies.¹²⁴

Equating trafficking with sex work does a great disservice to both sex workers and anti-trafficking campaigns alike, eventually infantilising women. The most powerful weapon

¹²¹ *ibid*, para 49(a).

¹²² See: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

¹²³ See: NSWP, *Sex Work and the Law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reform*, 2014

¹²⁴ ICCPR, Article 17(1)(2); ICRPD, Article 22(1); *K.L. v. Peru*; UN Doc. CCPR/C/85/D/1153/2003, paras. 6.4-6.5; CEDAW, General Recommendation 24: At least one human rights body has directly applied the right to privacy to sex outside of the confines of marriage.

to deny sex work the status of work is that of stigma. Criminalizing, even acts surrounding prostitution, targets minority groups, increases stigmas, and inhibits organization.

2.5 The Sex Worker As An Autonomous Person

The European Court of Justice in *Jany*¹²⁵ held that prostitution is an economic activity that can be pursued by a self-employed person but it must be established that there is no relationship of subordination regarding choice, working conditions and conditions of remuneration, it must be under that person's own responsibility and the monies must be paid directly and in full to the person. Though this decision is only binding on one of the jurisdictions in question, the Netherlands, it reflects the entire Unions motion to recognize sex-work and emphasizes the implied desire for the autonomy of sex-workers in the EU.

Sex worker advocacy groups view prostitution as a legitimate form of labour that sex-workers voluntarily choose to practice.¹²⁶ They see all forms of labour as potentially exploitative, but subject to various laws and regulations that prevent said exploitation.¹²⁷ As such, the conditions under which sex work is practiced, rather than sex work itself should be challenged. Once prostitution is decriminalized, the potential harm that does arise from exploitative sex work can be dealt with by general criminal laws and municipal regulations. As such, decriminalization would enable sex-workers to exercise

¹²⁵ Case 268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [20 November 2001]

¹²⁶ *supra* note 43

¹²⁷ *supra* note 32

their rights through laws geared towards said specific right, instead of facing criminal punishment and/or barriers.

2.6 Concluding Remarks

In the case of sex-work, according to international law, a private actor should not be subjected to state control. With the regulation of sex-work governments have stigmatized sex-workers, in fact displacing sex workers more than helping them. It is, for example, not exactly clear how many people are actually trafficked. States have a duty to ensure that policies and procedures account for all their citizens, and that their rights are upheld. More generally, governments need to develop adequate responses to violations and abuses surrounding sex-work, not sex-work itself.

Though several instruments exist in international law, major human rights violations still persist – largely the right to security and the freedom of expression- should prostitution be criminalized. Decriminalization is in line with international obligations, emphasizing the respect, protection and fulfillment of human rights of sex-workers. Emphasis should now shift from prostitution in its exploitative capacity to including a network of labour law reform, creating a niche for prostitution as legitimate work.

-CHAPTER III –

GENERAL OVERVIEW OF PROSTITUTION IN CANADA

-A HUMAN RIGHTS APPROACH-

In Canada, we see a similar pattern of change as in international law, emphasizing women's rights, the best interest of the child¹²⁸, and outlawing exploitation and violence rather than prostitution itself. Legal reform has been addressed by several government funded commissions and committees: the Special Committee on Pornography and Prostitution in 1985¹²⁹, the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights in 1991¹³⁰, Federal-Provincial-Territorial Working Group on Prostitution in 1998¹³¹, to name a few.

Tackling the laws that arguably expose sex workers to violence, harassment, health risks, and other human rights violations, we are confronted with several potential means of regulation of sex-work. The foci of Canadian legislation and, ultimately, the position of regulation have been determined by human rights obligations and by the purpose of preventing the extreme harm of prostitution- sexual exploitation.

¹²⁸ Children's Law Reform Act, R.S.O. 1990, s 24

¹²⁹ *supra* note 22: Fraser Committee

¹³⁰ ***Note: Pursuant to Standing Order 108, the Subcommittee on Solicitation Laws was composed of 6 members of parliament

¹³¹ Federal-Provincial-Territorial Working Group on Prostitution, "Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities", (December 1998) 5

Canada finds itself in a curious situation where almost everything related to prostitution has been regulated by criminal law except the transaction itself.¹³² The 1985 addition of the communicating provision to the existing bawdy-house and living on the avails provisions¹³³ created a more precarious mode of work for sex workers. Sex workers were driven to street-work, and ultimately denied their one safeguard-communication-which allowed them to evaluate prospective clients forthwith,¹³⁴ ultimately inhibiting sex-workers ability to preassess any threat a john may or may not pose to their safety and well-being.

In criminalizing so many activities surrounding the act itself, Parliament has made prostitution *de facto* illegal if not *de jure* illegal.¹³⁵ There are certainly risks involved with being a sex-worker, and neither sex workers nor parliament seek to underplay risks, but it should be about a balance between protecting sex-workers and protecting the citizens the parliament represents.¹³⁶

According to Kate Shannon, due to the existing regulations, prostitutes face some of the highest health concerns in Canada.¹³⁷ This includes an exacerbated rate of "drug related harms, trauma, and HIV and other sexually transmitted infections."¹³⁸ In addition, prostitutes suffer from the highest mortality rate in Canada, in contrast to other victims of homicide.¹³⁹ This is due to the proclivity for secrecy and being unable to vet clients

¹³² [1990] 1 S.C.R. 1123

¹³³ Canadian Criminal Code, RSC, 1985 (3d Supp.), c. 19, s. 9.

¹³⁴ Jane Dodsworth, Pernille Sorensen, and Birgit Larsson, "A study of the support needs of sex workers across Norfolk, UK" (2014)

¹³⁵ *ibid*

¹³⁶ Laura Barnett and Lyne Casavant, Prostitution: A Review of Legislation in Selected Countries (Background Paper), (Library of Parliament Ottawa, Canada, 2011)

¹³⁷ Kate Shannon, "The hypocrisy of Canada's prostitution legislation," (Canadian Medical Association Journal (182) 2010) 1388

¹³⁸ *ibid*

¹³⁹ *ibid*

properly, driving the sex-workers more underground.¹⁴⁰ David Hugill argues that the former Criminal Code provisions regarding prostitution partially contributed to the prolific serial murders that were committed between 1978-2002 by Robert Pickton,¹⁴¹ responsible for the murder of almost 50 sex-workers. This is largely due to the failure to accept sex-work as work and force them to go underground. What's more, sex-workers were not able to assess Pickton as a threat due to laws barring communication for the purpose of soliciting sex.

3.1 Background To Regulation - Multi-Tiered Responsibility

In Canada, it is important to recognize the fact that there are various levels of law: federal, provincial, and municipal. For our purposes, and due to the confines of this thesis, I will have on a brief overview of the division of powers. Parliament has used its criminal law power to exercise primary jurisdiction over prostitution-related concerns.¹⁴² These specific prostitution-related offences are contained primarily in sections 210 to 213 of the *Criminal Code*,¹⁴³ as discussed above.

Although the international community is most interested in protecting victims of trafficking and prostitution, local communities have their own agendas- protecting their cities, homes, and children from the negative repercussions of “embracing” prostitution. Each level of Canadian government approaches prostitution in a different way, according

¹⁴⁰ *ibid*

¹⁴¹ David Hugill, *Missing women, missing news: Covering crisis in Vancouver's Downtown Eastside*, (Halifax: Fernwood Publishing, 2010) 41

¹⁴² *Constitution Act, 1867*, s 91(27): the powers of Parliament include “[t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”

¹⁴³ Canadian Criminal Code, RSC, 1985, c. C-46.

to its priorities and powers. Ultimately we find a nexus of prostitution-related measures intertwined with one another, with junctions at various levels.

The federal government strives to fulfill international obligations with emphasis on criminal law based penalties for procurement, trafficking, and the commercial sexual exploitation of children. Needless to say, trafficking remains a reality in Canada, which seeks attention through new modes of combat – human rights and administrative law. Beyond federal legislation, provinces and municipalities are also making full use of their powers to deal with prostitution. A number of the measures currently in place have been accused of being unconstitutional, although only a few have actually been brought before the courts. The dilemma is that there are so many different approaches to dealing with prostitution, as well as different perceptions of the acts, rights, and standards of the sex workers. The problem also varies across the provinces, cities, and municipalities as such a strictly federal approach is also not the solution. On the flip side, however, provincial and municipal jurisdictions can only cater to issue-specific or area-specific issues within the purview of their power. Thus they are unable to solve the problem on a broader scale. To understand the situation in Canada I will look to specific changes in legislation relative to acts and their implications for the Canadian prostitution law framework.

