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# **Cristina Cayo Ascencio**

**Generation**

## **Silenced Voices: Sex Workers' Human Rights in Europe**

**Nr. 6**



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# Silenced Voices: Sex Workers' Human Rights in Europe

Cristina Cayo Ascencio\*

*Changes in the regulation of sex work have been observed over the last two decades. The trend towards the partial criminalization of sex work, targeting clients, has gained significant support at the European level under the arguments of gender violence and human trafficking. However, this regulatory approach has not adequately addressed the negative consequences for sex workers themselves. In order to determine whether the European Convention on Human Rights provides protection for sex workers in this context, this paper examines the contrasting feminist perspectives influencing the debate, the legal framework at the national, regional, and international levels, and case law. The case pending in Strasbourg, “M.A. and Others v. France” is analysed in the light of the potential protection of the right to life, the prohibition of degrading treatment, and the right to respect for private life.*

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## List of abbreviations

art	Article
CEDAW	Committee on the Elimination of Discrimination against Women
CoE	Council of Europe
ECHR	European Convention on Human Rights 1950
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
eds	Editors
EP	European Parliament
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union 2000
FEMM	European Parliament's Committee on Women's Rights and Gender Equality
GAATW	The Global Alliance Against Traffic in Women
ibid	Ibidem, in the same place
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MEPs	Members of the European Parliament
n	Footnote
NGO	Non-Governmental Organization
NYU	New York University
p	Page
para	Paragraph
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
vol	Volume
v.	Versus
WHO	World Health Organization

## Introduction

A wave of legal changes regarding prostitution has been witnessed in the last two decades. The current debate in Europe has been polarized between on the one hand those who defend these legal modifications that aim at the criminalization of payment for sexual services, under the campaign against gender violence and human trafficking, and on the other hand, those who consider that even if sex workers are not considered criminals, they end up being the ones affected by the law's outcomes.

The criminalization of purchasing sex services has resulted in an alarming and harmful outcome for sex workers not willing to leave prostitution. This puts their lives in danger, affecting their physical and mental integrity and autonomy. In light of the neo-abolitionist approach to prostitution, the present study aims to address the question, "Does the European Convention on Human Rights provide a shield for sex workers' rights in light of the rise of the neo-abolitionist approach?"

The legislative framework of the ECHR can provide an effective shield against the criminalization of payment of sex services, as it allows the law's outcomes to be subsumed under specific protected human rights, thereby triggering states' obligations. The methodology for this research will involve a legal analysis of legal literature, international legal instruments, and court jurisprudence.

The first section will define the boundaries of the concept of "prostitution" that guides the present research. It will also define the associated terms such as consent, coercion, and human trafficking. The understanding of the concept of "prostitution" has influenced legal measures. There have been two feminist positions that have led the debate: neo-abolitionist and pro-sex workers which will be explained in this section.

The second section will focus on the legal framework, starting with the different national regulatory models in Europe. Systems of legalization, non-regulation, total criminalisation, and partial criminalisation, will be presented through one or two countries for each. Then, the regional legal framework in Europe will be discussed, with a focus on the European Parliament's position and its influence on CoE members. Finally, the international legal framework will be analysed as a valuable benchmark for sex workers' rights protection. International Organizations and NGOs will be presented as advocates against purchase criminalisation.



The third section will examine the conflicting human rights in light of the ECHR. The analysis will consider the right to life, the prohibition of degrading treatment, and the right to respect private life. Within those rights, the right to health and the right to work will also be addressed. Then, the relevant jurisprudence of the ECtHR will be reviewed. This will illustrate the stance of the Court regarding the concept of prostitution, as well as the protection of the rights in conflict. The final analysis will be applied to the current open case at the ECtHR “*M.A. and others v. France*”, which illustrates the conflict presented in the entire research. This case result is particularly significant because the court is directly confronted with the problem of the prostitution legal framework. Its decision could have a significant impact on the current debate.

## Section I: Definition of prostitution and feminist perspectives

### A. Scope of “prostitution” and related terms

For the purposes of this research, the term “prostitution” refers to the act of selling sexual services. Concerning the subject of the act, two feminist theoretical currents define the concept of “prostitute”, which will be explained in detail in this chapter. On the one hand, the Neo-abolitionist approach considers prostitutes as victims of violence against women.<sup>1</sup> Accordingly, prostitutes will be referred to in Part “B” of this chapter as “women involved in prostitution”.

On the other hand, the Pro-sex workers’ approach avoids conceptualizing prostitutes as victims, respecting women’s agency, autonomy, and self-determination.<sup>2</sup> Within this framework, the Pro-sex workers approach uses the term “sex workers”, to differentiate between force and consent, and consequently between “voluntary prostitution” and “exploitation of prostitution”.<sup>3</sup> In this research, a pro-sex workers approach will be adopted. On that account, the terms “prostitute” and “sex worker” will be used indistinctly.

For the purpose of this research, the concept of “consent” avoids connecting “prostitution” with “trafficking in persons”. The definition of “human trafficking” given by the GAATW, is considered since it includes “coercion or deception” in the elements of human trafficking.<sup>4</sup> Therefore “consent” will be defined as the autonomy to make their own decisions and the possibility to establish limits on the services provided.<sup>5</sup> From this definition of consent, structural injustices are not considered as being per se coercive, because considering it like that, it affects women’s agency and merges prostitution with the exploitation

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<sup>1</sup> Jane Scoular, ‘The “Subject” of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory’ (2004) 5 *Feminist Theory* 343, 344.

<sup>2</sup> *ibid* 349.

<sup>3</sup> Karni Kissil and Maureen Davey, ‘The Prostitution Debate in Feminism: Current Trends, Policy and Clinical Issues Facing an Invisible Population’ (2010) 22 *Journal of Feminist Family Therapy* 1, 3.

