

Disability, sexuality and the law: discussing sexual assistance in a comparative perspective

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Abstract: Disabilità, sessualità e diritto: una prospettiva comparata sull'assistenza sessuale – This article aims to discuss sexual assistance for people with disability in a comparative legal perspective. Sexual assistance is being discussed as tool to tackle discrimination against people with disability in the field of sexuality. Its definition, however, is still controversial amongst scholars. At the same time, from the legal point of view, sexual assistance is not subjected to autonomous regulation. On the contrary, its discipline depends on the regulation of sex work and a crucial role is played by social actors and grassroots organization. In this perspective, it is possible to theorize the existence of two legal approaches towards sexual assistance in Europe.

Keywords: disability; sexuality; sexual assistance; sex work; sexual accessibility.

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1. Introduction: on the reasons for a research on sexual assistance

Sexuality is a key factor through which we understand ourselves both as individuals and as members of communities¹. If sexuality was initially theorized as an instinctive drive, linked to genes, thanks to the development of studies and research in this field, it is now clear that sexuality is socially malleable, shaped by a multitude of variables, including social and legal interventions, prohibitions, and definitions. This is particularly evident when we look at the intersection between disability and sexuality. In fact, here the social construction of sexuality meets a field already permeated by stereotypes and misconceptions and this generates a peculiar discourse of discrimination, highly influenced by the perception of disability in society. Disabled people²'s sexuality is a social taboo, a discourse which is primarily

¹ L. J. Moran, *Introduction*, in Moran L. J. (eds.), *Sexuality and Identity*, London, New York, 2017, XII.

² In this paper the term disabled people and the term people with disability will be used in an interchangeable way, to be both intended as respectful and inclusive. The terminology disabled people is used in an identity first language, emphasizing disability as a key part of someone's experience. It implies the recognition of the social process of disablement enacted for individuals with impairments. This language, mostly used by UK disability scholars, pays homage to the social model of disability (See: M. Olivier, *The social Model in Action: If I had an hammer*, in C. Barnes, G. Mercer (eds.), *Implementing the social model of disability*, Leeds, 2004, 20). On the contrary, the term people with disability On the contrary, the term people with disability is part of a person-first

dominated by denial, censorship and stigma³: this implies a process of desexualisation of disabled people. However, the barriers inhibiting disabled people's sexuality are a social construct: these obstacles are not inherently linked to the bodies but rather to the social perception of these bodies⁴.

All these insights have been recently considered by some scholars from the disability movement who decided to address sexuality as a social issue. Their goal is to let sexuality step outside of the private/individual dimension as it is usually perceived by the medical approach or by the single person living their experience of sexuality in isolation⁵. The notion of sexual accessibility was elaborated for this purpose. It can be defined as follows: "By sexual access we do not mean access to physical intimacy per se. Rather, we mean access to the psychological, social and cultural contexts and supports that acknowledge, nurture and promote sexuality in general or disabled people's sexuality specifically⁶". Sexuality can be led into the social realm, for example, by improving media representation of disabled people's sexuality, but also by ensuring "access to cultural, social and psychological supports aimed at synergistically improving the possibilities for sexual expression and negotiating sexual relationship for disabled people⁷".

One of the most discussed tools in the field of sexual accessibility is sexual assistance. This paper will discuss sexual assistance in a comparative legal perspective and from a multidisciplinary angle. In the second paragraph the definition of sexual assistance will be discussed in order to define the perimeter of the analysis. From this common understanding the following paragraphs will be dedicated to the discussion of the comparative discipline of sexual assistance in Europe and its relationship with the regulation of sex work. It is possible to theorise the existence of two approaches in Europe towards the phenomenon of sexual assistance. To

language. It is aimed at highlighting the common features shared by human beings, given that people shouldn't be defined or limited by their disabilities. This language is widely used in the context of human rights international law, as a result of the approval of the UN Convention on the Rights of Persons with Disability (2006) and it is the expression of the human rights model of disability (see: T. Degener, *A Human Rights Model of Disability*, in P. Blanck, E. Flynn (eds.), *Routledge Handbook of Disability Law and Human Rights*, London, 2016, 31-49). On the debate around language and disability see: P. Foreman, *Language and disability*, in *Journal of Intellectual and Developmental Disability*, 30,1 2005, 57-59.

³ E. A. G. Arfini, *Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali*, in M. Inghilleri, E. Ruspini (eds.), *Sessualità narrate. Esperienze di intimità a confronto*, Milano, 2011, 101-122.

⁴ E. A. G. Arfini, *Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali*, cit.

⁵ T. Shakespeare, D. Davies, K. Gillespie-Sells, *Sexual Politics of Disability: Untold Desires*, London, 1996.

⁶ R. P. Shuttleworth, L. Mona, *Disability and Sexuality: Toward a Focus on Sexual Access*, in *Disability Studies Quarterly*, 22, 4, 2002, 2-3.

⁷ R. P. Shuttleworth, L. Mona, *Disability and Sexuality: Toward a Focus on Sexual Access*, cit.

conclude, pros and cons of each model will be discussed, and some hints will be given on the discipline and the current proposal in Italy.

2. Sexual Assistance: A Cross-Border Practice

The definition of sexual assistance is not immediate and unambiguous. For example, it is not always easy to draw clear boundaries between sexual assistance and similar commercial/medical practices involving sexuality. On the contrary, if we look both at the praxis and the theoretical level, a variety of praxis and definitions emerges.

For the purposes of this paper, sexual assistance can be defined as a particular form of sexual facilitation, the act of receiving assistance with sexual activity. We know indeed that people with disability might need to receive personal assistance for ordinary life activities: receiving support with mobility or personal hygiene, for example, are undoubtedly considered as rights. We should, however, think about the fact that the same person who needs assistance in everyday life activities might need support in the sexual sphere, as well, for example in having access to the possibility of masturbating or engaging in sexual activity with partners⁸. Personal assistance in the field of sexuality is sexual facilitation. It might include a wide range of activities such as: “Providing accessible information, fostering an environment which allows intimacy, offering and observing the need for privacy, encouraging and enabling social interaction, the procurement of sexual goods, arranging paid-for sexual services, facilitation of masturbation or sexual intercourse with another party (undressing, handling of aids, positioning) and sexual surrogacy⁹”.

According to the *European Platform Sexual Assistance*, sexual assistance is the act of “supporting adults with disabilities in the whole spectrum of their sexuality. It could be to help them to learn or improve their skills when it comes to interpersonal relationships, intimacy and intimate and/or sexual relationships.”¹⁰ and sexual assistants are: “men and women who have the competence necessary to offer quality support for an intimate or sexual relationship. These people are sensitive to different disabilities and offer an intimate or sexual experience with the disabled person in a professional manner and for a specified amount of time¹¹” The Platform was funded with the purpose of creating a network of organizations in Europe working in the field of sexuality and disability and to create an epicentre of advocacy in

⁸ L. R. Mona, *Sexual Options for People with Disabilities: Using Personal Assistance Services for Sexual Expression*, in *Women with visible and invisible disabilities*, 26, 3-4, 2003, 212.

⁹ S. Earle, *Disability, Facilitated Sex and the Role of the Nurse*, in *Journal of Advanced Nursing*, 36, 3, 2001, 447.

¹⁰ This information can be found in the website of the association: <http://www.epseas.eu/en/>.

¹¹ This information can be found in the section of the website “What in sexual assistance? Who are sexual assistants?”. See here: <http://www.epseas.eu/en/page/181>.

favour of sexual assistance in Europe. In fact, the situation in Europe is highly inhomogeneous, both on the legislative level (as we will see further) and on the factual level. The network's aim is to put all these different experiences from European countries in dialogue, to unite existing expertise and create new ones.

On this point: some of the existent organizations support the idea of a specific training needed to become a sexual assistant, while others do not; some of these organizations support the idea of sexual assistance as a comprehensive experience that might involve penetration and oral sex, while others conceive sexual assistance as support with masturbation only. The current factual situation is very fragmented, and consequently there are as many definitions of sexual assistance as there are NGOs and organizations working in this field all over Europe.

On this note, it will be discussed later how the different approaches of organizations working with sexual assistance can be framed into models, by analysing their assumptions of the role and function of sexual assistants and the legislative approach towards sex work adopted in each Country. From a theoretical point of view, we must point out that scarce attention has been given by scholars to the elaboration of a precise definition of sexual assistance, which remains very broad and capable of encompassing the many praxis existing on this matter.

