

Defining prostitution and sexual exploitation under European law

European perspectives in Sweden and The Netherlands

Bachelor dissertation

Name: Hananja Bos

Docent: Suzanne van Kooij

Word count: 6647

Table of contents

1 Introduction.....	3
2 EU Directive 2011/EU/36	5
2.1 The Directive and a following report of the European Parliament	5
3.1 The abolitionist model.....	11
3.2 Implementation of the Directive	11
3.3 The distinction between prostitution and sexual exploitation	12
3.4 Conclusion	13
4 The Netherlands.....	14
4.1 The regulatory model.....	14
4.2 Implementation of the Directive	15
4.3 The distinction between prostitution and sexual exploitation	15
4.4 Conclusion	18
5 Conclusion	19
5.1 Differences.....	19
5.2 Similarities	19
5.3 Accordance with the Directive	20
5.4 Further discussion	20
References.....	21
List of judgements.....	24

1 Introduction

In and about one year ago, the French parliament adopted a new law regarding prostitution, aiming at combatting human trafficking.¹ Clients of prostitutes are punishable and can get fined for up to €1.500 and can be obliged to follow a training to gain awareness of the fight against prostitution. In the 2,5-yearlong legislation procedure from bill to actual law, the topic has proven its controversy.² The complex debate is intertwined with issues of human trafficking, exploitation and their relation to law (enforcement), human rights, gender equality, health, social and economic factors and morality.

France is not the first country to endeavour to combat human trafficking by adopting legislation which criminalises the client. Several countries in the EU, namely Norway, Sweden, Iceland, and the United Kingdom, have similar laws. Especially Sweden has a strong voice within the international community promoting 'the Nordic Model'. At a gathering of the UN Security Council where the issue of human trafficking was discussed, the Swedish representative stated that 'prostitution is always exploitation'. The Swedish statement contained the core of the argument supporting 'the Nordic model' and was briefly explained: the reason of the existence of sexual exploitation is the demand for sexual services. By eliminating the demand, you effectively address the issue.³ Hence the strategy of punishing clients: the demand.

Sounds simple and logical, but, as a Dutch citizen, not completely so. Dutch legislation aims at protecting the position of people in prostitution by completely legalizing and regulating prostitution. Voluntary prostitution is legal, as is exploitation of voluntary prostitution. Forced prostitution is however not legal.⁴

Here, a distinction arises which is not found in the Swedish reasoning, where prostitution cannot be seen voluntary, but always as exploitation. Assuming this is true, there is no separation in voluntary or forced prostitution. How does this correspond to European law? Therefore, my research question will be: To what extent can prostitution be defined as sexual exploitation under namely the Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 in the Netherlands compared to Sweden? To answer this question, I will compare Dutch as well as Swedish legislation in the light of the European directive. The question is therefore partly descriptive and partly comparative. I will mainly focus on the difference between sexual

¹ Chrisafis, *The Guardian* 6 April 2016; Boring, *Global Legal Monitor* 28 April 2016.

² Askola 2007, p. 2.

³ 'Prevention, Protection, Prosecution Stressed as Security Council Holds Open Debate on Human Trafficking, Modern Slavery, Forced Labour in Conflict Situations', United Nations 15 March 2017, UN Doc SC/12751, par. 33.

⁴ National Rapporteur on trafficking in human beings and sexual violence against children 2016, p. 16.

exploitation and prostitution. However, sexual exploitation is closely entwined with human trafficking, as will be explained later. I will not engage human trafficking as much as possible, because it has an even broader scope. Also, I will focus on the European directive 2011/36/EU and specifically articles 2 and 18(4), because these explicitly address sexual exploitation. I chose this Directive, because it is the most recent binding law for the European Member States that addresses sexual exploitation. I found it interesting to examine the great contrast in prostitution policy of Sweden and the Netherlands within this European frame.

This resulted in the following sub questions: How are prostitution and sexual exploitation defined in Directive 2011/36/EU and to what extent are these distinguished according to the European Parliament, Amnesty International and the European Women's Lobby? This question is descriptive and I will answer it by examining the relevant definitions and terms by discussing the directive, reports on the directive and a study executed for the European Parliament. Furthermore, I will analyse the directive and several interpretations and views hereof from the European parliament and two NGO's.

Secondly: To what extent does Sweden distinguish prostitution from sexual exploitation and to what extent does this answer to Directive 2011/36/EU? This is a descriptive as well as a comparative question. I will answer the question by examining the Swedish law and explanatory reports of this law regarding sexual exploitation and prostitution. I will compare these terms and define the differences with the European directive. Next, I explored both supporting and opposing views from specialized researchers on prostitution.

Thirdly: To what extent does the Netherlands distinguish prostitution from sexual exploitation and to what extent does this answer to Directive 2011/36/EU? This is a descriptive as well as a comparative question. I will answer the question by examining the Dutch law and case law and regarding sexual exploitation and prostitution. I will compare these terms and define the differences in national law and with the European directive.

