

Master Thesis
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Prostitution and feminist theories: how legislation reflects competing ideologies

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CHAPTER 1 - INTRODUCTION

1. INTRODUCTORY REMARKS AND RESEARCH QUESTION

Prostitution has often been said to be the “oldest profession in the world”¹. Therefore, it has faced tumultuous discussions for centuries. Indeed, prostitution is a very controversial and complex subject which links with many factors such as poverty², economy³, culture⁴, migration⁵, connection to drug business⁶, human rights and women’s rights⁷ (indeed, even though, man’s prostitution is real, the issue mainly concerns women). Legislation, because of that complexity, is very varied and rich. In addition, prostitution is sometimes confused with human trafficking⁸.

First, the issue of prostitution has divided feminists for decades and it still does today. Traditionally, feminists are separated into two major groups: the sex work position and the abolitionist position.

On the one hand, the sex work position claims for rights to prostitutes. Indeed, this position considers prostitution as a normal work⁹, that should be protected under the International

¹ Jessica Drexler, “Government’s role in turning tricks: The world’s oldest profession in the Netherlands and the United States” (1996) 15 Dickinson Journal of International Law 201, 201.

² European Commission, “The EU strategy towards the eradication of Trafficking in Human Beings” (2012-2016) Home Affairs 1, 2.

³ Siddhart Kara, “A Framework for Abolition: Risk and Demands” in *Sex Trafficking: Inside the Business of Modern Slavery* (Colombia University Press 2017) 200, 201.

⁴ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 73.

⁵ Wim Huisman and Edward Kleemans, “The challenges of fighting sex trafficking in the legalized prostitution market in The Netherlands” (2014) *Crime Law Soc Change* 215, 220.

⁶ Amy Young, Carol Boyd and Amy Hubbel, “Prostitution, Drug Use and Coping with Psychological Distress (2000) 30 *Journal of Drug Use* 789.

⁷ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 99.

⁸ Gunilla Ekberg, « The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” 10 *Violence against Women* 1187, 1189.

⁹ Melissa Ditmore, “From Prostitutes to Sex Workers: a movement for Rights” in *Prostitution and Sex Work* (Greenwood 2011) 105, 111.

Labour Convention¹⁰. Therefore, they prefer the term “sex workers”. Those rights encompass the right to social security, to use a condom – notably to be protected from HIV transmission¹¹-, birth control, health services and so forth¹². The proponents of the sex work position consider free prostitution -they distinguish between forced and voluntary prostitution- as the exercise of the right to self-determination and the empowerment of women¹³. Noting that I choose to use the term “sex worker” as neutral, it does not reflect my own thought on the subject.

On the other hand, the supporters of the abolitionist position believe that prostitution reflects the domination of men over women¹⁴. Therefore, it should be illegal. Indeed, partisans of this vision do not consider prostitution as a choice but only as a result of a pression imposed by a patriarchal society. Consequently, those scholars “equate”¹⁵ prostitution with human trafficking: “sex trafficking is inseparable from prostitution, and prostitution is evil by definition”¹⁶.

Second, legislation is as fragmented as feminists’ theories are. Usually, three legal systems are identified by scholars: criminalization, legalization or decriminalization¹⁷. First, criminalization is the legal regime which penalizes prostitution. Depending on the State, it could either penalize sex workers or the buyers or both¹⁸. The second system is legalization: it tolerates prostitution

¹⁰ Melissa Ditmore, “21st Century Campaigns and Laws against Trafficking in Persons” in *Prostitution and Sex Work* (Greenwood 2011) 87, 88.

¹¹ Melissa Ditmore, “From Prostitutes to Sex Workers: a movement for Rights” in *Prostitution and Sex Work* (Greenwood 2011) 105, 111.

¹² Jonathan Todres, “The importance of realizing other rights to prevent sex trafficking” (2006) 32 New York University Public Law and Legal Theory Working Papers 885, 887.

¹³ Sheila Jeffreys, “prostitution as choice” in *The Idea of Prostitution* (Spinifex Press 1997) 129.

¹⁴ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) 161 *Procedia Social and Behavioural Science* (2014) 96, 97.

¹⁵ Wim Huissman and Edward Kleemans, “The challenges of fighting sex trafficking in the legalized prostitution market of the Netherlands” (2014) *Crime Law Soc Change* 215, 216.

¹⁶ Ronald Weitzer, “The movement to Criminalize Sex Work in the United States” (2010) 37 *Journal of Law and Society* 61, 71.

¹⁷ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 47-50.

¹⁸ Barbara Brents and Kathryn Hausbeck, “Violence and legalized Brothels Prostitution in Nevada” (2005) 20 *Journal of Interpersonal Violence* 270, 272.

and regulates it, for instance, by conferring rights and protections to prostitutes¹⁹. The last one, decriminalization, does not prohibit prostitution nor regulates it²⁰.

In this Master thesis, I will identify whether legislation on prostitution shows traces or reflects those above cited feminists' theories. Resulting from this, my research question will be the following: **“How feminist theories on prostitution reflect on international, regional and domestic legislation?”**. This question will be answered in a dedicated chapter. Indeed, the analysis of the feminist's theories and the legal system will allow to draw conclusions on their possible mutual link. I am therefore starting with the hypothesis that there is a link and that the different legal regimes will show traces of the theories.

For clarification purposes, this Master thesis will focus on prostitution. However, it is difficult to speak about prostitution without mentioning the issue of human trafficking, especially at the international or regional level. Indeed, the choice of legal system for prostitution is given to States. Human trafficking is defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children in the article 3 (a). Three conditions are required: an act (“recruitment, transportation, transfer, harbouring or receipt of persons”²¹) which must be forced and for the aim of exploitation. International legislation strictly prohibits human trafficking and requires States to adopt “legislative and other measures as may be necessary to establish human trafficking as a criminal offence”²² and to ensure the protection of victims²³. Sometimes, legislation regulating human trafficking also mentions prostitution: this is the reason why human trafficking will be mentioned in this paper.

2. THE AIM AND GEOGRAPHICAL SCOPE OF THE MASTER THESIS

The aim of this Master thesis is to analyse different legal regimes of prostitution at the international, regional and domestic levels and to examine whether those legal regimes show

¹⁹ Melissa Ditmore, “21st Century Campaigns and Laws against Trafficking in Persons” in *Prostitution and Sex Work* (Greenwood 2011) 87, 93.

²⁰ Melissa Ditmore, “21st Century Campaigns and Laws against Trafficking in Persons” in *Prostitution and Sex Work* (Greenwood 2011) 87, 95.

²¹ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 3 (a).

²² UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 5 (1).

²³ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 6.

traces of the two feminist theories that I have introduced. However, throughout my research, I will possibly find legal regimes which do not fall under any of the feminist's theories.

The chapter concerning the international level will overview the main legal instruments and the general trends of legislation. Then, I will concentrate on three regional levels: the European one (encompassing the European Union and the Council of Europe) and the Inter-American one. Consequently, I will present three different but also very linked regional instruments. For instance, the European Court of Human Rights did a research report on the "references to the Inter-American Court of Human Rights and Inter-American Instruments in the case-law of the European Court of Human Rights"²⁴. It shows a connection between these regional courts, referring frequently to their respective case-law.

Furthermore, a chapter will be dedicated to domestic law and five States will be analysed: The Netherlands, Sweden, The United States, Thailand and India. I did not choose those countries randomly. Indeed, first, this selection offers a widespread geographical view, those States having different historical and cultural points of view. Second, The Netherlands and Sweden are often cited as two opposite systems in Europe. The United States are also interesting because even though most States adopted a similar legal system, Nevada did not. Then, Thailand is known for its "sex tourism", however, its legislation does not correspond to this apparent freedom. Finally, I chose India for its viewpoint on women's rights. In addition, the availability of resources in English also played a role.

3. METHODOLOGY

This Master thesis will be a legal research paper. Indeed, I will analyse the above cited legal regimes with the help of secondary (mainly articles and books) and primary (laws on prostitution, on violence against women's, on human trafficking) literature. When relevant, I will also refer to case-law, mostly for the regional level. In addition, in the first place, the feminists' theories I will rely on (the sex work and the abolitionist position) will be developed in a literature review. In addition, I will draw some overview tables at the end of certain chapters to provide more clarity.

²⁴ ECtHR, "Research Report Reference to the Inter-American instruments in the case-law of the European Court of Human Rights" (2016) 1. See also IACtHR and ECtHR, "Dialogue Across the Atlantic: Selected Case-Law of the European and Inter-American Human Rights Courts" (2015) Wolf Legal Publishers 1.

Then, concerning the last chapter, and the answer to my research question, I will examine the wordings and spirit of the laws and rules at the different level and determine whether it corresponds with one of the positions.

4. THE MASTER THESIS' STRUCTURE

Consequently, this Master thesis will be divided into five chapters. The second one will consist of a literature review of the two feminists' theories. The third chapter will focus on the international level and the analysis of international law regarding prostitution (and the issue of human trafficking). Forth, three regional instruments and regimes will be analysed: the European Union, the Council of Europe and the Inter-American system. The fifth Chapter will focus on domestic law, more specifically on The Netherlands, Sweden, The USA, Thailand and India. The last one will be the answer to my research question. Lastly, I will conclude.

CHAPTER 2 – THE SEX WORK AND THE ABOLITIONIST POSITION – A LITERATURE REVIEW

As mentioned in the introduction, two positions are held by feminists all around the world on the issue of prostitution. This chapter aims at reviewing literature regarding both positions. In addition, a third part will be added to discuss two NGO's which defend those positions: The Coalition Against Trafficking in Women and the Global Alliance Against Trafficking in Women.

Sometimes, scholars define themselves as part of “sex work” or “abolitionist” feminists. However, it might be subtler. In that case, I will pay attention to the language as recommended by Nicole Westmarland and Geetanjali Gangoli: “Pick up a book or article about prostitution and the general approach to prostitution that the author is taking soon becomes clear. The term “sex worker” and any words relating to “trade” or “work” imply a different approach to prostitution from the terms “women abused through prostitution”, “prostituted women” and “commercial sexual exploitation”²⁵”.

In addition, it is important to say that proponents of those positions, in the end, have mostly at heart to end the exploitation of women meaning that even though, they are contradictory, they have the same goal²⁶. Furthermore, those positions only consider the situation of adult women and not children. Finally, there seems to be a tendency for feminists to find a “middle ground”²⁷ from those positions.

²⁵ Nicole Westmarland and Geetanjali Gangoli, “Introduction: approaches to prostitution” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 1, 1.

²⁶ Jorn Johannes Marinus Van Rij, “Human Trafficking and Prostitution Policy: A European Issue” (2014) 1 *Journal of International and European Law* 75, 82.

²⁷ Prabha Kotiswaran, “Theorizing Sex Work” in *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press 2011) 11, 31.

SECTION 1 – THE SEX WORK POSITION

The sex work position rests on the vision that prostitution can be a free choice for a woman who is only exercising her right to self-determination²⁸. Relevant authors -among many others- are the following.

First, Ronald Weitzer advocates in favour of rights for sex workers in the United States, while most States criminalize prostitution. For instance, he claims that the “blanket [of] criminalization is problematic²⁹” which means that criminalization is only covering the bigger issue behind prostitution. In addition, he exposed different consequences deriving from criminalization³⁰. First, a conviction will not discourage women to return to prostitution. Second, sex workers themselves usually do not represent a threat to the public order “insofar as their activities occur in discrete private settings between willing sellers and buyers”³¹ -it has to be noted that he uses the word “willing”-. Thirdly, it is very costly and time-consuming for the police. Finally, he believes that criminalization would restrain prostitution from reporting to the police in case of mistreatment or rape for instance. Indeed, they might be afraid that the police will not take them seriously or even condemn them for illicit exercise of prostitution. He also examines how the legal reform is perceived by sex workers³². With the help of statistics, he answers that the vast majority of sex workers are in favour of decriminalization and health insurance for the workers.