An interesting theoretical framework defines sexual assistance as “the space of intersection of sexual assistance (which concretises the right to access one's own body) and sex work (where one exchanges money for sexual pleasure)¹²”. In this view, sexual assistance is aimed at helping the person with disability before, during and after sexual intercourse with other people and/or sexual assistants are expected to help the person with masturbation in case she/he is not able to do it by her/himself. Here sexual assistance must be conceived as an expression of the right to access one's own body¹³. The perimeter of sexual assistance is drawn by allowing a personal assistant to support the person in actions she/he cannot do alone due to her/his impairment. In this view, sexual assistance can be defined as a human tool (*erramienta humana*) within the philosophy of Independent Living¹⁴. In this model “there is no right to oral sex or coitus or any other sexual practice on other bodies. The access to others' bodies is by agreement not by law¹⁵”.

¹² A. Centeno, 2014, *Asistencia sexual para personas con diversidad funcional*, in *DerechosHumanos*, 2014, available at the following link: <http://www.derechoshumanosya.org/node/1240>.

¹³ A. Centeno, 2014, *Asistencia sexual para personas con diversidad funcional*, cit.

¹⁴ S. Arnau Ripolles, *La asistencia sexual a debate*, *Forum on Sexual Assistance*, in *Dilemata*, 6, 15, 2014, 12. In the same paper she also explains how, if personal assistance can be defined as a first-class need, basic and universal, sexual assistance can be defined as a second-class need, basic but specific.

¹⁵ A. Centeno, 2014, *Asistencia sexual para personas con diversidad funcional*, cit.

2.1. *Sexual assistance vs. sex work*

Within this framework, sexual assistance, which is paying for assistance in the sexual sphere, finds its place somewhere between sex work and personal assistance. Still, it must be recognised that there is no common agreement on the way in which these factors interact, on the contrary, this matter is very controversial¹⁶.

For example, the proposal of sexual assistance elaborated in Italy by the *Love Giver Committee*, is strongly distances itself from “simple” sex work due to its nature and purposes (for further information see the last paragraph). This kind of rhetoric is not solely part of the Italian proposal but can be found in other organizations working with sexual assistance all over Europe. For example, the organization *Tandem Team*, currently active in providing sexual services for people with disability in Spain, clearly distinguishes the service they provide from sex work, explaining it as follows: “Here we don’t have clocks, there is no lucrative intention but only vocation for the service, it’s not just sex but personal growth, an improvement of the quality of life¹⁷”. Given this, the difference between sexual assistance and prostitution is the emotional connection and the intimacy that differentiate this experience from sex work.

Scholars recognised that this approach presents the correlated risk of perpetuating the already existent stigma surrounding sex work¹⁸. In some countries in Europe the national Committees on Bioethics faced this issue. According to the *Comitè Consultatif de Bioéthique de Belgique*, as expressed in their document on sexual assistance¹⁹, prostitution and sexual assistance can be deemed distinct for four main reasons. First of all, sexual assistance is

¹⁶ G. Mannino, S. Giunta, G. La Fiura, *Psychodynamics of the Sexual Assistance for Individuals with Disability*, in *Sexuality and Disability*, 35, 10, 2017, 1-12.

¹⁷ This statement is an excerpt of an interview to Maria Clemented (co-Founder of TandemTeam), available, in Spanish, at this link https://www.eldiario.es/retrones/Maria-Clemente-sexo-ofrecemos-intimidad_6_310129007.html. For a sociological analysis of this interview see: A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, in *Pedagogia i Treball Social. Revista de ciències socials aplicades*, 5,1, 2016, 18.

¹⁸ A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías*, cit., 18; G. Garofalo Geymonat, *Oltre il dibattito pubblico ma non oltre la critica*, in M. Ulivieri (ed.), *Loveability. L’assistenza sessuale per persone con disabilità*, Trento, 2016, 99-114. The author wants us to notice how sexual assistants are often pictured as heroines or saints who are ready to do what no-one else is willing to (having sex with a person with disability), and for this reason they are considered better than simple sex workers, who do it all for money. Garofalo draw our attention on the fact that this kind of discourse marginalize people with disability. On this point see, for example, the critiques to sexual assistance from a French disabled thinker R. Gendarme, *Je n’accepterai aucune assistante sexuelle si lui faire l’amour ne la fait pas elle-même trembler de Plaisir*, Paris, 2014.

¹⁹ Comitè Consultatif de Bioéthique de Belgique, *Avis n° 74 du 13 novembre 2017 relatif à l’assistance sexuelle aux personnes handicapées*, available online at: https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/avis_74_ass_sex_uelle_aux_ph.pdf.

specifically provided by people who are trained. Secondly, it is strictly legally framed to ensure the quality of the service and it is accessible for a fixed and moderate price, it is not a paid job nor the assistant's primary activity, as the fixed amount of money received is not a salary. Finally, sexual assistance is addressed both to women and men.

On the contrary, the French *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé*, in its document from 2012 on the sexual and affective life of people with disability²⁰, concludes that there are no substantial differences between prostitution and sexual assistance: "The associations of disabled people claim that sexual assistance challenges the comparison with prostitution. However, it is difficult to qualify it otherwise (...) "²¹", then it continues: "The difficult question of exploitation, even if it is consented to, remunerated or compassionate, of one person's body cannot be dismissed for the personal satisfaction of another". This document widely discusses the relationship between criminal law on prostitution and sexual assistance, a framework which- as we will discuss later- has changed recently.

The debate between scholars in the field of medical ethics revolves around the same questions. Some of these scholars believe that even in a legal system condemning prostitution²², there should be a legal exception for people with disability²³. On the contrary, others show scepticism towards these arguments²⁴. For example, some agree on the urgency to address the sexual needs of people with severe disability but argue against the construction of a right to sexual pleasure, a state-funded service (as

²⁰ Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé, *Avis n°118, Vie affective et sexuelle des personnes handicapées Question de l'assistance sexuelle*, 27 September 2012, available at: https://www.ccne-ethique.fr/sites/default/files/publications/avis_ndeg118.pdf.

²¹ The translation of the sentence is from the author. See: Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé, *Avis n°118*, cit., 10.

²² F.K. Thomsen, *Prostitution, disability and prohibition*, in *Journal of Medical Ethics*, 41, 2015, 451–459; J. M. Appel, *Sex rights for the disabled?*, in *Journal of Medical Ethics*, 36, 2010, 152– 154.

²³ According to Thomsen the reasons are mainly two: "(1) Many or most persons have a sexuality that generates strong needs for sexual relations, and (2) Some disabled persons are partially or entirely incapable of satisfying this need except through the purchase of sexual services from a prostitute". See: F.K. Thomsen, *Prostitution, disability and prohibition*, in *Journal of Medical Ethics*, 41, 2015, 455. Appel, who argues for the recognition of sexual pleasure as a fundamental right, states that "If sexual pleasure is a fundamental right, as this author believes, then jurisdictions that prohibit prostitution should carve out narrow exceptions for individuals whose physical or mental disabilities make sexual relationships with non-compensated adults either impossible or highly unlikely". See: J. M. Appel, *Sex rights for the disabled?*, in *Journal of Medical Ethics*, 36, 2010, 152–154.

²⁴ E. Di Nucci, *Sexual rights and disability*, in *Journal of Medical Ethics*, 37, 3, 2011, 158–161; B. D. Earp, *Paying for sex—only for people with disabilities?* in *Journal of Medical Ethics*, 42, 1, 2016, 54–56; A. Liberman, *Disability, sex rights and the scope of sexual exclusion*, in *Journal of Medical Ethics*, 44, 4, 2018, 253–256.

supported by other scholars) and, in general, against the idea of a legal exception from prostitution²⁵.

In the field of social science, scholars explored the mutual influence that the public debate and the elaboration of new policies on sex work and sexual assistance might have on each other. Sanders notices how “people living with impairments and sex workers are marginalized groups fighting for sexual rights, autonomy and freedom” and suggests that social movements should cooperate and work on common pragmatic issues²⁶. It also emerged that an approach to sexual assistance rooted on disabled rights could “only be supported by decriminalizing and integrative policies, not exclusively with respect to sexual assistance, but in the field of prostitution as a whole²⁷”. Although this topic of discussion is highly challenging, what emerges clearly is that the relationship between sex work and sexual assistance is a core issue in the debate on sexual assistance: the blurred lines separating them will be a topic of discussion on the legal level as well.

2.2. *Sexual assistance vs. sexual surrogacy*

It is also quite common to conflate the figure of sexual assistant with that of sexual surrogate; however, there are substantial differences between these two figures. First of all, sexual surrogacy has a wider target: it is not for people with disabilities only. Sexual surrogacy is a specific medical therapy²⁸ for people who are facing issues with physical and emotional intimacy²⁹, as well as sexual dysfunction, with a professional figure who works individually with the patient. This is a strictly therapeutic relationship, aimed at overcoming emotional and/or physical obstacles to a satisfactory sexual life, in order to accomplish sexual health. The fact that the framework of this relationship is a medical one is also revealed by the subjects involved in it. The surrogate partner, in fact, represents one of the actors in a triadic relationship, he/she is not contacted directly by the user, on the contrary, her/his presence is recommended by a doctor. Sexual

²⁵ In this sense, his alternative is the following one: “by making this service wholly voluntary and non-commercial, we likely guarantee a better experience for those involved; the severely disabled would probably enjoy it more in virtue of the fact that the service would be independent, voluntary, charitable, non-profit, and non-commercial”. See: E. Di Nucci, *Sexual rights and disability*, in *Journal of Medical Ethics*, 37, 3, 2011, 160.