I will conclude with a comparison of the Netherlands and Sweden in the light of the Directive and answer the main question of this dissertation.

2 EU Directive 2011/EU/36

On the 5th of April 2011, the European Parliament and the Council of the European Union adopted a directive on preventing and combating trafficking in human beings and protecting its victims and it should have been implemented by the Member States at the latest by 6 April 2013.⁵ The directive is aimed at combatting cross border trafficking, as well as internal trafficking in the Member States. I will, at first, discuss the articles of the Directive defining the trafficking of human beings and the nature of the Directive. Next, I will discuss several opinions of NGO's regarding sexual exploitation and prostitution, namely Amnesty International and the European Women's Lobby. At the end of this chapter, I will conclude with an answer on the central sub-question of this chapter: How are prostitution and sexual exploitation defined in Directive 2011/36/EU and to what extent are these distinguished according to European Parliament, Amnesty International and the European Women's Lobby?

2.1 The Directive and a following report of the European Parliament

In the European Union, legislation concerning prostitution is the exclusive competence of the Member States. Therefore, there is no obligation of the Member States to implement certain laws concerning prostitution.⁶ States are free to choose policies and in the European Union different approaches can be distinguished. The abolitionist model and regulatory model will be discussed in respectively chapter 3 and chapter 4.

Although the prostitution policy is not within the competence of the European Union, human trafficking is an issue that the European tries to tackle together with the Member States. Within the European Union, different measures are taken to combat human trafficking. Trafficking in human beings is explicitly prohibited under Article 5(3) of the Charter of Fundamental Rights of the European Union. Article 2 of the Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (hereafter: the Directive), concerns criminal acts regarding sexual exploitation. The article states the following:

Article 2. Offences concerning trafficking in human beings:

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of

⁵ Article 22 of Directive 2011/36/EU.

⁶ Schulze et al. 2014, p. 7-8.

force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. 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.

(...)

A study commissioned by the European parliament states that there is no definition of the terms sexual exploitation or exploitation of prostitution. It is discussed, with regards to the Palermo protocol, that this is due to evading prejudices regarding prostitution laws of Member States. However, the exploitation of the prostitution of others or other forms of sexual exploitation can be defined as trafficking in human beings.⁷

Although no definitions are given in the Directive, it does, however, give some perspective on how a distinction between prostitution and sexual exploitation could be made. Assuming prostitution is something someone freely chooses to do, this choice is, according to subsection 4, not relevant when someone is in a position of vulnerability and consequently falls under sexual exploitation. The emphasis, thus, is on the circumstances of the person in prostitution, not on his or her choice.

Although the definition of the terms may not be unambiguously and the parliament wants to come through 'neutral' in this issue, the Directive carefully points in a certain direction. Next to its gender dimension, which I will not discuss in this essay, it is a victim-centred approach and stresses the significance of the demand. In the report on implementation of the Directive of 2016 of the European Parliament, the rapporteur C. Bearder mentions the Nordic model as having decreased human trafficking for sexual exploitation. Furthermore, she 'highlights the normative effect of the Swedish model of regulation and its potential to change social attitudes in order to

⁷ Schulze et al. 2014, p. 76.

reduce overall demand for the services of victims of THB'.⁸ Likewise, The Committee on Civil Liberties, Justice and Home Affairs notes that 'the demand for women, girls, men and boys in the prostitution industries is a decisive pull factor for THB for sexual exploitation'.⁹ Overall, the Directive asks for supporting the victim's rights and to reduce trafficking by decreasing the demand side, for which the report mentions the Nordic model.

Accordingly, in Article 18(4) of the Directive, Member States are called on to consider taking measures 'to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2'. The measures aim at discouraging the demand.

2. European parliament

Although laws regarding prostitution are not within the European Union's competence, the European Parliament has a strong opinion regarding this matter. In its Resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality it recognises prostitution and forced prostitution as a cause and consequence of gender inequality. Furthermore, prostitution and forced prostitution are called 'forms of slavery incompatible with human dignity' whereas prostitution 'reduces all intimate acts to their monetary value and diminishes the human being to the level of merchandise or an object to be used by the client'. However, a distinction is drawn between forced and voluntary prostitution. Next, they address the normative effect of the legislation of laws regarding prostitution. Moreover, they point in the direction of the Swedish model, mentioning the model and pointing out its 'deterrent effect' on trafficking. At the same time, the Parliament challenges the regulatory model, calling out its ineffectiveness in combatting violence and exploitation of vulnerable women and under-age females. However, according to the Parliament more data needs to be collected on which model is the most effective and both models are in need of further examination. Lastly, it should be mentioned that the Resolution also tones down the impact of Article 18(4) of the Directive, when mentioning a similar law in Finland and its ineffectiveness in combatting trafficking.¹⁰

3. Amnesty International

In 2016, Amnesty published a report called: Amnesty International policy on state obligations to respect, protect and fulfil the human rights of sex workers. Worldwide, the report received both

⁸ *Report on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective* 2016, p. 6 - 16, under G, L, N and 50.