<sup>4</sup> The Global Alliance Against Traffic in Women, ‘FAQ: Understanding Trafficking in Persons (GAATW)’ <[https://gaatw.org/158-frequently-asked-questions/faq/454-understanding-trafficking#What is TIP?](https://gaatw.org/158-frequently-asked-questions/faq/454-understanding-trafficking#What%20is%20TIP?)> accessed 9 October 2023.

<sup>5</sup> Juno Mac and Molly Smith, *Putas insolentes. La lucha por los derechos de las trabajadoras sexuales* (Ana Useros Martín tr, Traficantes de Sueños 2020) 88.

of prostitution and trafficking, making it very difficult to address the problem of human trafficking.<sup>6</sup>

The session on case-law development in this investigation will address the debate around the concept of “exploitation of prostitution”.

This research will consider only adult prostitutes, leaving out child prostitution. At the same time, the activity of study focuses on selling sexual services, meaning “intercourse” and acts that involve sexual physical contact. This excludes the debate on pornography, online sex services, and stripping.

This research will take the terminology of the “shield” and “sword” effects of human rights, which neutralize or trigger criminal law, given by Judge Christine Van den Wyngaert and consequently developed by the legal literature.<sup>7</sup>

## **B. The Neo-abolitionist feminist approach**

The Neo-abolitionist feminist approach refers to the current tendency to promote a change in national legislation, criminalizing prostitution in part, with a special focus on the criminalization of sex services purchases, and considering prostitutes as victims.<sup>8</sup> From this approach, it is possible to identify two main arguments that support the initiative. The first is intended to combat gender inequality because it considers prostitution as a form of violence against women. The second refers to the contested relationship between prostitution and human trafficking. A partial criminalization of prostitution would tackle the human trafficking problem in a more effective way.<sup>9</sup>

From this standpoint, prostitution is a form of violence against women. This is due to men's indifference to women's pleasures and humanity during the sexual act, reducing them to “just” a body.<sup>10</sup> It is argued that previous and ongoing circumstances undermine their voluntariness, making all prostitution in-

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<sup>6</sup> Rebecca Mf Hewer, 'The Language of Violence: Exploring the Contested Relationship Between Violence Against Women and Sex-Work/Prostitution' (2023) 32 *Social & Legal Studies* 1, 5.

<sup>7</sup> Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577, 577.

<sup>8</sup> Marcus A Sibley, 'Attachments to Victimhood: Anti-Trafficking Narratives and the Criminalization of the Sex Trade' (2020) 29 *Social & Legal Studies* 699, 705.

<sup>9</sup> Lucrecia Rubio Grundell, 'The EU's Approach to Prostitution: Explaining the “Why” and “How” of the EP's Neo-Abolitionist Turn' (2021) 28 *European Journal of Women's Studies* 425, 431.

<sup>10</sup> Sheila Jeffreys, 'Prostitution, Trafficking and Feminism: An Update on the Debate' (2009) 32 *Women's Studies International Forum* 316, 318.

herently exploitative. For example, they point out that most women involved in prostitution have been victims of sexual abuse or forced prostitution during childhood. Therefore their consent ability is compromised.<sup>11</sup>

They also stress that pressing financial situations are the most recurrent reason for engaging in commercial sex activities.<sup>12</sup> On this line, Catharine MacKinnon, a prominent feminist promoter of the neo-abolitionist approach, describes prostitution as “sex for survival”.<sup>13</sup>

In addition to the previous particular circumstances, Neo-abolitionists emphasize the recurrence of rape and physical violence during sexual activities. They also emphasize the higher mortality rate compared to the average population.<sup>14</sup> This creates an ongoing situation of violence that is equated to domestic violence scenarios, in which the victim is subjected to such abuse and oppression that it becomes very challenging to escape.<sup>15</sup>

Neo-abolitionists argue that what opposing doctrines refer to as “voluntary prostitution”, and the control that they have over their decisions and their bodies, is under a fiction of consent since women involved in prostitution suffer from high levels of post-traumatic stress disorder,<sup>16</sup> and they show coping mechanisms like dissociative episodes to get through the sex activities.<sup>17</sup>

Therefore the gender factor relies on prostitution’s characteristics, built on a basis of sex inequality. This questions women’s autonomy in this specific context, which constrains their human rights, due to the structural problem.<sup>18</sup>

Regarding the argument about the relationship between prostitution and human trafficking, neo-abolitionists start with the concept of “trafficking in persons” given by the Palermo Protocol. This concept includes “abuse of power or a position of vulnerability” as a factor in obtaining consent for exploitation.<sup>19</sup>

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<sup>11</sup> Catharine A MacKinnon, ‘Prostitution and Civil Rights’ (1993) 1 Michigan Journal of Gender & Law 13, 27–28.

<sup>12</sup> Catharine A MacKinnon, ‘Trafficking, Prostitution, and Inequality’ (2011) 46 Harvard Civil Rights-Civil Liberties Law Review 271, 276.

<sup>13</sup> MacKinnon (n 11) 27.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid* 28.

<sup>16</sup> MacKinnon (n 12) 286.

<sup>17</sup> Kathleen Barry, *The Prostitution of Sexuality* (NYU Press 1995) 33.

<sup>18</sup> Doris Buss and others, ‘Introduction to “Sexual Movements and Gendered Boundaries: Legal Negotiations of the Global and the Local”’ (2005) 14 Social & Legal Studies 5, 13.

<sup>19</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000) (UNGA Res 55/25) art 3.

This approach considers intersectionality factors, including extreme poverty and gender, as conditions for vulnerability.

Moreover, neo-abolitionists base their argument on studies that show that countries that legalize prostitution experience increased human trafficking. The risks involved in illicit activities are lower, and the profits are significantly higher due to the amount of demand, compared to countries where prostitution is criminalized.<sup>20</sup>

The Neo-abolitionist feminist approach advocates for a system of partial criminalization of prostitution, seen as the most effective way to protect women's rights, by applying the effect of the sword of human rights, instigating the criminalization of buyers, procurers, and landlords.<sup>21</sup> In the next section, it will be explained why the pro-sex worker's feminist approach criticizes this legal model. Women's rights will then be protected in the form of a shield of human rights, contrary to what neo-abolitionists propose.