After the decision by the Supreme Court of Canada in *Hutt*¹⁴⁴, in 1978, there was increasing public pressure to amend section 195(1) of the criminal code to expand the definition of soliciting in response to what some perceived as the “plague” of street prostitution.¹⁴⁵ Police and provincial governments sought to be able to deal with activity

¹⁴⁴ *supra* note 81

¹⁴⁵ Sarah Beer, "The Sex Worker Rights Movement in Canada: Challenging the Prostitution Laws" (2011)

that, in their opinion, infested residential and commercial areas, bringing in drug trafficking and exploitation of children. As such, an undercover Vancouver police officer allowed Hutt, a sex-worker, to enter his unmarked vehicle, posing as a john. Ultimately, the “mere indication” of Hutt’s willingness to engage in the act of prostitution was not enough for it to be deemed criminal in nature.¹⁴⁶

It was after the *Hutt* case that the Fraser Committee reviewed three suggested strategies for dealing with prostitution: criminalization, decriminalization, and regulation. Criminalization would forbid all forms of prostitution and related activities. The Committee rejected this approach for several reasons. They thought it would lack public support, be virtually impossible to enforce, and applies a narrow moral view. The aims of decriminalization were enticing, but the Committee could still not fully get behind it. Finally, the Committee also rejected an exclusively regulatory approach: that prostitution should be controlled and regulated by the state, as is done in Nevada or West Germany. Following similar logic as that for contra-decriminalization, over-regulation would also lack support and pose problems relative to enforcement. Instead they opted for a combined approach- carefully linking the provisions to each aspect of prostitution-related activity. This has not been effective since several human rights violations are resultant of the explicit provisions set forth in the criminal code. On the surface, the client has been out-lawed and the presumed victim is protected. However, in actuality it is the sex-worker who still suffers from these new legislations.

¹⁴⁶ *supra* note 81

3.2 Violation of the Freedom of Expression

In 1986, two lower courts reached contradictory conclusions about the constitutionality of Bill C-49, which is an Act that sought to amend the criminal code in order to prevent the trafficking in persons.¹⁴⁷ In May 1987, the Appeal Division of the Nova Scotia Supreme Court ruled that the legislation violated the guarantee of freedom of expression, as well as freedom of association in the *Canadian Charter of Rights and Freedoms*¹⁴⁸, by placing unusual constraints on communication in relation to activity that was not illegal,¹⁴⁹ and interferes with their ability to associate with potential clients. What's more the nuisance caused by the act pitted against the limitation on association was deemed to fail the proportionality test.¹⁵⁰

On 17 July 1987, the Alberta Court of Appeal¹⁵¹ reached a contrary conclusion as follows: though the law did infringe on freedom of expression, the Alberta court held that it fell under the justifiable limitation clause of the Charter, as no "clear and convincing" alternative was available for dealing with the "nuisance" of street prostitution.

A third appellate court decision was the *Reference* case¹⁵² in the Manitoba Court of Appeal. Like the Alberta Court, they sustained section 195.1(1)(c)- a reasonable limit upon freedom of expression- without recourse to section 1 of the Charter. It held that "freedom of expression" was not even *prima facie* involved, and generally adopted a restrictive approach to the Charter. It remained for the Supreme Court of Canada to

¹⁴⁷ *R. v. McLean* (1986); 28CCC(3d) 176; *R. v. Bear* (1986), 54 C.R. (3d) 68).

¹⁴⁸ Canadian Charter of Rights and Freedoms, s 7, Part I of the Constitution Act, 1982

¹⁴⁹ *R v. Skinner* (1987); 35 C.C.C. (3d) 203

¹⁵⁰ *ibid*

¹⁵¹ *R. v. Jahelka* (1987), 79 A.R. 44

¹⁵² *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1987] 6 W.W.R. 289

resolve the issue, which it did in the Supreme Court *Reference Case*, by upholding the provisions.¹⁵³ Essentially, the court decided that there is a rational connection between the impugned legislation and the prevention of the social nuisance associated with the public display of the sale of sex. What's more, s. 195.1(1)(c) was deemed not to be unduly intrusive. This case certainly stirred things up, legally speaking. Up to this point in time nothing prohibited Parliament from using criminal law to deal with the "nuisance of street solicitation". That said, the Standing Committee on Justice and Human Rights established a Sub-committee on solicitation laws in Canada thereafter.

3.3 Bawdy Houses¹⁵⁴ - Deprivation of Security of Person

In Section 197(1), "common bawdy-house" means:

"a place that is kept or occupied, or resorted to by one or more persons, for the purpose of prostitution or to practice acts of indecency."

As per the Courts, this means that any defined space is capable of being a bawdy-house - a hotel, a house, a parking lot - provided that there is frequent or habitual use of it for the purposes of prostitution or for the practice of acts of indecency,¹⁵⁵ and the premises are controlled or managed by individuals selling sexual services or individuals with a right or

¹⁵³ *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 [hereinafter Prostitution Reference Case]

¹⁵⁴ Canadian Criminal Code, RSC, 1985, s 210 provides the following:

- Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- Every one who
 - is an inmate of a common bawdy-house,
 - is found, without lawful excuse, in a common bawdy-house, or
 - as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any

¹⁵⁵ *R. v. Patterson*, [1968] S.C.R. 157; *R. v. Sorko* (1969), 4 C.C.C. 214 (B.C. CA); *R. v. Rockert*, [1978] 2 S.C.R. 704; *R. v. Ikeda* (1978), 42 C.C.C. (2d) 195 (Ont. CA); *R. v. Lahaie* (1990), 55 C.C.C. (3d) 572 (Que. CA); *R. v. Labaye* (2004), 191 C.C.C. (3d) 66 (Que. CA); and *R. v. Kouri* (2004), 191 C.C.C. (3d) 42 (Que. CA)

interest in that space.¹⁵⁶ The test used to determine whether an act is indecent is a community standard of tolerance.¹⁵⁷

Within this framework, the interpretation of indecency depends on context, taking into account factors such as consent, the composition of any audience and the level of privacy of the room, community reputation of the place, and any harm caused. For example, if the room is private, or if there is no actual physical contact between a client and an entertainer, then an act is less likely to be labelled “indecent.” In *R. v. Pelletier*¹⁵⁸ the Supreme Court of Canada did allow sexual contact between an exotic dancer and her client, provided that it took within the confines of a private room.

Like its Common-law counterpart, the UK, there is no distinction in Canadian law between types of brothels, yet there are considerable differences, in terms of size, management practices, charges to sex workers and safety precautions. Though independent workers may be likened to self-employed sole operators in other sectors, the lack of recognition as an occupation results in sex workers being denied the labour and human rights afforded to workers in other labour market settings. Some brothels exhibit good employee-employer relations, while others display exploitative practices. That said, the perception of prostitution as a nuisance is still deeply rooted in the legal system and needs to be addressed.

Courts have also held that to be found guilty of keeping a common bawdy-house a person must have some degree of control over the care and management of the premises, as well

¹⁵⁶ *R. v. Pierce* (1982), 37 O.R. (2d) 721 (CA)

¹⁵⁷ See *R. v. Tremblay*, [1993] 2 S.C.R. 932; *R. v. Theirlynck* (1931), 56 C.C.C. 156 (SCC); *R. v. Mara*, [1997] 2 S.C.R. 630

¹⁵⁸ *R. v. Pelletier*, [1999] 3 S.C.R. 863

as must participate in the illicit activities that take place there.¹⁵⁹ This does not necessarily mean participating in sexual acts.¹⁶⁰ A sex worker may even be found guilty of keeping a common bawdy-house where he or she has used his or her own residence alone for the purposes of prostitution.¹⁶¹

Alternatively, to be found guilty of being an “inmate” of a bawdy-house, a person must be a resident or a regular occupant of the premises. To be guilty of being “found in” a bawdy-house, a person must have no lawful excuse for his or her presence and must have been explicitly found there by the police at the time of the raid.¹⁶² To be guilty of knowingly permitting the premises to be used as a common bawdy-house, a person must have actual control of the place and must have encouraged its use for that purpose.¹⁶³ Finally, to be found guilty of transporting a person to a common bawdy-house, the accused must know that the location is a bawdy-house. Taken together, a legitimate question that can be asked is: how does a sex worker even know when and where they find themselves in a “bawdy house”? This lends to the argument that Canada needs to re-address the regulation of prostitution, combining both labour and human rights law.

In 1990, the Supreme Court of Canada upheld the constitutional validity of what is now section 210. The Court held that although the bawdy-house provision infringed the *Canadian Charter of Rights and Freedoms*’ section 7 guarantee of life, liberty and security of the person, this infringement was in accordance with the principles of fundamental justice.

The *Bedford Case*, however, illuminates the changing outlook as the Supreme Court

¹⁵⁹ Canadian Criminal Code, RSC, 1985, s. 197(1); *R. v. Corbeil*, [1991] 1 S.C.R. 830

¹⁶⁰ *ibid*

¹⁶¹ *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. CA)

¹⁶² *R. v. Lemieux* (1991), 70 C.C.C. (3d) 434 (Que. CA)

¹⁶³ *R. v. Wong* (1977), 33 C.C.C. (2d) 6 (Alta. CA); and *R. v. Corbeil*

shifted its approach. The Court held that it could deviate from precedent because the 1990 judgment¹⁶⁴, under section 7, was primarily based on the physical liberty interest not the new security of the person dilemma raised in *Bedford*. What's more, it maintained that the principles of fundamental justice relied on in *Bedford*. The principles were argued to have only been developed since the 1990 judgement and are as follows:

- the law must not be arbitrary;
- the law must not be broader than necessary to achieve its purpose;
- and that the harmful effects of the law must not be grossly disproportionate to the benefits gained.¹⁶⁵

Thus these principles were not addressed in the earlier decision. Consequently, with respect to bawdy-houses, the Court held that section 210 infringed the section 7 Charter rights of prostitutes by preventing them from: “working at a fixed location; setting up indoor safeguards such as receptionists, bodyguards or other forms of monitoring that could help reduce the risks they face; benefitting from preventative health measures; and using safe houses to meet with clients.”¹⁶⁶

This deprivation of security of the person was not in accordance with the principles of fundamental justice. Chief Justice McLachlin stated:

“Parliament has the power to regulate against nuisance, but not at the cost of the health, safety and lives of prostitutes.”¹⁶⁷

¹⁶⁴ *supra* note 151

¹⁶⁵ *supra* note 7(*Bedford Case*)

¹⁶⁶ *ibid*

¹⁶⁷ *Bedford*, para. 136.