⁹ *Report on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective* 2016, p. 28, under F.

¹⁰ European Parliament resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)), under A, B, K, W, 25, 29, 31, 32, 34, 48 and 49.

praises and critique. The heart of the report is the call on States to ensure human rights for persons in prostitution decriminalising prostitution. Amnesty is not unknown with the wrongs around prostitution: human rights abuses, multiple and intersecting forms of discrimination and structural inequalities. To address this issue, Amnesty believes that 'decriminalisation of all aspects of adult consensual sex work' is needed to protect the human rights of sex workers. Furthermore, Amnesty recognises that only decriminalisation does not solve these problems. Therefore, they underline the fact of states responsibilities to realize economic, social and cultural rights.¹¹

Amnesty distinguishes prostitution from human trafficking, sexual violence and gender-based violence with the element consent. Amnesty International uses this term 'to mean the voluntary and ongoing agreement to engage in a particular sexual activity'. Note, however, that there is no evident definition of consent under international law. Amnesty states that this 'consent' can be influenced by certain situations which also increase risk of exploitation, but that this does not disqualify the decision made by this person. This, however, is not the case when force is used. They put great emphasis on the agency and capacity of adults to make their own choices in their own circumstances.¹²

4. European Women's Lobby

The European Women's Lobby (hereafter: EWL) is a feminist NGO. Regarding the debate about prostitution, feminists are greatly divided with some stating that prostitution must be legal, believing this system would enforce women and on the other hand a group stating that prostitution is inevitably violence against women and a violation of human rights.¹³ The EWL stands for the latter.

The EWL supports the abolitionist model, which will be explained in Chapter 3 of this essay. EWL believes that prostitution is violence against women. It is, firstly, physical violence, mainly by clients of the prostitutes, but also by pimps, traffickers and brothel owners. Secondly, prostitution is violence against women because of the mental health consequences. Thirdly, persons in prostitution experience political abuse because of laws that do not acknowledge certain rights for them and lastly it is violence against persons in prostitution because of the public eye, including humiliation and insults.¹⁴

¹¹ Amnesty International 2016 (explanatory note), p. 9.

¹² Amnesty International 2016, p. 15.

¹³ Jakobsson & Kotsadam, A. Eur J Law Econ 2013/35, issue 1, p. 91.

¹⁴ European Women's Lobby 2010, p. 1 -2.

EWL states that prostitution, voluntary or forced, is the same act: being paid to access your body and sexuality. This is an unequal situation, where the buyer has the power because of the money, and the person in prostitution is the 'vulnerable person' because he or she needs the money. EWL states that governments support trafficking by tolerating prostitution. Prostitution and sexual exploitation fuel trafficking. By combatting those, trafficking would end too.¹⁵

To conclude, the EWL does not distinguish prostitution from sexual exploitation, as prostitution is violence against women, it violates human rights and is a cause and consequence of gender inequality.

5. Conclusion

How are prostitution and sexual exploitation defined in Directive 2011/36/EU and to what extent are these distinguished according to European Parliament, Amnesty International and the European Women's Lobby?

The European Union distinguishes prostitution from sexual exploitation. This can be derived from the competences of the European Union. National prostitution policies are not the competence of the European Union, while human trafficking is, all be it shared. Whereas the terms 'sexual exploitation' and 'exploitation of prostitution' are not defined, the division of competences does not concur anymore when prostitution equals sexual exploitation. If, as the Swedish government states, prostitution is exploitation, this would inevitably fall under art. 2 of the Directive and thus within the competence of the European Union. So implicitly, by dividing the competences, it means that it considers prostitution and sexual exploitation two different things.

Furthermore, the Directive has a victim-centred approach and emphasizes combatting the demand of knowingly using services of victims of human trafficking.

The European Parliament recognizes the Swedish sex purchase law as more successful than other approaches. Although not explicitly stated, they tend to argue that prostitution is in fact the same as sexual exploitation, as both prostitution and forced prostitution is incompatible with human dignity and forms of slavery.

NGO's take different views. Amnesty advises full and worldwide legalisation to ensure human rights of the people in prostitution are enforced. The EWL takes the view that prostitution is violence against women and a cause and consequence of gender equality. Both NGO's acknowledge the earnestness of sexual exploitation, but differ from perspective. Where Amnesty emphasizes the importance of autonomy which entails the possibility to choose for prostitution,

¹⁵ European Women's Lobby 2011, par. 5.

EWL emphasizes that, acknowledging the autonomy of a person, this autonomy is violated by being in prostitution. Both views can be in line with the Directive as this is so broadly formulated. Amnesty however takes a slightly different perspective than the Directive, as it does not necessarily take the victim-centred approach of the Directive, but rather stresses the autonomy and empowerment of the person in prostitution.