²⁶ T. Sanders, *The politics of sexual citizenship: Commercial sex and disability*, in *Disability & Society*, 22, 5, 2007, 453. But also: K. Fritsch, R. Heynen, A. Ross, E. Van Der Meulen, *Disability and sex work: developing affinities through decriminalization*, in *Disability & Society*, 31, 1, 2016, 84-99.

²⁷ G. Garofalo Geymonat, *Disability Rights Meet Sex Workers' Rights: the Making of Sexual Assistance in Europe*, in *Sexuality Research and Social Policy*, 16, 2, 2019, 226.

²⁸ Developed by Masters and Johnson in the 1970s, see: W.H. Masters, V. E. Johnson, *Human Sexual Inadequacy*, Boston, 1970.

²⁹ T. Rosenbaum, R. Aloni, R. Heruti, *Surrogate Partner Therapy: Ethical Considerations in Sexual Medicine*, in *The Journal of Sexual Medicine*, 11, 2, 2013, 321-329.

therapy is carried out by a three-way therapeutic team formed by the sex therapist (usually a mental health professional), the sex surrogate partner, and the client³⁰. The relationship between the sex surrogate partner and the client is always supervised, guided and mediated by the psychologist/therapist, who dictates the terms and conditions of the medical relationship³¹. If we consider all these elements, the differences between a surrogate partner and a sexual assistant depend on to the kind of relationship, the actors involved, the aims and goals, but also to the instruments used.

3. Sexual assistance in a comparative perspective: two main models in Europe

Given this mosaic of definitions and practices, when looking at the situation of sexual assistance in Europe, it is mainly possible to make two remarkable observations.

First of all, no country in Europe has adopted a particular legislation on sexual assistance. Secondly, the approach towards sexual assistance is strictly connected to the regulation of the trade of sexual services³².

On the first point, in the upcoming paragraphs we will have the opportunity to notice how, even in countries where sexual assistance is a well-established service, with dedicated associations since the early '90s, there is no specific regulation on the topic. From the legal point of view, sexual assistance is assimilated to the broader notion of sex work. For this reason, we can say that, in this field, if we tried to build models based on the observation of the sources of law, we would fail.

The classic distinction between models based on intervention and abstentionist models³³ is not adequate to describe the legal status of sexual assistance. From this point of view, we should acknowledge that in Europe

³⁰ T. Sanders, *The politics of sexual citizenship: commercial sex and disability*, in *Disability & Society*, 22, 5, 2007, 440.

³¹ B. Casalini, *Disabilità, immaginazione e cittadinanza sessuale*, in *Etica & Politica*, XV, 2, 2013, 301-320.

³² For an overview of politics, policy and approach towards prostitution and sex work in Europe: see D. Paola, *Tutti in comune disaccordo. Diritti umani e questioni di policy nel dibattito sulla prostituzione in Europa*, in *Studi sulla questione criminale*, XII, 3, 2017, 45-78. For a focus on policy against human trafficking see: A. Di Nicola, *La prostituzione nell'Unione Europea tra politiche e tratta di essere umani*, Milano, 2006.

³³ See the description provided by C. Casonato, *Introduzione al biodiritto*, Torino, 2012, 94-107. Here the author observes that a model can be found looking at the source of law or at the contents of law. As far as sources of law are concerned, the legal system can be distinguished by analysing whether they regulate a specific field. According to Casonato, the choice to set up a legislation has these positive consequences: legitimacy, political responsibility and democratic accountability. This intervention then might be a "heavy" one or a light one, it can be substantial or procedural, depending on the choice of the single legal system. The abstentionist model implies a *laissez faire* approach that exposes all the subjects and does not grant them any kind of protection.

all the States adopt an abstentionist model towards sexual assistance. No primary sources of law, in fact, have been created to regulate this service. An exception is Denmark, where a non-binding document, first in the form of Guidelines and later of a Handbook, tries to set out good-practice in the field of sexuality for people with intellectual impairments living in State houses.

If it is desirable to elaborate new models, we need to adopt another point of view and look at the factual regulations and conditions regarding sexual assistance. From this perspective, it appears evident that the presence of a well-established service of sexual assistance is strictly linked to the decriminalization of prostitution and conducts related to it, at different levels. On the contrary, in countries where the approach towards prostitution is abolitionist or neo-abolitionist, as it will be further defined and explained in the following paragraphs, sexual assistance is struggling to be recognized both on a social and a legal level. In these countries, associations are advocating and working outside any legal framework, trying to create a space for this service outside the criminal provisions on prostitution, often having difficulties falling outside the criminally sanctioned umbrella.

For this reason, two main models of approach will be theorized: the negative incorporation model and the positive incorporation model. In the *negative incorporation* model, there are no specific provisions on sexual assistance; on the contrary there is a social and public debate about the creation of this professional figure. At the same time, the general approach towards sex work is an abolitionist or neo-abolitionist one, that criminalizes conducts linked to prostitution and often the person who purchases sexual services. Sexual assistance is incorporated within the legal discourse of sex work and for this reason it struggles to find its space in the system. In this group we find countries such as Spain, France, Sweden, and Italy. In the *positive incorporation* model, sexual assistance is a well-established practice, even though there are no specific provisions surrounding it. Sexual assistance is disciplined by laws on sex work in general. Indeed, in these countries, there is a regulationist approach towards prostitution, and sexual assistance is usually a service that has been existing for more than 20 years. In this model we find countries such as Germany, the Netherlands, Switzerland and Denmark.

4. The negative incorporation model: sexual assistance as part of a criminally relevant phenomenon

The negative incorporation model can be defined as a model where there is no specific legislation on sexual assistance, and the issue is considered more broadly connected to sex work, which is surrounded by criminal law provision. In this model the dimension of sexuality and disability addressed through the service of sexual assistance does not emerge *per se* in the legal dimension. On the contrary, sexual assistance becomes visible to the legal

system when it reaches a “pathological dimension”: when it evolves into a criminally relevant fact.

In fact, the countries belonging to this model, are characterized by the presence of neo-abolitionist or abolitionist legislations on prostitution, where linked conducts at least, such as procuring, are criminalized and prostitution is surrounded by social stigma.

For this reason, the topic of sexual assistance is struggling to reach Parliamentary debate, and institutional politics in general. However, in all these countries, sexual assistance has been raised as an issue to be addressed by social actors. In particular in France, Spain, and Italy associations and NGOs are advocating for and are offering this service, even outside of, and, arguably against, the legal framework.

This model is shared by different European countries such as Sweden, France, Spain, and Italy. In particular, Sweden and France have a more severe approach, both being systems where the purchase of sexual services is criminalized. In Sweden, this system has existed since 1998 and has become a shared social outlook. On the contrary, in France this system is the result of a very recent reform, enacted in 2016.

For a better understanding of the above-mentioned points, we are going to briefly analyse the legislation and approach towards sexual assistance in France, Sweden, and Spain. The situation in Italy will be briefly analysed in the last paragraph.

4.1. France

In 1964, France adopted an abolitionist approach³⁴. If we analyse the repression and punishment of conducts linked to prostitution, we can observe that most of these measures find their place in Chapter V, Title II, Book II, of the French Criminal Code: Offences against the dignity of persons (*Des atteintes à la dignité de la personne*). The provisions formulate the offence of procuring and related conducts. The latest reform turned France in a country with a neo-abolitionist approach towards prostitution, where the purchase of sexual services is considered an offence, according to the new Article 20–611–1 of the Criminal Code³⁵. This reform was also subjected to

³⁴ S. P. Conner, *The Paradoxes and contradiction of prostitution in Paris*, in M. R. Garcia, L. H. van Voss, E. van Neederven Meerkerk (eds.), *Selling Sex in the City: A Global History of Prostitution, 1600s–2000s*, Leiden, 2017, 190–195.