The Court striking down section 210 of the Criminal Code complements the aforementioned shift to human rights approach- traditionally accepted in Canada- but also can be coupled with the labour rights approach, a hallmark of the Dutch regulation regime.

3.4 Procurement Law- Violation of Charter Section 7 – Life, Liberty & Security of Person

Procurement denotes an act of persuasion. As we can deduce, this excludes situations where the person is already or subsequently becomes involved in prostitution of his or her own free will.¹⁶⁸ Procurement encompasses the following situations:

- requiring or attempting to require an employee to have sexual intercourse with a client;¹⁶⁹
- enticing someone who is not a prostitute into a bawdy-house for the purposes of illicit sexual intercourse or prostitution;¹⁷⁰
- procuring a person to enter or leave Canada for the purposes of prostitution;¹⁷¹
- controlling or influencing another person for gain in order to facilitate prostitution;¹⁷²
- intoxicating a person for the purpose of enabling anyone to have sexual intercourse with the intoxicated person;¹⁷³ and

¹⁶⁸ *R. v. Cline* (1982), 65 C.C.C. (2d) 214 (Alta. CA)

¹⁶⁹ *R. v. Deutsch*, [1986] 2 S.C.R. 2

¹⁷⁰ Canadian Criminal Code, RSC, 1985, s. 212(1)(b))

¹⁷¹ Canadian Criminal Code, RSC, 1985, s. 212(1)(g))

¹⁷² *R. v. Perrault* (1996), 113 C.C.C. (3d) 573 (Que. CA).

¹⁷³ Canadian Criminal Code, RSC, 1985, s. 212(1)(i);

- living on the avails of prostitution.¹⁷⁴

Relative to this last point we cannot simply presume that a person who lives with a sex worker, is in the “habitual company” of a sex worker or thought to live in a common bawdy-house, as such can automatically be considered to be living on the avails of prostitution.¹⁷⁵ This offence implies, instead, a form of “parasitic living” on a sex worker’s earnings, where an accused must have directly received all or part of the prostituted person’s proceeds from prostitution.¹⁷⁶

In *Bedford*, the Supreme Court also struck down section 212(1)(j), the living on the avails of prostitution provision, as a violation of section 7 of the Charter. The Court found that, while this provision might be aimed at parasitic or exploitative relationships, it made it a crime for anyone to supply a service to a prostitute because he or she made a living as a prostitute. The Court found that the provision was overbroad in that it also included non-exploitative relationships. Prostitutes could not hire bodyguards, drivers or receptionists to make their workspace a safe place to work. Section 212(1)(j), then, was also struck down as invalid.

Section 212(1) lists various methods of procurement and states that a person committing such crimes is guilty of an indictable offence and liable to imprisonment for a maximum term of 10 years.¹⁷⁷ However, sections 212(2) and 212(2.1) expand this offence for situations dealing with minors. Under section 212(2), a person who lives on the avails of prostitution of a minor is guilty of an indictable offence and liable to imprisonment for a term of up to 14 years, but not less than two years. Section 212(2.1) provides a further

¹⁷⁴ *ibid.*, s. 212 (1)(j)).

¹⁷⁵ *R. v. Downey* (1992), 72 C.C.C. (3d) 1 (SCC)

¹⁷⁶ *R. v. Grilo* (1991), 64 C.C.C. (3d) 53 (Ont. CA)

¹⁷⁷ Canadian Criminal Code, RSC, 1985, s.212 (1)

offence punishable by imprisonment for up to 14 years, but not less than five years, for a person who lives on the avails of prostitution of a minor and who, for the purposes of profit, aids, abets, counsels or compels the minor to engage in prostitution, and who uses, threatens to use or attempts to use violence, intimidation or coercion against the minor. Finally, section 212(4) states that every person who obtains for consideration, or communicates with anyone for the sexual services of a minor, is guilty of an indictable offence and liable to imprisonment for a maximum term of five years. Consideration is the interest, benefit or advantage given in exchange for sex ie. money, food or shelter. Thus, re-emphasizing the legal enormity when dealing with minors, as well as the distinction made between children and adults.

Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution.¹⁷⁸

3.5 By-Law, Licensing & Zoning - Increased Stigma & Decreased Police Protection

3.(5.1)) By-Laws on Street Prostitution

In the early 1980s, a number of Canadian cities passed by-laws regulating use of the streets, in effective attempting to forbid street solicitation. Montreal and Calgary, in 1981 and 1982 respectively, enacted by-laws that penalized those engaging in prostitution in public (under penalty of substantial fines). A number of municipalities have continued to enact similar by-laws that directly and indirectly affect street solicitation. The Montreal by-law is declared *ultra vires* — beyond [Montreal's] jurisdiction — by the Superior

¹⁷⁸ *ibid*, s.212 (3)

Court of Québec.¹⁷⁹ At about the same the Supreme court of Canada determined the Calgary bylaw to also be ultra-vires.¹⁸⁰ In 1983, Montréal enacted a by-law to forbid selling services on city streets without a permit. As the city did not issue permits for soliciting, prostitution was essentially forbidden.

A number of cities, including Winnipeg and Vancouver, had also enacted by-laws outlawing “obstructive solicitation,” thus prohibiting anyone from impeding pedestrian traffic or harassing pedestrians in hoprd of solicitation. Although primarily targeting pan-handling, these by-laws also have an impact on street-level sex workers. Several cities have issued by-laws giving police officers the power to ticket anyone engaging in prostitution near schools and residences, as well as makes it illegal for clients in motor vehicles or prostitutes to solicit on public roads. Finally, police in most municipalities commonly use anti-jaywalking and loitering laws to hand out tickets in areas frequented by prostitutes. It could be argued that this is an abuse of power, as it indirectly targets those working in or soliciting sex.

3. (5.2)) Regulating Prostitution-Related Services

In 1993, the Supreme Court of Canada handed down a groundbreaking ruling interpreting the community standard of the tolerance test used to determine “indecent acts.” *R. v. Tremblay*¹⁸¹ allowed private dances in adult entertainment parlours, provided that there was no physical contact between the patron and dancer (as discussed above in the context of bawdy-houses). In reaction, in August 1995, the City of Toronto passed a municipal by-law prohibiting physical contact between patrons and dancers.

¹⁷⁹ *Montreal (City) v 2952-1366 Quebec Inc.*, 2005 SCC 62

¹⁸⁰ *Westendorp v R*, [1983] 1 S.C.R. 43

¹⁸¹ *R v. Tremblay*, [1993] 2 S.C.R. 932

Establishments who opted to ignore this bylaw were fined \$50,000 and risked licence revocation. The Ontario Court of Appeal upheld the by-law in *Ontario Adult Entertainment Bar Association v. Metropolitan Toronto (Municipality)*¹⁸² stating that it was enacted for valid provincial objectives relating to business regulation, including health, safety and crime prevention. The Court held that, accordingly, the by-law did not conflict with the *Criminal Code*, civil liberties or with federal jurisdiction over criminal matters. The court held that the by-law did not violate dancers' freedom of expression under section 2(b) of the Charter because close-contact dancing does not amount to a constitutionally protected right. The ultimate result of this case was to leave municipalities with the power to regulate aspects of prostitution-related activities, such as placing limits on exotic dances, despite the federal entitlement to criminal law.

3. (5.3) Licenses for Prostitution-Related Services

Municipalities exercise broad power over the licensing of sexual services. Cities such as Calgary, Edmonton, Saskatoon, Toronto, Victoria, Vancouver and Winnipeg have enacted by-laws that require dating and escort services, exotic entertainers, massage parlours and others to obtain business licences like other business establishments.¹⁸³ Although, on the surface sexual services are provided, it is widely believed that they are often a front for prostitution. To obtain a licence, such establishments must comply with various conditions, including requirements pertaining to location, hours of operation, advertising, certification, minimum age and police

¹⁸² (1997), 35 O.R. (3d) 161 (CA); See also: *R v. Butler* (1992)

¹⁸³ Jacqueline Lewis and Eleanor Maticka-Tyndale, "Licensing Sex Work: Public Policy and Women's Lives," (*Canadian Public Policy*, 26/4, 2000) 440; Mike D'Amour, "Bylaw to be Massaged: Big Bust Prods City to Review Licensing Structure for Rubdown Artists," (*The Calgary Sun*, 7 November 2003)3

screening of escorts.¹⁸⁴ Licensing by-laws are generally held to be within municipal jurisdiction, because business licences are of general application and do not specifically target prostitution or act as a regulatory buffer for public morality. Nonetheless, a number of cases have questioned the validity of certain by-laws in their application to prostitution-related activities.

For example, in 2002, the Manitoba Court of Queen's Bench acquitted a Winnipeg business owner of carrying on a dating and escort service without a licence. The court held that the services offered were not those of an escort service but were clearly prostitution services - "no licence of any sort is available to carry on prostitution"; rather, it is the *Criminal Code* that should apply.¹⁸⁵ In 2006, the Alberta Court of Queen's Bench acquitted a Calgary man of procurement charges, holding that the license issued to him to operate an escort agency was vague and could have been interpreted as a licence to sell sex.¹⁸⁶ The city's response was to drastically reduce its licensing fees for escort agencies and to revamp its escort by-laws. The new by-law require applicants to sign a declaration stating that receiving a licence does not absolve him or her from criminal charges, and increases fees for non-compliance.¹⁸⁷ Finally, in 2007, the Ontario Court of Appeal struck down part of a Windsor by-law setting out licensing fees for those working in adult entertainment parlours. The court held that it was discriminatory to charge a higher fee than those directly related to the administration and enforcement of the by-law.¹⁸⁸ This was certainly in line with some negative attributes of the Dutch regime since many sex-workers complained that high license fees were an invitation for exploitation.

