Pragmatism in Nordic Contract and Tort Law: "In this way, we show that we as a society reject the idea that people's bodies can be bought" - or Business as Usual?

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The article is a commentary on two Nordic court cases on prostitution income. It explores the pragmatic approach in Nordic contract and tort law, particularly focusing on the legal treatment of prostitution earnings. The Finnish Supreme Court ruled against compensation for lost prostitution income due to its conflict with good practice, emphasizing legal contracts contrary to morality. Meanwhile, the Norwegian Supreme Court was divided, with the majority denying compensation by prioritizing societal efforts to reduce prostitution, while the minority argued for equal legal protection of prostitutes' income. The article highlights the inherent value judgments in legal decisions, illustrating how Nordic pragmatism balances societal interests and individual rights. It also draws parallels with European Union law, which considers prostitution a service under certain conditions, yet allows member states to impose restrictions for public interest. Ultimately, the commentary underscores the ongoing debate on prostitution regulation and its implications for gender equality and human rights within the EU.

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1. Introduction and question

Pragmatism is a term used in many contexts to describe a utilitarian approach. In law, the term pragmatism has often been used to describe a legal - or jurisprudential - approach that differs from a more theoretical or systematic approach to legal issues. Sverre Blandhol's book *Nordisk rettspragmatisme* (2005), is an example of this.[2] The book was the basis for the seminar "Pragmatism v. Principle in Nordic Commercial Law" organized at the Stockholm Centre for Commercial Law by Professor Jan Kleineman, 22-23 November 2018. This chapter takes Blandhol's book as its starting point and is based on the author's speech at the seminar.

In the Nordic countries, we like to use concepts such as pragmatism or realism to describe the legal scientific approach that Nordic lawyers feel comfortable with. [3]

Pragmatism can be analysed from both a scientific-theoretical and a more practical, methodological perspective. In both cases, the fundamental question is how a lawyer solves, and not least, *should* solve, a legal problem. For the pragmatic Nordic lawyer, the answer is that he or she should seek *the best possible solution*, or a *good result*, within the framework of what is methodologically sustainable, of course. But what is that? Such a question has no simple answer. The perspective itself poses problems: should the individual case be decisive, or should the question be decided from a more systematic point of view? And which perspective is the most pragmatic?

In the following, two Nordic court cases on the right of prostitutes to compensation for lost earnings are analysed against the background of the discussion on Nordic legal pragmatism (3). First, however, a brief introduction to this discussion is given, based on Blandhol's above-mentioned book (2). Finally, some conclusions are formulated, and some European views are presented (4).

2. The debate on Nordic legal pragmatism

2.1 The question of how legal issues should be resolved

From both an ideological and a practical legal perspective, it is important to philosophize about how legal issues *should* be resolved. In a way, it is the fundamental question of all law and therefore also a question that has occupied philosophers and philosophically minded lawyers throughout all ages. Each generation must ask the question anew. Schweigaard's criticism in the 19th century of Savigny's systematic conceptual law, as presented in Blandhol's book,[4] seems quite obvious to a Nordic lawyer today: According to Schweigaard, concepts are only indicative. They must not be confused with reality, which is not constant but constantly changing.[5] A dynamic view of reality and law represented in Schweigaard's time a break with the prevailing conceptual law or formalism. Although it is not difficult for the Nordic legal profession (or at least for me personally) to relate to Schweigaard's criticism, it may be useful to remember that the perception of reality varies - even today - depending on where one is looking from.

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2 Sverre Blandhol, *Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard om vitenskap og metode* [Nordic Legal Pragmatism: Savigny, Ørsted, and Schweigaard on Science and Method]. First edition, DJØF Publishing 2005. The book was the basis for the seminar "Pragmatism v. principfasthet i nordisk förmögenhetsrätt" [Pragmatism vs. Consistency in Nordic Commercial Law] organized at the Stockholm Centre for Commercial Law by Professor Jan Kleineman, 22-23 November 2018. This chapter takes Blandhol's book as its starting point and is based on the author's speech at the seminar.

3 David R Doublet and Jan F Bernt, Retten og vitenskapen: En introduksjon til rettsvitenskapens vitenskapsfilosofi [Law and Science: An Introduction to the Philosophy of Law and Science], 2nd edn, Alma Mater 1993, p. 2.

4 Blandhol (n 2) ch 3.

5 On Schweigaard's conceptualization, see ibid p. 244.

In Norway, a few years ago, a fierce debate erupted over who owns a limited company. Professor of civil law and expert in company law, Beate Sjåfjell, from the University of Oslo angered the financier, multi-millionaire and owner of the newspaper Kapital, Trygve Hegnar, when she claimed that shareholders do not own the company but that, as shareholders, they only have certain powers in the company to which the shareholding entitles them. Hegnar, who is not a lawyer but an economist, wondered that if the shareholders do not own the company, who does?[6]

Beate Sjåfjell's statement is, of course, indisputable from a legal point of view; it is obvious that the shares only give the holder certain rights in the company.[7] The debate that lasted for weeks, therefore felt somewhat unnecessary. In a way, they were both right - it was just a question of terminology, or concepts. However, the underlying question of what a company is for, and what its purpose is, may differ depending on the definition chosen - is it the 'owners' who determine the company's purpose, or is it conceivable that other 'interests' should also be considered? Beate Sjåfjell's goal was - and is - to find new sustainable models for companies and corporate finance, in this context a dynamic understanding of the concept of *ownership rights* can be useful.[8]

