



Sex work in Europe: the legal landscape and a rights based way forward

Pye Jakobsson, Rose Alliance, Sweden



Introduction

Over a prolonged period, dealing with the issues raised by sex work has been a major concern for most European countries, and many different legislative frameworks have been applied or discussed. The current focus on combating human trafficking has failed to recognize or understand the role that draconian migration laws play in creating an environment where exploiting someone's wishes to migrate is made possible. This often leads to a total disregard for issues around rights, health and harm reduction, as the focus is to rescue, rehabilitate and punish. The imperative of addressing trafficking has distorted discussions around voluntary sex work in such a way that the potential for legislation to put a perceived minority in a more harmful situation has been de-prioritized, in favour of protecting what is considered to be the large majority that are selling sex involuntarily. The claims of this standpoint have often had very little evidence to support them, but are rather based on moral convictions. Evidence is seen as less important, because the need to protect innocent victims has been taken to be its own justification. This very often puts sex workers, working in all kinds of circumstances, including exploitative ones, in a more harmful environment. It also fails to take the specific needs of migrant sex workers into account, and takes away the focus from HIV/STI prevention and other health related approaches. At the same time UNAIDS, WHO and other international and bilateral organisations argue that a rights based approach to sex work needs to include sex workers and their organisations as partners in order to ensure effective HIV prevention as well as to ensure that the human rights of sex workers are respected.



Background

Traditionally the different legal frameworks applied to sex work have been divided into one of three different camps, namely: prohibitionist, abolitionist and regulatory approaches. But as with the legal models applied to other policy areas, sex work policies in Europe are in practice composed of a mix between these various approaches. This paper will use the now more commonly used categories of criminalization, legalization and decriminalization although referring to the earlier set of terms when relevant.

Full criminalization is the same as a prohibitionist approach, where sex work is deemed a social, or criminal 'evil' that needs to be dealt with through criminalizing all aspects of sex work, including all related activities. Partial criminalization, more commonly called abolitionism, was originally based on ideas deriving from the anti-slavery movement. It is predicated on the assumption that sex work is by definition a form of slavery, rather than because of the conditions under which it occurs. Sex workers are seen as oppressed, but unaware of it. Thus they need to be enlightened regarding their oppression in order to be truly free. The abolitionist movement started as a response to the double morals for men and women and the abundant abuses in brothels made possible by the Contagious Diseases Acts,



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which sanctioned and legitimized those abuses. The original founder of the abolitionist movement, Josephine Butler, took the stance that sex workers should be allowed to work and should not be criminalized, but maintained that the activities of third parties that profit from that transaction should be criminalized. This approach has partly been abandoned as the laws criminalizing activities related to sex work in fact often make the activity itself illegal. Over the last decade the abolitionist approach has been under the strong influence of radical feminism, further reaffirming the notion that sex workers are passive victims. As sex work is seen as male violence against women, the idea of consent is seen to be both irrelevant and impossible, as sex work is considered to be forced by definition. Supporters of this position often maintain that sex workers are deluding themselves when they insist that they engage in sex work voluntarily, and are said to be suffering from 'false consciousness'.

„The Swedish Model“ in which the clients of sex workers are criminalized is often referred to as being Neo-abolitionist. However, it deems the agreement between sex worker and client invalid, because sex workers are seen to be incapable of consenting to the transaction and the clients are seen as violators against women. Therefore, it should rather be seen as a fully prohibitionist approach, as it no longer adheres to the basic abolitionist principle of „the freedom of individual prostitution“.

Legalization is a form of legal regulation based on the idea that sex work will always exist and therefore needs to be controlled by the state through different legislations and regulations. This is not to be confused with decriminalization in which all of the special laws regulating the sex industry are lifted and regular labour laws apply. The main difference lies in the level of state control that is applied in the two different models – being much stronger within a legalized system. A decriminalized approach will focus on regulating activities related to minors or forced labour.



Current challenges

With the current focus on human trafficking there is next to no focus on the potential harmful effects that different legal systems have on the individual sex worker or the collective of sex workers.

Even though most European countries have laws specifically targeting human trafficking, their legal systems are mostly reliant on laws criminalizing different aspects of voluntary sex work or laws on exploitation within the sex industry (these two very often get mixed up) in order to punish trafficking related crimes. Consequently, trafficking and sex work are frequently conflated, as the main goal is targeting traffickers through „pimping laws“. This also means that resources, financial as well as others, are mainly used towards combating trafficking. HIV prevention and other health oriented services are not a priority, especially in the light of the recent financial crisis.