Second, Prabha Kotiswaran advocates for a “postcolonial materialist feminist theory of sex work”³³ meaning that she defends third world sex workers. About the “materialist” part, it means that she is interested in the political economy of prostitution and she emphasizes the importance of the market. Throughout her book, she constantly refers to the two positions on

²⁸ Boaventura De Sousa Santos, Conceição Gomes and Madalena Duarte, « The Sexual Trafficking of Women: Representations of Illegality and Victimisation » (2010) 2 RCCS Annual Review 167, 170.

²⁹ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 53.

³⁰ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 49.

³¹ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 49.

³² Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 52.

³³ Prabha Kotiswaran, “Theorizing Sex Work” in *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press 2011) 11, p. 30.

prostitution, but she qualifies abolitionists as radical feminists. For instance, “Radical feminists understand prostitution as a social practice that perpetuates inequality”³⁴ or “In the radical feminist view, sex work with or without the consent of the sex worker is nothing but consent to the lack of consent, namely rape”³⁵.

Third, Lacey Sloan and Stephanie Wahab took an historical approach that blames religion, the historical “anti-prostitution crusade”³⁶, the first World War when women were pictured as “the Number 1 enemy”³⁷ and the psychiatrists who were diagnosing prostitutes as mentally ill³⁸ for the growth of abolitionists in the feminist debate. Among abolitionists, they cite different schools of feminists such as Marxists -who believe that prostitution is the result of capitalism and that makes women similar to objects and consumer good, the advocates of the domination theory (“female sexuality is constructed entirely as a man desire”³⁹) or the Black feminists who consider prostitution as a mix of male and racial domination. Then, about sex work, they explain that “members of the movement believe that (a) many women freely choose sex work. (b) sex work should be viewed and respected as legitimate work. (c) it is a violation of a woman’s civil right to be denied the opportunity to work as a sex worker”⁴⁰.

Fourth, Heidi Tinsman compares sex work with other works and states that sex work is as oppressive as other types of work for women⁴¹. In that way, she seems to fit in between the two theories. She also adds that prohibition is not the right answer. Rather, she believes that “the

³⁴ Prabha Kotiswaran, “Theorizing Sex Work” in *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press 2011) 11, 34.

³⁵ Prabha Kotiswaran, “Theorizing Sex Work” in *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press 2011) 11, 34.

³⁶ Lacey Sloan and Stephanie Wahab, “Feminist Voices on Sex Work: Implication for Social Work” (2000) 15 *AFFILIA* 457, p. 458.

³⁷ Lacey Sloan and Stephanie Wahab, “Feminist Voices on Sex Work: Implication for Social Work” (2000) 15 *AFFILIA* 457, 459.

³⁸ Lacey Sloan and Stephanie Wahab, “Feminist Voices on Sex Work: Implication for Social Work” (2000) 15 *AFFILIA* 457, 460.

³⁹ Lacey Sloan and Stephanie Wahab, “Feminist Voices on Sex Work: Implication for Social Work” (2000) 15 *AFFILIA* 457, 463.

⁴⁰ Lacey Sloan and Stephanie Wahab, “Feminist Voices on Sex Work: Implication for Social Work” (2000) 15 *AFFILIA* 457, 467.

⁴¹ Heidi Tinsman, “Behind the Sexual Division of Labour: Connecting Sex to Capitalist Production” *Yale* (1992) 17 *Journal of International Law* 241, 241.

most effective mean of challenging the unequal and exploitative nature of sex workers is to heighten workers empowerment within these social relations”⁴².

SECTION 2 – THE ABOLITIONIST POSITION

Abolitionists believe that prostitution cannot be chosen, that the exercise of prostitution can only be explained by male domination and the pressure of society against women. I will refer hereafter to a few authors defending this position.

First, Sheila Jeffreys is questioning the issue of forced and free prostitution. According to her, the “consent” labelling to prostitution is only a way to diminish the phenomenon as she compares prostitution to rape. For instance, she refers to the sociologist theory of “neutralising”: “Sociologists use this term to describe the way in which socially despised and marginalised groups create rationalisations which enables them to survive their marginal condition”⁴³. Furthermore, she states that, by dividing into consented and non-consented prostitution, it puts too much responsibility on women who are suffering from oppression⁴⁴ and not enough on consumers or society⁴⁵.

Second, Geetanjali Gangoli claims herself to be an abolitionist⁴⁶. Indeed, she believes that prostitution is the result of male violence and dominance. In addition, in India, she explains that even though the law seems to provide equality for men and women, in reality, it does not. She also mentions other factors such as “cast, poverty, dowry demands and the low status of women within the family and community (...) that may push women into the sex trade”⁴⁷. However, she criticizes some Indian feminists who “infantilise women”⁴⁸. She also refers to prostitutes as

⁴² Heidi Tinsman, “Behind the Sexual Division of Labour: Connecting Sex to Capitalist Production” (1992) 17 Yale Journal of International Law 241, 244-245.

⁴³ Sheila Jeffreys, “prostitution as choice” in *The Idea of Prostitution* (Spinifex Press 1997) 129, 137.

⁴⁴ Sheila Jeffreys, “prostitution as choice” in *The Idea of Prostitution* (Spinifex Press 1997) 129, 136.

⁴⁵ Sheila Jeffreys, “prostitution as choice” in *The Idea of Prostitution* (Spinifex Press 1997) 129, 136.

⁴⁶ Nicole Westmarland and Geetanjali Gangoli, “Introduction: approaches to prostitution” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 1, 3.

⁴⁷ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 117.

⁴⁸ Geetanjali Gangoli, « Silence, Hurt and Choice: attitudes to prostitution in India and the West” 6 Asia Research Center 1.

“sex workers”⁴⁹ and believes that legalization might be an option. Therefore, she does not hold a radical position on the issue. She is actually, in my opinion, both an abolitionist and advocate for sex workers.

Third, Enrique Javier Díez Gutiérrez argues that prostitution cannot be assimilated to sexuality -which involves consent and equality-, this can only be seen as a financial transaction⁵⁰. In addition, men are responsible for prostitution: “It is men who, as a social group, maintain, enforce and perpetuate the subjection of women and children to this form of gender-based violence”⁵¹. Therefore, the consumer should be accountable rather than prostitutes. He goes even further by saying that: “It is as every time that woman attain a higher degree of equality and rights, these men become incapable of adjusting to relationship of equality and thus resort with increasing frequency to commercial relationship”⁵². For him, it is impossible to consent to prostitution, as it is impossible to consent to slavery⁵³. He also compares prostitution with rape.

Fourth, Catharine MacKinnon claims that “women in prostitution are denied every imaginable civil right in every unimaginable way, such as it makes sense to understand prostitution as consisting in the denial of woman’s humanity”⁵⁴. According to her, prostitution is violating the right to be free from torture and inhumane treatments⁵⁵, the right for security liberty, privacy, the freedom of speech, equality, etc. ⁵⁶

⁴⁹ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 121.

⁵⁰ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 97.

⁵¹ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 98.

⁵² Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 98.

⁵³ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 99.

⁵⁴ Catharine A. MacKinnon, “Prostitution and Civil Rights” (1993) 1 *Michigan Journal of Gender and Law* 13, 13.

⁵⁵ Catharine A. MacKinnon, “Prostitution and Civil Rights” (1993) 1 *Michigan Journal of Gender and Law* 13, 13.

⁵⁶ Catharine A. MacKinnon, “Prostitution and Civil Rights” (1993) 1 *Michigan Journal of Gender and Law* 13, 14-17.

SECTION 3 – THE COALITION AGAINST TRAFFICKING IN WOMEN AND THE GLOBAL ALLIANCE AGAINST TRAFFICKING IN WOMEN

At the international level, those theories are represented by two entities: The Coalition Against Trafficking in Women (CATW) and the Global Alliance Against Traffic in Women (GAATW). Both groups are against Sex Trafficking, but they do not agree on the issue of prostitution. First, the CATW considers prostitution as violence of men against women. The non-governmental organisation⁵⁷ “seeks to penalise all those who profit from or use women in prostitution, whilst decriminalising the activities of prostituted women⁵⁸”. Thus, it represents the abolitionist position. Notably, its members are even qualifying themselves “abolitionists” on their website⁵⁹.

A concrete example can be found in the words of the founder of the Coalition Against Trafficking in Women, Kathy Barry who stated that: “We are really going back to the values women have always attached to sexuality, values that have been robbed from us. Sexual values and the positive, constructive experience of sex must be based in intimacy... It follows that sex cannot be purchased, legally acquired, or seized by force”⁶⁰. This shows the NGO cannot consider prostitution as a legitimate work for woman. Furthermore, the NGO adopts a moralist rather than a legalist view of prostitution is this statement.

Second, the GAATW is an “alliance of non-governmental organizations from around the world (Africa, Asia, Europe, LAC and North America)⁶¹” which “seeks a convention which will outlaw trafficking of anyone -men, women or children- for any purposes. GAATW makes a distinction between trafficking, which is forced, and “free” prostitution, which is potentially a

⁵⁷ Coalition Against Trafficking in Woman, “Who we are” <<http://www.catwinternational.org/WhoWeAre> > Accessed 10 June 2019.

⁵⁸ Sheila Jeffreys, “Trafficking, Prostitution and Human Rights” in *The Idea of Prostitution* (Spinifex Press 1997) 306, 306-307.

⁵⁹ Coalition Against Trafficking in Woman, “Who we are” <<http://www.catwinternational.org/WhoWeAre> > Accessed 10 June 2019.

⁶⁰ Ronald Weitzer, “The movement to Criminalize Sex Work in the United States” (2010) 37 *Journal of Law and Society* 61, 70.

⁶¹ Global Alliance Against Traffic in Woman, “About us” <<https://www.gaatw.org/about-us> > Accessed 10 June 2019.

form of “work” or “self-determination” for women⁶²”. In addition, in April 2019, the Global Alliance against Traffic in Women published a report specifically on sex work. It emphasizes that sex workers are “organising to create resistance”⁶³ in order to execute their work and to fight discrimination. In that way, the GAATW is following the sex work position.

From this literature review and the presentation of two international NGO’s representing the two theories, I can first conclude that scholars are not always fitting strictly in either one of the two theories -even though the majority does-. A possible example might be Heidi Tisman who advocates for sex workers and also recognizes that they are facing oppression. Furthermore, it seems that what divides the two camps is the question whether prostitution represents a violence against women/domination of men against women and or an empowerment/ choice for woman. In addition, concerning the feminist debate, in my opinion, the sex work position would favour the legalization and decriminalization models because it allows the exercise of free and voluntary prostitution. However, abolitionist, because they believe that prostitution is evil and is result of man/society/religion domination over woman, would favour the criminalization model.

This table overview provides a summary of what it is important to look for in order to find reflection/traces of the two feminist theories:

<p>Figure 1</p> <p>The sex work position</p>	<p>The abolitionist position</p>
<ul style="list-style-type: none"> - It is possible to consent to prostitution. The sex work feminists make a difference between forced and voluntary prostitution. Voluntary prostitution should be legal. - The exercise of prostitution is the exercise of the right to self-determination for women. 	<ul style="list-style-type: none"> - No difference. Prostitution is always seen as forced. It is therefore impossible to consent to prostitution. - Prostitution is the result of the domination of men/society over women. - Abolitionist favours the criminalization model.

⁶² Sheila Jeffreys, “Trafficking, Prostitution and Human Rights” in *The Idea of Prostitution* (Spinifex Press 1997) 306, p. 307.

⁶³ Global Alliance Against Traffic in Woman, “Special Issue Sex Work” (2019) 12 Anti-Trafficking Review 1, 8.

<ul style="list-style-type: none">- The opponent of the sex work position favours the models of legalization and decriminalization.	
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CHAPTER 3 – INTERNATIONAL LAW

As stated in the introduction, this third chapter on international law mostly focuses on human trafficking rather than strictly on prostitution. Indeed, at the international level, human trafficking is firmly prohibited by diverse legal instruments and studies. However, the issue of prostitution is less clear, it does not seem to have a homogeneity. Below, I will refer to relevant legal instruments – in addition to a study from the International Labour Organization and a declaration by the UN General Assembly- on the issue.

First, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was not in favour of an idea of free prostitution. Indeed, its preamble stated that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”⁶⁴. Then, its article one indicates that “The Parties to the present Convention agree to punish any person, who, to gratify the passion of another: (1) Procures, entices or lead away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person”⁶⁵. In addition, article 16 states that: “The parties to the present Convention agree to take or to encourage, through their public and private educational, health, social, economic and other related services, measures to the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offenses referred in the present Convention”⁶⁶. Thus, this Convention pictures prostitution as “evil” and it does not distinguish between forced and free prostitution. Also, it requires States to prevent prostitution.

This 1949 Convention was not the first one dealing with human trafficking. Indeed, the Convention cites the previous “instruments in force: (a) International Agreement of 18 May 1904 for the Suppression of White Slave Traffic, as amended by the Protocol approved by the

⁶⁴ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, preamble.

⁶⁵ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, article 1.

⁶⁶ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, article 16.

General Assembly of the United Nations on 3 December 1948. (b) International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, as amended by the above-mentioned protocol. (c) International Convention of 30 September 1912 for the Suppression of the Traffic in Women or Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947. (d) International Convention of 11 October 1933 for the Suppression in the Traffic in Women of Full Age, as amended by the aforesaid Protocol”⁶⁷. However, none of those Conventions mentions prostitution. But, for instance, the last-mentioned Convention states, in its article one, that “Whoever, in order to gratify the passions of another person, has procured enticed or led away, even with her consent, a woman or a girl of full age for immoral purposes to be carried out in another country, shall be punished”. So, prostitution is not prohibited as such but the fact for a woman who exercise prostitution “to be carried out in another country”⁶⁸. Thus, the Convention prohibits transnational prostitution and refers to it as “immoral”.

The second relevant Convention is the 1979 Convention on the Elimination of All forms of Discrimination against Women which refers to prostitution and Trafficking in its article 6: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”⁶⁹. According to Beverly Balos, “regardless of whether consent is present, CEDAW seems to conceive of trafficking and prostitution as violating the principle of equality and respect for human dignity and as inconsistent with its goal of equal rights for all people”⁷⁰. However, I do not agree with this affirmation: indeed, CEDAW prohibits the exploitation of prostitution (which is human trafficking) but not prostitution itself. In addition, prostitution is not regarded in the Convention as a discrimination against women. In addition, it is worth noting that prostitution does not only impact women, even though they are most of the persons concerned.

In the General Recommendation n°19 on violence against women, the Committee on the Elimination of Discrimination against Women looked into the causes of Trafficking and prostitution such as poverty or armed conflicts. According to the Committee, human trafficking

⁶⁷ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, preamble.

⁶⁸ International Convention for the Suppression of the Traffic in Women of Full Age 1933, article 1 (1).

⁶⁹ Convention on the Elimination of All forms of Discrimination against Women 1979, article 6.

⁷⁰ Beverly Balos, “The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation” (2004) 27 Harvard Women’s Law Journal, 137, 153.

and prostitution are distinct. For instance, trafficking is defined as follows: “the practices of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals, are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse”⁷¹. About prostitution, however, “prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence”⁷². Therefore, the Convention does not position itself on the possibility of “free” prostitution but still differentiates it from trafficking. It also highlights the need for protection for prostitutes who are particularly vulnerable.

Then, The International Labour Organization Study of Prostitution in Southeast Asian from 1998 seems to consider prostitution as a free choice. For instance, “While many current studies highlight the tragic stories of individuals prostitutes, especially of women and children deceived or coerced into the practice, the ILO surveys point out that many workers entered for pragmatic reasons and with a general sense of awareness of the choice they were making”⁷³. The International Labour organization, however, admits that most sex workers would prefer to find another job, but they carry on to earn money⁷⁴.

Also, there is the well-known 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children -also called the Palermo Protocol- which says in article 3 (c): “The consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in (a) have been used”⁷⁵. Those means are “the recruitment, transportation, transfer harbouring or receipt of persons by means of the threat or

⁷¹ UN Committee on the Elimination of Discrimination Against Women, General Recommendation n° 19: Violence Against Women 1992, article 6 (14).

⁷² UN Committee on the Elimination of Discrimination Against Women, General Recommendation n° 19: Violence Against Women 1992, article 10 (15).

⁷³ International Labour Organization, “Sex Industry assuming massive proportions in Southeast Asia: Press Release” (1998) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007994/lang--en/index.htm> Accessed 10 June 2019.

⁷⁴ International Labour Organization, “Sex Industry assuming massive proportions in Southeast Asia: Press Release” (1998) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007994/lang--en/index.htm> Accessed 10 June 2019.

⁷⁵ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 3 (c).

use of force or other forms of coercions”⁷⁶. Thus, the Convention does not position itself on the issue of consented prostitution but only expresses that no one can consent to human trafficking. Notably, human trafficking does not require a transnational displacement of sex workers. This Convention requires, for instance, that human trafficking should be a criminal offence⁷⁷, that victims should be protected and receive assistance⁷⁸, that States cooperate with each other⁷⁹.

In addition, The UN General Assembly adopted the Declaration on the Elimination of Violence against Women in 1993. Its article 2 expressed that: “Violence against women should be understood to encompass, but not limited to, the following: b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution”⁸⁰. Thus, this declaration distinguishes between forced and free prostitution.

This chapter exposed different relevant instrument on the issue of human trafficking (and on prostitution), it shows that the formulations and the objectives are very diverse ranging from the 1949 Convention which qualify prostitution as “immoral” and the 2001 Convention which does not mentions it. Furthermore, prostitution in itself is sometimes not but the “exploitation of prostitution” which is considered to be human trafficking at the international level. I can therefore conclude that international law leaves the discretion to States to choose for their legal systems on prostitution.

⁷⁶ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 3 (a).

⁷⁷ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 5 (1).

⁷⁸ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 6.

⁷⁹ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 10 (1).

⁸⁰ UNGA A/RES/48/104, Declaration on the Elimination of Discrimination Against Woman 1993, article 2 (b).

To recapitulate, here is what I found in this chapter:

Figure 2	1949 Convention	1933 Convention	CEDAW	GR n° 19	ILO Study	2001 Convention	GA Declaration
Is prostitution mentioned?	Yes	Yes	No, only the “exploitation of prostitution” (human trafficking)	Yes	Yes	No, only the “exploitation of prostitution” (human trafficking)	Yes, but only “forced” prostitution
Is the issue of consent (or free or forced prostitution) discussed?	Yes	Yes	No	No	Yes	Yes, but only about human trafficking	Yes

CHAPTER 4 – REGIONAL LEVELS

The fourth chapter of this Master thesis deals with three regional levels: the European Union, the Council of Europe and the Inter-American Commission on Human Rights. In legal terms, those three systems have similarities -such as a legal instrument for the promotion of Human Rights and a Court to ensure the compliance with the instrument- and differences. However, the European Union, opposite to the other two is not an institution which only advocates for the promotion of Human Rights. It also has other primary goals such as the promotion of the internal market. In addition, in contrast to the European Court of Human Rights, individuals cannot accede to the Inter-American Court of Human Rights directly, they have to complaint before the Inter-American Commission first.

SECTION 1 – THE EUROPEAN UNION

The European Union adopted numerous instruments on prostitution and human trafficking. First, the European directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims adopted the same logic as the Palermo Protocol. Indeed, Article 2 (3) and (4) states that: “exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation (...). The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used”⁸¹.

Then, the article 5 (3) of the Charter of Fundamental Rights explicitly states “trafficking in human beings is prohibited”⁸² -opposite to the article 4 of the European Convention on Human Rights which implicitly recognized the prohibition of Human Trafficking-. However, the issue of prostitution itself has been discarded from EU’s political agenda. Indeed, “EU policy documents rarely mention prostitution. When they do, it is often in the context of HIV prevention targeting particular groups including prostitutes, child prostitution and pornography,

⁸¹ EU directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims adopted the same logic as the Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children [2011], article 2 (3) and (4).

⁸² Charter of Fundamental Rights of the European Union 2000, article 5 (3).

and trafficking in human beings for the purpose of the exploitation of prostitution⁸³”. However, this does not mean that European institutions never mention prostitution: the above-mentioned instrument, the European Parliament and the European Court of Justice do.

The common argument is that prostitution does not fall within the competence of the EU⁸⁴. Basically, when prostitution is regarded as the exploitation of women (or men), the European Union is qualified to legislate as stated by the article 83 of the TFEU. However, outside Sex Trafficking, the EU does not regulate it⁸⁵, it is left at the States’ discretion. One argument might be the absence of consensus among Member States.

In 2014, a motion for a European Parliament Resolution stated: “Whereas prostitution and forced prostitution are forms of slavery incompatible with human dignity and fundamental human rights (...). Whereas prostitution reduces all intimate acts to their monetary value and diminishes the human beings to the level of merchandise or an object used by the client”⁸⁶. The European Parliament, in this resolution, recalls the importance of obtaining gender-equality and the abolition of violence against women by “recognising that prostitution feeds the trafficking of vulnerable women”⁸⁷.

Nevertheless, the European Court of Justice rendered a judgement in 2001 that emphasizes prostitution as a legitimate work: “prostitution is an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods. Consequently, prostitution is a provision of services for remuneration which falls within the concept of “economic activities”. The activity of prostitution pursued in a self-employed capacity can be regarded as a service”⁸⁸. Furthermore, on the “morality” and on the issue whether “prostitution can be freely chosen”, the Court adds that it is not competent to answer

⁸³ Gill ALLWOOD, “Agenda setting, agenda blocking and policy silence: Why is there no EU policy on prostitution?” (2018) 69 Women’s Studies International Forum 126, 129.

⁸⁴ Gill ALLWOOD, “Agenda setting, agenda blocking and policy silence: Why is there no EU policy on prostitution?” (2018) 69 Women’s Studies International Forum 126, 127.

⁸⁵ Gill ALLWOOD, “Agenda setting, agenda blocking and policy silence: Why is there no EU policy on prostitution?” (2018) 69 Women’s Studies International Forum 126, 129.

⁸⁶ European Parliament 2013/2103 (INI) motion for a Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality” [2013], para B-K.

⁸⁷ European Parliament 2013/2103 (INI) motion for a Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality” [2013], para 3.

⁸⁸ Case C-268/99 *Jany and Others vs Staatssecretaris van Justicie* [2001] ECR 2001 I-08615, paras 48-50.

such a question⁸⁹. However, under classical EU law⁹⁰, Member States can restrict EU law for reasons of public order, when there is “a genuine and sufficient serious threat affecting one of the fundamental interests of society⁹¹”. But, the issue concerned Polish and Czech nationals sex workers who were refused resident permits in the Netherlands -which legalised prostitution-, so the Court did not follow that argumentation.

An older judgment was rendered in 1982 by the Court of Justice of the European Communities concerning Belgium which never allowed the deliverance of a residence permit of a sex worker from France for reasons of public policy⁹². However, in Belgium prostitution was and is still legal but the fact of working behind a window was not in the city of Liège. In Belgium’s opinion in that case: “it must be observed that personal conduct taking the form of prostitution in certain circumstances promotes criminal activities, in particular by the money which it raises for those who exploit prostitution (...). It goes without saying that the activity of a prostitute intrinsically jeopardizes public policy if she carries on that activity in a provocative manner⁹³”. This judgement is interesting as it received observations from Belgium and France but also Italy, The Netherlands, United Kingdom. This interest might be explained by the two sensitive issues discussed in this judgement: resident permit and prostitution. The Commission also made an observation which relies mostly on proportionality⁹⁴.

The Court in this *Andoui and Cornuaille* judgement, does not position itself about prostitution, it declares that: “although community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State”⁹⁵ if the nationals adopting the same conduct are not the target of repressive measures from the State. Therefore, the Court admits that prostitution can be a justification to restrict European law.

⁸⁹ Case C-268/99 *Jany and Others vs Staatssecretaris van Justicie* [2001] ECR 2001 I-08615, para 56.

⁹⁰ Catherine Kessedjiam, “Public Order in European Law” (2007) 1 Erasmus Law Review 25, 25.