³⁵ The reform is not well considered by many French scholars, both for technical reasons regarding criminal law (such as the respect of legal principle) and for the fact that it seems to be inspired by a pedagogical view of criminal law. Here are some remarks on the reform by French scholars: B. Lavaud Legendre, *Quand le législateur se veut pédagogue...Retour sur les objectifs de la loi de lutte contre le système prostitutionnel*, in *Revue de science criminelle et de droit pénal comparé*, 4, 2016, 725; P. Morvan, *Quand le «cave» devient délinquant: la pénalisation des clients de prostitué(e)s*, in *La semaine juridique - édition générale*, 2016, 487.

a decision from the *Conseil Constitutionnelle*, decision n° 2018-76³⁶. The application concerns the first section of Article 225-12-1, and Article 611-1 of the Criminal Code. The applicants affirmed that the provisions would violate the personal liberty of persons working as prostitutes, their right to respect of personal privacy, personal autonomy, and the right to sexual freedom. Moreover, a violation of the freedom of enterprise and freedom of contract would also occur. To conclude, the applicants claim that these offences would go against the principles of necessity and proportionality of penalties. The Conseil, however, rejected all the arguments. Responding to the alleged violation of personal freedom, the judges state that these offences are aimed at safeguarding human beings against human trafficking and sexual exploitation. In addition, the Court observes that the penalties are not to be considered disproportionate to the offence. In regard to the limitations of freedom of enterprise and freedom of contract, the *Conseil* states that the lawmaker has the liberty to impose limitations according to constitutional requirements, or requirements that are justified by the public interest, as long as they do not result in disproportionate infringements³⁷.

In order to fully understand the French approach towards sexual assistance, it is also relevant to analyse the political debate and its social dimension. First, it must be understood that the social mobilization and discussion about sexual assistance is strongly linked to the discourse on prostitution. The debate on sexual assistance in France started in the early 2000s with an interview published on the newspaper *Le Monde* at Renè-Claude Lachal³⁸. In the following years, the issue reached the institutional

³⁶Comments from French scholars on this decision: L. Constantin, T. Lefort, *Prostitution (sanction contre les clients): constitutionnalité du régime*, in *Recueil Dalloz*, 4, 2019, 202; R. Coralie, *Pénalisation des clients de personnes se livrant à la prostitution : la schizophrénie juridique*, in *La Gazette du Palais*, 10, 2019, 30-31; P. Le Maigat, *Question prioritaire de constitutionnalité (QPC) Pénalisation du recours à la prostitution : entre mépris et compassion, le juge constitutionnel valide les dispositions de la loi abolitionniste de 2016*, in *La Gazette du Palais*, 11, 2019, 29-31; E. Buge, *Pénalisation des clients de la prostitution: le Conseil constitutionnel face aux choix de société*, in *Actualité juridique, In Droit administratif*, 17, 2019, 969-979; J.P. Camby, *La Constitution, entre consentement et prostitution: le respect de la prostituée n'est pas le respect du client*, in *Les Petites Affiches*, 119, 2019, 18-28; A. Darsonville, E. Daoud, *La pénalisation du recours à la prostitution soumise à l'examen du Conseil constitutionnel*, in *Constitutions*, 1, 2019, 83-88; A. Ponseille, *La pénalisation du recours à la prostitution soumise à l'examen du Conseil constitutionnel, observations sur Cons. const., 1er février 2019*, in *QPC*, 761, 2019; D. Goetz, *Prostitution : conformité à la Constitution de l'infraction de recours à l'achat d'actes sexuels*, in *Dalloz actualité*, 5 février 2019; H. Diaz, *Blanchiment : présomption simple d'illicéité des biens ou revenus*, in *Dalloz actualité*, 26 mars 2019.

³⁷ The Full text of the decision is available in French from the website of the Conseil Constitutionnel at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2018761qpc/2018761qpc.pdf.

³⁸ Claude Lachal is a tetraplegic person, who was director of CRNS. In his interview for *Le monde*, published on the 23rd of October 2002, he revealed for the first time to a greater public the obstacles a person with disability might face in the field of sexuality. This interview brought the topic of disabled people's sexuality into the public discourse,

political debate by entering the Parliamentary discussion, with very little success. This was mainly due to the strong opposition coming from politicians supporting a neo-abolitionist view of prostitution, inherently considered in conflict with sexual assistance³⁹. Nonetheless, a similar position was adopted by the French *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé (CCNE)* in 2012⁴⁰. According to the Comité, recognizing a professional and remunerated sexual assistant would require an adjustment to the legislation prohibiting the procuring of prostitution. In any case, the *CCNE* considers it impossible to equate sexual assistance with any other professional situation, because of the principle of non-commercial use of the human body. Even though the *CCNE* recognized the existence of sexual rights, this doesn't imply an obligation of the State to compensate for the situation of people with disability in the sexual sphere. The State's only responsibility is to facilitate people's social life, as already stated by law. The institutional, legal, and Parliamentary debate definitively stopped after the Comité's opinion. Since then, the legal framework has become even more complex with the adoption of the new law on prostitution incriminating clients. It must be reported, however, that an association named *APPAS* has been very active in promoting training courses and in helping sexual assistants get in touch with potential users⁴¹. They state that, as prostitution is not illegal in France, then sexual assistance doesn't infringe the law⁴² and *APPAS* cannot be persecuted for procuring because the association does not receive any pecuniary advantage from helping assistants and users get in touch⁴³.

4.2. Spain

The regulation of prostitution in Spain can be described, at a national level, as moderately abolitionist. However, in recent years, when it comes to street

tackling pervasive stereotypes and raising awareness on their needs. See: A. Giami, *Sexualité et handicaps: de la stérilisation eugénique à la reconnaissance des droits sexuels (1980—2016)*, in *Sexologies*, 25, 3, 2016, 93-99.

³⁹ P. Bresseur, P. Detuncq, *L'assistance sexuelle: qu'est-ce-à-dire? Quels enjeux?*, in *VST, Vie sociale et traitements*, 2014, 53-54.

⁴⁰ Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé, Avis N°118, *Vie affective et sexuelle des personnes handicapées Question de l'assistance sexuelle*, 27 September 2012. Available in French here: https://www.ccne-ethique.fr/sites/default/files/publications/avis_ndeg118.pdf.

⁴¹ See article 7 of their Statute "*Engagements de l'APPAS vis-à-vis des accompagnants sexuels*" available on their website: <https://www.appas-asso.fr>.

⁴² On this point see: P. Missoffe, *L'admission judiciaire d'une formation théorique à l'assistance sexuelle pour les personnes en situation de handicap*, in *La Revue des droits de l'homme*, 2015; J. B. Thierry, *Libres propos sur l'assistance sexuelle au sujet de la liberté sexuelle des personnes handicapées*, in N. Deffains (eds.), *Le sexe et la norme*, Nancy, 2011.

⁴³ *APPAS* doesn't provide the salary for sexual assistants and there is no employment relationship between the professionals and the association. P. Missoffe, *L'admission judiciaire d'une formation théorique à l'assistance sexuelle pour les personnes en situation de handicap*, in *La Revue des droits de l'homme*, 2015.

prostitution, some Municipalities have adopted a more severe approach, closer to the prohibitionist one⁴⁴. In general, we can say that, in the Spanish legal system, prostitution is respected as a personal decision and tolerated if freely chosen and carried out voluntarily and autonomously by a person over 18 years old with legal capacity. However, working as a prostitute for someone else is considered exploitation (in the form of induction, coercion, and, in more general terms, when the subject is considered to be particularly vulnerable) and, therefore, illegal⁴⁵. The criminal provisions are all aimed at protecting self-determination and freedom of decision against any possible limitations for economic reasons, while there is no criminalization of intermediation and similar conducts⁴⁶. The relevant criminal provisions in this matter are Article 188 of the Spanish Criminal Code, that at §1 punishes anyone who force an adult to engage or remain in prostitution by using violence, intimidation or deception, or by abusing a situation of superiority, necessity, or vulnerability of the victim, and Article 187 that punishes all conducts related to the prostitution of minors, people with disability, and vulnerable subjects.

If prostitution in Spain is relegated in this grey area, sexual assistance is a topic widely debated and addressed by local initiatives and associations outside the legal framework, despite not having yet reached institutional politics. The public debate on sexual assistance started in Barcelona with some specific projects around disability and sexuality⁴⁷. In particular, activists from the Forum for Independent Living (*Foro de Vida Independiente y Divertad-FVID*) and also the Crip-transfeminist Alliance (Alianza tullido-

⁴⁴ E. Bodelón González, P. Arce Becerra, *La reglamentación de la prostitución en los ayuntamientos: una técnica de ficticia seguridad ciudadana*, in *Revista Crítica Penal y Poder*, 15, 2018, 71-89.

⁴⁵ However, according to jurisprudence from the Tribunal Social it must be made a distinction between prostitution and “actividad de alterne”. The latter is a form of work in which the employee is paid by a club or a bar to entertain clients and drink with them, but further exchanges between the client and this person are not in any manner controlled by third parties. This is considered as a legitimate form of work. See: R. Fernández Villarino, *El alterne y la prostitución. La legítima asociación de sus protagonistas y los efectos de su consideración laboral*, in *Temas Laborales. Revista Andaluza de Trabajo y Bienestar Social*, 74, 2004; D. De La Villa De La Serna, *Relaciones laborales de hecho, nulidad del contrato de trabajo y actividades laborales de causa u objeto ilícitos o contrarios a las buenas costumbres. Comentario a la doctrina judicial sobre el alterne*, in *Revista General del Derecho del Trabajo y de la Seguridad Social Ius-Tel*, 6, 2004.