### **C. The Pro-sex workers' feminist approach**

The starting point of the feminist approach that supports sex workers is the principle of self-determination and the right to autonomy, avoiding referring to prostitution as inherently exploitative, and prostitutes as victims of violence against women.<sup>22</sup>

Pro-sex workers emphasize the need to distinguish between coercion and consent, where "voluntary prostitution" should be framed as work, and when there is "force" involved, we are in a situation of violence, such as human trafficking and/or the exploitation of prostitution.<sup>23</sup>

This distinction is critical, because it protects prostitutes' agency, since it reflects their autonomy and self-determination, avoiding infantilization of sex workers' choices,<sup>24</sup> and stigmatization.<sup>25</sup> At the same time, when "voluntary

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<sup>20</sup> MacKinnon (n 12) 304.

<sup>21</sup> Sharron FitzGerald and Jane Freedman, *Gender, Equality and Social Justice: Anti-Trafficking, Sex Work and Migration Law and Policy in the EU* (Routledge 2022) 9.

<sup>22</sup> Teela Sanders, Kathryn McGarry and Paul Ryan (eds), *Sex Work, Labour and Relations: New Directions and Reflections* (Springer International Publishing 2022) 48.

<sup>23</sup> Jo Doezeema, 'Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation' (2005) 14 *Social & Legal Studies* 61, 80.

<sup>24</sup> Sharron FitzGerald and Kathryn McGarry, 'Problematizing Prostitution in Law and Policy in the Republic of Ireland: A Case for Reframing' (2016) 25 *Social & Legal Studies* 289, 302.

<sup>25</sup> Jay Levy and Pye Jakobsson, 'Abolitionist Feminism as Patriarchal Control: Swedish Understandings of Prostitution and Trafficking' (2013) 37 *Dialectical Anthropology* 333, 337-338.

prostitution” is not considered, sex workers engage in more unsafe sexual practices, and they are subject to more police persecution,<sup>26</sup> and their economic capacity is impoverished.<sup>27</sup> Through partial criminalization, a decrease in demand decreases the capacity for negotiation with clients, causing the activity to develop underground.<sup>28</sup>

Pro-sex workers emphasize that sex work is work, which is why they refer to prostitutes as sex workers. Their explanation for women’s engagement in prostitution also recognizes the unfavourable socio-economic conditions like in the neo-abolitionist approach, but in this case, it stresses the fact that most workers in non-sexual jobs are also working under conditions of oppression.<sup>29</sup> Socio-economic conditions are a systemic problem, and working in the sex industry can be a reasonable option to improve these conditions.<sup>30</sup>

In the same vein, the pro-sex workers approach advocates for non-pathologization. They argue that survivors of sexual abuse during childhood have the urge to leave their homes because of this abuse. Prostitution serves as a valid solution to economic independence.<sup>31</sup>

They argue that supporting prostitution as a job does not mean that sex work is not sexist and misogynist.<sup>32</sup> There are other jobs commonly reframed as “women’s jobs” where there is also a sexist conceptualization, therefore it is necessary to include labour rights to protect them, just as in other jobs.<sup>33</sup> A pro-sex workers approach does not deny the difficult socio-economic conditions of sex workers, but quite the opposite. It recognizes that those conditions leave people with limited choices and a more comprehensive approach is needed. This approach focuses on improving their environment which prevents them from making “desperate exchanges”.<sup>34</sup>

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<sup>26</sup> Emily St.Denny, ‘The Gender Equality Potential of New Anti-Prostitution Policy: A Critical Juncture for Concrete Reform’ (2020) 18 French Politics 153, 166.

<sup>27</sup> Mac and Smith (n 5) 232.

<sup>28</sup> Jay Levy and Pye Jakobsson, ‘Sweden’s Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden’s Sex Workers’ (2014) 14 Criminology & Criminal Justice 1, 6–7.

<sup>29</sup> Mac and Smith (n 5) 90.

<sup>30</sup> *ibid* 95.

<sup>31</sup> *ibid* 92.

<sup>32</sup> Sanders, McGarry and Ryan (n 22) 49.

<sup>33</sup> Mac and Smith (n 5) 90.

<sup>34</sup> Jane Scoular, *The Subject of Prostitution: Sex Work, Law and Social Theory* (Routledge 2015) 129–130.

Considering prostitutes as victims invisibilizes the rights of women who do not want to leave prostitution.<sup>35</sup> As a result, states are not required to include labour rights in their legislation.<sup>36</sup> The frame of sex work as work gives prostitutes the capacity to establish limits and take action when those limits have been exceeded by “real” physical or sexual aggression.<sup>37</sup>

Under the guise of rescue, the anti-trafficking argument and policies have committed abuses against sex workers,<sup>38</sup> but it also makes it harder to tackle the human trafficking problem. This is because the effects of the law under a partial criminalization approach apply not only to sex workers but also to victims of sex trafficking.<sup>39</sup> These victims will be even more hidden from the public eye.<sup>40</sup>

From the pro-sex workers approach, neo-abolitionists mislead the argument of human rights in the name of gender equality and the fight against trafficking in persons, with abusive outcomes against sex workers and no convincing results to solve human trafficking.<sup>41</sup> In this regard, human rights should play a defensive role, neutralizing criminal law, since we are dealing with a legal model from which protection is necessary.

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<sup>35</sup> Mac and Smith (n 5) 22., Doezema (n 23) 74.

<sup>36</sup> Sanders, McGarry and Ryan (n 22) 50.

<sup>37</sup> Mac and Smith (n 5) 89.