⁹¹ Case C-268/99 *Jany and Others vs Staatssecretaris van Justicie* [2001] ECR 2001 I-08615, para 59.

⁹² Case 115 and 116/18 *Andoui and Cornuaille* [1982] ECR 1982-01665, 1669.

⁹³ Case 115 and 116/18 *Andoui and Cornuaille* [1982] ECR 1982-01665, 1685.

⁹⁴ Case 115 and 116/18 *Andoui and Cornuaille* [1982] ECR 1982-01665, 1699.

⁹⁵ Case 115 and 116/18 *Andoui and Cornuaille* [1982] ECR 1982-01665, 1708.

SECTION 2 – THE COUNCIL OF EUROPE

The Council of Europe has its own instrument on human trafficking: The Council of Europe Convention on Action against Trafficking in Human Beings of 2005. In its preamble, it generally states that: “trafficking in human beings constitutes a violation of human rights and an offense to the dignity and integrity of the human being”⁹⁶. This Convention is very similar to the Palermo Protocol and the European Directive: prostitution itself is not mentioned, only the “exploitation of prostitution”⁹⁷ as human trafficking.

There are also some relevant recommendations of the Committee of Ministers. For instance, the recommendation No. R (91) 11 of the Committee of Ministers to Member States Concerning Sexual Exploitation, Pornography and Prostitution of, and trafficking of and trafficking in, children and young adults (1991) formulates in its preamble: “prostitution and traffic of human beings has assumed new and alarming dimensions at national and international level. Considering that sexual experience linked to this social phenomenon, often associated with early sexual abuse within the family and outside of it, may be detrimental to a child’s and young adult’s psychological development”⁹⁸. About prostitution, the recommendation then gives some measures to be adopted by Member States such as “intensify efforts with a view to identifying and sanctioning those who foster or encourage the prostitution of children or young adults, or who profits from it, on the one hand, and of the customers of child prostitution, on the other”⁹⁹, avoid the development of sex tourism, improve and train the police, etc. However, it is important to keep in mind that this recommendation mostly focuses on children.

In addition, the European Court of Human Rights developed a jurisprudence on human trafficking and forced prostitution based on article 4 of the European Convention of Human Rights as formulated in the *Rantsev v. Cyprus and Russia* case¹⁰⁰. The article 4 prohibits slavery

⁹⁶ Council of Europe Convention on Action against Trafficking in Human Beings 2005, preamble.

⁹⁷ Council of Europe Convention on Action against Trafficking in Human Beings 2005, article 4 (a).

⁹⁸ Committee of Ministers Recommendation N° R (91) 11 concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults [1991], preamble.

⁹⁹ Committee of Ministers Recommendation N° R (91) 11 concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults [1991], 3.

¹⁰⁰ *Rantsev vs Cyprus and Russia* App no 25965/04 (ECtHR 10 May 2010), paras 281-282.

or servitude, forced or compulsory labour¹⁰¹. This is an absolute right which cannot face any exception or derogation¹⁰².

S.M. vs Croatia is a possible example of case involving prostitution. The applicant was forced into prostitution: “T.M. had physically and psychologically forced her into prostitution”¹⁰³. Then, the Court declared: “There can be no doubt that trafficking and exploitation of prostitution threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. The Court concludes that trafficking itself as well as exploitation of prostitution, fall within the scope of article 4 of the Convention”¹⁰⁴. Another relevant quotation might be: “in international law, prostitution, sexual exploitation, and trafficking in human beings are closely related. In order to honour their obligations under Article 4 of the Convention the States must set in place a legislative and administrative framework that prohibits and punishes forced or compulsory labour, servitude and slavery. The member States should be also required to ensure that efficient criminal-law provisions are in place for cases concerning forced prostitution¹⁰⁵”. In that way, the European Court of Human Rights is requiring States to prohibit forced prostitution in their legislation.

SECTION 3 – THE INTER-AMERICAN COMMISSION

First, the Convention on the Prevention, Punishment and Eradication of Violence against Women (also called the Belem do Para Convention) was adopted by the Inter-American Commission on Human Rights. The Convention mentions prostitution in its article 2 b : “Violence against Women shall be understood to include physical, sexual and psychological violence: that occurs in the community and is perpetrated by any person, including among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace as well as in educational institutions, health facilities or any

¹⁰¹ European Convention on Human Rights 1953, 4.

¹⁰² ECtHR, “Guide on article 4 of the European Convention on Human Rights” (2019), 5.

¹⁰³ *S.M. vs Croatia* App no 60561/14 (ECtHR 03 December 2018), para 6.

¹⁰⁴ *S.M. vs Croatia* App no 60561/14 (ECtHR 03 December 2018), para 54.

¹⁰⁵ *S.M. vs Croatia* App no 60561/14 (ECtHR 03 December 2018), para 62.

other place”¹⁰⁶. Thus, in this article, only forced prostitution is prohibited and considered as a violence against women.

However, in a report about poverty and Human Rights, The Inter-American Commission did not make a distinction between forced and free prostitution. For instance, The Commission “notes that indigenous women may be particularly affected by poverty. They suffer additional discrimination based on gender, leading to additional disadvantages, marginalization, poverty and in the most extreme cases, violence, trafficking, prostitution, and restricted access to justice”¹⁰⁷. To paraphrase, women have a risk to suffer from prostitution simply by being woman. However, the Commission is also making a distinction between trafficking and prostitution.

In another report dedicated to the issue of migration, the Inter-American Commission, about human trafficking (not prostitution) expressed that: “gender discrimination and machismo present in many countries explain the disproportionate impact that human trafficking in persons has on the victimization of women”¹⁰⁸. The Commission also only prohibits prostitution as being “forced” and not in general or as “sexual exploitation”¹⁰⁹. Thus, in the latter report, the Inter-American Commission expresses that “gender-discrimination” and “machismo” might create an “over-victimization” of woman.

Furthermore, the Inter-American Court only pronounced itself on the issue of prostitution in the *advisory opinion on Judicial Condition and Human Rights of the Child*. About prostitution it stated that it raises “great concerns internationally. This problem arises primarily when there are legislative flaws that place no obstacle to this type of justice”¹¹⁰.

¹⁰⁶ Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, article 2 (b).

¹⁰⁷ IACHR, OEA/Ser.L/V/II.164 “Report on Poverty and human rights in the Americas (2017) Doc 147, para 367.

¹⁰⁸ IACHR, OEA/Ser.L/V/II “Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System” (2015) Doc 46/15, para 66.

¹⁰⁹ IACHR, OEA/Ser.L/V/II “Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System” (2015) Doc 46/15, para 68-71.

¹¹⁰ *Advisory opinion on Judicial Condition and Human Rights of the Child* OC-17/2002 (ACtHR 28 August 2002), 38.

SECTION 4 – INTERMEDIATE CONCLUSION

As a preliminary conclusion I can first conclude that there are similarities with the international law. Indeed, inside each regional level there are very diverse documents and points of view. This is especially noticeable within the European Union. For instance, the 2014 report from the European Parliament advocates for the Swedish model (which will be discussed in the next chapter), which is different from the European Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims. Indeed, the latter does not position itself on prostitution but on the “exploitation of prostitution”. Furthermore, most regional instruments, case-law and reports focus on human trafficking rather than prostitution.

Similarly, to the precedent chapters, here is an overview table presenting what I discussed above:

Figure 3

	European Union	Council of Europe	Inter-American Commission
Is prostitution mentioned?	Yes, in the Motion for a European Parliament Resolution and in the Judgments of the CJEU/CJEC. No, in the Charter of Fundamental Rights. No, in the European directive which only mentions “the exploitation of prostitution”.	Yes, in the recommendation of the Committee of Ministers and in the ECtHR case-law. No, in the Convention which only mentions “the exploitation of prostitution”.	Yes, in the Belem do Para Convention but only as “forced” also in the reports and in the advisory opinion of the IACtHR.
Is there a difference between voluntary	No, but the CJEU recognize prostitution as work.	Yes, in <i>SM vs Croatia</i> case, the applicant was	Yes, in the Balem do Para Convention and in the second report:

and forced prostitution?		“forced into prostitution”.	prostitution is referred as “forced”.
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CHAPTER 5 – DOMESTIC LEVELS

This Chapter analyses various domestic level's legislation on prostitution: Sweden, The Netherlands, The USA (and Nevada), Thailand and India.

SECTION 1 – SWEDEN

The Swedish model is one of the most cited in the context of prostitution. Mainly because, it criminalizes the purchase of sex but does not criminalize prostitutes and Sweden was the first country to do so¹¹¹ as Swedish law primarily focus on the “prevention of violence”¹¹². Indeed, today (and since 2005), the Swedish Criminal Code (Chapter 6 Article 11) states that: “A person who obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most one year. The provision of the first paragraph shall also apply if the payment was promised or given by another person”¹¹³

Before that, in 1999, Sweden passed a law criminalizing the purchase of prostitution, commonly called the Swedish Sex Purchase Act. At first, the intention was to criminalize completely but then, it was perceived by the public opinion to be too aggressive against prostitutes¹¹⁴. Thus, prostitutes cannot be convicted under criminal law, only the buyer can¹¹⁵. The law includes all forms of prostitution: brothel, escort agencies, street prostitution, etc¹¹⁶.

In addition, it is quite revealing to note that the Swedish law “passed in a package of measures to do with violence against women”¹¹⁷. Indeed, in Sweden, prostitution is seen as violence against women, as a demonstration of male dominance over women that affects every level of

¹¹¹ Arthur Gould, « The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden » (2011) 30 Jnl Soc, 437, 441.

¹¹² Government Offices of Sweden, “National started to prevent and combat men’s violence against women” November 2016 <https://www.government.se/4ac3ba/contentassets/4bbb1643e427432682464d4559c41027/fact-sheet_national-strategy-to-prevent-and-combat.pdf> Accessed 11 June 2019.

¹¹³ Talita, “The Sex Purchase Act” <<http://talita.org/facts/prostitution/the-sex-purchase-act>> Accessed 11 June 2019.

¹¹⁴ Arthur Gould, « The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden » (2011) 30 Jnl Soc, 437, p. 442.

¹¹⁵ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1192.

¹¹⁶ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1192.

¹¹⁷ Arthur Gould, « The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden » (2011) 30 Jnl Soc, 437, 452.

society¹¹⁸. In this paternalist State view, sex workers are victims and deserve assistance to escape from prostitution. Also, if the law is gender-neutral, clearly, it focuses mainly of women prostitutes and men buyers.

Thus, in Sweden, prostitution seems to be perceived like sex trafficking. Indeed, those are “issues that cannot and should not, be separated; both are harmful practices and intrinsically linked¹¹⁹”. Thus, the main aim of the law was to reduce sex trafficking with prostitution’s criminalization¹²⁰. According to some Swedish studies, it did have an impact: “Sweden has the reputation of being a country in which it is difficult to operate in prostitution, which may have a deterrent effect on those involved in human trafficking¹²¹”. As a matter of fact, traffickers usually enter the trafficking business for the reasons of minimal cost and of the low risk to get caught¹²². By criminalizing sex purchase, Sweden, might have increased trafficker’s risks which can lead them to move to other countries. However, there is need to be careful here because of the complex ways to get data on the subject. For instance, traffickers and prostitutes could have moved to the internet or other “less visible areas”¹²³.

According to the proponents of this model, Sweden is just implementing legal instruments on human trafficking¹²⁴. For instance, article 9 (5) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons provides that “States Parties shall adopt or strengthen legislative and other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of

¹¹⁸ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1189.

¹¹⁹ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1189.

¹²⁰ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1189-1190.

¹²¹ Government of Sweden, *Utvärdering av förbudet mot sexköp, Beslut vid regeringssammanträde den 24 april 2008* [Committee directive 2008:44], 5 cited by Charlotta Holmstrom and May-Len Skilbrei, “The Swedish Sex Purchase Act: Where does it stand?” January 2017 < https://www.idunn.no/oslo_law_review/2017/02/the_swedish_sex_purchase_act_where_does_it_stand> Accessed 11 June 2019.