The term pragmatism is similar to the term realism. Both terms are used to explain how the Nordic countries paved the way for a realistic - or pragmatic - view of law. Compared to American pragmatism, however, the Nordic legal realists were less concerned with describing phenomena in the use of law through empirical studies, and more concerned with making critical and philosophical analyses of basic legal concepts.[9] Blandhol therefore argues that the Nordic legal realists were in fact not very pragmatic, but rather stuck in old system and conceptual thinking.[10] Modern legal theorists hence discuss new theoretical foundations for our activities - such as natural law or systems theory or some form of postmodernity. It can be argued that postmodernity and pragmatism are not so different that postmodernism can almost be counted as a form of pragmatism.[11] According to Blandhol, however, the two directions should not be mixed. He argues that pragmatism goes further than postmodernism in seeking practical solutions rather than "truth and certainty".[12] Pragmatism is presented as a "flexible tool that enables the lawyer to seek the best possible solutions to the problems that through a combination of techniques and tools".[13] Blandhol describes pragmatism with 10 different keywords: Pragmatism is 1) anti- fundamentalist and 2) anti-formalist, it is based on a 3) rhetorical conception of language and accepts that there are "degrees of certainty". Pragmatism is also 4) problem-oriented, 5) experience-oriented and 6) consequence-oriented. It is based on a 7) moderate skepticism and, as an ethical or legal theory, is 8) pluralistic, which means that it is also 9) contextual - in other words, it is not enough to focus on the internal relations of law, but law must be understood as part of society. Finally, pragmatism recognizes the importance of 10) style. Language is not a 'neutral' medium for thought, but language is used as a means of argumentation/rhetoric which is seen as something more than logical conclusions and evidence. Thus, it is not only what is said, but also how it is said that is of importance. Blandhold takes the opportunity to take a swipe at Nordic jurisprudence: "...it is not normally an aesthetic pleasure to read Nordic law or legal theory. Some of the best has a certain effective simplicity. But much is characterized by a rather dreary monotony and impersonal objectivity."[14] There is clearly room for improvement here!

2.2 The role of values in argumentation

However, law is not art, and it is not mathematics. For the user of the law, it is ultimately a matter of which method is available to investigate interesting legal questions that arise, or to investigate various interesting questions about the law. And then we are back to square one: How *should* a lawyer solve a legal problem? The criticized Nordic realists had an answer to this. *Alf Ross'* prognosis theory launched in the 1953 book "Ret og redfærdighet" and *Torstein Eckhoff's* "Rettskildelære" first published in 1971[15] are still in use. The focus of both was how the courts argued. Eckhoff based his theory of sources of law on empirical studies of legal cases and then noted which sources of law were relevant, which were binding, etc. Eckhoff qualifies as a pragmatic jurist, as he used "empirical" methods to describe the legal method. However, he has been criticized for not sufficiently discussing problems of scientific theory.

6 See Beate Sjåfjell, *Myten om aksjonæren som eier av selskapet.* [Myten om aksjonæren som eier av selskapet]. Finansavisen Thursday February 31, 2013.

7 See for example the Finnish Limited Liability Companies Act 624/2006, which states that "A limited liability company is a legal person independent of the shareholders, which is established by registration" § 1-2. The rights conferred by the holding of shares are specifically regulated in Chapter 3 of the Act.

8 Sjåfjell's work on sustainable market and company law started with her doctoral thesis "Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law" (Kluwer 2009). She has since published several books and articles on the subject. Sjåfjell leads several major international research projects and networks on sustainability issues: https://www.jus.uio.no/ifp/english/people/aca/beatesj/.

9 Doublet and Bernt (n 3).

10 Blandhol (n 2) p. 73.

11 Jørgen Dalberg-Larsen, *Pragmatisk retsteori* [Pragmatic Legal Theory], Jurist- og Økonomforb Forlag 2001).

12 Blandhol (n 2) p. 75.

13 Ibid. p. 76.

14 Ibid. pp. 60-71, quote p. 71.

15 Ross's book was published in a new edition in 1982: Alf Ross, *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi* [On Law and Justice: An Introduction to Analytical Legal Philosophy)], 4th edition, Nyt Nordisk Forlag 1982 and Torstein Eckhoff's textbook *Rettskildelære* (Doctrine of Legal Sources) was published in a 6th edition in 2016, updated by Jan E. Helgesen: Torstein Eckhoff by Jan E. Helgesen, *Rettskildelære* (Universitetsforlaget 2016).

Jan Hellner writes that "much of what in Sweden is perceived as fundamental methodological problems for legal science is completely overlooked".[16] When it comes to what Hellner describes as "applied methodology", however, there does not seem to be much difference of opinion. When the legal reasons do not provide guidance, the legal practitioner must, according to Hellner, make a so-called "free assessment"[17] which, after all, is not so different from Eckhoff's real considerations. Both are based on practice and values of different kinds.[18]

The fact that real considerations or the goodness of the result/values are recognized as a valid argument in the legal argumentation is perhaps what best characterizes Nordic realism or pragmatism, and which precisely makes it possible to "through a combination of techniques and tools seek the best possible solutions to the problems that arise".[19]