¹⁸⁴ Ibid; Laura Barnett, and Julia Nicol, *Prostitution in Canada: International obligations, federal law, and provincial and municipal jurisdiction*, (Parliamentary Information and Research Service, 2008)

¹⁸⁵ *Treessan Management Inc. v. Richmond Hill (Town)*

¹⁸⁶ *R. v. Hrabchak* (2002), 171 Man. R. (2d) 140

¹⁸⁷ 679619 *Ontario Ltd. (c.o.b. Silvers Lounge) v. Windsor (City)* (2007), 278 D.L.R. (4th) 292 (Ont CA)

¹⁸⁸ *ibid*

Concern has also been expressed that some licensing fees may be set so high as to make licences unattainable or causing a monopoly to take place. It has also been argued that collecting licensing fees for essentially prostitution-related activities could make the government guilty of living on the avails of prostitution. In 2002, an Edmonton sex worker launched a civil suit to challenge overcharging for licensing fees¹⁸⁹, demonstrating the risk of exploitation is still imminent. She demanded that the city lower the licensing fee for independent escorts on the basis that the City was effectively living on the avails of prostitution. In April 2003, the Alberta Court of Queen's Bench rejected this claim.¹⁹⁰

3. (5.4) Zoning

Zoning by-laws are another means of restricting prostitution. Cities such as Saskatoon, Niagara Falls, Moncton and Saint John have zoning by-laws to control the location of body-rub parlours and adult entertainment facilities in certain areas of the city.¹⁹¹ Like restrictions on licensing, zoning is generally considered to be within municipal purview, provided that it does not create a general prohibition of adult entertainment or is not actually regulating public morality. They must strictly stick to only limiting the areas in which the establishments can operate.

Essentially, by-laws facilitate policing of prostitution and are a mechanism for municipalities to have some control over the issue without violating federal jurisdiction. However, municipalities teeter between federal and municipal/provincial jurisdiction and must be careful not to take any measures that might deal with actual prostitution.¹⁹²

¹⁸⁹ *Strachan (c.o.b. Kats) v. Edmonton (City)* (2003)

¹⁹⁰ *ibid*

¹⁹¹ *supra* note 149

¹⁹² *ibid*

3.(5.5) “John-Shaming”–Client Targeting

“John-shaming” is another technique that is often used locally to combat prostitution. Without resorting to actual laws that could be open to challenge, john-shaming works as a form of public pressure to deter those who engage in prostitution from continuing to do so.¹⁹³ Examples of john-shaming include the name publication in local newspapers or message boards of clients charged with prostitution offences. In Ottawa and Saint John, police send letters to the homes of motorists seen to frequent known areas of prostitution. This certainly could be deemed an infringement of the right to privacy. John-shaming measures do not necessarily lead to a decline in prostitution. Critics argue that such measures may only force prostitutes to move and can lead to family break-up and violent confrontations.¹⁹⁴ In Ottawa, after police consultations with the Ontario Information and Privacy Commissioner’s office, a policy of sending john-shaming letters in unmarked envelopes by registered mail was adopted.

A number of community-based methods have also been used to combat prostitution at the local level without resorting to legislation. Citizen patrols are one means of deterrence and neighbourhood protection. Citizen patrols made up of community volunteers and police have popped up all across the nation.

More recently several municipalities have opted for ongoing stings to single out repeat johns. In Cape Breton the police undertook “Operation John Be Gone”. These stings are sure to occur more often as a result of the legislative changes in 2014, outlawing john-

¹⁹³ *ibid*

¹⁹⁴ *ibid*

ship. Essentially this recognizes the exploitative attributes of prostitution, but fails to address the problem as a whole by ostracizing the buyers instead of the sellers. This does not help the “victim” at all.

Referring back to the *Bedford Case*¹⁹⁵—the respondents- sex worker activists Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott—described the laws as 'ancient' and emphasized that the purpose of the laws was not to eradicate prostitution but to mitigate harms emanating from it:

"We are satisfied that the challenged provisions are not aimed at eradicating prostitution, but only some of the consequences associated with it, such as disruption of neighbourhoods and the exploitation of vulnerable women by pimps."¹⁹⁶

They argued that although prostitution is legal in Canada, the current laws made it impossible to engage in prostitution in a safe environment. Sex-workers could not legally operate indoors, or hire managers, drivers or security personnel. They also argued that the communication law prevents sex-workers from properly screening incumbent johns.¹⁹⁷

¹⁹⁵ *supra* note 93

¹⁹⁶ OCA at 169

¹⁹⁷ *ibid*

3.7 Concluding Remarks

The regulation of sexual services takes place at the federal level through the Criminal Code. Beyond the Criminal Code there are limited municipal licensing and zoning bylaws. The extent of municipal power differs from city to city, generally having the power to revoke business and individual licenses.¹⁹⁸ The municipality, for example, can restrict the number of certain kinds of establishments and/or licenses, effectively limiting the number of people that are able to work in a specific sector.¹⁹⁹ These tactics are quite prevalent in the sex industry related businesses.²⁰⁰ Tens of thousands of people are employed in “legal” sex industry establishments, known as health enhancement centers: massage parlours, dating and escort services, exotic dance venues and more. Within this grey zone of establishments, cities and sex industry owners are able to circumvent the federal provisions by denying the direct exchange of sexual services is occurring on site, while municipalities remain ignorant. Perhaps this gives rise to the need for a stricter definition regarding sex work. Prostitution rates are directly influenced by legislation and police enforcement practices. The 2013 Supreme Court *R. v. Bedford* ruling on prostitution appears to coincide with a decline in the total volume of prostitution-related offence cases processed through the courts²⁰¹. Specifically, keeping a common bawdy-house and communicating cases contributed to this decline.

¹⁹⁸ Emily van der Meulen, and Elya Maria Durisin, Why decriminalize?: How Canada's municipal and federal regulations increase sex workers' vulnerability, (Canadian Journal of Women and the Law 20/2, 2008) 315

¹⁹⁹ Mary Child, and Pivot Legal Society, *Beyond decriminalization: Sex work, human rights and a new framework for law reform*, (Vancouver: Pivot Legal Society 2006)

²⁰⁰ *supra* note 98

²⁰¹ Juristat, Cristine Rotenburg, Prostitution offences in Canada: Statistical trends (10 November 2016)<<http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14670-eng.pdf>> accessed 12 August 2017

That said, Canadians are especially in favour of decriminalizing prostitution.²⁰² A Canadian report on prostitution and pornography concluded that girls and women in prostitution have a mortality rate 40 times higher than the national average.²⁰³ 95% of those in prostitution experienced sexual harassment that would be legally actionable in any other job setting.²⁰⁴ Between 1991 and 2014, there were 294 homicides of sex workers. One in three (34%) homicides of sex workers remained unsolved; a much greater proportion than for homicides that did not involve a sex worker victim (20%).²⁰⁵ The above-mentioned cases speak at the important shifts that took place over the last 30 years, a need for legal reform - outlining the respective legislative backgrounds and considering their implications for sex workers. The *Bedford case* has demonstrated that human rights have had a great impact on legislative change. In turn, there is a shift from basic rights to human rights. Despite positive change there is a need to combat stigmatization and explore the realm of legal sex work.

²⁰² Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Bliss*, (New York University Press, 2012)

²⁰³ Special Committee on Pornography and Prostitution, 1985, *Pornography and Prostitution in Canada*

²⁰⁴ Melissa Farley, "Prostitution is sexual violence" (*Psychiatric Times* 21/12, 2004)7-8

²⁰⁵ *supra* note 201

-CHAPTER IV –

GENERAL OVERVIEW OF PROSTITUTION IN THE NETHERLANDS

-A LABOUR LAW APPROACH-

In chapter 3 it became clear that the Canadian legal system relative to regulation of prostitution has its shortcomings. This chapter will conclude whether or not the Dutch approach can answer the Canadian shortcomings. There are minimum international (and European standards), which the Netherlands must abide by- as is the case for Canada. International law stipulates the human rights that must be guaranteed to sex workers. While national Dutch law has shifted to including sex work as an occupation- thus opening up labour rights - has the addition of labour rights enabled sex-workers to work autonomously and gain access to their human rights? This is what we seek to answer in this chapter.