¹²² UNOC, “Global Report on Trafficking in Persons” (2014) United Nations Publications 1.

¹²³ Charlotta Holmstrom and May-Len Skilbrei, “The Swedish Sex Purchase Act: Where does it stand?” January 2017 < https://www.idunn.no/oslo_law_review/2017/02/the_swedish_sex_purchase_act_where_does_it_stand> Accessed 11 June 2019.

¹²⁴ Mady Coy, Helen Pringle and Meagan Tyler, “The Swedish Sex Purchase Law: evidence of its impact”, (2016) Nordic Model Information Network 1, 5.

persons, especially women and children, that leads to trafficking”¹²⁵. Indeed, for the Swedish government, criminalizing the purchase of sex is a way to “discourage the demand”.

In addition, the law is designed in such a way that if a Swedish citizen purchases sex in a country with the same legal system on prostitution, then, the so-called citizen can be convicted under the Swedish Sex Purchase Act¹²⁶. Indeed, “All Swedish laws are extraterritorial”¹²⁷.

SECTION 2 – THE NETHERLANDS

Although the position of the Netherlands is quite different because the Netherlands do not just legalize prostitution, they regulate it and provide rights for sex workers. The Netherlands are in favour of a “right to prostitute”¹²⁸.

In 2000, Netherlands legalized brothels and authorized the exercise of voluntary prostitution for adults¹²⁹. However, child prostitution and forced prostitution are, of course, forbidden. Indeed, section 273f of the Dutch Criminal Code states that: “Any persons who shall be guilty of human trafficking and as such shall be liable to a term of imprisonment not exceeding eight years or a fine (...). Exploitation shall at least include exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery or practices similar to slavery or servitude”¹³⁰. In addition, “section 250 b of the Dutch Criminal Code prohibits certain prostitution-related activities such as pimping, facilitating prostitutes and running prostitution enterprises”¹³¹. Interestingly, in 1901, The Netherlands had a similar

¹²⁵ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, 9 (5).

¹²⁶ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1196.

¹²⁷ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking over Human Beings” (2004) 10 Violence Against Women 1187, 1196.

¹²⁸ Sheila Jeffreys, “Trafficking, Prostitution and Human Rights” in *The Idea of Prostitution* (Spinifex Press 1997) 306, 318.

¹²⁹ Hendrik Wagenaar, “Democracy and prostitution: Deliberating the Legalization of Brothels in The Netherlands” (2006) 38 Administration and Society 198.

¹³⁰ Dutch Criminal Code, article 273 f (1) (2).

¹³¹ Jessica Drexler, “Government’s role in turning tricks: The world’s oldest profession in the Netherlands and the United States” (1996) 15 Dickinson Journal of International Law 201, 217.

system to Sweden -prostitution was criminalized but not the sex workers-, but it was never really implemented in practice¹³². In addition to that, municipalities can adopt stricter rules¹³³.

The Netherlands's view of position finds its origin in the 1960's, when feminist movements were in favour of "sexual freedom and liberal ideas about individual rights"¹³⁴. This went with the logic of "progressive" policies on abortion, euthanasia, same-sex marriage, etc.¹³⁵ The idea is that prostitution can be a consciously chosen work and that sex workers are not victims. Therefore, sex workers are entitled to labour rights, health rights and social security¹³⁶.

However, in the 70's because of a flourishing economy, Dutch sex workers found other jobs, and foreign sex workers started to immigrate in the Netherlands while suspicion of human trafficking were coming with them¹³⁷. Following this, the government "organized a high-level conference on sexual violence in The Hague"¹³⁸, where sex work and abolitionist feminists were present¹³⁹. On this occasion, "a distinction was drawn between "voluntary" prostitution, which should be regarded as work and regulated in order to improve the position of sex workers, and "forced" prostitution which occurs when women are coerced in doing such work"¹⁴⁰. However, because of this fear of migrant women, in the Netherlands, "a prostitute is said to perform non-legal labour if she originates from outside the European Economic Area"¹⁴¹.

¹³² Joyce Outshoorn, "Policy Change in Prostitution in the Netherlands: From Legalization to Strict Control" (2012) *Sex Res Soc Policy* 233, 234.

¹³³ Amelie Daalder, "Prostitution in The Netherlands in 2014" *Wetenschappelijk Onderzoek – Documentatie Centrum* (2014) 5, 11.

¹³⁴ Joyce Outshoorn, "Policy Change in Prostitution in the Netherlands: From Legalization to Strict Control" (2012) *Sex Res Soc Policy* 233, 235.

¹³⁵ Joyce Outshoorn, "Policy Change in Prostitution in the Netherlands: From Legalization to Strict Control" (2012) *Sex Res Soc Policy* 233, 235.

¹³⁶ Joyce Outshoorn, "Pragmatism in the Polder: Changing Prostitution Policy in the Netherlands" (2004) 12 *Journal of Contemporary European Studies* 165, 165.

¹³⁷ Joyce Outshoorn, "Pragmatism in the Polder: Changing Prostitution Policy in the Netherlands" (2004) 12 *Journal of Contemporary European Studies* 165, 167.

¹³⁸ Joyce Outshoorn, "Pragmatism in the Polder: Changing Prostitution Policy in the Netherlands" (2004) 12 *Journal of Contemporary European Studies* 165, 168.

¹³⁹ Joyce Outshoorn, "Pragmatism in the Polder: Changing Prostitution Policy in the Netherlands" (2004) 12 *Journal of Contemporary European Studies* 165, 168.

¹⁴⁰ Joyce Outshoorn, "Pragmatism in the Polder: Changing Prostitution Policy in the Netherlands" (2004) 12 *Journal of Contemporary European Studies* 165, 168.

¹⁴¹ Amelie Daalder, "Prostitution in The Netherlands in 2014" *Wetenschappelijk Onderzoek – Documentatie Centrum* (2014) 5, 22.

In 2011, there was a proposition of amendment which would rend stricter the exercise of prostitution. First, the minimum age would be raised to 21 years (it was 18 years before). Second, “local authorities retain the freedom to more precisely organize prostitution”¹⁴². Furthermore, they must “register within the Internal Revenue Service and carry an identity card”¹⁴³. In 2014, this “amended Bill regulation of prostitution removed the regulation that required prostitutes to register to authorities” but the age was indeed raised to 21 years¹⁴⁴. According to some scholars, “the fundamental objective of the 2014 Bill is to protect prostitutes and the general public from harm”¹⁴⁵. They also qualify it as “paternalist”¹⁴⁶. In 2014 also, the Ministry of Freedom and Justice (*Ministerie van Veiligheid and Justitie*) published a report on prostitution evaluating the law of 2000. It stated that 75 % of municipalities adopted laws on prostitution¹⁴⁷. In addition, compared to the previous evaluation in 2006, the number of licensed brothels decreased¹⁴⁸.

¹⁴² Che Post, Jan Brouwer and Michel Vos, “Regulation of Prostitution in the Netherlands: Liberal Dream of Growing Repression?” (2019) Eur J Crim Policy Res 100, 111.

¹⁴³ Joyce Outshoorn, “Pragmatism in the Polder: Changing Prostitution Policy in the Netherlands” (2004) 12 Journal of Contemporary European Studies 165, 172.

¹⁴⁴ Amelie Daalder, “Prostitution in The Netherlands in 2014” Wetenschappelijk Onderzoek – Documentatie Centrum (2014) 5.

¹⁴⁵ Che Post, Jan Brouwer and Michel Vos, “Regulation of Prostitution in the Netherlands: Liberal Dream of Growing Repression?” (2019) Eur J Crim Policy Res 100, 111.

¹⁴⁶ Che Post, Jan Brouwer and Michel Vos, “Regulation of Prostitution in the Netherlands: Liberal Dream of Growing Repression?” (2019) Eur J Crim Policy Res 100, 110.

¹⁴⁷ Amelie Daalder, “Prostitution in The Netherlands in 2014” Wetenschappelijk Onderzoek – Documentatie Centrum (2014) 5, 14.

¹⁴⁸ Amelie Daalder, “Prostitution in The Netherlands in 2014” Wetenschappelijk Onderzoek – Documentatie Centrum (2014) 5, 18.

SECTION 3 – THE UNITED STATES (AND THE STATE OF NEVADA)

In the United States, prostitution is a competence of States¹⁴⁹. At the federal level the “interstate transportation of prostitute”¹⁵⁰ is however prohibited under the 1910 Mann Act¹⁵¹. Furthermore, in accordance with international law, the United States prohibit human trafficking by the 2000 Trafficking and Violence Protection Act¹⁵². Interestingly, in the latter Act, it is stated that: “Congress finds that: Many of these [victims] are trafficked into the international sex trade, often by force, fraud or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry”¹⁵³. From this extract, I cannot conclude for certain that the Congress believed that the growth of the sex industry caused the “burgeoning of the trafficking industry” but nonetheless it seems to have a link.

Opposite to Sweden, the criminalization encompasses both the sex worker and the buyer (in most States)¹⁵⁴. Therefore, the United States, except from Nevada, adopted a strict criminalization. However, attempts were taken in 2008 and 2012 in California to decriminalize prostitution but they failed as they were not supported by the population¹⁵⁵. According to Ronald Weitzer, “Prostitution remains beyond the pale in the United States. Indeed, prostitution is being increasingly demonized, marginalized, and criminalized as a result of the efforts of a

¹⁴⁹ Moira Heiges, “From the inside out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad” (2009) 94 Minnesota Law Review 428, 432.

¹⁵⁰ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 48.

¹⁵¹ Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 48.

¹⁵² Ronald Weitzer, “America and Beyond” in *Legalizing prostitution: From illicit Vice to Lawful Business* (New York University Press 2011) 45, 48.

¹⁵³ US Victims of Trafficking and Violence Protection Act 2000, article 102 (b) (2).

¹⁵⁴ Jessica Drexler, “Government’s role in turning tricks: The world’s oldest profession in the Netherlands and the United States” (1996) 15 Dickinson Journal of International Law 201, 205.

¹⁵⁵ Ronald Weitzer, “The movement to Criminalize Sex Work in the United States” (2010) 37 Journal of Law and Society 61, 61.

robust moral crusade”¹⁵⁶. Indeed, in the United States, the prostitute is seen as a victim¹⁵⁷ that needs to be saved by abolitionists feminists but also as devilish by religious members¹⁵⁸.

Furthermore, in the United States the risk of prison sentences for sex workers starts from 10 days in Alaska to two years in Iowa. However, the most common prison sentence is one year¹⁵⁹. Regarding fines, it starts from 50 \$ in West Virginia to 10 000 \$ (first offence)¹⁶⁰. The most common fine¹⁶¹ is however 500 \$. In addition, a few States determine the sentence by the number of previous convictions. For example, in Arkansas, the first offense might result in maximum 90 days of imprisonment. If it is the second or more, then the sentence will be up to one year. For buyers, it also starts from no prison days in Minnesota (only community service or fine) to two and a half years in Massachusetts. In most States, the prison sentence from consumer¹⁶² is 6 months or one year¹⁶³. Regarding fines, the most common sentence is also a payment of 500 \$¹⁶⁴, 1000 \$¹⁶⁵ or 2000 \$¹⁶⁶. The maximum fine is however 10 000 \$ in

¹⁵⁶ Ronald Weitzer, “The movement to Criminalize Sex Work in the United States” (2010) 37 Journal of Law and Society 61, 62.

¹⁵⁷ Jorn Johannes Marinus Van Rij, “Human Trafficking and Prostitution Policy: A European Issue” (2014) 1 Journal of International and European Law 75, p. 80.

¹⁵⁸ Ronald Weitzer, “The movement to Criminalize Sex Work in the United States” (2010) 37 Journal of Law and Society 61, 64.