<sup>38</sup> Chi Adanna Mgbako, ‘The Mainstreaming of Sex Workers’ Rights as Human Rights’ (2020) 43 *Harvard Journal of Law & Gender* 92, 108.

<sup>39</sup> Mac and Smith (n 5) 252.

<sup>40</sup> *ibid.*

<sup>41</sup> Sanders, McGarry and Ryan (n 22) 64.

## Section II: International and European legal framework

### A. Domestic regulation in European countries

In the following, different legal models in the European context will be discussed. At the time of the research, countries of the CoE were considered, since they are the ones to which the ECHR applies. Considering the length of the present study, the different models will be explained in one or two countries each. This will enable a better understanding of the models presented.

The classification is divided into legalization and criminalization models, and then sub-divisions for each. For legalization models, a “total legalization” system regulates sex services as an economic activity. In contrast, a “non-regulation” system avoids conceptualizing sex work and leave prostitution uncertain. For criminalization models, the distinction is made between models that criminalize the activity in its entirety, considering sex workers as criminals. On the contrary, partial criminalization models eliminate prostitutes as crime perpetrators and view them as victims.

In the group of total legalization models, there is a clear distinction between voluntary and forced prostitution, whereas voluntary prostitution is legal and regulated. The Netherlands constitutes the most famous example of this type, where a change from a partial model of criminalization of procurers and brothels (but not the clients) and considering sex workers as victims,<sup>42</sup> developed over time into a completely regulated system by the lift of the brothel ban in 2000.<sup>43</sup>

Nowadays sex work forms part of the administrative law, as it is the municipalities that regulate most of the activity.<sup>44</sup> Municipalities can for example impose restrictions on home-based sex services, prohibit street prostitution or establish specific areas where sex work is permitted, and give the police the power to control and intervene in case of non-compliance.<sup>45</sup>

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<sup>42</sup> Che Post, Jan G Brouwer and Michel Vols, ‘Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?’ (2019) 25 *European Journal on Criminal Policy and Research* 99, 106.

<sup>43</sup> *ibid* 109.

<sup>44</sup> Synnøve Økland Jahnsen and Hendrik Wagenaar (eds), *Assessing Prostitution Policies in Europe* (Routledge 2018) 64.

<sup>45</sup> *ibid* 66.



Labour relations and taxes are also regulated through an “opt-in system”.<sup>46</sup> The club or brothel and the sex worker have an employment relationship. Several conditions must be met to protect sex workers’ rights, at least in theory.<sup>47</sup>

Another example of a legal and regulated system is Switzerland, where prostitution is regulated at the federal and cantonal levels. At the federal level, specifically in the Criminal Code, there is a clear differentiation between voluntary and coercive prostitution and age limits.<sup>48</sup> Sex work is considered an economic activity, and therefore subject to taxes and contributions.<sup>49</sup> In 2021, the Federal Supreme Court determined that prostitution is no longer an immoral activity, and therefore private sexual agreements are also protected by civil laws.<sup>50</sup>

Specific aspects of prostitution are regulated by the different cantons, and within their framework, municipalities can also determine their own rules.<sup>51</sup> For example in the Canton Zürich, the city of Zürich has its norms related to sex work licenses or permits to operate a brothel, and zone regulations.<sup>52</sup>

Within the group of legalization, there are countries where prostitution is not illegal but also not regulated. In Spain, the Criminal Code punishes procuring, forced prostitution, and child prostitution, but not voluntary prostitution.<sup>53</sup> In addition, there is no mention of sex workers’ activity at the national level, which allows municipalities to control it with ordinances.<sup>54</sup> A large number of municipalities have shown a prevalence of total abolitionist policies, in the name of public space, including administrative sanctions for sex workers and clients.<sup>55</sup>

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<sup>46</sup> *ibid* 67.

<sup>47</sup> *ibid* 72.

<sup>48</sup> Frauen Zentrale Zürich, ‘Prostitution in Der Schweiz, Whitepaper’ 10 <<https://frauenzentrale-zh.ch/prostitution-in-der-schweiz-das-whitepaper-der-frauenzentrale-zuerich/>> accessed 27 September 2023.

<sup>49</sup> Humanrights.ch, ‘Sexarbeit: Bundesgericht anerkennt Gültigkeit von Prostitutionsverträgen’ <<https://www.humanrights.ch/de/ipf/menschenrechte/zugang-zum-recht/sexarbeit-prostitutionsvertraege?search=1>> accessed 9 October 2023.

<sup>50</sup> Anna Camozzi, ‘Prostitution in der Schweiz: Kritisch-feministische Würdigung der Rechtslage nach Catharine A. MacKinnon - Das Schwedische Modell als Alternative?’ (2022) *Cognitio* 4 <<https://doi.org/10.5281/zenodo.6899676>> accessed 20 September 2023.

<sup>51</sup> Frauen Zentrale Zürich (n 48) 11.

<sup>52</sup> *ibid*.

<sup>53</sup> Saray Capa Santamaría, ‘La prostitución en España y su limbo normativo: ¿Estado proxeneta o abolicionismo utópico?’ (2023) 25 *Dos mil tres mil* 1, 16.

<sup>54</sup> Elena Boza Moreno, ‘La prostitución en España: el limbo de la alegalidad’ (2019) 39 *Estudios Penales y Criminológicos* 217, 226.

<sup>55</sup> *ibid* 227–228.