⁴⁶ See: E. Orts Berenguer, C. Suárez Mira, *Los delitos contra la libertad e indemnidad sexuales*, Valencia, 2001; F. Alonso Pérez, *Delitos contra la libertad e indemnidad sexuales (perspectiva jurídica y criminológica)*, Madrid, 2001.

⁴⁷ For example, the documentary “Yes, we fuck!”, directed by Antonio Centeno and Raul Morena in 2015. The documentary tells the story of six different characters exploring the complex universe of sexuality and disability through different topics such as life as a couple, sexual assistance, prostitution and sex work. See: A. García-Santesmases, “Yes, we fuck! El grito de la alianza queer-crip”, in *Revista latino-americana de geografía y género*, 7, 2, 2016, 226-242.

tranfeministas) are developing a discourse around crip pride⁴⁸, addressing the issue of sexual assistance by elaborating on their own bodies and experience of sexuality⁴⁹. Outside the institutional recognition, theoretical and factual solutions for sexual assistance are enacted all around Spain, with a multitude of different approaches. The variety of associations and models is Spain's most distinctive feature compared to countries such as Italy or France. Currently, in Spain, sexual assistance is provided by three main actors and an archipelago of smaller grassroots initiatives. In *Tandem Team's* and *Sex Asistent's* model, defined as "erotic connection model", sexual assistance consists in intimacy and connection, given for free by volunteers⁵⁰. Other associations and movements, such as *asistenciasexual.org*, more linked to the philosophy of independent living, promote a different form of sexual assistance, the so called "auto-erotic"⁵¹ model. According to it, sexual assistance is a form of personal assistance, and a way to grant the right of access to one's own body⁵².

4.3. Sweden

Sweden is the first country in Europe to adopt a neo-abolitionist model to regulate prostitution and to criminalize the purchase of sexual services. The law was passed in 1998 and was the result of a public debate dominated by the radical feminist perspective, according to which prostitution is a form of

⁴⁸ Crip theory is an elaboration within critical disability theory. The term "crip" derives from the offensive terminology "crippled" that assumes a new meaning through an act of political reclaim. Crip theory investigates the area of intersection between disability and queerness (queer is an umbrella term for not heterosexual and/or not cisgender identities. Originally used pejoratively, it was reclaimed in the '80s by activists and scholars). Some common interests of these studies are: medicalization, passing, and coming out (in particular in the case of invisible disabilities). See, in general, authors such as: A. Kafer, *Compulsory Bodies: Reflections on Heterosexuality and Able-Bodiedness*, in *Journal of Women's History*, 15(3), 2003, 77–89; A. Kafer, *Feminist, Queer, Crip*, Bloomington, 2013; R. McRuer, , *As Good As It Gets: Queer Theory and Critical Disability*, in *GLQ: A Journal of Lesbian and Gay Studies*, 9(1), 2003, 79–105, R. McRuer, *Composing Bodies or De-Composition: Queer Theory, Disability Studies, and Alternative Corporealities*, in *JAC*, 24(1), 2004, 47–78; R. McRuer, *Crip Eye for the Normate Guy: Queer Theory and the Disciplining of Disability Studies*, in *PMLA*, 120(2), 2005, 586–592.

⁴⁹ A. García-Santesmases, "Yes, we fuck! El grito de la alianza queer-crip", cit.; P. Guzmàn, R. L. Platero, *The critical intersections of disability and non-normative sexualities in Spain*, in *Annual Review Critical Psychology, Gender and Sexuality*, 11, 2014, 357–387.

⁵⁰ This model implies the risk of relegating people with disability to the role of undesirable subjects, condemning them to social exclusion and further stigmatization. See: A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, cit., 19.

⁵¹ A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, cit.

⁵² From the legal point of view see: R. De Asís, *¿Es la asistencia sexual un derecho?*, in *Revista Española de Discapacidad*, 5, 2, 2017, 7–18; S. Navarro Casado, *El asistente sexual para personas con discapacidad, ¿una figura alegal?*, in *Red CDPD*, 201.

male oppression of women⁵³. The section 6, chapter 11, of the Criminal Code punishes the conduct of purchasing sexual services⁵⁴. The offence is formulated in a gender-neutral way. The purchase of sexual services is considered a crime against the State, and not against the person, which is why people who engage in prostitution are called in trial as witnesses, not as plaintiffs⁵⁵. Obtaining sex in exchange for money is the main incriminated conduct, however, sexual intercourse is interpreted in a very broad way and it includes many sexual practices. For the offence to be realized, the sexual act needs to take place, while, when it comes to the payment, the promise is already sufficient⁵⁶. Attempts are punishable as well. Nonetheless, the Criminal Code specifies that the conduct is also punishable when the payment is given/promised by a third party. This also applies to the person who provides clients for someone engaging in prostitution as a business. In this case, the person who is involved in the *liaison* is considered the perpetrator, while the other one is considered as an instigator or an accomplice. Another relevant provision on prostitution is the one regarding procuring, found at Article 12.

As far as the debate around sexuality and disability is concerned, an important influence comes from the social disapproval of prostitution and its legal discipline⁵⁷. In fact, the issue remains unaddressed by institutional politics and, in addition, the public debate on sexual assistance is not very lively. Law on prostitution and its side effects, such as a very strong stigma surrounding the sex industry, turned the discussion about sexuality and disability into a taboo topic, hampering a constructive public debate on how sexual facilitation could be organized⁵⁸. In spite of these serious difficulties, the Swedish Federation of Youth with Mobility Impairments (*Förbundet Unga Rörelsehindrade*) launched a project on sexuality, disability, and sexual assistance between 2009 and 2011, which resulted in a book titled “A secret known by many” (*Hemligheter kända av många*⁵⁹).

⁵³ One of the feminist jurist and thinker who broadly inspired the regulation of prostitution in Sweden is Catharine MacKinnon. For a first approach to her view on prostitution see: C. A. MacKinnon, *Prostitution And Civil Rights*, in *Michigan Journal of Gender & Law*, 1, 1993, 13-31.

⁵⁴ An official English version of the Swedish Criminal Code is available at this link: <https://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf>

⁵⁵ Y. Svanström, *Prostitution in Sweden: debates and policies 1980-2004*, in N. Westmorland, G. Gangoli (eds.), *International Approaches to Prostitution: Law and Policy in Europe and Asia*, 2006, Bristol, 73-74.

⁵⁶ C. Wong, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. Cadoppi, *Prostituzione e diritto penale*, Roma, 2014, 184.

⁵⁷ A. Gould, *The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden*, in *Journal of Social Politics*, 30, 3, 2001, 437-456.

⁵⁸ V. Kulick, J. Rydstromm, *Loneliness and its opposite, Sex, Disability, and the Ethics of Engagement*, Duhram, 2015, 70.

⁵⁹ Available, unfortunately in swedes only, at this link: <http://enhemlighet.se/wp-content/uploads/2012/03/Hemligheter-k%C3%A4nda-av-m%C3%A5nga.pdf>.

The project's aimed was challenging judgmental attitudes to the topic and creating a mentorship program for service users, and a handbook with methods⁶⁰. In this book, the possibility of including sexuality in the range of services provided by personal assistants in Sweden is discussed from the user's point of view⁶¹.

In 2011 and 2013, the Swedish National Board of Health and Welfare (*Socialstyrelsen*⁶²) commented, through its Social Committee, some cases of sexual facilitation. The *Socialstyrelsen* observed that in Sweden the purchase of sexual services is illegal. This being considered, a personal assistant (who is, amongst other things, a public funded figure) should not be involved in any illegal act. The Committee evoked moral and ethical boundaries, to conclude that a personal assistant is not allowed to facilitate the purchase of sexual favours. In fact, in doing so, the assistant would "support the exploitation of another person's body⁶³". Secondly, the Committee affirmed that even though helping a service user with masturbation would not be relevant for criminal law, ethical dilemmas persist.

5. The positive assimilation model: sexual assistance in the regulatory umbrella of sex work

The positive assimilation model can be defined as a model where there is no specific legislation on sexual assistance⁶⁴ and the issue is considered more broadly connected to sex work, which is regulated and disciplined by law.

This model is shared by European countries such as Germany, the Netherlands, Switzerland and Denmark. In all these countries the law provisions on prostitution were changed between the '90s and the early 2000s to adopt a regulationist approach towards prostitution. In these countries, sex work is recognized as labour on different levels and the sex workers' self-determination and freedom of economic initiative are protected. Most of these countries, however, have some residual criminal law provisions on conducts linked to prostitution, in order to prevent those actions capable of hindering self-determination in the sexual sphere.