¹⁵⁹ in South Dakota, Virginia, Vermont, Pennsylvania, Oregon, North Carolina, New Hampshire, Massachusetts, Maryland, Indiana, Georgia, Connecticut and Alabama. See ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶⁰ ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶¹ in Tennessee, Ohio, New York, New Mexico, Montana, Michigan, Massachusetts, Maryland, Louisiana, Hawaii, Florida and Washington DC. See ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶² ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶³ in Alabama, Connecticut, Georgia, Kansas, Maryland, Montana, Nebraska, New Hampshire, New York, Oregon, Pennsylvania, South Dakota, Utah, Vermont and Virginia. See ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶⁴ In Colorado, DC, Florida, Hawaii, Louisiana, Maryland, Michigan, Minnesota, New Mexico and Ohio. See ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶⁵ In Washington, New York, Montana, Missouri, Maine, Idaho, Georgia and California. See ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

¹⁶⁶ In Alaska, Arkansas, Connecticut, New Hampshire, South Dakota and Texas. See ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

Wisconsin, and in New Jersey, buyers have to participate to a “Prostitution Offender Program”. From all the above, I can conclude that globally there is no major difference between the sentences of prostitutes and consumers. It depends on the States, some penalize more strictly the prostitute, some penalize more the buyer, and some give the exact same sentence.

Concerning the particular State of Nevada, it does not exactly authorize prostitution, but it leaves the opportunity for the counties to do so¹⁶⁷. But, Nevada is nonetheless said to legalize prostitution¹⁶⁸. The system of legalization also means a regulation by the State, indeed, under the Nevada Revised Statute section 201.354: “It is unlawful for any person to engage in prostitution or solicitation therefor, except in a licenced house of prostitution”¹⁶⁹. Otherwise, a prostitute will be “guilty of misdemeanour”¹⁷⁰. And the consumer will also be guilty of misdemeanour, be sentenced to 6 months of imprisonment and/or pay a fine of 400 \$ as a first offence¹⁷¹.

In addition, in article 244.345 of the Nevada Revised Statute, it is declared that “Every natural person wishing to be employed as an entertainer for an entertainment by referral service and every natural person, firm, association of persons or corporations wishing to engage in the business of conducting a dancing hall, escort service, entertainment by referral service or gambling game or device permitted by law must: make an application in counties whose population is less than 700.000”¹⁷². In addition, under the Nevada Administrative Code, once a month, sex workers need to make a blood test to “confirm the absence or presence of HIV and Syphilis”¹⁷³. In addition, once a week, they can be tested for other sexually transmitted diseases such as Chlamydia¹⁷⁴. Sex workers are also required to use condoms¹⁷⁵. Nevada has 17 counties and only 10 counties legalized prostitution¹⁷⁶.

¹⁶⁷ Nevada Revised Statute, article 301.354.

¹⁶⁸ Ronald Weitzer, “The movement to Criminalize Sex Work in the United States” (2010) 37 Journal of Law and Society 61, 75.

¹⁶⁹ Nevada Revised Statute 2017, article 201.354 (1).

¹⁷⁰ Nevada Revised Statute 2017, article 201.354 (2).

¹⁷¹ Nevada Revised Statute 2017, article 201.354 (3) (a).

¹⁷² Nevada Revised Statute 2017, article 244.345 (1).

¹⁷³ Nevada Administrative Code, article 441.A.800 (3) (a).

¹⁷⁴ Nevada Administrative Code, article 441.A.800 (3) (b).

¹⁷⁵ Nevada Administrative Code, article 441.A.805.

¹⁷⁶ ProCon, « US Federal and State Prostitution Laws and Related Punishment” April 2018 <<https://prostitution.procon.org/view.resource.php?resourceID=000119>> Accessed 11 June 2019.

The reason why Nevada adopted this legislation, opposite to the rest of the United States, may be because of “an attitude of general tolerance by Nevadans. Nevada relies heavily on gaming, mining, agriculture and tourism. Some attribute the local attitude to a sense of tradition that included brothels and did not consider them to be a threat to the community”¹⁷⁷.

SECTION 4 - THAILAND

Thailand is sometimes called “the land of Smile”¹⁷⁸ because of its sex or drug tourism which is said to have grown after the US military presence during the war in Vietnam¹⁷⁹. Indeed, Thailand served as a “rest and recreation”¹⁸⁰ State for Americans. Furthermore, Thailand put policies in place to make the tourism flourish. In addition, “prostitution became a defining feature of the way Thailand was packaged as a tourist destination. Sex tours were run from Europe and East Asia, and the delights of Thai women were promoted in holiday brochures catering mainly to male tourist”¹⁸¹.

In 1960, Thailand criminalized prostitution in the Suppression of the Prostitution Act¹⁸² “penalizing procurers, pimps and prostitutes, whether or not they have been forced to sex work. The aim of imprisoning prostitutes was to engender their “moral rehabilitation””¹⁸³. Then, in 1982 and 1996, the Act was revised in order to penalize more strongly child prostitution¹⁸⁴, which appeared to be a big issue in Thailand. For instance, the article 5 of the Act states: “Any person, who, for the purpose of prostitution, solicits, induces, introduces herself or himself to, follows or importunes a person in a street, public place or any other place in an open and

¹⁷⁷ Nicole Bingham, « Nevada Sex Trade: A Gamble for the Workers » (1998) 10 Yale Journal of Law and Feminism 69, 85.

¹⁷⁸ Bernard Formoso, « Corps étrangers : tourisme et prostitution en Thaïlande » (2001) 25 Anthropologie et Sociétés 55, 57.

¹⁷⁹ Sheila Jeffreys, “Trafficking, Prostitution and Human Rights” in *The Idea of Prostitution* (Spinifex Press 1997) 306, 309.

¹⁸⁰ Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 192.

¹⁸¹ Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 192.

¹⁸² Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 194.

¹⁸³ Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 194.

¹⁸⁴ Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 195.

shameless manner or causes nuisances to the public, shall be liable to a fine not exceeding one thousand Baht”. In addition, article 8 expresses that: “Any person who, in order to gratify his or her sexual desire or that of another person, has sexual intercourse or acts otherwise against a person over fifteen but not over eighteen years of age in a prostitution establishment, with or without his or her consent, shall be liable to imprisonment for a term of one to three years and to a fine of twenty thousand to sixty thousand Baht. If the offence under paragraph one is committed in relation to a child not over fifteen years of age, the offender shall be liable to imprisonment for a term of two to six years and to a fine of forty thousand to one hundred twenty thousand Baht”.

For some scholars, one explanation for the criminalization may be the strong influence of Buddhism in Thailand. According to the Buddhist tradition, woman is supposed to bring the financial means to the family, however, because they usually access to less-paid job, they might choose to engage in prostitution. And the religion does not award lots of value to sex workers as “woman sexuality is considered dangerous and latent, woman walk a thin line between being a “good” wife and a “bad” sexually manipulative prostitute”¹⁸⁵.

SECTION 5 - INDIA

India is “a land of contrast”¹⁸⁶ where “sexuality is celebrated”¹⁸⁷ and prostitution is decriminalized¹⁸⁸ but it is also a State where women are suffering from much violence. An example might be the article 155 (4) of the Indian Criminal Code which states that when a man is prosecuted for rape, the defence can introduce evidence relevant to the “past sexual history”¹⁸⁹ of the raped woman. It follows that an “immoral” woman, generically a prostitute,

¹⁸⁵ Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 199.

¹⁸⁶ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 115.

¹⁸⁷ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 115.

¹⁸⁸ Kathleen Barry, “The State: Patriarchal Laws and Prostitution” in *The Prostitution of Sexuality* (NYU Press 1995) 220, 240.

¹⁸⁹ Geetanjali Gangoli, « Silence, Hurt and Choice: attitudes to prostitution in India and the West” 6 Asia Research Center 1, 8.

cannot be raped¹⁹⁰”. In India, “prostitution is seen as a necessary evil, to meet the sexual needs of young men”¹⁹¹. In addition, since there is religious and society pressure, even law is qualifying prostitution (and human trafficking) as immoral.

Prostitution is legal but human trafficking is not according to the 1956 Suppression of Immoral Traffic in women and Girls Act and its amended version of 1986, The Immoral Traffic (Prevention) Act. Those Acts have many provisions regarding prostitution. First, article 2 (f) defines prostitution as: “the act of a female who offers her body for promiscuous sexual intercourse for hire, whether offered immediately or otherwise¹⁹²”. Then, article 3 makes it illegal to own a brothel¹⁹³ and articles 4 and 5 condemns pimps. Thus, living on the earnings of prostitute “is punishable with imprisonment for a term which may be extended to two years”¹⁹⁴. In addition, article 7 prohibits the exercise of prostitution in public places: “Any woman or girls who carries on prostitution, and the person with whom such prostitution is carried on, in any premises which are within a distance of two hundred yards of any place of public religious worship, educational institution, hostel, nursing home or such public place of any kind as may be notified in this behalf by the Commissioner of Police or District Magistrate, shall be punishable with imprisonment for a term which may extend to three months”¹⁹⁵.

Moreover, “seducing or soliciting for purpose of prostitution” is also prohibited¹⁹⁶. Concerning the police, it is also written in the Act that search without warrant are permitted¹⁹⁷, that special police officers shall be trained¹⁹⁸. Interestingly article 16, called “Rescue of girl” states that “Where a magistrate has reasons to believe that a girl apparently under the age of twenty-one years, is living or is carrying on, or is being made to carry on prostitution, in a brothel, he may direct the special force officer to enter such brothel”¹⁹⁹. Furthermore, “These provisions are

¹⁹⁰ Geetanjali Gangoli, « Silence, Hurt and Choice: attitudes to prostitution in India and the West” 6 Asia Research Center 1, 8.

¹⁹¹ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 115.

¹⁹² The Suppression of Immoral Traffic in Women and Girls Act 1956, article 2 (f).

¹⁹³ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 3.

¹⁹⁴ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 4 (1).

¹⁹⁵ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 7 (1).

¹⁹⁶ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 8.

¹⁹⁷ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 15.

¹⁹⁸ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 13.

¹⁹⁹ The Suppression of Immoral Traffic in Women and Girls Act 1956, article 16 (1).

aimed at making it difficult, though not impossible, for women to practice prostitution”²⁰⁰. This 1956 Suppression of Immoral Traffic Act resulted from the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others²⁰¹.

The second Act, named the Immoral Traffic Prevention Act, as an amendment of the first one, also has the same dispositions. The definition is however different: “the sexual exploitation or abuse of persons for commercial purposes”²⁰². It is also worth noting that “protectives houses” established by the 1956 Act²⁰³ are sometimes qualified by scholars as “correctives homes”²⁰⁴.

According to Kiran Bhatti, “this contradiction reflects the confused position on prostitution inherent in the law. While prostitution *per se* is not outlawed in India (only when using public spaces), all women in prostitution are routinely treated as offenders under the Act”²⁰⁵. In addition, as stated above, many provisions are intended to make it complicated for prostitutes to exercise prostitution.

In addition, the Indian Criminal Code has two dispositions related to prostitution, but which only concern minors: the articles 372 and 373 which condemn the selling and buying of minors for the purpose of prostitution. In addition, the code deals with the issue of human trafficking in articles 370, 371 and 374. Indeed, it is prohibited to buy or dispose of any person as a slave, and “whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both”.

SECTION 6 – INTERMEDIATE CONCLUSION

In this fifth chapter, I examined five States with various legislation on prostitution and representing the criminalization, decriminalization and legalization model. First, Sweden is a

²⁰⁰ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 118-119.

²⁰¹ Prabha Kotiswaran,, “Revisiting the Material: Recasting the Sex Work Debate” in *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press 2011) 24, 29.

²⁰² Prabha Kotiswaran,, “Revisiting the Material: Recasting the Sex Work Debate” in *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press 2011) 24, 29.

²⁰³ The Suppression of Immoral Traffic In Women and Girls Act 1956, article 21.

²⁰⁴ Kiran Bhatti, “A review of the Immoral Traffic Prevention Act” (2017) Centre for Policy Research 1, 3.

²⁰⁵ Kiran Bhatti, “A review of the Immoral Traffic Prevention Act” (2017) Centre for Policy Research 1, 3.

country which penalizes buyers not sex workers. Sweden is however said to have chosen the criminalization model. Second, the Netherlands adopted the legalization model. Third, The United States adopted, for most States, the criminalization model (by penalizing both the buyer and sex worker) with the exception of Nevada which gives the counties the choice of their legal system on prostitution. Fourth, Thailand also criminalized prostitution for both the buyer (only if the prostitute is minor) and the prostitute like the United States. Finally, India decriminalized prostitution (but it is restricted) because prostitution is no prohibited nor regulated.