Failure to regulate prostitution at the state level means regulation is left to politicize administrative norms. Management at the municipal level leaves sex workers without legal protection and state intervention.<sup>56</sup>

Among the group of criminalization models, some legal systems punish the entire activity of selling sex services. These systems are called “systems of total criminalization” because they punish sex workers.<sup>57</sup> Between them, Croatia considers helping, enabling, or facilitating a location, and “falling into” prostitution as misdemeanours against public order and peace.<sup>58</sup> Despite some interpretations which suggest that “falling into” prostitution must be understood as a recurrent activity,<sup>59</sup> the case law shows that just arranging sex services for the first time could suffice the requirements.<sup>60</sup>

In addition, all activities related to prostitution committed by third parties, clients of children, and clients of victims of trafficking or forced prostitution, knowing or should knowing these conditions, are criminalized.<sup>61</sup> It is imperative to emphasize that those are the only circumstances where clients are penalized.<sup>62</sup> This differs from Lithuania, another example of the “total criminalization system”, where sex workers, third parties, and clients are under any circumstance punished.<sup>63</sup>

Finally, some systems criminalize the purchase of sex services, regardless of the prostitute’s consent or coercion. Consequently, they are called a “partial criminalization system” because they view prostitutes as victims of gender violence. In 1999, Sweden was the first country in the world to apply this type of regulation.<sup>64</sup> This included the criminalization of the purchase of sexual services at any place and the assistance of “victims” by municipalities.<sup>65</sup> The

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<sup>56</sup> *ibid* 290.

<sup>57</sup> European Parliament, Directorate-General for Internal Policies of the Union, Di Nicola A., ‘The Differing EU Member States’ Regulations on Prostitution and Their Cross-Border Implications on Women’s Right, European Parliament’ (2021) PE 695.394 7 <<https://data.europa.eu/doi/10.2861/467006>> accessed 12 September 2023.

<sup>58</sup> Ivana Radačić and Mojca Pajnik (eds), *Prostitution in Croatia and Slovenia: Sex Workers’ Experiences* (Institute of Social Sciences Ivo Pilar 2017) 27.

<sup>59</sup> *ibid* 28.

<sup>60</sup> *ibid* 32.

<sup>61</sup> Jahnsen and Wagenaar (n 44) 218–219.

<sup>62</sup> European Parliament, Directorate-General for Internal Policies of the Union, Di Nicola A. (n 57) 14.

<sup>63</sup> *ibid* 19.

<sup>64</sup> *ibid* 22.

<sup>65</sup> Gunilla Ekberg, ‘The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings’ (2004) 10 *Violence Against Women* 1187, 1192.

Criminal Code establishes a penalty for buying sex services or intending to buy them, ranging from a fine to one-year imprisonment.<sup>66</sup> Interestingly here, prostitution income is not exempt from taxation, contradicting the position of not considering prostitution as work.<sup>67</sup>

The Swedish prostitution model has influenced other legal systems, which have also adopted partial criminalization in recent years.<sup>68</sup> One of them is France, which in 2016 criminalized the purchase of sex services with fine penalties and mandatory attendance at “sensitization training”.<sup>69</sup>

French law also implemented an “exit program” for sex workers willing to leave prostitution. This program intends to provide social and financial support to achieve this objective.<sup>70</sup> However, the implementation of this program has not been as successful as expected. This is due to the large amount of conditions and documentation required for the application. In addition, there is insufficient financial support, and a impractically short visa extension for migrant sex workers, among other reasons.<sup>71</sup> As in the Swedish case, sex workers have to pay taxes on their income, even though sex work is not considered legitimate and therefore is not subject to labour protection.<sup>72</sup>

## **B. Legal framework at the regional level**

At the regional level, the EU has actively addressed the prostitution discussion, influencing legal developments and policies across its member states.<sup>73</sup> Therefore, it becomes necessary to understand the interactions between the CoE and the EU when it comes to human rights issues.

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<sup>66</sup> Jahnsen and Wagenaar (n 44) 171.

<sup>67</sup> *ibid* 177.

<sup>68</sup> European Parliament, Directorate-General for Internal Policies of the Union, Di Nicola A. (n 57) 22.

<sup>69</sup> Jahnsen and Wagenaar (n 44) 95.

<sup>70</sup> Calogero Giametta and Hélène Le Bail, “The National and Moral Borders of the 2016 French Law on Sex Work: An Analysis of the “Prostitution Exit Programme” (2023) 43 *Critical Social Policy* 214, 218.

<sup>71</sup> *ibid* 219.

<sup>72</sup> Jahnsen and Wagenaar (n 44) 94.

<sup>73</sup> Rubio Grundell (n 9) 426.

Since the Treaty of Lisbon,<sup>74</sup> the EUCFR has a binding legal status for the European Union.<sup>75</sup> Article 52 §3 and Article 53 of the Charter<sup>76</sup> state that the rights contained in it must be interpreted in accordance and respect of the ECHR and the ECtHR case law.<sup>77</sup> One thing to note here is that the EU has a pending accession to the ECHR, therefore the ECtHR has no control over actions concerning the EU, but only its member states, because of their status as state parties to the convention.<sup>78</sup> Taking that into consideration, human rights protection by these two institutions can be construed differently.<sup>79</sup>

Regarding non-judicial dynamics, the EU has a significant role in setting standards in human rights issues and protecting human rights through its legal instruments and political mechanisms. These instruments not only apply to their member states but also impact on an international level.<sup>80</sup>

On 14 September 2023, the EP adopted a non-binding resolution, called “Regulation of prostitution in the EU: its cross-border implication and impact on gender equality and women’s rights”,<sup>81</sup> which was the result of the process initiated by the FEMM Committee (European Parliament’s Committee on Women’s Rights and Gender Equality). This resolution reflects the EP neo-abolitionist tradition that started with the “Resolution on the need to establish a European Union-wide campaign for zero tolerance of violence against women”,<sup>82</sup> and its adjoining report, in 1997, where prostitution was defined for the first time as a form of violence against women.<sup>83</sup>

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<sup>74</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, entered into force 1 December 2009 (2007/C 306/01).

<sup>75</sup> Emmanuelle Bribosia and Isabelle Rorive (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation* (Intersentia 2018) 227.

<sup>76</sup> Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000. (2010/C 83/02) art 52 para 3, art 53.