The problem is that there is no one answer to what are "the best possible solutions to the problems that arise". At least the parties to a dispute disagree on that. Nevertheless, is there a 'right' answer to a difficult legal question? We recognize this question from questions about the relationship between legal positivism and natural law. And from the discussion about the objectivity of legal dogma. Legal positivists see law as an expression of the will of the governing power. It is the latter which, through its legislative power, formulates the rules of law. The courts must "be the mouth that expresses the will of the legislator", as Montesquieu said.[20] By focusing on the will of the legislator, we avoid the individual user of the law having too much influence. A uniform direction in the application of the law also safeguards values such as predictability and equality. But we all know that the will of the governing power can sometimes run counter to more general rules. That legal law and moral law is not always the same.[21] Regardless, we cannot escape the question the relationship between law and politics. As an example, *Bernt and Doublet* refer to an article published in 1965 by the historian *Jens Arup Seip*. The title was 'Høyesteret som politisk organ/The Supreme Court as a Political Organ'. Seip strongly criticized the inability of lawyers to recognize that they (we) also engage in political activity. Lawyers pretend to make a normative conclusion - objective and independent of their own preferences - but the decision reflects the judge's political views. The response to this criticism is that law must necessarily allow for values or 'discretion'. However, lawyers do not perceive this as politics, as the value-based questions involved are often addressed within the framework of "a broad professional consensus".[22] As *Bernt and Doublet* write, this is possible because "there is a broad community of values in the population on which professional judgments can be based".[23] But the range of those who should agree can also be limited to those who belong to what *Aulis Aarnio* describes as the enlightened auditorium, which Aarnio uses as a metaphor for the scientific community or the legal profession.[24] This does not mean, however, that lawyers always agree on what is a good outcome in individual cases. As *Aleksander Peczenik* points out, we must recognize that there is an element of value judgments in all law. There is no "one right answer" to difficult questions, but that the legal method nevertheless contains fairly stringent requirements regarding definite data, precise concepts, and verifiable working methods that protect against conditionality and are thus compatible with the requirements of legal certainty. He argues that the "relative legal certainty" offered by legal method is sufficient.[25]

3. Pragmatism in practice

3.1 Two Nordic court cases on prostitution income

What does this look like more concretely within Nordic contract and tort law? Is Peczenik right that there is an element of values in all law - that there is no "one right answer" to difficult questions, but that the legal method nevertheless contains fairly stringent requirements for definite data, precise concepts and verifiable working methods that protect against conditionality and are thus compatible with the requirements of legal certainty? The question is discussed by analysing how the highest courts in two of our Nordic countries, Finland and Norway, proceed when questions in the outer limits of contract and tort law are to be resolved. Since the Norwegian Supreme Court (NHR) discusses the substantive issues more broadly than the Finnish Supreme Court (FHD), more space is left for analysis of the Norwegian case law. I have chosen cases concerning contract and tort claims in an area that is "political" and by no means "value neutral". The cases are related to financial losses in connection with prostitution or sex purchase. In the two decisions (HD 2005:72 and HR-2017-2352-A), the FHD and NHR have both decided that financial claims related to prostitution contracts are not protected by the legal order. In the Finnish case, the result is based on the fact that the contract on which the income is based is

16 Jan Hellner, *Metodproblem i rättsvetenskapen: Studier i förmögenhetsrätt.* [Methodological Problems in Legal Science: Studies in Commercial Law], Jure 2001, p. 190.

17 Ibid. p. 216.

18 Ibid. p. 217.

19 Blandhol (n 2) p. 76.

20 Doublet and Bernt (n 3) p. 107 ff.

21 In Sweden, Torbjörn Ingvarsson has published several articles on the relationship between law and morality. See for example. Torbjörn Ingvarsson, *Ogiltighet och moralens eviga återkomst* [Invalidity and the eternal return of morality] in Andersen, Mads Bryde, Bärlund, Johan, Flodgren, Boel and Giertsen, Johan (eds), *Aftaleloven* [The Contracts Act] 100 år, Copenhagen 2015, ch. 13.

22 Seip, Jens Arup, *Høyesterett som politisk organ* [The Supreme Court as a Political Body], Lov og Rett 1965, pp. 1-21.

23 Doublet and Bernt (n 2) p. 159.

24 Aulis Aarnio, *The rational as reasonable: A treatise on legal justification* (Law and philosophy library, Reidel 1987), chap. IV: The Acceptability of Interpretative Statement.

25 Aleksander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* [What is Right?: On Democracy, Legal Certainty, Ethics, and Legal Argumentation], Institutet för rättsvetenskaplig forskning vol. 156, Fritzes 1995, p. 698.

contrary to good practice or "decency", in the Norwegian case the legal argumentation is somewhat more complicated, and the question of good practice or "decency" does not come to the fore. In both cases there was a vote. In the Finnish case the vote was 2-2-1 and in the Norwegian case it was 3-2.[26] Voting cases concerning questions of morality and decency may well be used to shed light on how Nordic realism/pragmatism stands up to difficult questions. Is it just relativism, or does our legal method still contain such requirements for specific data, precise concepts and verifiable working methods that it protects against conditionality and is thus compatible with the requirements of legal certainty?

3.2 The Finnish case: prostitution contracts are against good practice

In the Finnish case,[27] the question was whether a prostitute, who claimed damages from the Finnish State for loss of earnings as a result of her illegal detention, should be granted leave to appeal to the FHD as lower courts had rejected the claim as "manifestly unfounded". In assessing the case, the starting point was the Act on Compensation from State Funds to Persons Wrongfully Detained or Convicted.[28] Under this Act, the State must pay compensation, inter alia, loss of income and suffering to a person who has been wrongfully detained. The prostitute had been wrongfully detained for 51 days in connection with the investigation of a major pimping case. Compensation for suffering was paid in the normal way, but the claim for damages for loss of income was rejected. The District Court found that it was contrary to the Finnish legal order to promise rewards for sexual services. The said legal acts were therefore invalid. A claim for compensation for loss of income for activities that were contrary to good practice was based on an invalid legal act and the claim was thus clearly unfounded. The FHD agreed and decided, however by a vote of 2-2-1 (4-1), that prostitution income derives from contracts that are contrary to morality and that such contracts are not protected by the legal system even though they are not illegal. The claim was therefore manifestly unfounded and could be dismissed without a lawsuit.