Harm reduction services and low threshold health services are often the first to be cut, under conditions of austerity. This is especially true for partial criminalization based on the abolitionist view in which sex workers are viewed as victims lacking the ability to give consent, thus making all sex work involuntary. Through that assumption conflating it with human trafficking appears less controversial. However, under the abolitionist approach, voices of sex workers that do not conform to the political agenda are silenced, and the sex work community is not seen as a resource; neither as a source of information regarding potential incidences of exploitation, nor as a partner in HIV prevention. Under such regimes, the bulk of the financial resources available for addressing sex work related issues are funnelled into social work (the dominant aim being 'rescuing' sex workers). Thus, funding often goes to religious organizations or to organizations with a clear agenda based on abolitionist ideology, rather than those with a more neutral rights based approach focusing on providing health services.

The latter situation is particularly evident in the case of Sweden where there is next to no focus on HIV prevention amongst sex workers at all. Quite the opposite in fact, as the simple act of handing out condoms or guidelines on how to work safely is often seen to encourage sex work. Sex workers' voices are often silenced if they criticize the current state of affairs as they are deemed to be non-representative, romanticizing prostitution or as suffering from "false consciousness". One could argue that it is quite a contradiction that while sex workers are seen as victims on the one hand, their individual experience on the other hand is disqualified when not being in accordance with the current political agenda. There are also clear indications that the biased and stereotypical description of sex workers as passive victims without agency, contributes to reinforcing social stigma. This has a negative impact on how sex workers are treated within the health care and social services systems. Sex workers who are not ready to identify as victims will be regarded as lacking personal insight and deemed mentally unstable. The refusal to acknowledge their victim status is considered to be yet another proof of the level of trauma they suffer.

However a legalized environment also comes with a set of contradictions. While often portrayed as accepting sex work as an occupation, this approach in reality is often more a form of state control on something considered a 'necessary evil'. The special regulations that are applied to the sex industry are more often than not bordering on human rights violations. For example in the Netherlands, sex work is the only legally recognized occupation for which you cannot apply for a work visa, and in Greece and Austria the mandatory health checks are clear human rights abuses. Again the focus lies on controlling the individual sex worker, while anyone who has sex with them is not obliged to have any kind of check-ups. It could be argued that if sex workers are to be controlled for STIs so should the whole sexually active population. In several countries these mandatory health checks determine whether sex workers are working legally or not and they lose the right to work if they fail to comply. In Greece, sex workers

living with HIV have been “outed” on the police website and on mass media, while in Turkey sex workers will lose their right to work if they marry.

There are no examples of decriminalization of sex work in Europe as it has only been implemented in New Zealand and New South Wales, Australia.



Discussion

As the abolitionist approach has long diverged from its initial ideas, it is no longer concerned with whether legislation leads to criminalizing the selling of sexual services. Although

arguing for sex workers being decriminalized it fails to recognize the potential harms an abolitionist approach has on sex workers’ health and safety. Nowadays it comes with the same harms as other models of criminalization, because if only the act of selling sex is decriminalized sex workers will still operate in a criminalized environment, with its potential negative impacts on health and safety. In Canada where they have an abolitionist approach, the supreme court recently struck down the three major laws criminalizing prostitution related activities: The law on communicating for the purpose of prostitution, the law on living of the earnings of prostitution, and the law on “bawdy houses”. The court said in its decision: “[T]he prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risk.” The same could be argued for many laws in all European countries. For example in Sweden: a sex worker selling sex in an apartment s/he rents can be evicted for selling sex on the premises. Actually, the landlord is obliged to evict the sex worker in order to not be charged with pimping. If someone owning an apartment sells sex on the premises they are seen as having forfeited the right to own the property. The accusation of pimping also applies to sex workers renting a hotel room or a client renting a hotel room where he sees a sex worker. So even if selling sex is not illegal the only way a sex worker in Sweden can work without being affected by any law apart from the law criminalizing the client is by going to the home of the client or working in the street. Many sex workers consider these two options to be the most risky. The view of sex workers as victims contributes to an added stigma, which renders sex workers more isolated and less likely to turn to the authorities if they are a victim of a crime or seek other assistance in need of health or social services. It is therefore near to impossible to consider the partial criminalization that comes with abolitionist approaches to be a viable option if the focus is on sex workers’ rights to health and safety and not on the elimination of sex work itself.