<sup>77</sup> Bernd Kannowski and Kerstin Steiner (eds), *Regional Human Rights: International and Regional Human Rights: Friends or Foe?* (Nomos Verlagsgesellschaft mbH & Co KG 2021) 186.

<sup>78</sup> *ibid* 192–193.

<sup>79</sup> *ibid* 191.

<sup>80</sup> Bribosia and Rorive (n 75) 235–237.

<sup>81</sup> European Parliament resolution of 14 September 2023 on the regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women’s rights. (2022/2139(INI)).

<sup>82</sup> European Parliament resolution on the need to establish a European Union wide campaign for zero tolerance of violence against women. 1997 (OJ C 304, 6101997, p 55).

<sup>83</sup> Rubio Grundell (n 9) 430.

This approach was developed despite Case C-268/99 at the ECJ “*Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*” in 2001, where the court acknowledged prostitution under the self-employment categorization.<sup>84</sup>

In 2014, the EP adopted the “Resolution on sexual exploitation and sex work and its impact on gender equality”, where the neo-abolitionist narrative at the FEMM Committee advanced the point of silencing sex workers’ voices, portraying them as highly traumatized women that are unable to understand what is best for them,<sup>85</sup> excluding sex workers’ arguments from the political discussion.

The recently approved resolution, which has as a main objective to “reduce demand and protect people in prostitution”<sup>86</sup> even though it does not include a “call for an EU-wide approach based on the Nordic/Equity model”, still adopts a neo-abolitionist posture.<sup>87</sup> It points out that countries where prostitution is legalized, are connected with increased human trafficking,<sup>88</sup> due to the societal normalization of prostitution.<sup>89</sup> It is also mentioned that the legal environment in legalized models allows traffickers to conceal their illegal activities.<sup>90</sup> It also calls on member states to criminalize the soliciting, accepting, or obtaining a sexual act from a person in exchange for remuneration or benefit.<sup>91</sup> This follows the neo-abolitionist argumentation to criminalize sexual services purchases.

Despite the negative impacts that the criminalization of clients has on sex workers’ rights, the EP resolution insists on taking a “human rights-based approach”,<sup>92</sup> which seems to differ completely from the interpretation of human rights at the international level.

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<sup>84</sup> *ibid* 430–431.

<sup>85</sup> FitzGerald and Freedman (n 21) 106.

<sup>86</sup> European Parliament, Press room, ‘Reduce Demand and Protect People in Prostitution, Say MEPs | News’ (14 September 2023) <<https://www.europarl.europa.eu/news/en/press-room/20230911IPRO4923/reduce-demand-and-protect-people-in-prostitution-say-meps>> accessed 13 October 2023.

<sup>87</sup> Human Rights Watch, ‘EU: Harmful “Prostitution” Resolution Passes’ (18 September 2023) <<https://www.hrw.org/news/2023/09/18/eu-harmful-prostitution-resolution-passes>> accessed 9 October 2023.

<sup>88</sup> EP Regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women’s rights. (n 81) para AG.

<sup>89</sup> *ibid* 13.

<sup>90</sup> *ibid* 21.

<sup>91</sup> *ibid* 41.

<sup>92</sup> *ibid* J.

It is important to note that prostitution is viewed as a form of violence against women. This aims to create an interrelation with the Istanbul Convention,<sup>93</sup> which, unlike the recently approved resolution, is legally binding. Anyway, there are still some EU members that have not ratified the Istanbul Convention yet.

In the same vein, a proposal for amendments to Directive 2011/36/EU on “Preventing and combating trafficking in human beings and protecting its victims” is being discussed. The proposal was approved by the committees FEMM and LIBE, on 05 October 2023,<sup>94</sup> and is awaiting Parliament’s position. These amendments, especially the one concerning Article 18 a), as the European Sex Workers Rights Alliance says, take a clear approach to criminalizing the purchase of sex services in all scenarios.<sup>95</sup>

### C. Legal framework at the international level

Through the leadership of international human rights bodies and sex worker rights organizations, the legal framework at the international level appears to have a consensus on the protection of sex workers’ rights.<sup>96</sup> This argument could serve as a shield against criminal laws that threaten their fundamental rights and freedoms.

At the UN system, the Special Rapporteur on “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, delivered a report to the Human Rights Council, on 28 April 2010, where it addressed the effects of criminalization systems on the right to health, specifically the detrimental outcomes on access to health services which lead to an impoverished health situation, the stigmatization, the high amounts of violence and police harassment, and the unsafe working conditions.<sup>97</sup> The report

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<sup>93</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, entered into force 1 August 2014 (CETS No 210).

<sup>94</sup> European Parliament, Press room, ‘Human Trafficking: MEPs Want Strong Focus on Victims’ Rights | News’ (5 October 2023) <<https://www.europarl.europa.eu/news/en/press-room/20230929IPR06110/human-trafficking-meps-want-strong-focus-on-victims-rights>> accessed 9 October 2023.

<sup>95</sup> European Sex Workers’ Rights Alliance, ‘Open Letter to Members of the European Parliament Re: Article 18 a) of the Anti-Trafficking Directive (CA 11 and CA 11a Alternative)’ (4 October 2023) <[https://www.eswalliance.org/open\\_letter\\_to\\_meps\\_article\\_18a\\_anti\\_trafficking\\_directive\\_call\\_calla\\_alternative](https://www.eswalliance.org/open_letter_to_meps_article_18a_anti_trafficking_directive_call_calla_alternative)> accessed 9 October 2023.

<sup>96</sup> Mgbako (n 38) 110–111.

<sup>97</sup> UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, 27 April 2010. (A/HRC/14/20) 22, 12–14.

concludes that effective interventions to improve sex workers' health are facilitated by models where clients are not criminalized. This is because in those cases, sex workers are more willing to participate in interventions.<sup>98</sup>

On 30 September 2021, this UN Special Rapporteur made a written submission on the case “M.A. and others v. France”, mentioning that the criminalization of sexual services purchase has shown a negative outcome regarding sex workers' rights,<sup>99</sup> the specific rights will be addressed in the next section.