One member took a different view. In particular, procedural law principles were invoked. The starting point was section 21(2) of the Finnish Constitution, according to which one of the guarantees of a fair trial is the right receive a reasoned decision. The Supreme Court also referred to the case law of the European Court of Human Rights. It was also emphasized that the case did not concern A's payment claim against a customer, but A's claim against the state under the Act on Compensation to Persons Wrongfully Detained or Convicted. Nor could the claim be considered to be manifestly unfounded in the light of Finnish taxation practice. On the grounds stated in the District Court, there was no reason to reject the claim without issuing a summons. The dissenting member concluded that the case should be referred back to the district court, which should the case on its own initiative. The FHD was generally brief on the grounds that prostitution contracts are contrary to good practice but contented itself with a reference to case law and doctrine.

The majority based its decision on the rule that contracts contrary to morality are not protected by the legal order. There was no doubt in the majority's mind that, under Finnish law, prostitution contracts count as contracts contrary to morality and thus the result was 'obvious'. The question of value - how to assess prostitution contracts - was legally clear, and the court therefore did not need to discuss it. The dissenting judge focused on a fundamental procedural right - the right to a reasoned decision, which is another important issue, but not directly related to how to view prostitution contracts. Whether it was a good or bad result that the prostitute did not receive damages for lost earnings was therefore not discussed at all, the court only took a position on the procedural issue.

3.3 The Norwegian case: Prostitution income (from a short period) not covered by the Damages Act

3.3.1 The question

The Norwegian Supreme Court (NHR) considered issue of unconscionable contracts or claims not protected by the legal system in a case from 2017. The case concerned eight prostitutes who had been robbed and who, in connection with the criminal proceedings, claimed damages because they had been unable to sell sex for a short period (two weeks) after the robberies due to the injuries and trauma that the robberies had caused them. The *District Court* decided that the women could not receive damages as the loss of income was of such a nature that it was not protected by the legal system. It was the Norwegian equivalent of the rule on contracts contrary to public policy that was applied. In Norway, it follows from Kristian 5's Norwegian Law (NL) 5-1-2 that contracts contrary to "decency" are invalid.[29] Since no damages were awarded in the District Court, the prostitutes sought a retrial in the *Court of Appeal*. The Borgarting Court of Appeal found that the income was worthy of damages, but that it was unlikely that the women would have a loss of income of NOK 50 000 in two weeks and reduced the

26 The two cases were previously discussed at the inaugural seminar of the (at the time) newly founded Forum for Civil and Commercial Law at the University of Helsinki in May 2018. Professor Lena Sisula-Tulokas, Deputy Chief Justice, former MP Astrid Thors and the undersigned spoke on the topic. The lecture is published as: Eftestøl-Wilhelmsson, Ellen, Sisula-Tulokas, Lena and Thors, Astrid, *Har prostitutionsinkomster skadeståndsrättsligt skydd? En kommentar till två nordiska HD-fall* [Does prostitution income have tort law protection? A commentary on two Nordic Supreme Court cases] [2018] Journal of the Finnish Law Society, JFT 473-489. See also Hagland, Birgitte's thorough account of the Norwegian case *Om erstatningsrettslig vern for prostitusjonsinntekte*r (HR-2018-2352-A) Dissens 3-2 [On tort law protection of prostitution income] in Nytt i privatretten nr. 1/2018 p. 5-10 and Ørjasæter, Jo and Bergsjø, Håkon's somewhat more critical *Uten en tråd - Høyesterett om tapte prostitusjonsinntekter og erstatningsrettslig vern* [Without a thread – The Supreme Court on lost prostitution income and tort law protection] in Jussen Venner vol 53 p. 329-345, and Eidissen, Stig: *Kortvarig tap av prostitusjonsinntekter og erstatningsrettslig vern. En kommentar*. [Short term loss of prostitution income and tort law protection. A commentary on HR-2017-2352-A], Lov og Rett 03/2019 p. 133- 145.

27 The presentation is based on Lenas Sisula-Tulokas's presentation of the case in the abovementioned article.

28 Act on Compensation from State Funds to be Paid to Wrongfully Detained or Convicted Persons as a Result of Detention 422/1974 § 4.

29 LOV-1687-04-15 Kristian 5.s Norske Lov, (NL) 5-1-2 "Alle Contracter som frivilligen giøris af dennem, der ere Myndige, og komne til deris Lavalder, være sig Kiøb, Sal, Gave, Mageskifte, Pant, Laan, Leje, Forpligter, Forløfter og andet ved hvad Navn det nævnis kand, som ikke er imod Loven, eller Ærbarhed, skulle holdis i alle deris Ord og Puncter, saasom de indgangne ere." [Kristian 5th's Norwegian Law, (NL) 5-1-2.

amount to NOK 15 000. The estimated income was thus NOK 30 000 per month. All parties requested a review by the NHR. The perpetrators because they had to pay damages, and the women because the damages awarded was too low. The NHR split 3-2 on the issue: three judges voted against the claim having legal merit, while two judges voted in favour and thus thought the women should receive damages. Both fractions take the law as their starting point - which, according to Nordic legal source theory, is at the top of the hierarchy of norms. The Norwegian Act Relating to Compensation in Certain Circumstances (13.6. 1969 no. 26) does not define which injuries are protected by tort law. The main question was therefore whether prostitution income is at all included in the concept of damage that has tort law protection.[30]

3.3.2 Majority argument: prostitutes (as a group) are best protected if prostitution income is not protected by tort law

According to the majority, the answer must be sought through a "broad overall assessment".[31] This "overall assessment" includes consideration for the victims on the one hand, and consideration for society on the other. In other words, it is a balancing of the real considerations or the goodness of the result that must determine the objective. The majority starts by limiting the consequences of the decision – in the case, it is only a question of loss of income for two weeks, the consideration for the injured party could weigh more heavily if it were a question of a longer loss of income.[32]