3 Sweden

As mentioned in the introductory chapter of this dissertation, Sweden considers prostitution equal to sexual exploitation. In this chapter I will examine this perspective. First, I will shortly discuss the prostitution policy in Sweden. Next, I will discuss how this corresponds to the Directive. Thirdly, I will discuss several academics' standpoints supporting and opposing the Swedish approach. Lastly, I will answer the central sub-question in this chapter: To what extent does Sweden distinguish prostitution from sexual exploitation and to what extent does this answer to Directive 2011/36/EU?

3.1 The abolitionist model

In 1999, Sweden pioneered with the so called 'sex-purchase law'. This law criminalizes the purchasers of sex, 'the demand', and at the same time decriminalizes the persons in prostitution, 'the supply'. The law was introduced 'to help fight prostitution and its harmful consequences in a more effective manner than was possible using the previous measures against prostitution'. The bill expressed the disapproval of men obtaining sexual relations in exchange for money in a gender equal society. Furthermore, the bill stated that 'prostitution results in serious harm to both individuals and to society'. Criminalizing the demand should effectuate a 'deterrent effect' on the interest of various groups of sex buyers.¹⁶ Accordingly, in a Statement on a Conference on Combatting human trafficking, Wahlberg, the Swedish National Rapporteur, states that the law is not created to send people to jail, but to scare people to buy sexual services. This serves the purpose of protecting women (and men) against violence. She also addresses the secondary purpose, which is the normative effect of the law 'that no woman, man, boy or girl is for sale, and that no one has a right to purchase someone else and sexually exploit her or him'.¹⁷

3.2 Implementation of the Directive

The Swedish law does not criminalise the purchase of sexual services of victims of exploitation with the knowledge that the person is a victim of exploitation, as stated in art. 18(4) of the Directive. However, the Swedish law takes the perspective that prostitution is harmful to women and undermines the in Sweden prioritized gender equality.¹⁸ In other words, the element of the Directive containing 'the knowledge of the victim' is absent in the Swedish legislation, as prostitution is always harmful. Whereas the Directive does not give explicit definitions of the terms sexual exploitation and exploitation of prostitution and whereas the knowingly purchase of

¹⁶ Skarhed 2010.

¹⁷ Statement by Kajsa Wahlberg, Swedish National Rapporteur on Trafficking in Human Beings, Conference on the "Preventing and Combatting Trafficking in Human Beings and reducing prostitution and sexual exploitation," Plzen, The Czech Republic, June 3 2009, p. 3 (online public).

¹⁸ Mattson 2016, p. 82.

sexual services of victims of exploitation is inevitably part of the complete demand, the law corresponds to the Directive, specifically Articles 2 and 18(4).

3.3 The distinction between prostitution and sexual exploitation

From the Swedish perspective, one can hardly consent to prostitution. Mattson, about an interview with the Swedish National Rapporteur Wahlberg, writes that ‘even if a Swedish woman believed she had chosen prostitution, social solidarity requires society to intervene’. He discerns two themes as justifying this, namely that individual actions affecting other people must be limited and solidarity, in the sense that individuals cannot be allowed to hurt themselves.¹⁹

In the previous chapter, it was concluded that the distinction of the Directive between prostitution and a situation of sexual exploitation is not clear. However, the position of the person in prostitution is a significant element. The Swedish legislation departs from a different reasoning, that is both supported and opposed by academics. Hereafter, I will discuss two standpoints from two researches in this area.

M. Farley is a research and clinical psychologist and the founder of prostitutionresearch.com and has, together with many researchers, legislators, survivors, activists and advocates researched prostitution and trafficking.²⁰ She argues that prostitution cannot be isolated from trafficking, because it cannot be considered that genuine consent consists. She states that conditions which make genuine consent possible are missing, namely physical safety, equal power with customers and real alternatives.²¹ In one of her articles, she compares prostitution to slavery and concludes: “Modern-day slaveholders no longer legally own slaves, but they continue to exploit and benefit from woman’s and children’s poverty, which channels people into prostitution.”²² The article, as well as her other research, is supported with data and cases from survivors of prostitution that give a clear view and understanding of this perspective.

R. Weitzer is a professor of in Sociology and specialized in criminology. He is known for his publications on, among others, the sex industry. In his book ‘Legalizing prostitution’, he tries to unravel the different, so-called paradigms of prostitution and analyses the arguments supporting these. He categorizes three different paradigms: the empowerment paradigm, the oppression paradigm and the polymorphous paradigm.²³ The oppression paradigm is comparable to the

¹⁹ Mattson 2016, p. 83.

²⁰ Prostitution research & education 2016.

²¹ Farley, Prostitution and the Invisibility of Harm 2003, p. 3.

²² Farley 2015, p. 304.

²³ Weitzer 2012, p. 7-21.

abolitionist model, which he criticizes by stating that it is 'wholesale denial of women's agency in sexual commerce and emphasis on passive victimhood violates a central tenet of feminism, which centres on women's intentionality and empowerment'. Furthermore, he states that authors, like Farley, choose the most horrendous examples to illustrate the assertion that there cannot be consent in prostitution and that no evidence or no good evidence supporting their claims can be found.²⁴

3.4 Conclusion

To what extent does Sweden distinguish prostitution from sexual exploitation and to what extent does this answer to Directive 2011/36/EU?