In 1911, brothels were banned in the Netherlands to protect prostitutes from exploitation; however this ban has not been enforced for the past 50 years.²⁰⁶ Action toward brothels and sex clubs was only enforced if they engaged in criminal activities or disturbed public order.²⁰⁷ The Netherlands is one of the first countries in the world to recognise voluntary adult prostitution as a “normal” occupation²⁰⁸ and is continually updating and revisiting their laws so as to maximize safety, optimize benefits to sellers and buyers, while punishing exploiters. The number of illegal prostitutes is assumed to have declined over the past few years, as a result of frequent inspections of licensed brothels by the police

²⁰⁶ Karoline Bech Pedersen, Policies on prostitution in Sweden and in the Netherlands, (July 2016)

²⁰⁷ Joyce Outshoorn, "Policy change in prostitution in the Netherlands: from legalization to strict control", *Sexuality Research and Social Policy* 9/03, 2012) 233-243

²⁰⁸ Ben Coates, Why the Dutch are Different: A Journey into the Hidden Heart , (2015)

and tax authorities.²⁰⁹ I will open the chapter by looking at important aims of the new Dutch policy. Since sex-work has always been legal in the Netherlands focus will shift to the growth of the labour law approach. Following a brief overview of Dutch Policy I will look specifically to brothel legalization, sex-worker registration, and the rights that sex-workers can derive from their employers. Finally I will look to the shifting paradigm of prostitution in Dutch culture and whether or not the labour law approach has been successful in ensuring sex-workers' rights are upheld.

4.1 New Prostitution Policy Changes

The new policy changes highlight an aim to control and regulate prostitution and, largely, to protect minors from sexual abuse. This was accomplished by raising the age of consent to 18 years of age. The main downfall of the policies implemented is that they have not provided sex workers the necessary support to exercise and facilitate their rights (i.e. the ability to form unions), contributing to their marginalization.²¹⁰

Law reform took place through the regulation of prostitution and fight against sexual abuse 'Rules concerning the regulation of prostitution and the fight against abuses in the sex industry'/law regulating prostitution and combating abuse in the sex industry',²¹¹, abbreviated as WRP.²¹² The main points under the new bill proposal were the following:

²⁰⁹ *supra* note 207

²¹⁰ *ibid*

²¹¹ WRP

²¹² Letter (16 May 2008) from Ministers of Justice, Foreign and Social Affairs to the President of the Dutch Parliament on a Change in the Dutch Penal Code (Lifting of the Ban on Brothels). KST. 25 437. Nr. 56. Parliamentary Papers II 2009/10, 32 211, no. 1-2

If types of prostitution would require permits, all prostitutes would be obliged to register; unregistered women would be criminalised; buyers of illegally working prostitutes would be criminalized; and Municipalities would have the choice for a 'zero-option'- zero brothels on their grounds. The controversy mainly surrounds the registration of sex-workers, as well as the powers granted to individual municipalities.

Registration infringes sex-workers' right to privacy, is impractical, and would lead the majority of prostitutes to work illegally. Among those prostitutes are migrant women from third countries who would not have the possibility of registering.²¹³ Rather than improving the situation of prostitutes, this might undermine efforts to combat the sexual exploitation of women and increase the vulnerability of prostitutes who are not able or not willing to register by depleting their working conditions and exacerbating their social exclusion. The new bill failed in the 1st chamber of senate, which recognized that registration would infringe privacy rights.

4.2 Brothel Legalization & Regulation

The lifting of the ban on brothels means that the operation of a prostitution business is legal, unless it is prohibited by municipal rules through a General Municipal By-Law (Algemenn Platselijke Verordening; APV).²¹⁴ Strict regulations on the operation of brothels govern the position and status of sex workers, protecting their physical and mental integrity; and prohibit forced prostitution, the employment of minors, or people without a valid residence permit. New policy and regulation of brothel establishment

²¹³ Judith Vocks and Jan Nijboer, "The Promised Land: A Study of Trafficking in Women from Central and Eastern Europe to the Netherlands", (European Journal on Criminal Policy and Research, 8 (2000) pp379-388

²¹⁴ A.L.Daalder, *Prostitution in the Netherlands in 2014* (Centre of the Ministry of Security and Justice, 2015)

gives local authorities power to exert influence and minimize disruption to everyday life of civilians in the neighborhood.²¹⁵ Brothels must conform to zoning and urban renewal plans, as well as local by-laws relative to living and working environment.²¹⁶

When the ban was lifted, there were estimated to be 25,000 prostitutes in the country, with 12,500 working at any one time at a total of 6,000 locations.²¹⁷ Many were migrants. In the 1970s the majority of foreign prostitutes were from Thailand and the Philippines, in the 1980s from Latin America and the Caribbean. In 1999 no more than one third were Dutch nationals, the remainder representing 44 nationalities with the majority being from the Dominican Republic, Colombia, the Czech Republic, Romania and Poland.²¹⁸ Sex-workers originating from outside the European Economic Area (EEA) are considered illegal if they do not possess the legal residence permit required for employment or if they are working from home without a license in a municipality that requires a license for homework.²¹⁹ A sex-worker is also working non-legally, when she is operating outside the public areas designated and licensed for it.²²⁰

While regulation alone may not necessarily ensure optimum labour rights for sex workers, evidence from legal brothels in Nevada shows violence is less prevalent where systems are in place for protecting sex workers and regulating establishments.²²¹ The licensing system in the Netherlands has also, to an extent, improved working conditions

²¹⁵ Hendrik Wagenaar, Sietske Altink, and Helga Amesberger, *Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade*, (Policy Press 2017)

²¹⁶ *ibid*

²¹⁷ *ibid*

²¹⁸ *ibid*

²¹⁹ AL Daalder, *Prostitution in the Netherlands Since The Lifting of the Brothel Ban*, (WODC, 2007)

²²⁰ *ibid*

²²¹ B. Brents. and K. Hausbeck, 'Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk and Prostitution Policy', (Journal of Interpersonal Violence 20/ 03 2005) 270-295

within brothels. Workplaces now largely conform to health and safety standards that are normal in other industries.²²²

4.3 Municipal Regulation and Input

Through Article 151a of the Local Governance Act (Gemeentewet): “[m]unicipalities are able to adopt a regulation which prescribes criteria for the commercial arrangement of the opportunity to perform sexual acts with or for a third person against payment, can thereby pursue a local licensing policy with respect to sex businesses”.²²³ Out of the 75 percent of the municipal authorities who responded to a survey in 2014 indicated that they have developed a prostitution policy within their municipality.²²⁴

The introduction of a municipal licensing system enabled the police and other law enforcement agencies to conduct inspections of brothels, (subject to the mayor’s consent). The police conduct frequent controls of brothels and are thus in a position to pick up signs of human trafficking. It is up to the municipality who will undertake the “checks” on brothels, but general consensus is that the police are responsible. Municipalities can also choose to have no such businesses at all, the “nul-optie”, if they feel that is necessary for the protection of public order, the environment in which people live, and the health of sex workers and their clients. In that case, too, the municipality will continue to be responsible for enforcement and supervision. According to Daalder, 24 percent of the municipalities subjected to the aforementioned study pursued this zero option. By court order municipalities are not allowed to make a moral assessment on this

²²² H Dekker, R Tap, and G. Homburg Evaluatie opheffing bordeelverbod. De sociale positie van prostituees 2006 (Evaluation lifting of the ban on brothels: the social position of prostitutes 2006). Amsterdam: Regioplan Beleidsonderzoek (2006)

²²³ *supra* note 215, p11

²²⁴ *ibid*

matter, because the legislator has already done so.²²⁵ A factual zero policy is not a formal zero policy²²⁶; it actually is a policy containing such conditions for licences to be issued to a sex establishment that, in practice, the establishment of this sex business turns out to be impossible.²²⁷ Municipalities also use other instruments to discourage prostitution. Examples of these instruments are an establishment policy coupled to a zoning plan, or high dues. On the basis of sections 149 and 151a of the Local Government Act, municipalities can impose regulations regarding legal forms of the exploitation of prostitution by means of a by-law, adapting the General By-laws.

Compulsory licences and mandatory registration enable municipalities by strengthening monitoring. What's more, many measures and protocols have been adopted in order to protect trafficked women.²²⁸ For example, it is now law that pimps speak the same language as their working girls.²²⁹ On the flip side, it is fairly easy for the municipality to use their power to impose such sanctions and/or parameters that indirectly discourage sex-work.

4.(3.2) Employer Obligations

Medical checkups are not compulsory, as to do so would perpetuate the stigma that all sex workers have and transmit infections. Further, it has been shown that clients use medical checkups as an excuse to illicit unsafe sex.²³⁰ As a rule, sex workers are asked to have medical checkups four times a year and the majority willingly comply. Clinics in

²²⁵ *supra* note 219

²²⁶ *ibid*

²²⁷ *ibid*

²²⁸ UN Protocol, *supra* note 86, art 1

²²⁹ *ibid*

²³⁰ *supra* note 215

the cities offer free and anonymous checkups. Safe sex, education and awareness are key in protecting sex workers and their clients against transmissible infections. Keeping medical matters unregulated prevents crossing the threshold between fundamental rights and infringements once again.

Very specific regulations exist pertaining to the work space, health, fire and safety, as well as hygiene.²³¹ For instance, every working area must be equipped with a panic button, hot and cold running water, appropriate circulation of air, and comfortable temperature, and condoms.²³² Local authorities are responsible for ensuring that sex workers have easy access to health care, with readily available services and no sanctions, but ultimately it is up to the sex workers themselves to follow up with these services or not. The municipality ensures that employers fulfill said obligations, set conditions for granting licenses and take preemptive steps to ensure these conditions are met.