In the concrete assessment of whether a claim for damages for lost prostitution income deserves the protection of the legal system, the NHR majority takes as its starting point how prostitution as such is valued by the legal system. An isolated analysis of the law of damages is not sufficient for the assessment, which must be made after weighing up "the interests of the injured party and society in general".32[33] The NHR majority carefully examines the criminal law assessment of prostitution and places great emphasis on the fact that the *purchase of* sexual services is prohibited under Norwegian law. The criminalization took place in 2009, and the rules are now contained in Chapter 26, Section 316 of The General Civil Penal Code (22.5. 1902 no. 10).[34]

However, the sale of sexual services is permitted and selling sex is not considered to be participation in the crime buying sex. Participation in criminal acts is otherwise punishable. Not only is the purchase of sex punishable, but it is also punishable to rent out premises for prostitution (and it is not a condition that the landlord know that there is prostitution on the premises). Moreover, pimping is also a criminal offense in Norway.

The criminalization of the purchase of sex in Norway is based on *two considerations*: Firstly, Norway wants to tackle the *international trafficking in human beings* that often underlies prostitution activities. The Norwegian legislator's assessment here differs from that of the Finnish legislator, as the Norwegian view has been that a general prohibition is needed to tackle the purchase of sex from victims of trafficking. Secondly, Norway believes that a general ban on the purchase of sex is a good tool for changing attitudes, reducing demand and thus the market for prostitution. It is believed that a ban on buying sex can influence the awareness of sex buyers. The preparatory works to the Criminal Code state "*In this way we show that we as a society reject the idea that people's bodies can be bought*".[35] The criminal law rules are designed with the prostitute's need for protection in mind. According to the majority of the NHR, this argues against the loss of future income from prostitution being protected by the law of damages.[36] The idea is that in order to earn the money for which the prostitutes claim damages, the prostitutes must commit acts that are undesirable from society's point of view. By providing damages for the loss of income from such acts, tort law supports an activity that society is otherwise trying to get rid of. The fact that the sale itself is not punishable is not because the activity is accepted, but because the rules are designed to protect the prostitute. In other words, it does not matter that the claim for damages is not directly directed against an illegal or offensive contract (NL 5-1-2); the prerequisite for the claim is in any case that such a contract must be concluded. As the purchase of sex is illegal in Norway, the purchaser of the service must enter into an illegal contract. The majority therefore does not need to take a position on whether prostitution contracts are contrary to "decency" or good practice since, according to the majority, the contract is invalid due to its illegal nature. On this point, the context of the legal system militates against the protection of the proceeds of prostitution by tort law[37].

The systemic counter-arguments - that the sale part of the prostitution contract is not criminalized, that prostitution income is taxable, that the victim could have a need for the money or that it feels unreasonable[38] that the perpetrators do not have to pay damages for their crime – is discussed only summarily by the majority of the Court. The majority mentions that tax law is based on different considerations than tort law,[39] and that in practice no tax is paid

All contracts that are voluntarily made by those who are authorized, and come to their maturity, be it purchase, sale, gift, transfer of property, pledge, mortgage, lease, obligations, promises and other by whatever name it can be mentioned, which is not against the law, or honesty, should be kept in all their words and points, as they are entered into.]

30 NHR pt. 36.

31 Ibid. para. 37.

32 Ibid. Para. 38.

33 Ibid. para. 37.

34 Chapter 26 on sexual offences was inserted into the Norwegian Criminal Code by Act 74/2009. According to section 316 is [k]jøp av seksuelle tjenester fra voksne [purchase of sexual services from adults] punishable by a fine or imprisonment.

35 Ot.prp. nr. 48 Om lov om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.) [Parliamentary proposal no. 48 On the Act on Amendments to the Criminal Code 1902 and the Criminal Procedure Act (criminalization of the purchase of sexual intercourse or conduct, etc.) (2007–2008) p. 14.

36 NHR pt. 51.

37 Ibid. pt. 51.

38 Ibid. pt. 52.

39 Ibid.

on prostitution income. As regards the *injured party's need the money*, the Court emphasizes that the loss of earnings relates to a period of two weeks, whereas the payment of damages will take much longer, because various public guarantee schemes will be responsible for payment. However, if the loss of earnings were to apply for a longer period, the result could be different[40].

Concrete reasonableness is overshadowed here by more fundamental considerations of fairness. The majority considers that damages in an individual case are of little importance in relation to society's overall efforts to help and support prostitutes. Consideration of the individual reparative function of damages must therefore give way to consideration of prostitutes as a group. Research shows that the ban on buying sex is having an impact and that "most people a more negative view of buying sex". The purchase of sex in Norway has been reduced by 20-25% compared to before the ban, and by 45% compared to what it would have been if the purchase of sex had not been criminalized.[41] The idea is that tort law must support the rationale behind the criminal law construction in Norwegian law, which is to abolish the purchase of sex and protect prostitutes as a group. This is best achieved by not awarding damages for future loss of income, even though individual prostitutes have to "pay the price" for the system, so to speak.[42] The decision is largely made on the basis of values, or real considerations, but it is not the judges' own values that are (at least directly) expressed - what the majority is trying to do is to make a decision that is consistent with the view the legislator has of prostitution today, as expressed through the criminal law regime. The fundamental question is whether the lost prostitution income should have the protection of the legal system. For the majority, the answer is no; a claim for damages cannot be based on illegal acts/claims. The social interest in getting rid of prostitution outweighs the prostitution-related the individual need for protection, which in this case also carries little weight, as the loss of income only covers two weeks of work.