Regarding the relationship between sex work and trafficking, the Special Rapporteur on “trafficking in persons, especially women, and children”, reports on 17 July 2020, maintaining a clear difference between sex work and trafficking, and pointing out that anti-trafficking policies end up repressing sex workers in many cases and violating their rights.<sup>100</sup>

Also noteworthy, the Report of the Special Rapporteur on “Contemporary forms of slavery, including its causes and consequences”, dated 14 July 2022, points out that systems that do not consider sex work as a job leave out sex workers from social protection. This puts them at higher risk of forced prostitution and sexual exploitation.<sup>101</sup>

In a much more straightforward way, at the UN Human Rights Special Procedures, the Mandate of the Working Group on discrimination against women and girls, issued a position paper this year called “Eliminating discrimination against sex workers and securing their human rights”, addressing the negative outcomes of the client's criminalization model on the human rights of sex

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<sup>98</sup> *ibid* 15.

<sup>99</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. para 4.

<sup>100</sup> UN Human Rights Council, Report of the Special Rapporteur on Trafficking in Persons, Especially in Women and Children, note by the Secretary-General. Maria Grazia Giammarinaro, 17 July 2020. (A/75/169) 18, 13–14.

<sup>101</sup> UN Human Rights Council, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, note by the Secretary-General. Tomoya Obokata, 14 July 2022 (A/77/163) 23, 15.

workers,<sup>102</sup> and considering the full decriminalization of adult voluntary sex work as the better approach to protect sex workers' rights.<sup>103</sup>

A call for the full decriminalization of voluntary adult sex work has been supported by various UN entities, such as UNFPA, WHO, and UNDP.<sup>104</sup> A remarkable statement is found in the "Guidance Note on HIV and Sex Work" from UNAIDS (Joint United Nations Programme on HIV/AIDS), where the fact is stressed, that criminalization systems, including the ones that criminalize the purchase of sex services, create an unsafe environment, where sex workers are more discriminated, exposed to physical and sexual violence, and police harassment.<sup>105</sup>

Missing within the UN system, the CEDAW has surprisingly not been straightforward enough. In some cases it refers to prostitutes as sex workers, addressing the importance of their working conditions,<sup>106</sup> and making a clear call for decriminalizing sex work, in other circumstances it refers to them as "women engaged in prostitution" and avoids analysing the human rights problem under a client criminalization model.<sup>107</sup>

Looking at some of the most widely recognized non-governmental organizations, Amnesty International has taken a clear stand against partial criminalization of prostitution. In its report "The human cost of "crushing" the market: Criminalization of sex work in Norway", it points out that through a system of client criminalization, sex workers' rights are considered less relevant<sup>108</sup> in comparison to the objective of preventing human trafficking by reducing, and eventually eradicating commercial sex, and tackling gender-based violence.<sup>109</sup>

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<sup>102</sup> UN Special Procedures, Mandate of the Working Group on Discrimination against Women and Girls, "Eliminating Discrimination against Sex Workers and Securing Their Human Rights" (2023) 5 <<https://www.ohchr.org/en/special-procedures/wg-women-and-girls/eliminating-discrimination-against-sex-workers-and-securing-their-human-rights>> accessed 8 October 2023.

<sup>103</sup> *ibid* 11.

<sup>104</sup> *ibid* 10.

<sup>105</sup> UNAIDS Guidance Note on HIV and Sex Work (Updated April 2012) (UNAIDS 2008) UNAIDS / 09.09E 4 <[https://www.unaids.org/en/resources/documents/2012/20120402\\_UN-AIDS-guidance-note-HIV-sex-work](https://www.unaids.org/en/resources/documents/2012/20120402_UN-AIDS-guidance-note-HIV-sex-work)> accessed 8 October 2023.

<sup>106</sup> UN Special Procedures, Mandate of the Working Group on Discrimination against Women and Girls, "Eliminating Discrimination against Sex Workers and Securing Their Human Rights" (2023) (n 102) 8.

<sup>107</sup> Mgbako (n 38) 128-129.

<sup>108</sup> Amnesty International, "The Human Cost of "Crushing" the Market, Criminalization of Sex Work in Norway" (2016) EUR 36/4034/2016 12 <<https://www.amnesty.org/en/documents/eur36/4130/2016/en/>> accessed 8 October 2023.

<sup>109</sup> *ibid* 16.



Another example is Human Rights Watch, which in reaction to the EP resolution released on September 14, 2023, refers to the client's criminalization model as highly harmful due to the increasing sexual violence and homicide rates of sex workers, police misconduct, and refusal of care at social services.<sup>110</sup> This statement comes in addition to their previous active engagement in the discussion. They advocate for a complete decriminalization model in opposition to buyer criminalization, based on its devastating consequences.<sup>111</sup> Furthermore, Human Rights Watch points out that voluntary sex work does not inherently lead to gender-based violence, but criminalization models increase violence against sex workers.<sup>112</sup> It also emphasizes that sex work falls into the agency of sex workers. The response to their socioeconomic background must include an improvement of the job environment, economic support, and access to information and social services.<sup>113</sup>

Aside from the inconsistency of the CEDAW's position, it is clear at the international level that human rights tend to be defensively positioned against criminal legal frameworks that pose harmful outcomes. The next section will delve deeper into the specific human rights affected.

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<sup>110</sup> Human Rights Watch (n 87).

<sup>111</sup> Human Rights Watch, 'Why Sex Work Should Be Decriminalized' (7 August 2019) <<https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>> accessed 9 October 2023.

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

## Section III: Navigating sex workers' rights protection

### A. Rights in conflict and their submission to the ECHR

The argument from a human rights perspective allows us to create a shield against criminal law and its harmful effects. This hypothetically could help neutralizing the criminalization of sex services payment.