Brothels that fail to observe the regulations are liable to administrative sanctions such as a penalty payment, revocation of their licence and/or closure. They can also be prosecuted for the offences covered by article 273f of the Criminal Code²³³, increasing human trafficking punishment, in the event of prohibited forms of prostitution or sexual services. Compulsory licenses for all businesses where men or women are employed as sex workers will make it easier for the municipalities and police to take action under either administrative or criminal law. Should brothel owners not possess a license where

²³¹ Ministerie van Sociale Zaken Werkgelegenheid, ARBO Regels Prostitutie, <https://www.soaaid.nl/nl/informatie-voor/prostitutie/goed-geregeld/arbo-regels-prostitutie> accessed 16 August 2017

²³² *ibid*

²³³ *ibid*

required, they will have committed an offence under article 1 of the Economic Offences Act (Wet Economische Delicten) (EOA).²³⁴

The Working Conditions Act²³⁵ and most other legislations that apply to the business sector, in general, apply to sex-workers as well. Sex workers ideally have the same rights and obligations as other professionals. The owners of brothels operated in a grey area for many years, in that the relevant legislation was not enforced. As a result, the working relationship between sex workers and their employers differed from that in other sectors and now has to be formalised.

4.4 Employer-Employee Relations

Most brothel owners are unwilling to enter into employment contracts. The rationale they put forward is that they provide support services to “self-employed” sex workers, and are therefore not obliged to pay income tax or social insurance contributions. Zuidema, Aerts, and Boonstra (2007) argue that a business owner in the prostitution sector is not a normal employer, in view of the nature of the work, the stigma on the sector, and the sector’s being tied up with the illegal circuit. In addition, they indicate that, on average, prostitutes have a weaker social and legal status than the average Dutch employee does,²³⁶ in turn increasing the risk of exploitation and abuse of power by the employer. However, already in 1998, the court in The Hague has determined that the nature of prostitution work is not inconsistent with paid employment.²³⁷ This Established that the labour relation(s) between a sex business owner and one or more prostitutes working in

²³⁴ Economic Offences Act (Wet Economische Delicten) (EOA), 1950

²³⁵ Working Conditions Act, 1999

²³⁶ R. Zuidema, M.C.M. Aerts, and K. Boonstra, “*Arbeidsrecht voor prostituees? De (on)mogelijkheid van toepassing van het arbeidsrecht op arbeidsverhoudingen in de prostitutiebranche*,” (Hugo Sinzheimer Instituut, University of Amsterdam, 2007)

²³⁷ *ibid*

the business should be considered a employment contract in the sense of section 7:610 of the Civil Code²³⁸, and should not be considered a labour relation between a self-employed prostitute and a lodging-house keeper.

4. (4.1) Tax Relations

Sex workers and their employers are required to pay taxes. There are various forms of tax relationships accepted between sex workers and their employers. The Tax and Customs Administration applies a target group approach which is uniform throughout the country. Both parties are responsible for paying tax, depending on the nature of their working relationship. Employers are obliged to contribute towards employee insurance schemes, with payments being made to the Tax Administration (as of 1 January 2006).²³⁹

In 2008 an “opt-in” system was introduced in an attempt to clarify labour relations between sex-workers and brothel operators. Under this arrangement the operator would withhold income tax and VAT on the earnings of sex workers, as in any other “normal” employment relationship. The sex worker, however, cannot derive workers’ rights from this. Neither can they claim the (tax) benefits allotted to self-employed workers. This means that they neither have the advantages of an employee nor those of a self-employed worker. The operator determines which regime applies and concludes an agreement with the tax department.²⁴⁰

²³⁸ Article 7:610DCC (Dutch Civil Code)

²³⁹ See: Unemployment Insurance Act (*Werkloosheidswet, WW*); Work and Income (Capacity for Work) Act (*Wet werk en inkomen naar arbeidsvermogen, WIA*); Sickness Benefits Act (*Ziektewet, ZW*); Invalidity Insurance Act (*Wet op de arbeidsongeschiktheidsverzekering, WAO*)

²⁴⁰ Janice G. Raymond, *Not a choice, not a job: Exposing the myths about prostitution and the global sex trade*, (Potomac Books, Inc., 2013)

If the operator decides for the opting-in system, they have to comply with a number of conditions. These include that the sex worker must be free to come and go as they please, cannot be obliged to wear specific clothing, to use alcohol or drugs, take specific clients or perform services that they does not want to perform, nor can the operator impose fines on the worker or prohibit them working for others. The operator is also obliged to provide receipts.²⁴¹ It is important for self-employed prostitutes to receive receipts to give to the Tax Administration, but 60% of the prostitutes who indicate that they rent rooms claim not to get a receipt. Clients who use unregistered prostitutes can be liable to prosecution as will unregistered prostitutes or prostitutes working in unlicensed premises.²⁴² This prevents parties on either side of the transaction from being ostracized.

In January 2009, as previously mentioned, regulations came into effect setting out the conditions under which people who work in the sex industry are liable for tax and social security contributions. This has clarified some of the previously ambiguous clauses relative to labour relations in the industry. The main aim was to make sex workers more independent. To this end, the regulations set out a number of crucial conditions relating to their position and management of the business. If they are not complied with, or if businesses choose not to apply the conditions, the Tax Administration will treat the sex worker as an employee for tax purposes. This will have implications for taxation, contributions and social security. The Tax and Customs Administration has distributed an information pack to the owners of businesses and to sex workers, and will monitor compliance with these conditions. These rules and regulations pertaining to taxation are published in the prevalent languages spoken by sex workers: Dutch, English, Spanish,

²⁴¹ *ibid*

²⁴² *ibid*

Bulgarian, and Romanian.²⁴³ That said, the prostitution laws are not dealt with in the first chamber of senate, so there is certainly room for a more streamlined approach.

The biggest negative impact of brothel legalization was to the brothel operators. Under new law, the Dutch municipalities no longer can demand a permit from home-workers, meaning it would, logistically speaking, be easier for sex-workers to start their own business based out of their homes, often not reporting themselves to the tax authority. That said, this year (2017) the government supported the (re)opening of a brothel run completely by sex-workers in Amsterdam.

4. (4.2) Sex-Worker Labour Rights

The lifting of the ban on brothels has positively enforced labour rights by adding a private law element to the relationships between sex workers and their employers. The most important points are that individuals should possess the autonomy to decide whether they wish to work in the sex industry and, if so, how. They should also choose when to terminate the business relationship.

Two researchers of de Rode Draad(the Red Thread)²⁴⁴, Altink and Bokerman, did extensive fieldwork in licensed brothels but also irregular locations such as Thai massage parlors, escort services and pick-up bars, to investigate whether or not working conditions of sex workers had improved. De Rode Draad collected addresses of 633 of the estimated 800 sex businesses in operation; the researchers visited about half of those still in

²⁴³ *ibid*

²⁴⁴ ****Note: De Rode Draad (The Red Thread) is a national reference centre and interest group for current and former sex-workers, campaigns for sex-worker rights and recognition of sex work as a profession. It collaborates with the Trade Union Confederation FNV.

operation in 2005.²⁴⁵ De Rode Draad still supported the legalization, but only under strict conditions, such as the upholding of labour law, proper monitoring by municipalities and stopping criminals from investing in the sex industry, and the right to bodily integrity. The sex trade has always been legal in the Netherlands and it is regulated under normal labour laws. Self-employed prostitutes can join a union and they all have to be registered with the Dutch government.

The Labour Inspectorate has published a booklet containing information on legislation governing safety, health and welfare. The booklet is intended for sex workers and their employers, and for safety, health and welfare services.

4.5 Sexual Exploitation (Human Trafficking) of Sex-Workers

Most victims of international human trafficking are women and girls who often end up being sexually exploited through prostitution.²⁴⁶ The lifting of the ban on brothels makes prostitution a legitimate occupation and gives sex workers the same rights and protection as other professionals. The labour laws offer the most effective protection against exploitation, violence and coercion. Moreover, abuses are easier to detect when sex workers operate publicly and legally rather than in a clandestine subculture. That said, it is important to note that 80-85% of prostitutes are thought to be of non-Dutch descent, with up to 75% being illegal.²⁴⁷ Given that predominantly women work in the sex sector, this raises the question of how migrant workers' exclusion from the legal sector, with its labour law protection, fits with the obligations under article 11 of CEDAW (equal

²⁴⁵ *ibid*

²⁴⁶ United Nations Office of Drugs and Crime (UNODC), 2006

²⁴⁷ House of Commons Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006) 83

treatment in employment).²⁴⁸ Illegal sex workers are pushed more underground, in turn increasing their vulnerability to violence and exploitation.²⁴⁹ Though important to the necessary regulatory changes, extensive elaboration on human trafficking is outside the scope of this paper. I can only highlight some of the key changes and implications.

The laissez-faire approach has failed to benefit small entrepreneurs, as large, deep-pocketed criminal organizations dominate the industry. Criminals and manipulators drag in more and more women and girls (many from other countries, often by deception) to meet the unencumbered demand for commercial sex. The Netherlands is famous for “lover-boys” who lure vulnerable domestic and international girls into the sex trade.²⁵⁰ In 2016, the government prosecuted 174 trafficking defendants and convicted 103, compared with 189 prosecuted and 140 convicted in 2015.²⁵¹ The legalization of prostitution, however, improves working and safety conditions for sex workers, allowing sex businesses to recruit among domestic women who choose prostitution as their free choice of occupation. This, in turn, makes resorting to trafficked women less attractive, (or so the Dutch argue).²⁵² There ought to be a stark difference between those forced into sex-work and those willingly entering the sex trade.²⁵³

²⁴⁸ M de Boer, Wijers, M., Taking Women’s Rights Seriously? Shadow report by Dutch NGOs: an examination of the Fourth Report by the Government of the Netherlands on the implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women, 2000-2004, on behalf of NJCM (Dutch Section of the International Commission of Jurists) and Network VN-Vrouwenverdrag (CEDAW Network), Utrecht: HOM. (2004)

²⁴⁹ Karen Hindle, Laura Barnett, and Lyne Casavant, *Prostitution: A review of legislation in selected countries*, (Library of Parliament, Parliamentary Information and Research Service, 2005)

²⁵⁰ *ibid*

²⁵¹ Bureau of the Dutch National Rapporteur on Trafficking, 2017 Report <https://www.state.gov/documents/organization/271344.pdf> accessed 1 August 2017

²⁵² Bureau of the Dutch National Rapporteur on Trafficking, 2005

²⁵³ M Farley, Theory versus Reality: Commentary on four Articles about Trafficking for Prostitution, vol 32 (Women’s Studies International Forum, 2009) 311-315

Most victims of trafficking are poorly educated, lacking knowledge about viruses, STI's, and ultimately not looking after their own health.²⁵⁴ As such, victims of sexual exploitation require even more care and attention when it comes to their health. Trafficking victims must be provided with full health services by health professionals without any type of discrimination against these victims.