3.3.3 The minority's argument: prostitutes are best protected if they receive compensation for lost prostitution income

Two judges nevertheless concluded that the prostitutes should be compensated for their lost earnings. It is worth noting, however, that the two dissenting judges agreed with the majority that prostitution is "considered undesirable in our society".[43] The disagreement is thus solely about whether awarding damages in the specific case contributes to supporting prostitution. The minority states that the award of damages does not compel anyone to engage in illegal acts, nor does it presuppose that such acts will take place. All that will happen is that a hypothetical economic calculation of a hypothetical course of events will be made.[44] In addition to taking a different view from the majority in assessing the impact of damages on societal attitudes towards prostitution, the minority has a different view of the legal analysis of the Damages Act. Whereas the majority thought that the question is whether prostitution income is income that deserves the protection of the legal system and is therefore included in the group of income that is entitled to protection in tort, the minority is of the opinion that the starting point is that all economic losses are protected in tort. In some cases, exemptions can be made to this, but this requires, according to the minority, a specific justification.[45] However, the minority thinks that such a justification must be derived from other regulation. In other words, the consideration of harmony in the legal system weighs heavily for both factions of the NHR. However, it is not the criminal law rules that the minority focuses on. The minority places more emphasis on the economic regulation of prostitution: If one first accepts that prostitution income is legal - and that the prostitute, for example, must pay tax on it - then the income should also be protected by tort law: "...[I]ncome from prostitution is legal income in the hands of the prostitute. The income cannot be confiscated by the authorities, and it is, like other income, subject to taxation. My view, then, is that the context of the legislation indicates that the loss of this income must be recoverable from a tortfeasor. If the income is accepted, there is reason to accept the loss of it as well. My view is, moreover, that this legislation is based on the fundamental idea that the legal position of the prostitutes should not be affected by others committing offenses in connection with the prostitution."[46]

The protection of prostitutes is also important for the minority, but it places greater emphasis on the protection of the prostitute as an individual than on efforts to eliminate prostitution as such. The basic idea behind the protection rules is that the prostitute should not suffer from others committing crimes in connection with prostitution. According to the minority, the fact that buying sex is a punishable offense is not an argument for not compensating the prostitute.[47] Nor does the prohibition against contracts that are contrary to "honesty"/good practice in NL-5-1-2 provide any guidance, quite the contrary. Looking at the situation of prostitutes today, the policy (and the rules) is based on the idea that prostitutes are a group that needs the support of society. In other words, the moral condemnation is not directed at the prostitutes, but at the clients. As far as the clients are concerned, criticism of them has increased. The amendments to the Criminal Code have contributed to men, and young people in particular, having a more negative view of purchase of sex. According to the minority, awarding prostitutes damages for loss of earnings "fits in with this trend".[48] If prostitutes are not awarded damages, the consequence will be that they will have less legal protection than other people and this may contribute to increasing their insecurity. The need for protection thus argues in favour of giving prostitutes damages. In other words, the minority does not believe that the general assessment of prostitution will become more positive if prostitutes who have

40 Ibid. para. 74.

41 Report 2014/30 from Vista Analysis on "Evaluering av forbudet mot kjøp av seksuelle tjenester" [Evaluation of the ban on the purchase of sexual services], ibid. para. 57.

42 NHR pt. 56.

43 Ibid. para.74.

44 Ibid.

45 Ibid. para. 67.

46 Ibid. at 70.

47 Ibid. at 71.

48 Ibid. para. 74.

been subjected to violence are compensated for their loss of income by the perpetrator.

4. Conclusions

4.1 The value issue is hidden in a legal discourse

Both cases are interesting because they so clearly address questions of value for which there is no clear answer. How does one treat prostitution from a commercial law perspective? The income is legal and should be taxed. Nevertheless, the arrested (Finland) or abused (Norway) prostitutes do not receive compensation for lost income, although all the "normal" conditions for compensation should be met. The only thing that remains is the fundamental question of whether prostitution income is different, whether the loss of these 'has interest protection,' and thus is covered by the Act relating to compensation in certain circumstances. In the Norwegian court case, it is clear that the two factions have completely different views on what is a good result in this matter. However, neither faction prints anything like: "The question is unclear, I think the best result is X." Instead, judges use what Blandhol describes as "a combination of techniques and tools" to find "the best possible solutions to the problems that arise".[49] It is this technique that we like to refer to as the legal method that, with its "...fairly stringent requirements for definite data, precise concepts and verifiable working methods, protects against conditionality".[50] In difficult questions, this "relative legal certainty"[51] is the best the system can offer. Legal certainty lies in the fact that the legal decision is made based on accepted arguments, or legal factors. The relativity that must be accepted reflects the fact that trade-offs are inherent in all judicial practice. In voting cases this becomes particularly clear. Judges have different views on how the trade-offs should be made, which is probably related to the judge's view of what is a good result. The real considerations are not only included as a separate argument but affect the entire legal analysis. This is accepted, but only if the result is well justified, or as Aarnio points out, only if the method can be approved by the group of people who are part of the "enlightened auditorium."[52] If one reads various case commentaries, it is the justification that is discussed, although the aim is to get at the result, which is rarely attacked directly. See, for example, Ørjasæter and Bergsjø, where it is stated that the authors "compare the different methodological approaches of the majority and the minority" and that the authors are "critical of the majority's reasoning".[53] The title of the article "Uten en tråd" (Without a stitch) also reflects this. Is it the prostitutes or the majority's reasoning in the court case that is without a (red) thread?