In addition, the penalties, for the counties who penalize prostitution are also various. In Sweden, the purchase of sex can be sentenced up to one year of prison. In the United States, it depends on the State, but the most common sentence (if it is the first conviction) for the prostitutes is one year of imprisonment or a 500 \$ fine. Regarding the buyer, it is mostly the same, but maybe a little bit more. In Thailand, the sentence of the prostitute can be “for a term of one to three years and to a fine of twenty thousand to sixty thousand Baht²⁰⁶”.

Here is a summary in an overview table of the fifth chapter:

Figure 4

	Sweden	The Netherlands	The United States	Thailand	India
Which model adopted by the State?	Criminalization (but only the buyer)	Legalisation	Criminalization (buyer + sex worker) and legalization in Nevada	Criminalization (buyer + sex worker)	Decriminalization

²⁰⁶ About 565 € to 1697 €

CHAPTER 6 – “HOW FEMINIST THEORIES ON PROSTITUTION REFLECT ON INTERNATIONAL, REGIONAL AND DOMESTIC LEGISLATION?”

This final Chapter answers the research question of this Master thesis: “How feminists’ theories on prostitution reflect on international, regional and domestic legislation?”.

SECTION 1 – INTERNATIONAL LEVEL

International law mostly focuses on human trafficking rather than on prostitution. However, prostitution is sometimes mentioned. At the international level, the two sides of the two theories seem to appear and one possible way to distinguish between the two positions might be the issue of consent. Indeed, the proponents of the sex work position advocate for the right to exercise prostitution if it is voluntary²⁰⁷. On the other hand, abolitionists argue that prostitution cannot be consented to²⁰⁸.

First, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others stated that, even with the consent of the prostitute, prostitution is prohibited²⁰⁹. This reflects the abolitionist position. Indeed, as Enrique Javier Díez Gutiérrez argues, it is not possible to consent to prostitution as he compares prostitution to slavery and rape²¹⁰.

However, the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children might reflect more the sex work position. Effectively, prostitution in itself is not discussed, the Protocol only outlines that human trafficking -as a forced act for the aim of exploitation- cannot be consented to²¹¹. This could reflect the sex work position more by not

²⁰⁷ Jane Scoular, « The subject of prostitution: Interpreting the discursive, symbolic and material position of sex work in feminist theory » (2004) 5 Feminist Theory 343.

²⁰⁸ Jane Scoular, « The subject of prostitution: Interpreting the discursive, symbolic and material position of sex work in feminist theory » (2004) 5 Feminist Theory 343, 344.

²⁰⁹ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, article 1.

²¹⁰ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 99.

²¹¹ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, article 3.

condemning prostitution. Indeed, the Protocol leaves the possibility for States to choose between the different legal systems of prostitution. However, by leaving the choice to member States, this is also a way not to position itself on the debate²¹². In addition, the International Convention of 11 October 1933 for the Suppression in the Traffic in Women of Full Age²¹³ and the 1979 Convention on the Elimination of All forms of Discrimination against Women follow the same logic²¹⁴ by only condemning human trafficking and the exploitation of women and not prostitution.

However, regarding the latter Convention and its Committee, it is emphasized in the General Comment No 19 that women who exercise prostitution are vulnerable²¹⁵. This could be a mix of the sex work position and the abolitionist one -indeed abolitionists consider women to be dominated by man and therefore need special protection²¹⁶-.

In addition, The International Labour Organization 's Study of Prostitution in Southeast Asian from 1998 could also be a mix of the theories. Indeed, the Study states that prostitution can be a free choice for women -which is part of the sex work view-. But, this Study also adds that the main reason why women enter prostitution is usually financial needs which could also mean that woman have no choice -which is more abolitionist-²¹⁷. In that way, the ILO's Study has the same reasoning that Geetanjali Gangoli which explains that "poverty can push women into sex trade"²¹⁸, but she also states that woman should not be "infantilized"²¹⁹.

²¹² Beverly Balos, "The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation" (2004) 27 Harvard Women's Law Journal 137, 162.

²¹³ International Convention for the Suppression of the Traffic in Women of Full Age 1933, article 1 (1).

²¹⁴ Convention on the Elimination of All forms of Discrimination against Women 1979, article 6.

²¹⁵ UN Committee on the Elimination of Discrimination Against Women, General Recommendation n° 19: Violence Against Women 1992, article 10 (15).

²¹⁶ Kathy Miriam, "Stopping the Traffic in Women: Power, Agency and Abolition in Feminists Debates over Sex-Trafficking" (2005) 36 Journal of Social Philosophy 1, 4.

²¹⁷ International Labour Organization, "Sex Industry assuming massive proportions in Southeast Asia: Press Release" (1998) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007994/lang--en/index.htm> Accessed 10 June 2019.

²¹⁸ Geetanjali Gangoli, "Prostitution in India: laws, debate and responses" in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 117.

²¹⁹ Geetanjali Gangoli, « Silence, Hurt and Choice: attitudes to prostitution in India and the West" 6 Asia Research Center 1.

Furthermore, the Declaration on the Elimination of Violence against Women is following the sex work prostitution because it only mentions forced prostitution as a violence against women.²²⁰

From the international law perspective, I can conclude the following. First, legal instruments indeed show traces of the two feminists' theories. Second, few instruments fit completely in either one of the two categories such as the Declaration on the Elimination of Violence against Women, the 1949 Convention or the 1998 Study from the International Labour Organization. Third, some instruments also chose another path by avoiding, however, to mention prostitution such as the 2001 Protocol and CEDAW. In addition, a few instruments or the study found themselves tinted from the other theory, for instance, the General Comment No. 19 who described women as particularly vulnerable.

SECTION 2 – REGIONAL LEVELS

As international law, the three regional levels focus more on human trafficking rather than on prostitution. It is however possible to examine whether the regional levels show traces of the two positions. Indeed, I can establish that the Inter-American Commission on Human Rights is strictly following one position. For the Council of Europe, the same conclusion can be taken, with one exception which can be explained. However, the European Union seems to be more conflicted on the issue.

First, the European Union's directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims has adopted the same definition of human trafficking as the Palermo Protocol²²¹, therefore it only mentions prostitution as the "exploitation of prostitution". In addition, the Charter of fundamental rights only prohibits human trafficking²²². Therefore, both legal instruments are letting States the discretion to choose a legal system on prostitution. This was also the position followed by the Court of Justice the European Communities in the *Andoui and Cornuaille* case. However, the Court expressed that "it should

²²⁰ UNGA A/RES/48/104, Declaration on the Elimination of Discrimination Against Woman 1993, article 2 (b).

²²¹ EU directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims adopted the same logic as the Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children [2011], article 2 (3) and (4).

²²² Charter of Fundamental Rights of the European Union 2000, article 5 (3).

nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State”²²³. In that way, the Court does not impose any obligation on member States but states that it could admit the reason of prostitution as a justification to the restriction to the freedom of movement²²⁴. Those three documents nor prohibit prostitution nor firmly advocate for the rights of sex workers²²⁵ as the opponents of the sex work doctrine would. In that way, they are not really choosing one side.

However, the European Court of Justice in a judgement of 2001 recognizes prostitution as a proper “economic activity” meaning that sex workers should be awarded labour rights²²⁶. In this specific case (as it is a case-by-case analysis), opposite to the above-cited one, the Court did not accept the exercise of prostitution as justifiable restriction to European law. In this judgement the Court took a step further and thus, is strictly following the sex work position. Indeed, the sex work position advocates for a judicial recognition of the profession as an exercise of the right to self-determination for woman²²⁷.

The European Parliament in 2014 took a different path and followed the abolitionist position by stating that prostitution ‘diminishes the human beings to the level of merchandise or an object used by the client’. In addition, prostitution is perceived as “incompatible with human dignity” or saying that “it is obvious that prostitution is a form of violence against women”²²⁸. In this motion for a European Parliament resolution, the Parliament is considering prostitution as evil for woman²²⁹. This could be linked with the statement of Catharine McKinnon: “prostitution is a denial of women’s humanity”²³⁰. In addition, the European Parliament is

²²³ Case 115 and 116/18 *Andoui and Cornuaille* [1982] ECR 1982-01665, 1669.

²²⁴ Case 115 and 116/18 *Andoui and Cornuaille* [1982] ECR 1982-01665, 1708.

²²⁵ Kamala Kempadoo, “Globalising sex workers’ rights” (2003) 22 *Canadian Women Studies* 143, 144.

²²⁶ Case C-268/99 *Jany and Others vs Staatssecretaris van Justicie* [2001] ECR 2001 I-08615, paras 48-50.

²²⁷ Sheila Jeffreys, “prostitution as choice” in *The Idea of Prostitution* (Spinifex Press 1997) 129.

²²⁸ European Parliament 2013/2103 (INI) motion for a Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality” [2013], paras B-K and 3.

²²⁹ ²²⁹ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 115.

²³⁰ Catharine A. MacKinnon, “Prostitution and Civil Rights” (1993) 1 *Michigan Journal of Gender and Law* 13, 13.

pointing the Swedish model as a positive example²³¹ -which is also following the abolitionist model as explained in the next section-.

Second, the Council of Europe's Convention on Action against Trafficking in Human Beings is also only referring to human trafficking and the exploitation of prostitution²³². Similarly, to the European directive and the Palermo Protocol, meaning that it is choosing neither side (or slightly more the sex work position). Moreover, in the article 4 of the European Convention on Human Rights nor prostitution nor human trafficking is cited. This was, however, confirmed by the Court that it has competence to discuss the issue of human trafficking. The European Court of Human Right in its case-law on human trafficking is also mentioning the sexual exploitation of woman²³³. However, it also condemns forced prostitution as stated in the *S.M. vs Croatia* case "The member States should be required to ensure that efficient criminal-law provisions are in place for cases concerning forced prostitution"²³⁴. The Court, by differentiating between "free" and "forced" prostitution is also representing the sex work position²³⁵. According to Lacey Sloan and Stephanie Wahab, sex work feminists argue that "many women freely choose sex work and that sex work should be viewed and respected as legitimate work"²³⁶.

The noticeable exception is the recommendation No. R (91) 11 of the Committee of Ministers stating that: "prostitution and traffic of human beings have assumed new and alarming dimensions at national and international level"²³⁷. However, this recommendation being focused on children, condemning child prostitution is not an opposition to the sex work position. Indeed, opponent of this position only fight for the empowerment of adult women, but they

²³¹ European Parliament 2013/2103 (INI) motion for a Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality" [2013], para 32.

²³² Council of Europe Convention on Action against Trafficking in Human Beings 2005, article 4 (a).

²³³ *S.M. vs Croatia* App no 60561/14 (ECtHR 03 December 2018), para 54.

²³⁴ *S.M. vs Croatia* App no 60561/14 (ECtHR 03 December 2018), para 62.

²³⁵ Lacey Sloan and Stephanie Wahab, "Feminist Voices on Sex Work: Implication for Social Work" (2000) 15 *AFFILIA* 457, 467.

²³⁶ Lacey Sloan and Stephanie Wahab, "Feminist Voices on Sex Work: Implication for Social Work" (2000) 15 *AFFILIA* 457, 467.

²³⁷ Committee of Ministers Recommendation N° R (91) 11 concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults [1991], preamble.

consider child prostitution as impossible to be consented to (just like the opponents of the abolitionist position)²³⁸.