In 2008 a Human Trafficking Task Force was established²⁵⁵, and worked in cohort with Aruba and the Netherlands Antilles in order to put legislation on trafficking in line with international standards, as well as created several working groups. Furthermore, the maximum penalty for human trafficking was increased to 8 years (18 years for if the victim died as a result of trafficking) on 1 July 2009, to reflect the seriousness of the crime. Several platforms, websites and support groups exist for victims of human trafficking and violence geared towards sex-work. A special phone line, Meld Misdaad Anoniem, is open to the public to anonymously report suspicious activities.²⁵⁶ One website is www.wegwijzermensenhandel.nl, which was launched in June 2015 and outlines the support available for victims of human trafficking.

Under the current rules on residence for human trafficking victims, a victim can obtain a temporary residence permit on humanitarian grounds if there are clear indications that they are a victim of human trafficking but are unable to cooperate with the criminal investigation due to threats or a serious medical impairment.²⁵⁷ We see a strict regime existing relative to human trafficking and the prosecution of perpetrators of trafficking.

²⁵⁴ Responding to Trafficking for Sexual Exploitation in South Asia, (2007) 27

²⁵⁵ CEDAW, para 114-117

²⁵⁶ See: Meld Misdaad Anoniem, <<https://www.meldmisdaadanoniem.nl/english/>> accessed 15 July 2017

²⁵⁷ Wagenaar et al, supra note 215

4.5 Concluding Remarks

There is a regulatory drift²⁵⁸ and goal displacement in the Netherlands. On the surface it seems that labour law is the primary focus, but in reality labour relations and the sex-workers' legal position(s) have been replaced by combatting human trafficking and, in fact, curtailing prostitution. The new municipal power has effectually enacted a means of diminishing sex-work. Working conditions have been addressed, as well as health and safety, but employee-employer relations need to still be clarified. What's more, stigmatization and rights violations still persist. The Dutch have not truly answered rights violations regarding labour law.

As a result of brothel legalization, most Dutch sex workers benefit from the rights accorded to other workers, Dutch brothels have a host of occupational health and safety regulations that they must comply with, and sex-workers no longer need to compete as much, nor do they need to pay pimps for protection and support. Dutch sex workers sit on advisory boards and committees, helping to develop local policy. What's more, recently city council, in Amsterdam, showed the ultimate support for sex-worker autonomy by opening the first brothel run by sex-workers themselves.²⁵⁹

All that said, the legalization of prostitution has done little to combat the stigma associated with the trade. Social isolation and exclusion are real issues for sex workers in the Netherlands, who continue to experience considerable difficulty in obtaining the services of accountants, banks, and health insurance companies. These are key to affect

²⁵⁸ *ibid*

²⁵⁹ The Guardian, Amsterdam mayor opens brothel run by prostitutes: 'It's a whole new model',

<https://www.theguardian.com/cities/2017/may/16/amsterdam-mayor-brothel-prostitutes-new-model> accessed 1 August 2017

true change. The Dutch approach, in and of itself has proven to be semi-ineffective. I say this because it cannot be deemed futile, but rather digressed from it's initial intentions and created further contention. At face value, sex-work has been perceived as a legitimate occupation, but at the end of the day actions speak louder than words. Municipal action has told us that they wish to abolish sex-work. As municipalities refuse to let sex workers operate in their respective municipality they send a signal that sex workers are not welcome. On the surface it seemed as though the Dutch had reached a solution, but we see that they have abandoned the prospect of protecting sex workers position and instead shifted to combatting human trafficking. Though human trafficking is certainly a prolific occurrence in the Netherlands, this has perpetuated the stigmatization of sex workers. I personally find this reprehensible as we should be protecting all classes of disadvantaged people, upholding our freedom of choice and maximizing people's right to act autonomously.

-CHAPTER V -

MAIN RESEARCH QUESTION & CONCLUDING REMARKS

I presented the legal frameworks on prostitution in Canada and the Netherlands. Canada is a partial-decriminalized regime in which the buying of sex is criminalized and that prostitution is seen as a form of violence against women. Conversely, in the Netherlands, the lifting on the ban on brothels has made sex businesses legal again in 2000.²⁶⁰ Prostitution is not seen as violence against women, but rather as any other normal job. As such, the Netherlands is an example of full legalization. I have comparatively distinguished between the two different approaches to sex work in Canada and in the Netherlands, further reflecting upon both. I applied a human rights approach-relative to International Law and Canada - and the labour approach to the Netherlands. I will briefly summarize key points of my research, make some concluding comments and close with an answer to my research question: *Which regulatory approach to prostitution should Canada adopt in order to fully protect sex-workers' right?*

The answer is simple, while the practical approach is complicated. In accordance with international standards and as demonstrated by the present status of sex workers, sex-work should be decriminalized. The practical approach is complicated, because statistics and data remain inconsistent given the nature of sex-work and its current propensity for anonymity.²⁶¹ What's more, the state is governed by individuals and those individuals'

²⁶⁰ Outshoorn, *supra* note 207

²⁶¹ Cristine Rotenberg, Prostitution Offences in Canada: Statistical Trends, < <https://www.statcan.gc.ca/pub/85-002-x/2016001/article/14670-eng.htm>> accessed 12 August 2017

beliefs definately influence administrative decisions.²⁶² As such, social platitudes and personal beliefs play a large role.²⁶³

For every argument insisting that fully decriminalizing prostitution is the best choice, there is a strong counter argument. I have demonstrated that decriminalization is by no means the perfect solution, (nor is legalization). Stigmatization and criminalization result in feelings of ambivalence toward the work and a struggle to foster internal momentum and external support.²⁶⁴ As a result, researchers, on several occasions, have noted the difficulties faced by sex workers in collectively establishing themselves²⁶⁵, cashing in on their labour and autonomy rights²⁶⁶. The bottom line is that sex workers should enjoy the same labour rights as other workers and the same human rights as other people.²⁶⁷ As such I firmly advocate an amalgamation of the two testimonies with emphasis on both human rights and labour law.

5.1 Triumphs of Sex-Workers in International Law

The evolution towards a better recognition of female autonomy is evidently reflected in the evolution of the approach to sex-work in International Law. We have seen a shift from a very strong condemnation of all forms of prostitution towards a more flexible approach; that is, the condemnation of forced prostitution only. Using labour rights to approach the issue of sex-work is, in principle, a step forward because it allows seeing the sex-worker as not just a potential victim but as an autonomous subject. On the other

²⁶² Herbert A. Simon, *Administrative Behavior*, 4th Edition: A Study of Decision-Making Processes in Adminstrative Organizations, (The Free Press, 1997)

²⁶³ *ibid*

²⁶⁴ Ana Lopez, *Stigma/ising Sex Workers*, (The Chartist, 2006)

²⁶⁵ *ibid*

²⁶⁶ Elizabeth Bernstein, What's wrong with Prostitution? What's Right with Sex Work? Comaring Markets in Female Sexual Labor, (Hastings L.J. 10/91, 1999)

²⁶⁷ Julia O' Connell Davidson, The Rights and Wrongs of Prostitution, (Hypatia: A Journal of Feminist Philosophy, 2002)

hand, labour law alone risks not being able to capture the complexities of sex work and the high risk of exploitation. For this reason we need to apply correctives such as having procurement prohibit the recruitment of sex-workers i.e prosecuting lover-boys and criminal organizations. Even when it is regulated as a work activity, sex work needs a special regulation in order to prevent exploitative situations.²⁶⁸ In International law the distinction between children and adults has been made clear. Forced and voluntary prostitution need to be clarified, and we have demonstrated that criminalization incapacitates sex-workers.²⁶⁹ Instead we have already started to turn to immigration, administrative and human rights law.

5.2 Canada versus the Netherlands- who does it better?

The victimization of women constructs a certain status of women being in the need of protection. In the Dutch discourse, the disruption lies within the acceptance of prostitution, normalizing it and yet ignoring the fact that prostitution is indeed an occupation. Canadian regulation assumes that all prostitution is a form of violence against women and that no woman has entered this sector voluntarily. Conversely, the Dutch regulation assumes, that by making prostitution legal in all aspects, it will make the sex market more transparent, in turn combatting human trafficking. In both cases historical effects, culture, religion and further globalization have had a great effect on the development of the legislations on prostitution.²⁷⁰

²⁶⁸ Barnett, *supra* note 184

²⁶⁹ *ibid*

²⁷⁰ Pitcher, *supra* note 16

The Canadian regulation highlights the need for a more stream-lined approach, where no one should be targeted by sexual exploitation, but free-will ought to be accounted for. Moreover, the Canadian regulation has declared prostitution a social problem, which needs to be addressed.²⁷¹ Dutch regulation seems to be more effective when addressing abuses experienced within the sex industry, as by legalizing the prostitution industry it has become more transparent to some extent. However, this only includes the sectors where sex businesses are legal and have licenses.