The NHR formulates the core issue of whether prostitution income is protected by tort law as a balance between the interests of the victims (in receiving financial compensation) on the one hand and the interests of society (in getting rid of prostitution as a phenomenon) on the other. As shown above, the majority and the minority assess the issue differently. The arguments used are the same (basis in tort law, societal significance, need for protection, context in the legal system), but the trade-offs usually turn out differently. The way in which the Norwegian dual model for criminalizing the purchase of sex is used in the argumentation is illustrative: the majority emphasizes that the purchase of sex is illegal "When the sale of sexual services is not punishable, it is for the sake of the prostitutes themselves, who are considered to be a weak and vulnerable group,"[54] while the minority emphasizes that the sale of sex is legal: "...[I]ncome from prostitution is legal income for the prostitute ... If the income is accepted, there is reason to accept the loss of it."[55] Both factions seek a good outcome, but when societal interests and individual interests do not pull in the same direction, at least as the majority of the NHR sees it, it becomes a question of which interests carry more weight. This a not uncommon issue for judges. In contrast to their Finnish colleagues, who could not examine the question of whether prostitution contracts are contrary to good practice - then the solution would not be "obvious" - the Norwegian judges highlight the real arguments put forward both for and against the chosen outcome. Using pragmatic terminology, it can be said that the Norwegian judges are both problem- and consequence-oriented in their approach. The cases show that the judges base their arguments on a moderate scepticism (counterarguments are also highlighted). Both ethical and legal arguments are given space. In other words, the arguments are pluralistic and not least contextual. However, there is no agreement on which context is the right one, and it is the context that determines how the goodness of the result - the real considerations - is assessed.

For the majority of the NHR, society's desire to get rid of prostitution as such is essential, the isolated tort law arguments are given less weight. These arguments are again crucial for the minority, who probably agree that the social context is relevant, and that prostitution is not desirable. Essential for the minority is that it sees no conflict between society's desire to get rid of prostitution, and the award damages for lost prostitution income in the concrete case: "For me, however, it is essential that awarding damages as demanded does not in itself contribute to promoting prostitution."[56] In other words, the question is not which result best contributes to dismantling prostitution, it is enough that the judgment does not contribute to promoting prostitution. For the minority, the crucial context is that of tort law. Purely tort law considerations, and particularly the consideration of the victims, are decisive: "The prostitutes will receive a form of protection - a legal protection - if no exception is made to the duty of the injured party to compensate for their loss of earnings (*consideration for the injured party*). Prostitutes are particularly vulnerable to violence and other exploitation by clients, traffickers and others, as this case illustrates (*degree of risk*). Should lost prostitution income lack protection under tort law, the consequences of harming prostitutes will be fewer than

49 Blandhol (n 2) p. 76.

50 Peczenik (n 25) p. 699.

51 Ibid. p. 698.

52 Aarnio (n 24).

53 Ørjasæter and Bergsjø (n 26) p. 329

54 NHR pt. 50.

55 Ibid. at 70.

56 Ibid. para. 74.

those of harming others (*the preventive effect of damages*). This may, as the first respondent mentions, contribute to increasing their insecurity (*consideration for the injured parties*). For me, therefore, the consideration of this group's special need for legal protection is central (*consideration for the injured parties*). This implies that their loss of income has the same protection under tort law as the loss of income of others (*equal treatment*)."[57] While the majority thinks that a good result contributes to the elimination of prostitution as such, the minority thus believes that a good result means that prostitutes receive protection under tort law on the same terms as other injured parties.

One issue that is not (openly) discussed in the Norwegian case is the - to me - obviously decisive question of value: whether prostitution contracts are contrary to morality or honour (NL 5-1-2). The majority concludes that prostitution contracts are illegal, so it does not need to take a position on whether the contract is also contrary to morality.[58] However, it is interesting that the minority does not think that this issue needs to be discussed either: "It is not necessary for me to take a position on the scope of NL 5-1-2. It does not provide an unambiguous answer as to what legal protection the prostitute currently has in the contractual situation. In any event, I cannot see that this rule provides a justification for excluding lost prostitution income from protection under tort law."[59]

In other words, the two Nordic courts treat the question of whether prostitution contracts are contrary to good practice quite differently: in Finland, the majority is quite clear that prostitution contracts are contrary to good practice, while at least one judge thinks that the question should be examined. In Norway, both factions avoid taking a position on this difficult issue. The majority has already concluded that the agreement is illegal, so it does not need to discuss whether the agreement is contrary to good practice. The minority, on the other hand, argues that the question is not relevant, which must depend on the minority's view of whether a prostitution agreement must be concluded for damages to be paid: "The compensation does not force any act of prostitution to take place, nor does it presuppose that such an act will take place. The only thing that will happen is that a financial calculation is made of a hypothetical course of events."[60] The minority thus chooses to view the claim for damages for the loss of prostitution income as any other economic claim, which is neither illegal nor immoral. The decisive factor is the right of prostitutes to compensation for their losses and the liability of those who caused the damage.

4.2 Is prostitution a business - a service like any other service?

The NHR minority states that it agrees that society's goal is to get rid of prostitution as a business. However, if the activity is legal (and here partly legal is enough), the minority sees no reason to treat the activity differently from other economic activities. This view is in line with how prostitution is viewed in the European Union (EU). In EU law, prostitution is considered a business activity, but not just any business activity. The Court of Justice of the European Union (CJEU) has ruled that prostitution as a self-employed activity can be considered as a service provided for remuneration and therefore covered by the freedom of establishment.[61] However, the provider of the service must carry out the prostitution under certain conditions; 1) without being in a subordinate position with regard to the choice of activity and working and salary conditions, 2) on his own responsibility, and 3) for payment which is made in full and directly to the prostitute.[62]

Accordingly, the 2006 Services Directive applies to prostitution activities.[63] The Directive allows service providers to establish themselves freely within the Union. Member States may require an authorization only in certain situations, as where the activity in question is contrary to the public interest. Authorization conditions must be non-discriminatory, proportionate and objective, among other things.[64] In two joined cases, the ECJ ruled on how far Member States can go in restricting the right of establishment of prostitutes.[65] The first case concerned the right of the Dutch authorities to restrict temporally the operating license of a "pleasure boat" carrying prostitutes. The boat was to operate on the inland waterways of Amsterdam. The authorities argued that "...a limited duration is justified by overriding reasons of public interest."[66] In the second case, the question was whether the license to operate window prostitution by renting out rooms for that purpose could be limited by the condition that the service provider (the landlord) must be able to communicate with the recipient of the service (the prostitutes) in a language that they understand.