To conclude, Sweden does not distinguish prostitution from sexual exploitation. Prostitution is harmful to both the individual and the society and it violates gender equality. Academics differ from views regarding the matter of consent exists; Farley argues there cannot be genuine consent, whereas Weitzer found that denying that consent exists, erodes the women's agency and considers the statements void.

²⁴ Weitzer 2012, p. 10-16.

4 The Netherlands

In the Netherlands prostitution and a situation of exploitation of prostitution is not considered to be the same. This is also reflected in the legislation and case law regarding prostitution and a situation of sexual exploitation. In this chapter, I will examine the distinction between these two terms. I will start with a broad but limited exploration of the Dutch policy regarding prostitution by discussing the main principles behind the legislation. Hereafter, I will discuss the implementation of the Directive in the national law. Thirdly, I will examine the Dutch perspective on the distinction of prostitution and a situation of sexual exploitation. Lastly, I will answer the central sub-question of this chapter: To what extent does the Netherlands distinguish prostitution from sexual exploitation and to what extent does this answer to Directive 2011/36/EU?

4.1 The regulatory model

The Dutch prostitution policy is based on regulation, therefore named as the 'regulatory model'. The regulation of prostitution is considered to be in line with Article 11 of the Dutch Constitution, which defines the inviolability of the human body. This means that a person is free to choose what to do with his or her body and to what extent violations of his or her physical or mental integrity are permissible. Someone should therefore be able to choose for prostitution.²⁵

Prostitution is legal, when it concerns adults and they freely consented to the transaction. In 2000, also the voluntary exploitation of prostitution was made legal, by lifting the general brothel ban.

By lifting the ban on brothels, the government aimed to:²⁶

- *control and regulate the employment of sex workers through a municipal licensing system*
- *protect the position of sex workers*
- *protect people from being coerced into prostitution*
- *protect minors against sexual abuse*
- *reduce prostitution by foreign nationals residing illegally in the Netherlands*
- *sever the links between prostitution and crime.*

These aims give a clear insight in the reasoning behind the regulatory model. Although the model aims to regulate, no legislation to regulate was given by the government. The policies

²⁵ National Rapporteur on trafficking in human beings and sexual violence against children 2016, p. 86; see also Roermond District Court 13 December 2006, ECLI:NL:RBROE:2006:AZ5891.

²⁶ Ministry of Foreign Affairs 2012.

regarding prostitution is left to the local authorities. Local authorities define the rules for the brothels and are responsible for licensing the exploiters. This way, certain standards are meaning to be assured, like hygiene and a panic button.

A recent bill points to a somewhat new and reticent position of the parliament regarding legal prostitution and exploitation. Accordingly, a new bill (34 091) was passed by the second chamber of the parliament and which consequently will be discussed by the first chamber. The bill proposes to criminalise persons who perform sexual acts with a person, while he or she knows or has a reasonable suspicion that the person in prostitution is forced and a victim of trafficking.²⁷ This suspicion can be raised by several signals varying from the victim, the environment of the offered sexual services or the way the client has contacted the victim.²⁸ The Dutch national rapporteur on Human Beings advised in favour of this bill.²⁹ In this advice, she links the bill also to her recommendation regarding the implementation of the Directive. In her recommendation, she (too) proposed a (change in the) law which criminalises the client that takes services from an exploited person in prostitution.

4.2 Implementation of the Directive

Although the bill (34 091) is not adopted yet, the Directive effectuated a change in the Dutch law. In 2013, namely, a new subsection was added to Article 273f Sr that broadened the term 'vulnerable position'.³⁰ Consequently, vulnerable position means 'a situation in which a person has no genuine or acceptable alternative than to submit to the misuse'. The description of the Directive serves as a minimum standard.³¹ The Dutch national rapporteur mentions, however, that this description greatly overlaps with the existing law.³²

4.3 The distinction between prostitution and sexual exploitation

As previously mentioned, prostitution and sexual exploitation are distinguished in the Dutch law. The criterion of the 'articulate prostitute' is used to discern prostitution from sexual exploitation. The articulate refers to a certain maturity which enables the person to know the consequences of his or her acts and to make independent choices.³³ When this situation is not the same, this is

²⁷ *Parliamentary Documents II 2014/2015*, 34 091, no. 2, p. 1-2.

²⁸ *Parliamentary Documents II 2014/2015*, 34 091, no. 3, p. 9.

²⁹ National Rapporteur on trafficking in human beings and sexual violence against children 2015.

³⁰ *Parliamentary Documents II 2011/2012*, 33 309, no. 3 (Explanatory Memorandum), p 8.

³¹ *Parliamentary Documents II 2011/2012*, 33 309, no. 3 (Explanatory Memorandum), p. 16.

³² National Rapporteur on trafficking in human beings and sexual violence against children 2016, p. 133.