Third, the Inter-American Commission, in the *Balem do Para* Convention refers to forced prostitution as a violence against woman²³⁹, by distinguishing into “forced” “voluntary” prostitution, it is following the sex work position²⁴⁰. In addition, in a report concerning Human Rights of Migrants, the Commission also condemns human trafficking (the sexual exploitation of woman) and forced prostitution. It also explains that woman shall not be “over-victimized”²⁴¹, which is claimed by the opponents of the sex work position²⁴². In another report on poverty and human rights, the Inter-American commission concedes that poverty, gender-based discrimination or other factors could lead to prostitution²⁴³: this could reveal an abolitionist idea as it is a pressure of society²⁴⁴. However, it does not consider that because of poverty, women cannot make a reasonable choice. Thus, the Inter-American Commission clearly follows the sex work position. Concerning the Inter-American Court’s advisory opinion on the rights of the child²⁴⁵, similarly to the Committee of Minister’s recommendation of the Council of Europe, as it focus on children, it cannot be linked to any of the two positions.

To conclude on the regional level, just like at the international level, there is a tendency to avoid the debate by not mentioning prostitution as such. However, some instruments followed one of the positions.

²³⁸ Susanne Louis Mikhail, “Child marriage and child prostitution: two forms of sexual exploitation” (2002) *Gender and Development* 43, 46.

²³⁹ Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, article 2 (b).

²⁴⁰ Judith Kilvington, Sophie Day and Helen Ward, “Prostitution policy in Europe: A time for change?” (2011) 67 *Feminist Review* 78, 79.

²⁴¹ IACHR, OEA/Ser.L/V/II “Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System” (2015) Doc 46/15, para 68-71.

²⁴² Joyce Outshoorn, “The Political Debates on prostitution and Trafficking of Woman” (2005) 12 *Social Politics: International Studies in Gender, State and Society* 141, 145.

²⁴³ IACHR, OEA/Ser.L/V/II.164 “Report on Poverty and human rights in the Americas (2017) Doc 147, para 367.

²⁴⁴ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 117.

²⁴⁵ *Advisory opinion on Judicial Condition and Human Rights of the Child* OC-17/2002 (ACtHR 28 August 2002), 38.

SECTION 3 – DOMESTIC LEVELS

As well as international law and regional levels, domestic legislation show traces of the two feminists' theories on prostitution. In chapter 6, I presented five State's legislation on prostitution: Sweden, The Netherlands, The United States (and the State of Nevada), Thailand and India.

First, Sweden criminalized prostitution in the Swedish Sex Purchase Act -and today it is prohibited in the Swedish Criminal Code²⁴⁶, but only for buyers. Sex workers are therefore not penalized for their exercise of prostitution. This position is advocated by, for instance, Enrique Javier Díez Gutiérrez. In Sweden, prostitution is seen as violence against women, women who are vulnerable and needs to be protected. Furthermore, the spirit of the law is mainly to fight against human trafficking by “discouraging the demand” -the demand being caused by prostitution- as required by the Palermo Protocol²⁴⁷. Therefore, Sweden applied the abolitionist theory of prostitution. Indeed, following abolitionists authors, prostitution should be criminalized but only regarding the buyer²⁴⁸. Indeed, because women are considered as vulnerable victims²⁴⁹ and cannot consent to prostitution. Thus, they should not be convicted.

Second, The Netherlands legalized prostitution. For a State to apply the legalization model, it is not only required that the prostitution is legal but also that it is regulated by State's legislation²⁵⁰. Indeed, The Netherlands award labour rights to sex workers, as it is also required by Ronald Weitzer. In 2000, The Netherlands legalized brothels and the exercise of voluntary prostitution -forced prostitution being considered human trafficking is of course prohibited-. Interestingly, it was in the same year that Sweden adopted its Sex Purchase Act. However, in The Netherlands, the exercise of prostitution from sex workers coming outside of the European

²⁴⁶ Talita, “The Sex Purchase Act” <<http://talita.org/facts/prostitution/the-sex-purchase-act>> Accessed 11 June 2019.

²⁴⁷ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2001, 9 (5).

²⁴⁸ Michelle Madden Dempsey, « Sex Trafficking and Criminalization: in Defence of Feminist Abolitionism” 158 University of Pennsylvania Law Review 1730, 1750-1751.

²⁴⁹ Michelle Madden Dempsey, “Sex Trafficking and Criminalization: in Defence of Feminist Abolitionism” 158 University of Pennsylvania Law Review 1730, 1751.

²⁵⁰ Melissa Ditmore, “21st Century Campaigns and Laws against Trafficking in Persons” in *Prostitution and Sex Work* (Greenwood 2011) 87, 93.

Union is prohibited²⁵¹, which in my opinion, is contradictory with the philosophy of the law. Indeed, The Netherlands legalised prostitution as well as authorized euthanasia and other measures which could be qualified as “progressist”, the idea was that woman are free to exercise any work as long as they are not forced to do so. In this way, The Netherlands are applying the sex work theory of prostitution. However, with the exception of “foreigners outside of EU” and the current evolution with a stricter regulation (raise of the legal age to 21 years) in 2014 -and in 2011 with the proposition to register sex workers, which was abandoned-, some scholars critiqued the “paternalist” and “protective” vision of the State²⁵² which could reveal, if it is pushed way further, a tendency to move towards an abolitionist position. Nevertheless, for now, the Netherlands are applying the sex work position because of the legalization of prostitution, the rights for sex workers and the distinction between forced and voluntary prostitution.

Third, the United States -for the most part- criminalized prostitution. Indeed, all States but one criminalized both the sex worker and the buyer. Thus, this is one step further than Sweden which only penalizes the buyer. According to Ronald Weitzer, the United States entered a “moral crusade” against prostitution which is pictured as an evil thing which does not fit with religion’s morality. Thus, the United States -or more exactly all States but Nevada- can be linked to the abolitionist position. However, abolitionists argue that penalizing the sex worker will be too harmful for them. Concerning religion, abolitionists believe that it is an instrument of domination over women, such as patriarchy²⁵³. Therefore, The United States are not really following the abolitionist theory. However, Nevada did not follow the same tendency, it left the counties the choice to decide the legislation on prostitution²⁵⁴ -10 out of 17 counties legalized prostitution-. Nevada is said to be more tolerant regarding gambling and prostitution, but it seems to be more by habit²⁵⁵. For this reason, it is difficult to fit Nevada’s legislation in either one of the two positions.

Fourth, Thailand, similarly to the United States, penalized prostitution, both for the buyer and sex workers. In addition, also like the United States, one of the explanations for the

²⁵¹ Dutch Criminal Code, article 273 f (1) (2).

²⁵² Che Post, Jan Brouwer and Michel Vos, “Regulation of Prostitution in the Netherlands: Liberal Dream of Growing Repression?” (2019) *Eur J Crim Policy Res* 100, 110.

²⁵³ Alyson Brody, “Prostitution in Thailand: perceptions and realities” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 185, 199.

²⁵⁴ Nevada Revised Statute, article 301.354.

²⁵⁵ Nicole Bingham, « Nevada Sex Trade: A Gamble for the Workers” (1998) 10 *Yale Journal of Law and Feminism* 69, 85.

criminalization might be the pressure of religion which perceive prostitution as immoral. This could be linked with the “moral crusade”²⁵⁶ of religion criticised by Lacey Sloan and Stephanie Wahab. Therefore, Thailand is also not completely following the abolitionist position. However, in Thailand, “sex tourism” is flourishing²⁵⁷, meaning that there is a difference between what the law says and what happens in reality. Concerning the legislation on prostitution, it can still be linked to the abolitionist theory because of the ban of prostitution and is “immoral” character²⁵⁸.

Finally, India decriminalized prostitution. However, the access to prostitution is very restricted prostitution cannot be exercised in brothel or in public places²⁵⁹. The fact of decriminalizing prostitution could find an echo in the sex work theory because of the right of women to freely chose a legitimate job. However, in India, just like in the United States and in Thailand, because of religion and society pressure, prostitution is perceived as immoral. In addition, woman -in general, not only sex workers- are said to suffer many violence in India. It is also seen as a “necessary evil” “to meet the sexual needs of young men”²⁶⁰. For those, reasons, it is difficult to place India -just like Nevada- in either of the two categories, it is a combination of the two. Indeed, because prostitution is seen as immoral, it could be abolitionist. But the fact that prostitution is decriminalized fits more in the sex work position.

On this part, I can conclude that feminist theories do reflect on State’s legislation, but it was sometimes more difficult to categorized than for the regional and the international level. Indeed, sometimes States are not following perfectly into one of the two positions. Concerning the five States that I analysed, the abolitionist model could be said to be ore present. However, Thailand and the United States, by criminalizing both the buyer and the sex worker are not following the abolitionist model, Sweden however is. The Netherlands followed the sex work position. Concerning India and Nevada, they could not be categorised.

²⁵⁶ Lacey Sloan and Stephanie Wahab, “Feminist Voices on Sex Work: Implication for Social Work” (2000) 15 *AFFILIA* 457, p. 458.

²⁵⁷ Damien Garrick, “Excuses, Excuses: Rationalisation of Western Sex Tourists in Thailand” (2005) *Current Issues in Tourism* 497.

²⁵⁸ Enrique Javier Díez Gutiérrez, “Prostitution and gender-based violence” (2014) *Procedia Social and Behavioural Science* 161 (2014) 96, 99.

²⁵⁹ The Suppression of Immoral Traffic in Women and Girls Act 1956

²⁶⁰ Geetanjali Gangoli, “Prostitution in India: laws, debate and responses” in *International Approaches to Prostitution: Law and Policy in Europe and Asia* (The Policy Press 2006) 115, 115.

Following this last chapter, to answer the research question of this Master Thesis, I can conclude that while feminist theories reflects in some legislation, they do not reflect in all the legislation that I analysed. At the international and regional level, a few instruments avoided the debate. And, at the domestic level, sometimes it was a mix of the two models or one of the models was pushed further. Here is a representation of my findings in an overview table:

Figure 5

	International level	Regional level	Domestic level
Sex work position	1993 Declaration GA	Belem do Para Convention, reports of the Inter-American Commission and CJEU 2001.	The Netherlands
Abolitionist position	1949 Convention	European Parliament motion 2014	Sweden
Mix	General Comment 19, ILO Study	ECtHR 2018	Nevada and India
Avoid the debate/Other	2001 Convention, 1933 Convention and 1979 CEDAW	Directive 2011/36/EU, CJEC 1982, Charter of fundamental rights. Convention on Action against Trafficking 2001, European Convention on Human Rights, recommendation No. R (91) 11 and IACtHR 2002.	The United States and Thailand

CHAPTER 7 - CONCLUSION

This Master thesis focused on the two main feminists' theories regarding prostitution -the sex work position and the abolitionist one- and the relevant legislation on the subject. As a reminder, the sex work position argue that a distinction needed to be made between voluntary and forced prostitution. The abolitionist position defends that prostitution cannot be consented to. Therefore, it should be criminalized -but only regarding the buyer- just like human trafficking.

Therefore, my research question was: "How feminist theories on prostitution reflect on international, regional and domestic legislation?". In order to answer it, I first did a literature review and I discussed four advocates of each theories. In addition, I relied on two NGOs which represent the two theories. Then, in the chapters 3, 4 and 5, I outlined the legislation at the international, regional and domestic levels.

Concerning international law and regional law, it was mostly on human trafficking as States are free to choose different models on prostitution -legalization, decriminalization and criminalization-. Furthermore, as a reminder, I analysed the European Union, the Council of Europe and the Inter-American Commission on human rights for the regional level. For States, I based my analysis on five countries: Sweden, The Netherlands, the United States (and the State of Nevada), Thailand and India.

Finally, the sixth chapter was the answer to my research question. As a result, I first confirmed that feminist theories do reflect on legislation. At the international and regional level, I found that the sex work position was predominant. But also, that some instruments did not choose a side. Furthermore, based on the five States that I analysed I can say that the legislation usually differed from the theories (in Thailand, The United States, Nevada and India). The Netherlands and Swede, however, represented accurately the feminist's theories.

Nevertheless, it is important to say that States, opposite to abolitionists which aims is to protect vulnerable woman or sex workers who wants to protect empowered woman, States probably wants to protect themselves and to protect society.

In closing, throughout this Master thesis, I found myself passionate about this subject. I believe that if I had the opportunity to push it even further, I would have conducted interviews of sex workers to ask their opinion and perception on those feminist theories.

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