⁶⁰ In affirming this, J. Bahner refers to the work of Colebach, who discuss the different approaches in policy-making. See, H. K. Colebatch, *Policy*, Buckingham, 2009.

⁶¹ J. Bahner, *Sexual professionalism: for whom? The case of sexual facilitation in Swedish personal assistance services*, in *Disability & Society*, 30, 5, 2015, 788-801.

⁶² The Committee is an organism that meets every 3 months to solve questions related to ethical dilemmas in the field of social services, through issuing official statements. See: <https://www.socialstyrelsen.se/en/regulations-and-guidelines/national-guidelines/>.

⁶³ The translation from Swedish is courtesy of J. Bahner and can be found here: J. Bahner, *Sexual professionalism: for whom? The case of sexual facilitation in Swedish personal assistance services*, in *Disability & Society*, 30, 5, 2015, p. 800.

⁶⁴ A partial exception to this might be Denmark, as we will discuss later. The Country has a set of guidelines, which, however, are not legally binding (See paragraph 5.3 of this paper).

Sexual assistance has been practiced and promoted by local associations since the early 90s or 2000s. There are multiple theoretical approaches to sexual assistance, however sexual assistance doesn't infringe criminal law and it falls under the regulation of sex work.

5.1. Germany and the Netherlands

At the beginning of the XXI century, as a result of the evolution of social customs and morality, Germany and the Netherlands adopted a regulationist approach towards prostitution. In addition, both countries delegate municipalities to regulate this matter more in details, through administrative law. In general, if we compare the two legal disciplines, Germany has more pervasive criminal provisions, especially after the last reform in 2016.

Since 2002, in Germany, the Law *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten-Prostitutionengesetz*⁶⁵, considers prostitution a legitimate activity as long as rules concerning public order, public health, hygiene and the protection of minors are respected. Moreover, local authorities can circumscribe city zones where prostitution is allowed or forbidden⁶⁶. The law on prostitution is primarily aimed at protecting sexual self-determination and economic freedom of sex workers. This implies, for example, that sex workers are protected against possible noncompliance from clients. The residual criminal law provisions are: §180a of the German Criminal Code, punishing the exploitation of prostitutes; article §181a on the conduct of controlling prostitution, and article §181 on the conduct of aiding and abetting prostitution. Even though these criminal law provisions might appear to be in contrast with the law on prostitution, their application in Court grant a certain consistency of the legal apparatus. In fact, the judges appear to be very cautious in their application: any conduct promoting prostitution without violence, threat, or substantial abuse is not punished⁶⁷.

It should be mentioned, however, that the criminal law approach towards prostitution was exacerbated by a recent reform. The Bundesrat intervened in 2016 with two different laws: Law 21 of October 2016 (*Gesetz zur Regulierung der Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen*) about voluntary prostitution, and Law 11 of October 2016 against forced prostitution⁶⁸. As long as freely-chosen prostitution is

⁶⁵ For an historical excursus of prostitution before 2002 see: I. Hunecke, *Germany*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, 107-111.

⁶⁶ M. Helfer, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, in A. Cadoppi, *Prostituzione e diritto penale*, cit., p. 99.

⁶⁷ M. Helfer, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, in A. Cadoppi, *Prostituzione e diritto penale*, cit., p. 109.

⁶⁸ For a better understanding of this reform see the report made by the Federal Government: Federal Ministry of Family Affairs, Senior Citizens, *Women and Youth*, *Report on the Impact of the Act Regulating the Legal Situation of Prostitutes*, Berlin, 2007 available in English at the following link: <https://ec.europa.eu/anti->

concerned, the new regulation establishes, among other things, compulsory registration for people engaging in prostitution with the obligation of carrying a sex worker ID⁶⁹.

The Netherlands' approach is known for its social pragmatism⁷⁰. In fact, the lawmaker decided to decriminalise prostitution and framing it within the Dutch administrative welfare regulatory system in order to contrast criminality. The *Act Lifting the Ban on Brothels*⁷¹ came in force on the 1st October 2000. This reform decriminalised prostitution and applied administrative and labour law provision in this field, with the goals of protecting self-determination and autonomy of sex workers⁷². Nonetheless, in this legal system, sex work is still considered a peculiar form of work, capable of affecting physical and mental integrity⁷³. As we mentioned already, local authorities are given regulatory powers in this field and, since the 2000s, City councils have adopted laws regulating prostitution in their municipalities⁷⁴.

Aside from sharing a similar legal approach towards sex work, Germany and the Netherlands are both considered pioneers in the field of sexual assistance. Here sexual assistance is provided by sex workers, with particular attention to disabled clients, or by specifically trained sexual assistants. In fact, some local organizations provide specific training courses and offer some services for people with disability, nevertheless, from a legal point of view, their work falls inside the sex work umbrella. Since 1996, in Germany, Nina de Vries, one of the first sexual assistants in Europe, and the Institute for the Self-determination of the Handicapped association (*ISSB*,

trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf.

⁶⁹ The association Doña Carmen, together with 15 brothel operators and clients filed a constitutional complaint with the Federal Constitutional Court in June 2017 against the Prostitute Protection Act. The Federal Constitutional Court rejected the complaint. The Order was directed, in particular, against the obligation to be registered, which was claimed to be against the Constitution.

⁷⁰ S. Altink, I. van Liempt, M. Wijers, *The Netherlands*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, 62-77.

⁷¹ For a comment on the reform see J. A. E. Vervaele, *La prostituzione nell'ordinamento (penale) olandese; una depenalizzazione repressiva?*, in A. Cadoppi (ed.), *Prostituzione e diritto penale*, cit., p. 160-174.

⁷² H. Wagenaar, S. A. Helga Amesberger, *Final Report of the International Comparative Study of Prostitution Policy: Austria and the Netherlands*, Hague, 2013, 49-62; M. van Doorninck, M. Wijers, *They Get What They Deserve: Labour Rights for Sex Workers*, in D. Canter, M. Ioannou, D. Youngs (eds.), *Safer Sex in the City: The Experience and Management of Street Prostitution*, Ashgate, 2009, 101-116; J. Pitcher, M. Wijers, *The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers*, in *Criminology and Criminal Justice*, 14(5), 2014, 549-564.

⁷³ See decisions: Kamerstukken II 1997/98, 25,437, 5; Kamerstukken II 1998/99, 25,437, 189b.

⁷⁴ It is peculiar, in this sense, is the experience of the red light district in Amsterdam: M. B. Aalbers, M. Sabat, *Re-making a Landscape of Prostitution: The Amsterdam Red Light District*, in *City: Analysis of Urban Trends, Culture, Theory, Policy Action*, 16, 2012, 112-128.

Institut zur Selbst-Bestimmung Behinderter) have been working together. In 2002, they organized the first training course for sexual assistants in Germany, with the goal of creating a set of common rules and improving the overall quality of the service. The association currently works both in the field of sexual assistance and in the field of sexual counselling, and periodically organizes training courses for new operators. All these initiatives are rooted in the philosophy of independent living and aim to empower users. Even if the ISSB states the existence of differences between its services and sex work, from a legal point of view, sexual assistance is disciplined by the law on prostitution. Specifically, the *Prostitute Protection Act* 2017 frames sexual assistance within the discipline of sexual services. In this sense, sexual assistants, like sex workers, need to be registered and schedule an assessment meeting, as provided by law.

In the Netherlands, one of the first organizations involved in the field of sexuality and disability was founded in 1997 by people with disabilities themselves. This organization reunites different professionals, including care workers providing sexual care and support for users. According to this organization, their services are not to be qualified as sex work, but as a form of social work in the sphere of sexuality. On the contrary, a second organization, named *FleksZorg*, offers services more explicitly related to the sex work industry. In the Netherlands people with disability who are supported financially by the State can freely decide to spend their budget in sexuality-related services. It was estimated that this sum of money covers approximately 10-15 visits per year⁷⁵.

5.2. Switzerland

Currently, Switzerland has adopted a regulationist approach towards prostitution, with different implementations at a regional or cantonal level (8 cantons out of 25 have a specific regulation on prostitution). With the 1942 Penal Code, prostitution *per se* ceased to be an illicit activity and in 1992 the conducts of procurement, active solicitation and homosexual prostitution, were repealed⁷⁶. Nevertheless, some cantons still adopt a legislation against active soliciting⁷⁷. Prostitution is considered a legitimate activity, an expression of self-determination and economic freedom, covered by Article 27 of the Swiss Constitution. The activity of prostitution is subject to taxation and is covered by social insurance, but, according to the Federal Supreme Court of Switzerland, a contract of prostitution is still against

⁷⁵ L. Couldrick, *Disability sexual health services in the Netherlands*, SH&DA meeting, 12 October 2009, available online at: <http://shada.org.uk/sites/default/files/Netherlands.pdf>.

⁷⁶ M. Chimienti, G. Bugnon, *Switzerland*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, 136.