³³ *Parliamentary Documents II 1988/89*, 21 027, no. 3 (Explanatory Memorandum), p. 8.

called a 'situation of exploitation' instead of 'exploitation'.³⁴ The 'articulate' is automatically absent when speaking of a very young person. It is not required that the person in prostitution speaks a certain language, like Dutch or English. It is however an indication of vulnerability when the person in prostitution and the exploiter cannot communicate in the same language. It is therefore allowed to make use of regulations as a local authority that require that the person in prostitution and her exploiter speak the same language.

Accordingly, the Supreme Court ruled that there is a situation of sexual exploitation when a person is in a situation which is not equal to the situation where an articulate prostitute would be. Also, does voluntariness lack when a person in prostitution does not have or has to a lesser extent the ability to make a conscious choice regarding the continuation of her relationship with her exploiter. Among other things a situation of exploitation exists when a person in prostitution is an illegal resident.³⁵

A position of vulnerability can be derived from different circumstances, like debts, reduced mental abilities and drug addiction.³⁶ Other circumstances, mentioned in the Directive, are gender, pregnancy, health problems or handicaps. A person younger than 18 years is automatically seen as highly vulnerable, in line with Article 2 subsection 6 of the Directive.

Furthermore, a situation of exploitation is not explicitly defined in the law, more specifically in article 273f subsection 2 of the Dutch Criminal Code. An important directory in this is the Chinese restaurant case. In this case the Supreme Court judged that a situation of exploitation cannot be defined within general terms, but that it is highly intertwined with the circumstances of the case. The court thereby gives significance to the nature and length of the employment, the consequent restrictions of the person involved and the economic profit of the employer. Besides, other factors can be relevant and norms of the Dutch society should be used as a frame of reference.³⁷ More recently the Court ruled that forced labour in the sex branch inevitably leads to a situation of exploitation, as the physical integrity of the victim is always at stake.³⁸

Lastly, it should be noted that consent does not play significant role in a situation of exploitation when coercion is used. This is in line with Article 2 (4) of the Directive, which states that 'the consent of the victim of human trafficking to the intended or actual exploitation is irrelevant if any

³⁴ National Rapporteur on trafficking in human beings and sexual violence against children 2012, p. 77.

³⁵ Supreme Court 5 February 2016, ECLI:NL:HR:2002:AD5235.

³⁶ Zwolle-Lelystad District Court 27 March 2012, ECLI:NL:RBZLY:2012:BX2627.

³⁷ Supreme Court 27 October 2009, ECLI:NL:HR:2009:BI7099 (Chinese restaurant), consideration 2.6.1.

³⁸ Noord-Nederland District Court 13 May 2015, ECLI:NL:RBNNE:2015:2306.

of the means referred to in subsection 1 is used'. In the analysis of case law the national rapporteur determines that first an objectified situation of coercion must be established, after which the free choice of the victim is addressed. The rapporteur states that: 'A victim will often have the idea that he or she made the choice particularly in the event of deception and misuse of authority or of a vulnerable position.'³⁹ This argument does everything but close the search to a distinction between prostitution and a situation of sexual exploitation. It raises the question in what kind of situation the persons in prostitution who are considered 'the articulate prostitute' made their choices. The consent that seems the basis of the regulatory system seems of no worth when a person ended up in a situation of exploitation. Where this situation begins, is, however, not clear. Verhoeven and Van Straalen researched the contact moments of people in prostitution with the government. They state that in practice, consent and coercion is not a simple division. Rather, there are a lot of combinations in this and it could be seen as a continuum where persons in prostitution take in a place between consent and sexual exploitation or coercion.⁴⁰

Also, inconsistencies can be found in the case law regarding indicators of coercion. Whereas one court found a 50/50 division in the profit is not so unreasonable or disproportionate that it could conclude that there was abuse of a vulnerable position, in other cases this was concluded otherwise.⁴¹

Remarkably and in friction with the Directive, the Leeuwarden Court of Appeal came to an interesting conclusion by acquitting the accused while the person involved was under-aged, namely 15 years old. The court found that the 5-year older suspect, had influence on the process of the girl ending up in prostitution, but they could not determine the extent of this influence so he was acquitted.⁴² However, the girl cannot be considered to have made this choice on her own, since she is under-aged. In another case, the court, however, underlines the fact that under-aged persons, even when consented to it and even if they were asking about opportunities in prostitution to the defendant themselves, are in a vulnerable position and consequently exposed to a situation of sexual exploitation when working in prostitution.⁴³

³⁹ National Rapporteur on trafficking in human beings and sexual violence against children 2012, p. 65.

⁴⁰ Verhoeven & Straalen, van, 2015, p. 17.

⁴¹ National Rapporteur on trafficking in human beings and sexual violence against children 2012 p. 66.

⁴² Leeuwarden Court of Appeal 8 February 2011, ECLI:NL:GHLEE:2011:BP3606.