The Canadian government's professed motivations for passing the act(s) were to improve the legal and social status of sex workers, improve working conditions, facilitate workers exiting the sex industry, and decrease organized crime.²⁷² These motivations align with the Netherlands' reasons for adopting a regulatory framework for prostitution. Sex workers should have the right to employment contracts, be covered under the labour laws and occupational health standards, have the ability to take clients and brothel owners to court, and ought to have the right to health insurance.

Arguably, assertions that lifting the ban on brothels in the Netherlands has been a failure are based on unrealistic expectations about the elimination of trafficking and other abuses by a sole change of law.²⁷³ While I argue that decriminalization is a first step towards recognising the human and labour rights of sex workers, it is clear this is not sufficient alone and that a more proactive approach is needed to improve working conditions and rights realization.

²⁷¹ Marina Della Giusta, *Demanding Sex: Critical Reflections on the Regulation of Prostitution*, (Routledge, 2008)

²⁷² *supra* note STATCAN

²⁷³ *ibid*

As expected, I saw a few problems persist in the research, itself. Statistics, demographics and enforcement are still problematic in the context of prostitution. Furthermore, over the years, we have failed to strike the balance between safety for sex-workers and the “public good”. It is certainly difficult to reach a universal consensus on how to regulate prostitution, given the different needs, perspectives, and regimes that exist.

What can be said is that Canada’s recent partial decriminalization was not a step in the right direction, because, as mentioned above, it will result in clients not willing to help trafficked victims for fear of punishment. Also, dominant trafficking discourse suggests that all prostitutes are victims, further stigmatizing them. The legalization, alone, of prostitution is said to be a mistake and calls for more restrictions. Since provinces have the power to decide zoning restrictions in their respective municipalities, some municipalities could create requirements of registration with police even if registration on a national level fails. Some local authorities try to create registration requirements in their areas. This is an issue because, in some areas, this pushes prostitution to the outskirts of towns and cities where infrastructure is lacking, increasing the risk of victimization. This power to municipalities prevents uniform policy for licensure for brothels, taxation of sex workers, or employee contracts.

While there are significant differences between the legislative context and regulatory approaches in Canada and Netherlands, there are also common threads affecting managed and independent sex workers. These relate specifically to their human and labour rights and the impact of stigma. Clients of unlicensed sex-workers are being criminalized, much like in Canada. The position of sex-workers is still unclear and their rights have not been

fully realized. Although there is no formal labour protection for sex workers in the Canada, as sex work is not considered an occupation, legal changes in the Netherlands have resulted primarily in increased regulation and control of sex businesses. Thus the legislation in both cases, while distinct on the surface, appears to focus on interventions designed to manage and contain sex work for the convenience of the state.²⁷⁴ The Dutch approach has enabled sex-workers to gain access to better working conditions, more autonomy, and recognized sex work as work. On the flip side, administrative barriers have effectually limited the capacity for sex-workers to legally work.

Reflecting on the two case studies, it is clear that each country has different ways of implementing their legal frameworks. Each has their own problems to overcome but some commonalities have definitely emerged through my research. Regulations must be cautious of creating a two-tier effect by privileging certain forms of sex work over others, as is the case in the Netherlands. Mandatory registration is an ineffective means of trying to help sex workers because of privacy concerns and stigma. Health care and supportive vocational services should be offered but not forced onto sex workers, (as seen in the Netherlands). Disconnects between federal and local level authorities regarding prostitution can lead to troublesome zoning inconsistencies that again lead to the establishment of unregulated sectors of prostitution, heightening the risk of victimization and organized crime- evident in both Canada and the Netherlands. Conversely, this can also lead to over-regulation, completely ostracizing the sex-workers.

By country analysis I can conclude, that both means of regulating prostitution seems to have positive and negative effects on the women involved in prostitution. However, when

²⁷⁴ *ibid*

looking at how I have described the best outcomes: the need for protection, autonomy and/or going beyond the victimization of the prostitutes while still addressing the vulnerability - the Dutch approach addresses these outcomes best. Their approach works toward making prostitution a normal job and therefore working toward ending social stigmatization. Moreover, the Dutch address the prostitutes as sex workers and not as victims, while still addressing the violence experienced by the prostitutes. Hence, the approach goes beyond the victimization of the prostitutes while still addressing the vulnerability of the prostitutes. I wish to emphasize there is a need for more attention to the women involved in prostitution.

5.3 How Can We Improve the Regulation of Prostitution?

A few universal recommendations come to mind in response to some of the questions posed at the beginning of this thesis. Advocates, activists, and sex workers all emphasize the pertinence of addressing the stigmatization problem. This is understandably easier said than done, but education is the most useful tool for combating stigma. States should work with sex-worker rights groups, as well as local employers so as to prevent biases in hiring and education practices. This has recently occurred in the Netherlands, as discussed.

Another universal recommendation is to make social services available, which in both countries is already the case- to an extent. In Canada sex workers can visit one of many free clinics to get tested and receive the care they need. Mobile clinics have become more popular in metropolitan cities as well. That said, sex workers should have access to health care, which would require that commercial sexual acts be recognized as legitimate

labour. Expanding upon health care coverage, sex workers should have access to social security and pensions, just like with other employment.

In order to implement these policies, governments' approaches must be less top-down and state-centered, acknowledging that regulation must be supplemented by non-governmental organizations. Regulation is not enough to erase stigma, bolster autonomy, and enact fundamental human rights. By cooperating with sex-workers and sex-worker rights organizations in legislative discussions concerning prostitution, governments may gain a better understanding of what the most effective policies for their countries are. Many of the problems stem from the disconnect between the legislators and those whom they are legislating about.

Decriminalization is the answer in that it is most favourable to upholding human rights, as well as establishing labour rights. Decriminalization minimizes stigmatization and puts sex-work at the forefront of labour relations and establishing a safe environment for those who freely choose to operate in the legal sex work.

Outdated criminal laws need to be reformed to improve the living and working conditions of sex workers. Decriminalization is better for the workers than legalization as both criminalization and heavily-regulated legalization infringe on the workers' safety and human rights. Regulation is still necessary, largely due to the nature of sex-work. Such a reform can best be pushed through the submission of some sort of private bill and, in turn, also push for labour laws, as in the Netherlands.

Key tenets of such reform should and could include:

- Accept sex work as work
- Adult prostitution not being governed by criminal law- replacing criminal law with administrative, labour and immigration law
- Maintaining the distinction between forced and voluntary prostitution, so as to outlaw sexual exploitation, instead of prostitution itself.
- Support self-organization and self-determination of sex workers so as to prevent further stigmatization.

5.4 Recommendations to Regulate: Canadian Decriminalization of Sex-work in Practice

If Canada were to adopt the model of decriminalization, all sex work-related provisions would be removed from the Criminal Code, and regulation would most likely be pursued by the provinces and municipalities, as is the case in New Zealand. In the provinces, occupational recognition would grant sex workers income security, access to statutory protection and to legal recourses normally granted by employment. Some examples of how this model could work are as follows:

- Under Labour Relations Acts²⁷⁵, sex workers would be allowed to organize into labour unions, address labour exploitation, bargain for better working conditions with brothel managers, and collectively negotiate wages.

²⁷⁵ For example: the Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

- Under the Employment Standards Code, 2000²⁷⁶ (Alberta) sex workers would be protected under law from discrimination on the basis of their occupation and have grounds for fighting wrongful dismissal and/or discrimination claims. Specific standards could be negotiated through consultation with sex workers to determine minimum wages, hours of work, breaks, etc.
- Under the Occupational Health and Safety Act²⁷⁷, sex workers would have specific health and safety regulations catered to their profession (i.e. the mandatory use of condoms, medical testing, panic buttons etc. – as seen in the Netherlands). Sex workers would then have the right to refuse or stop work where health and safety are in danger. Sex workers would be entitled to WCB benefits (Workers Compensation Board) and have agency rights for reporting workplace violence and harassment.

The middle ground of the need to protect communities with strong criminal laws and that of focusing on the safety of prostitutes themselves was reached in the *Bedford* decision. The above-mentioned alternatives offer viable options for improvement to the regulation of prostitution, while building up labour and human rights- filling the gap between obligation and application of both international and domestic law.

²⁷⁶ The Employment Standards Code, 2000 (AB)

²⁷⁷ Occupational Health and Safety Act, 2000 (AB)

5.5 Future Research & Closing Statement

Further research and legal progression could be geared at making the above a reality, as well as focusing on enforcement and education. All of these factors being accounted for would alleviate the problem of inconsistency in prostitution regulation, as well as legal ambiguity amongst sex workers, brothel owners, clients, and society as a whole.

Further steps must be taken to contrive an adequate framework, which protects sex-workers from the risk of exploitation, while fully recognizing their autonomy and bolstering their human and labour rights. This framework requires full decriminalization of sex-work, and a combination of human rights and labour law. To place this issue within a broader picture, in light of the recent constitutional challenge (*Bedford*), decriminalization would provide better options and more possibilities for sex workers who could be legally recognized as workers instead of only victims (or criminals).

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