On the other hand the regulatory approach adopted in, for example the Netherlands, also limits sex workers’ options and access to safety measures. Initially all street work was

zoned and it is illegal to work outside the zoned areas. Little by little many of the “tippelzones” were closed down resulting in street based sex work being illegal in most parts of the country. In many countries with a legalized system, sex workers have to be registered in order to work legally. As many sex workers don’t want to go on record as having sold sex in fear that it will hinder future work applications or studies it means that the majority of sex workers, including national citizens, are in fact working illegally to protect their anonymity. The mandatory health checks that some countries enforce are yet another obstacle forcing sex workers to work illegally, either by choice or by fear of being exposed as living with HIV and risk deportation, as in the example of Greece where it is illegal to sell sex if you are living with HIV. The state-imposed control on sex work in legalized settings can hardly be seen as consistent with a human rights approach, and the need of mandatory testing for only one portion of the population is highly questionable both from a human rights standpoint as well as from an ethical one. Furthermore the zoning regulations and special licensing for sex work venues often affects sex workers’ choices and options on how and where to work. Limiting choices of work settings is likely to affect sex workers’ general well-being as well as the possibility to enforce the safety measures they find necessary to practice sex work safely.

As mentioned before there is no country in Europe that has decriminalized sex work, in spite of the fact that this is the recommendation from both UNAIDS and WHO as well as from the sex workers’ rights movement. The decriminalization model aims to support occupational health and safety and workplace issues through existing legal and workplace mechanisms. It is important to remember that the decriminalization of sex work doesn’t equal decriminalization of exploitation. For example in New Zealand where sex work is decriminalized there are laws against trafficking, forced prostitution, and buying sex from a minor. But at the same time there are laws criminalizing the attempt to have unsafe sex with a sex worker as well as other labour laws regulating sex work in the same way as other professions. This also means that third parties are not criminalized as long as they operate in accordance with general labour regulations.



Conclusions and recommendations

Most countries have laws in place that are perfectly adequate for dealing with any form of exploitation, force or violence that sex workers might be subjected to, this is also true in relation to trafficking for sexual purposes. Examples of such laws include laws on forced labour or services, slavery or practices similar to slavery or servitude, sexual exploitation, rape, dependent adult abuse, child labour and kidnapping. e Thus specific laws regulating the sex industry are unnecessary and the perceived need for them becomes even less logical when considering the negative consequences that such laws often have on sex workers’ health and safety.

The different systems of partial criminalization based on an abolitionist approach are specifically problematic as they are often based on ideology rather than reality. Therefore they contribute to, rather than prevent, violence and discrimination against sex workers. Furthermore such legal regimes contribute to an added stigma, and a state's legal approach leading to an already marginalized group suffering from further stigmatization can hardly be seen as a positive outcome. This in itself is a clear indicator that different forms of criminalization of sex work are never designed to protect the rights, health and safety of sex workers. It is simply not true to argue that an abolitionist model does not criminalise sex workers, when certain activities, such as working together or loitering, can result in sex workers being charged with a criminal offence.

In the example of Sweden, the law criminalizing the clients of sex workers contributes to a more dangerous working environment. Furthermore, the additional laws applying to sex work, that are also a part of the "Swedish Model" put the sex workers even more at risk. This includes the different laws regulating the right to work indoors as well as the "pimping law", not only criminalizing exploitation or financial gain of a third party, but also facilitation of prostitution without a financial incentive. They render sex workers more vulnerable, isolated and stigmatized and are not consistent with a human rights approach.

Furthermore, sex workers rights, health and safety are not at the centre of the legalized model, but rather an attempt to protect society from the perceived harms of the sex industry. Arguing that the state accepts sex work as an occupation is no "carte blanche" for subjecting sex workers to mandatory health checks, registration or any other regulations that only apply to them on the basis of their economic activity.

To ensure sex workers' rights to health and safety as well as other human rights the following is recommended:

- All aspects of voluntary sex work between consenting adults should be decriminalized, including sex workers' agreements with third parties, when established without force or coercion.
- There should be mechanisms in place to monitor and report discrimination against sex workers, including structural discrimination.
- Violence against sex workers should be considered hate crime.
- Sex workers, their chosen representatives and community based organisations should be involved in all levels of the design of service provision, from needs assessment to implementation and management.
- Sex workers, their chosen representatives and community based organisations should always be meaningfully involved in all matters that concern them, on a local, national and regional level.

Colophon:



**De Regenboog Groep /
Correlation Network
Postbus 10887
1001 EW Amsterdam / The Netherlands
Tel.: +31 20 570 7829
<http://www.correlation-net.org>
E-mail: info@correlation-net.org**

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