⁴³ Leeuwarden District Court 28 December 2010, ECLI:NL:RBLEE:2010:BO9043.

4.4 Conclusion

To what extent does the Netherlands distinguish prostitution from sexual exploitation and to what extent does this answer to Directive 2011/36/EU?

In general, the Dutch legislation is in line with the Directive, especially since the implementation of the subsection in Article 273f. Consequently, the term vulnerable position equals Article 2(2) of the Directive. The distinction of prostitution and a situation of sexual exploitation in the Netherlands is found in the 'articulate prostitute', whereas it is considered sexual exploitation as a person is in a situation which cannot be considered one the articulate prostitute would find herself. Several main factors are relevant here: the age of the person in prostitution, the position of vulnerability, force and consent. However, the line between those two is not always clear. Next, cases that could be considered sexual exploitation considering the Directive, could be differently interpreted by the Dutch courts, because the Directive is very broadly formulated. This is due to the fact that the Dutch courts use the criterion of 'articulate prostitute', while the Directive mainly focuses on the 'vulnerable position'.

5 Conclusion

The main question of this dissertation is:

To what extent can prostitution be defined as sexual exploitation under namely the Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 in the Netherlands compared to Sweden?

Every part of this question has been answered through the chapters of this dissertation. In both Sweden and The Netherlands, there is no discussion about the fact that a situation of exploitation is wrong and must be combatted. However, Sweden and the Netherlands have a different perspective on the definition of sexual exploitation and how, consequently, this must be combatted. In this chapter I will join the conclusions of the chapters and compare Sweden with The Netherlands in the light of the Directive.

5.1 Differences

Firstly, the laws differ: Swedish law criminalises the purchase of sex, and decriminalises the persons in prostitution. In contrast, the Netherlands legalises prostitution, both the buyers and the persons in prostitution, and exploitation of prostitution. The Dutch law emphasizes the autonomy and the choice of the persons as anchored in Article 11 of the Dutch Constitution. The point of departure is therefore the choice of the person and the 'articulate prostitute' as distinctive element between prostitution and sexual exploitation. This difference is, as explored in chapter 4.3, somewhat a grey area. On the other hand, Sweden does not focus on the choice, as prostitution is seen as violence against women, also when consented to it. Prostitution therefore equals sexual exploitation. It is also both a cause and consequence of gender inequality. The person who is in prostitution is viewed as a victim, opposed to the Dutch point of departure: the articulate prostitute.

5.2 Similarities

Firstly, both countries acknowledge a certain 'vulnerable position' that a person in prostitution can live in. In Sweden, this is always the case if a person is in prostitution, as explained above. In the Netherlands, this can be a distinctive element of a person is an 'articulate prostitute' or if the person is the victim of sexual exploitation. Also, a presumably change in the Dutch law will criminalise the knowingly buying of sexual services of victims of sexual exploitation. This is like Sweden victim-centred and focusing on the demand.

5.3 Accordance with the Directive

The Directive does not define sexual exploitation, so both the perspective of Sweden as the Netherlands can be in line with this. The Netherlands has implemented Article 2 sub 2 in the Directive, which defines the vulnerable position, which, in any case, distinguishes prostitution from sexual exploitation. In theory, the difference between sexual exploitation and prostitution is the same as in the Netherlands, because the definition of a vulnerable position has been copied into the Dutch law. In the Netherlands, the point of departure is the 'articulate prostitute', so somewhat discrepancy can therefore occur. However, those terms overlap greatly. Sweden, on the other hand, views prostitution as a situation of exploitation.

5.4 Further discussion

This dissertation does by no means touch upon the all the controversies in the prostitution debate. I tried to focus as much as possible on the terms sexual exploitation and prostitution. However, there are so many aspects for further study that intertwine with sexual exploitation and prostitution, like human trafficking.

I am also convinced that only claiming that terms have a certain definition will not contribute much to the debate that in the core revolves around the search for the best prostitution policy. It could be that it would help to define the terms more unambiguously in international law, so that human trafficking and sexual exploitation can be combatted as best as possible. These claims must, then, not be based on ideals as these will always differ from person to person or government to government, but on realities of persons in prostitution. This, nonetheless, is also material for further examination.

Lastly, combatting sexual exploitation demands more than just a certain law or policy. The discussion must be viewed in the context of the society and factors causing vulnerabilities are to be eliminated as much as possible.

References

Books

Askola 2007

H. Askola, *Legal responses to trafficking in women for sexual exploitation in the European Union*. North America (US and Canada): Hart Publishing (US) 2007.

Farley 2015

M. Farley, 'Prostitution and slavery: a 21st century abolitionist perspective', in: B. Martin and J.F. Brooks (eds.), *Linking the histories of slavery in North America and its borderlands*, Santa Fe: School for advanced research press 2015.

Mattson 2016

G. Mattson, *The cultural politics of European prostitution reform. Governing loose women*, Hampshire, UK: Palgrave Macmillan, 2016.