In the first question, the CJEU decided that prostitution on pleasure boats is a service covered by the Directive,[67] but that the authorization to provide such services may be limited in time for reasons of public interest.[68] The same answer was given to the window prostitution question: the CJEU specified that the public interests at stake were public order and the interest in preventing

57 Ibid. point 75. My comments on tort law considerations in italics.

58 Ibid. pt. 51.

59 Ibid. at 72.

60 Ibid. para. 74.

61 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, Case C-268/99. The issue arose in connection with the claim of Polish and Czech prostitutes to be able to establish themselves freely as prostitutes in the Netherlands. The question was decided on the basis of the Association Agreement between the Communities and the Republic of Poland and the Association Agreement between the Communities and the Czech Republic. However, the content of the agreement was identical to the provisions on freedom of establishment in Article 52 of the EU's founding treaty at the time.

62 Ibid. Judgment No 5.

63 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

64 Ibid. art. 9 and 10.

65 Joined Cases C-340/14 and C-341/14.

66 Services Directive art 11, 1 c).

67 The exemption for "transport services" in Article 2(2d) of the Directive could not be used.

68 Joined Cases C-340/14 and C-341/14 (59).

prostitutes from being subjected to crime, "in particular trafficking in human beings, forced prostitution and prostitution of minors".[69] The starting point of EU law is that national measures which restrict, or are likely to make less attractive, the exercise of fundamental freedoms, which thus include the free movement of prostitution services, and which are therefore guaranteed by EU law, can only be accepted if the national measures are appropriate to safeguard the public interest and do not go beyond what is necessary to achieve that objective.[70] It is for the national courts to assess whether a measure meets those requirements.[71]

In other words, national authorities should be allowed to criticize prostitution to safeguard the public interest, i.e. to prevent trafficking in human beings, forced prostitution and prostitution of minors. Prostitution related to human trafficking is prohibited in both Finland and Norway. In Norway, as mentioned above, it is not only trafficking that is prohibited, but all purchases of sexual services are also prohibited. Some elements of coercion on the part of the prostitute need not be present. The ban is based on two considerations: Firstly, Norway wanted to tackle international trafficking in human beings, which is often behind prostitution activities. It was considered that a general prohibition was needed to tackle the purchase of sex from victims of trafficking.[72] In this respect, Norwegian values are in line with international values. Secondly, a general ban on the purchase of sex was considered a good tool for changing attitudes, reducing demand and thus the market for prostitution. It was thought that a ban on buying sex could influence the awareness of sex buyers. The preparatory works to the Penal Code state "In this way we show that we as a society reject the idea that people's bodies can be bought".[73] The preparatory works to the Penal Code take a clear position on the issue of values: Prostitution is not a business activity. Prostitution is not a service that should be protected by EU market law. The majority of the NHR takes a position on the harm requirement against this background. The minority is not as radical and allows the considerations of tort law to weigh heavily (prostitution is going on anyway and is not an illegal service). Is prostitution as such considered contrary to the public interest in Norway and/or Finland? The question is not crystal clear. Did the courts come to a good result? My understanding is that the answer depends on how one views the criminalization of prostitution in general. Here there is no consensus in the Aarnio auditorium.

5. Post scriptum

The question is also under debate in the European Union. On 14 September 2023, the European Parliament agreed on a resolution on the regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women's rights (2022/2139(INI)). The resolution was inspired by inter alia the judgment of the Court of Justice of the European Union in Case C-268/99. The Parliament recognizes that the legislation in the Member states vary, hence the Parliament underlines the Member States' legal obligation to protect women's rights and physical integrity and promote gender equality and diversity.

It highlights the EU's role in doing this within the international community and in guaranteeing equal protection and safeguarding equal rights across the Member States. As part of this work, the Parliament calls on the Member States to ensure that it is punishable as a criminal offence to solicit, accept or obtain a sexual act from a person in exchange for remuneration, the promise of remuneration, the provision of a benefit in kind or the promise of such a benefit (at 41).

The Parliament makes a particular reference to the Nordic model and a study on this,[74] the Parliament stresses that there appears to have been a significant and positive shift in attitudes among boys and men in Sweden since the introduction of the Nordic model, whereby women in prostitution are seen less as objects to satisfy men's sexual desire but instead as victims of exploitation and whereby this dissuades them from purchasing sex.

69 Ibid. (68).

70 Ibid. (70).

71 Ibid. (71). In any event, in a specific case, the CJEU must provide the referring with information (on EU law) that will enable the national court to decide the individual case.

72 Ibid para 3.32.

73 Ot.prp. nr. 48 Om lov om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.) [Parliamentary proposal no. 48 On the Act on Amendments to the Criminal Code 1902 and the Criminal Procedure Act (criminalization of the purchase of sexual intercourse or conduct, etc.)] (2007-2008) p. 14.

74 Farley, M. et al., *Männer in Deutschland, die für Sex zahlen — und was sie uns über das Versagen der legalen Prostitution beibringen: ein Bericht über das Sexgewerbe in 6 Ländern aus der Perspektive der gesellschaftlich unsichtbaren Freier*, Berlin, 8 November 2022.