⁷⁷ See: JAAC (Jurisprudence des autorités administratives de la Confédération), *Exercices de la prostitution: Aspects contractuels, nécessité d'harmoniser les règles, mesures envisageables et compétence de réglementation*, 2014.

mores⁷⁸ (atf 11 II 195). The remaining criminal law provisions on prostitution are mainly three: Article 195 cps, Article 199 cps and Article 182 Cps⁷⁹. The last one is only partially applicable, as it punishes human trafficking, and as such it concerns forced prostitution. The offences in article 195 and 199 cps are aimed at punishing any conduct interfering with the self-determination of a sex worker by forcing her/him, or limiting her/his freedom in choosing modalities, timing and location of her/his work. In general, the punished conducts are mainly six: three related to the act of encouraging prostitution, and three on the exploitation of prostitution. Article 199 cps is titled *Unauthorized practice of prostitution* and it is aimed at protecting the economic freedom of the person involved in prostitution, and it defends aspects of public security by sanctioning the violation of administrative provisions⁸⁰.

The public discourse on sexual assistance took inspiration from Netherlands, Denmark and Germany and dates back in the 2000s⁸¹. During these years, two main associations in German-Switzerland and French-speaking Switzerland started several projects on sexual assistance, by providing training courses inspired by the experience of other European countries, such as Germany and the Netherlands. The first promoter of this initiative was Switzerland's largest disability association, *Pro Infirmis*, in the German-speaking territory. In 2003 they launched the first Swiss training course, led mainly by Nina de Vries. At the end of the summer 2004, the first sexual assistants in Switzerland, six women and four men, completed their training. Unfortunately, the association was shut down in 2010 for financial reasons. At the same time, however, a similar project was carried out in 2008-2009 in French-speaking Switzerland by the association *Sexualité et handicaps pluriels* (SEHP), which trained ten sexual assistants. The training was widely inspired by the experience of the Swiss-German in terms of contents, philosophy, structure, and other key elements. Both these associations have recruited and trained sex workers⁸², and, according to the heads of the two organizations, approximately 30 people have been trained,

⁷⁸ See the decision: ATFF 11// 297ss, JT 1986/ 449 ss.

⁷⁹ En english version of the Swiss Criminal Code is available at <https://www.admin.ch/opc/en/classified-compilation/19370083/201907010000/311.0.pdf>

⁸⁰ M. Chimienti, G. Bugnon, *Switzerland*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, 140-141.

⁸¹ J. Aregger, *L'assistance sexuelle une réelle amélioration de la qualité de vie des personnes vivant avec un handicap, âgées ou souffrant de troubles sexuels, grâce à une prestation de travail du sexe – est-ce socialement acceptable et intégrable?*, Geneve, 2013, p. 20. Available at this link:

https://www.unige.ch/formcont/files/9715/1326/9622/CAS_sexologieclinique_memoire_assistance_sexuelle_Aregger.pdf.

⁸² C. Agthe Diserens, *La formation en assistance sexuelle : toute innovation implique des risques !*, in *Reliance*, XXIX, 3, 2008, 46-52; S. Kessler, 2008, «*Mais qui sont-ils ? La sélection des candidats qui se destinent à l'assistance sexuelle* », in *Reliance*, XXIX, 3, 2008, 53-57.

fifteen/twenty of whom are currently working as sexual assistants in Switzerland⁸³. From a legal point of view, sexual assistance does not find any legal obstacle. Sexual assistance as a form of activity consisting in providing sexual services for remuneration is, in fact, considered prostitution. For this reason, it falls under the federal law, cantonal law, and municipalities regulations on sex work. At the same time, the activities of the associations, such as recruiting people and organizing training courses on sexual-related services, are to be considered legal, and subject to the above-mentioned laws. In the French-speaking Switzerland, aspiring sexual assistants are required, by the competent associations, to maintain an alternative source of income⁸⁴.

If the legal framework is very clear (sexual assistance is a form of sex work regulated by the related law and subject to the rules of the free market), the ideas of sexual assistants regarding their roles are many and inhomogeneous. Some of them, in fact, tend to distinguish their professional figure from sex workers, distancing themselves from the sex industry in a way which might be stigmatizing⁸⁵. For others, sexual assistance is a form of therapy within a medical framework⁸⁶, and as such should be covered - according to them - by health insurance. Others, on the contrary, perceive the reference to the therapeutic aim as problematic.

5.3. Denmark

Amongst the Nordic countries the abolitionist approach towards prostitution prevail, with the only exception of Denmark, where the regime is regulationist. The decriminalization of prostitution took place in 1999, while the Criminal code still criminalizes some conducts linked to prostitution⁸⁷. With this reform, the act of trading sex is considered a private matter between the seller and the buyer, except for some linked conducts, which are relevant for criminal law. Prostitution, however, is not considered

⁸³ Most of them come from the middle class, they are between 27 and 65 years old. About half of them are men. See C. Agthe Diserens, *La formation en assistance sexuelle: toute innovation implique des risques !*, in *Reliance*, XXIX, 3, 2008, 48.

⁸⁴ G. Garofalo Geymonat, P. G Maciotti, *Assistants in Switzerland*, in *Sociological Research Online*, 21, 4, 2016, p. 10. While the majority of assistants work in a body-related profession (masseur, physiotherapist, nurse, etc.), others have various activities (musician, translator, psychotherapist, secretary). Some sexual assistants were - or had been - sex workers.

⁸⁵ See L. Nayak, *Une logique de promotion de la «santé sexuelle». L'assistance sexuelle en Suisse*, in *Ethnologie française*, 43, 3, 2013, 461-468.

⁸⁶ The medicalization of sexual assistance would thus be part of the more general movement to medicalize social assistance: P. Aiach, *Les voies de la médicalisation*, in P. Aiach et D. Delanoë (eds.), *L'Ère de la médicalisation, Ecce homo sanitas*, Paris, 1998, 15-36.

⁸⁷ M. L. Skilbrei, C. Holmström, *Trafficking, Prostitution and the Sex Industry: The Nordic Legal Model and Prostitution Policy in the Nordic Region Ambiguous Sympathies*, London, 2016.

a profession by the law for the purposes of joining a trade union⁸⁸. Nonetheless, it is legal to have an income from sex work, as long as the person is registered and pays taxes. The purchase of sexual services is legal when the person selling it is over 18 years old. Currently, the Danish Criminal Code⁸⁹ punishes the conduct of pimping. The relevant articles are §228 and §229 of the Criminal Code.

As regard to sexual assistance, Denmark has developed guidelines for social and disability workers on the matter of sexuality and disability, specifically for people living in public institutions. In general, sexual assistance is considered a form of sex work and, as such, it follows the rules on prostitution. Sexual assistance in Denmark is approached as a very vast phenomenon, that involves different practices and professionals. In this case, we must truly acknowledge that in Denmark “the purchase of sexual services is only a tiny fragment of the vast landscape that emerges when one begins to examine the sexual lives and erotic desire of people with disability⁹⁰”. The services provided are various: counselling, education, assistance during intercourse with a partner, assistance with masturbation, and it takes into consideration the possibility of involving a sex worker. All these different dimensions are encompassed in the guidelines on *Sexuality regardless of Handicap* regarding the public sector and institutionalized people. In general, however, sexual assistants are treated either as social workers - when their job does not consist in having any form of sexual intercourse with the user - or are assimilated to sex workers, and subject to the above-mentioned regulation. The *Danish Association for Sexuality Advisors*, founded in 1998, is responsible for the training of sexual advisors in Denmark and consists of approximately 200 trained members. In line with the national Guidelines, sexual advisors do not provide sexual services, but can direct the person who may need them to a sex worker. For this reason, the Ethics committee of the association issued, in 2013, a paper called *Attitude paper on prostitution*. The Ethics Committee states that, since prostitution is legal in Denmark, people with disability should not be denied help with contacting a sex worker. However, when asked to help their client in contacting a sex worker, sexual advisors are suggested to apply the principle of “minimum intervention”. Contacting a sex worker should, in fact, be considered as the last resort, when everything else has somehow failed. Attention should also be paid to the issue of human trafficking, and the sexual advisor should investigate the situation and the condition of the sex worker he/she is referring to.

⁸⁸ J. Bjonness, M. Spanger, *Denmark*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, 160.

⁸⁹ The English version of the Danish Criminal Code is available here https://www.legislationline.org/download/action/download/id/6372/file/Denmark_Criminal_Code_am_2005_en.pdf.

⁹⁰ D. Kulick, J. Rydstrom, *Loneliness and its opposite*, cit.

6. A third way to sexual assistance? Some interim remarks

As we saw in the previous paragraphs, it is possible to theorize the existence of two main approaches to sexual assistance in Europe, if we look at the factual dimension and the intersection with the regulation of sex work. From this comparative analysis, it emerges how the existing models in Europe can be described as dichotomous, rather than being on a spectrum of possible factual and legal solutions. Both these approaches have their own weak and strong points, depending on the perspective we adopt on the phenomenon of sexual assistance.