Verhoeven & Straalen, van, 2015

M. Verhoeven & E. van Straalen, *Intakes interviews with sex workers by local authorities*. Den Haag: WODC 2015.

Weitzer 2012

R. Weitzer, *Legalizing prostitution. From illicit vice to lawful business*, New York: New York University Press 2012.

Reports

Amnesty International 2016

Amnesty International, *Amnesty International policy on state obligations to respect, protect and fulfil the human rights of sex workers*. 26 May 2016. POL 30/4062/2016.

Amnesty International 2016 (explanatory note)

Amnesty International, *Explanatory note on amnesty international's policy on state obligations to respect, protect and fulfil the human rights of sex workers*. 26 May 2016, POL30/4063/2016.

Ministry of Foreign Affairs 2012

Ministry of Foreign Affairs, *Dutch policy on prostitution*, 2012, AVT12/BZ106006.

National Rapporteur on trafficking in human beings and sexual violence against children 2012

National Rapporteur on Trafficking in Human Beings (2012). *Trafficking in Human Beings. Case law on trafficking in human beings 2009-2012. An analysis*. The Hague: BNRM2012.

National Rapporteur on trafficking in human beings and sexual violence against children 2016

National Rapporteur on trafficking in human beings and sexual violence against children (2016). *Prostitution and human trafficking*. (translated, original title: Prostitutie en mensenhandel) The Hague: National Rapporteur.

Skarhed 2010

A. Skarhed, *The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (Translation of the evaluation of the prohibition of the purchase of sexual services), Sweden: Swedish government report. (SOU 2010:49:).

Report on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective 2016

Report on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective (2015/2118(INI)).

Schulze et al. 2014

E. Schulze et al., *Sexual exploitation and prostitution and its impact on gender equality*. Policy Department C: Citizen's Rights and Constitutional Affairs, European Parliament, Brussels: Belgium.

Articles and weblogs

Boring, *Global Legal Monitor* 28 April 2016

N. Boring, 'France: New Law to Punish Prostitution Clients', *Global Legal Monitor* 28 April 2016, www.loc.gov/law/foreign-news/article/france-new-law-to-punish-prostitution-clients/ (accessed 9 May 2017).

Chrisafis, *The Guardian* 6 April 2016

A. Chrisafis, 'France passes law making it illegal to pay for sex', *The Guardian* 6 April 2016 (accessed 9 May 2017).

European Women's Lobby 2011

European Women's Lobby, Frequently asked questions, par. 5, 17 June 2011. Womenlobby.org/Q-A?lang=en (accessed on 9 May 2017).

European Women's Lobby 2010

European Women's Lobby, 'Prostitution is violence against women – let's refuse to be any part of it!', womenlobby.org/EWL-publications-and-articles?lang=en (accessed 9 May 2017) p. 1-2.

Jakobsson & Kotsadam, A. *Eur J Law Econ* 2013/35, issue 1

N. Jakobsson & A. Kotsadam, 'The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation', A. Eur J Law Econ 2013/35, issue 1.

National Rapporteur on trafficking in human beings and sexual violence against children 2015.

National Rapporteur on trafficking in human beings and sexual violence against children, advising on bill penalisation abusing prostitutes who are victims of human trafficking (34 091), 26 January 2015, [www.nationaalrapporteur.nl/binaries/brief-nationaal-rapporteur-advies-initiatiefwetsvoorstel-misbruik-prostitutie\(e\)s-die-slachtoffer-zijn-van-mensenhandel-26-januari-2015-tcm63-579309_tcm63-626725_tcm23-34655.pdf](http://www.nationaalrapporteur.nl/binaries/brief-nationaal-rapporteur-advies-initiatiefwetsvoorstel-misbruik-prostitutie(e)s-die-slachtoffer-zijn-van-mensenhandel-26-januari-2015-tcm63-579309_tcm63-626725_tcm23-34655.pdf), (accessed on 9 May 2017).

Prostitution research & education 2016

Prostitution research & education, History, prostitutionresearch.com/about/history/ (accessed 17 May 2017).

List of judgements

Supreme Court 27 October 2009, ECLI:NL:HR:2009:BI7099 (Chinese restaurant)

Supreme Court 5 February 2016, ECLI:NL:HR:2002:AD5235

Leeuwarden Court of Appeal 8 February 2011, ECLI:NL:GHLEE:2011:BP3606

Roermond District Court 13 December 2006, ECLI:NL:RBROE:2006:AZ5891.

Leeuwarden District Court 28 December 2010, ECLI:NL:RBLEE:2010:BO9043

Zwolle-Lelystad District Court 27 March 2012, ECLI:NL:RBZLY:2012:BX2627

Noord-Nederland District Court 13 May 2015, ECLI:NL:RBNNE:2015:2306

Parliamentary documents

Parliamentary Documents II 2014/2015, 34 091, no. 2.

Parliamentary Documents II 2014/2015, 34 091, no. 3.

Parliamentary Documents II 2011/2012, 33 309, no. 3 (Explanatory Memorandum).