If we consider the negative incorporation model, we should mention, as positive remarks, that all the countries belonging to this model maintain a certain level of coherence in their legal system. They coherently and widely define prostitution and make no exceptions for sexual assistance. The other side of the coin is that, despite the strong imposition on the legislative level, the factual dimension evolves and moves on. In fact, in most of these countries, associations and NGOs started providing this service regardless of the law. This implies the existence of an *extra legem* or *contra legem* dimension of sexual assistance, where abuses and discrimination might flourish.

In the positive incorporation model, the demand for protection in the sexual sphere for people with disabilities finds its own way within the legal framework. Nevertheless, we should notice that the dimension of sexuality and disability, addressed through services of sexual assistance, does not emerge *per se* in the eyes of law. For the legal system, sexual assistance completely overlaps with sex work, with both positive and negative consequences. On the positive side, sexual assistance finds recognition and a (non-specific) regulation inside the legal system. This implies more protection and guarantees for sexual assistants, people with disability, and disabled peoples' families, friends and caregivers. On the negative side, this fails to recognize the specific issues that might arise in this field. In fact, some of the most controversial issues still remain unsolved, such as the economic dimension of this service and the assessment of user's consent. Moreover, this prevents the formalization of existing good practices and of a shared definition of the terms of service, as well as a minimum common standard for it.

At this moment, Italy is one of the countries applying the negative incorporation model. However, since 2013, activists, professionals, and doctors created an association, *Love Giver* (then *Love Giver Committee*), aimed at promoting sexual assistance in Italy. The *Committee* has elaborated its own proposal, which differs from prostitution and sex work, in an attempt to find a framework compatible with Law 75/1958⁹¹ on prostitution. The work and

⁹¹ The basic assumption of this legislation is that no one would freely choose to work as a prostitute. As such, the prostitute is seen as a victim whose dignity must be protected. First of all, State brothels were declared illegal (Art. 1) and the existing ones

the commitment of the Love Giver Committee reached the legislative sphere as well and were the base for the elaboration of three draft laws on sexual assistance during the previous legislature, which, however, were never discussed in the Parliament. According to this view, the sexual assistant is a new professional figure and a “wellbeing practitioner” who educates the user on affectivity, emotions, body experience and sexuality⁹². The sexual assistant is a specifically trained person who assists and supports people with disability in recognizing, experiencing and living eroticism and sexuality⁹³. The proposals of the *Committee*, as well as those in the draft laws, are based on the assumption that sexual assistance in Italy needs to be easily distinguishable from prostitution. From this point of view, the proposal is very distant from the experience of Nordic countries, pioneers in this field.

What is suggested is a sort of “third-way” to sexual assistance. If this model were to fully realize, Italy would be the first country to adopt a specific legislation on sexual assistance. At the same time, Italy would be the first abolitionist country - when it comes to the regulation on prostitution - to create a legal space for a specific service in the field of sexuality, targeting a particular category of people (people with disabilities). In this sense, Italy would represent a third option, distancing itself from the existing solutions in Europe and at the international level. Although the elaboration of a new form of regulation is to be seen positively, some of its elements might be troublesome.

In fact, a legislation on sexual assistance in our legal system would be an exception to Law 75/1958. Such a regulation would create a legal space where the trade of sexual services for people with disability would not be criminally relevant. On the contrary, the proposed legislation suggests this service be promoted by the State and provided by the Regions. Such an exception would need to be reasonable and justified, especially from the Constitutional point of view.

It would be necessary to explore the compatibility of such a model with the constitutional framework on disability⁹⁴, deeply rooted in the social model, where the emphasis is always on social factors, barriers, accessibility

were forced to close (Art. 2). Art. 3 substantially changes the Criminal Code, from Article 531 to Article 536 by extending the field of action of the provisions, punishing all the conducts linked to prostitution. In particular, the provisions punish all those subjects who, in any manner, gain advantages from or promote a person’s prostitution. See: F. Parisi, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, Torino, 2018.

⁹² F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità. La formazione degli operatori*, in P. Valerio, T. Liccardo, A. Ricciardi (eds.), *Affettività, relazioni e sessualità nella persona con disabilità tra barriere familiari e opportunità relazionali*, Napoli, 2016, 108-109.

⁹³ F. Quattrini, M. Ulivieri, *Cosa è (e cosa non è) l’assistenza sessuale*, in M. Ulivieri (ed.), *Loveability. L’assistenza sessuale per persone con disabilità*, Trento, 2014.

⁹⁴ For an overview of the legislative definition of disability in the Italian system see: L. Busatta, *L’universo delle disabilità: per una definizione unitaria di un diritto diseguale*, in F. Cortese, M. Tomasi (eds.), *Le definizioni nel diritto. Atti delle giornate di studio 30-31 ottobre 2015*, Trento, 2016, 338.

and self-determination⁹⁵. At the same time, the hypothesis of a “third-way” might be prevented by the negative view on prostitution⁹⁶, recently confirmed by the Constitutional Court in decision nr. 141/2019⁹⁷.

In any case, sexual assistance alone, even when consistent with our constitutional framework and in coordination with existing laws, would not be a fully effective tool. On the contrary, when supported by other tools and policy, sexual assistance could help promote, in the legal sphere, an affirming culture of sexuality for people with disability. In other words, without inclusive sexual education, sexual counselling, training for medical professionals and social workers, policies to grant access to quality sexual health services, and to assisted decision-making on reproduction and sexuality, sexual assistance is condemned to be ineffective.

Only a combination of all these tools and policies could, in fact, tackle the social core of the discrimination and oppression faced by people with disabilities in the field of sexuality⁹⁸.

The need to intervene on the social perception is also recognized by the UN Convention on the Rights of Persons with Disabilities, which states at Article 8 the need for States to reduce stereotypes, prejudices, and harmful practices against people with disability, with social campaigns, in media representation, and through education.

From this point of view, sexual assistance should be one of the tools of a comprehensive effort to challenge misconceptions and tackle the discriminations against people with disability in the field of sexuality; a strategy built on the need to dismantle social barriers and aimed at granting the right to self-development and self-expression to every individual.

⁹⁵ See, for example C. Colapietro, *Diritti dei disabili e costituzione*, Pisa, 2011, 81.

⁹⁶ Some of these points are discussed in: F. Donelli, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, in *L'indice penale*, 2018, p. 392, 398-399.

⁹⁷ Constitutional Court, decision n. 141, 7 June 2019. With this decision, the Constitutional Court rejected the doubts of constitutional legitimacy on Article 3(4) (Recruiting) and Article 3(8) (Aiding and Abetting prostitution) in relation to Articles 2, 3, 12, 25 co. 2, 27 and 41 of the Constitution. For comments in a constitutional perspective see: M. Picchi, *La legge Merlin dinnanzi alla Corte costituzionale. Alcune riflessioni sulla sentenza n. 14/2019 della Corte costituzionale*, in *forumcostituzionale.it*, 8 settembre 2019), 9; P. Scarlatti, *La sentenza n. 141 del 2019 della Corte costituzionale tra discrezionalità del legislatore e tutela dei diritti fondamentali delle persone vulnerabili*, in *Dirittifondamentali.it*, 1/2020; C.P. Guarini, *La prostituzione «volontaria e consapevole»: né libertà sessuale né attività economica privata “protetta” dall’art. 41 Cost. A prima lettura di Corte costituzionale n. 141/2019*, in *Osservatorio AIC*, n. 4/2019, 176.

⁹⁸ Some authors stressed the need to reshape the social perception of disability, but also to question the liberal paradigm of the individual and the standard of productivity, beauty and autonomy imposed by it both inside and outside the law. See: B. Casalini, *Disporre in autonomia del proprio corpo disabile*, in *il Mulino*, 4/2017, 580-587; M. G. Bernardini, *Soggettività “mancanti” e disabilità. Per una critica intersezionale all’immagine del soggetto di diritto*, in *Rivista di Filosofia del diritto*, VII, 2, 2018, 281-300.

According to the Italian Constitutional Court⁹⁹, these are, in fact, the fundamental rights at stake when talking about sexuality. And, as fundamental rights, they should be granted to everyone, with no exception.

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⁹⁹ Corte costituzionale, decision n. 561/1987. For comments see: P. Vitucci, *Pensione di guerra a Ida e Rosetta. Osservazione a C. costituzionale 18 dicembre 1987 n. 561*, in *Giurisprudenza costituzionale*, 12, 1, 1987, 3542-3544; L. Mannelli, *Della libertà sessuale e del suo fondamento costituzionale. Nota a C. costituzionale 18 dicembre 1987 n. 561*, in *Il Foro italiano*, 1, 7-8, 1989, 2113-2119.