In communities oppressed by intersectionality factors, such as ethnicity, gender identity, sexual orientation, migration status, and socioeconomic status, partial criminalization of prostitution has higher negative outcomes.<sup>114</sup> For example, migrant sex workers are over-represented<sup>115</sup> and more affected by these legal models.<sup>116</sup> Notwithstanding the above, and given the length of this research, the implications regarding Equality and the Principle of Non-Discrimination within the law, have been excluded from the analysis.

The rights to be presented are based on articles 2, 3, and 8 of the ECHR. These articles have been invoked in the case “*M.A. and Others v. France*”, which will be analysed in the final part of this study.

The first human right to be analysed is the right to life. An international understanding of the right to life contemplates the right to be free of acts or omissions that could cause an unnatural death and the right to live with dignity.<sup>117</sup> The ECHR protects the right to life in its article 2.<sup>118</sup>

Legal systems that criminalize sex work, as a whole or in part, undermine two main areas of the right to life. On the one hand, they increase negative per-

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<sup>114</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) para 18.

<sup>115</sup> *ibid.*

<sup>116</sup> Alexandra Oliveira and others, 'Understanding the Impact of EU Prostitution Policies on Sex Workers: A Mixed Study Systematic Review' (2023) 20 *Sexuality Research and Social Policy* 1448.

<sup>117</sup> Daniel Moeckli and others (eds), *International Human Rights Law* (Fourth Edition, Fourth Edition, Oxford University Press 2022) 180.

<sup>118</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2.

ceptions of sex workers, strengthen stigmatization.<sup>119</sup> On the other hand, those systems have not shown enough protection mechanisms against violence.<sup>120</sup>

Stigma poses a direct threat to the human dignity of sex workers.<sup>121</sup> This occurs due to pre-existing power structures, under which stereotypes, prejudices, and discriminatory actions are inflicted based on the negative characteristics that create these labels, dehumanizing individuals.<sup>122</sup> Sex workers are dehumanized with perceptions such as “the indecent woman lacking self-control” or “the damaged woman lacking agency”,<sup>123</sup> which is one of the main arguments from the neo-abolitionist approach.

There have been examples of stigmatization in Norway, which has a partial criminalization system as well. As a result of the criminalization of clients in 2009,<sup>124</sup> the media began referring to sex workers as “black whores” causing “immorality in the streets”, especially targeting black people and migrants.<sup>125</sup> Sex workers are shouted down in political debates and are being called “dirty whores”.<sup>126</sup> They get excluded from bars and hotels,<sup>127</sup> being perceived as criminals, even though they are not in terms of the law.<sup>128</sup>

Addressing stigmatization allows us to recognize sex workers as human beings, and protect their dignity.<sup>129</sup> Accordingly, sex work provides economic autonomy and bodily autonomy,<sup>130</sup> but additionally, there are structural inequalities that surround the sex industry.<sup>131</sup> In front of that recognition, dignity is protected by labour rights, effective access to health care, effective access to

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<sup>119</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) para 16.

<sup>120</sup> *ibid.*

<sup>121</sup> Stewart Cunningham, *Sex Work and Human Dignity: Law, Politics and Discourse* (Routledge 2020) 139.

<sup>122</sup> *ibid* 159–160.

<sup>123</sup> Amnesty International, ‘The Human Cost of “Crushing” the Market, Criminalization of Sex Work in Norway’ (n 108) 87.

<sup>124</sup> Jahnsen and Wagenaar (n 44) 187.

<sup>125</sup> Amnesty International, ‘The Human Cost of “Crushing” the Market, Criminalization of Sex Work in Norway’ (n 108) 90.

<sup>126</sup> *ibid* 91.

<sup>127</sup> *ibid* 92–94.

<sup>128</sup> *ibid* 91.

<sup>129</sup> Cunningham (n 121) 184.

<sup>130</sup> Scouler (n 34) 111.

<sup>131</sup> Cunningham (n 121) 180–182.

criminal procedure when they are victims of violence,<sup>132</sup> and effective mechanisms against police abuse, among others.<sup>133</sup> Therefore, recognition of sex work as legitimate employment is essential for empowerment.<sup>134</sup>

Stigmatization and the illegal nature of sex work (despite the non-criminalization of sex workers) create an atmosphere where sex workers are more susceptible to violence, which includes severe life-threatening situations perpetrated by clients or by organized criminal groups.<sup>135</sup>

Due to partial criminalization laws, sex workers have less bargaining power, because they have to deal with clients afraid to be caught and lower demand.<sup>136</sup> This situation forces sex workers to accept potentially dangerous clients and sell sex services in less secure environments, where they have limited control over the conditions.<sup>137</sup>

In addition, calling the police during a violent assault poses a significant risk for sex workers. Among these risks are eviction, deportation, increased clients' surveillance by the police, leading to a loss of their income, and exposure of their identity, among others.<sup>138</sup> Consequently, sex workers often choose to handle attacks by themselves, unless there is certainty of immediate life danger.<sup>139</sup>

The second human right to be analysed is the right to be free from torture and ill-treatment. Torture is the deliberate perpetration of severe physical or mental pain or suffering, with the purpose of coercion, intimidation, discrimination, or humiliation, in a situation of abuse of power.<sup>140</sup> This right is protected by the ECHR in its article 3.<sup>141</sup>

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<sup>132</sup> *ibid* 144.

<sup>133</sup> Scoular (n 34) 137.

<sup>134</sup> Helen Hester and Zahra Stardust, 'Sex Work in a Postwork Imaginary: On Abolitionism, Careerism, and Respectability' in Jennifer Cooke (ed), *The New Feminist Literary Studies* (Cambridge University Press 2020) 79.

<sup>135</sup> Amnesty International, 'Sex Workers at Risk. A Research Summary on Human Rights Abuses against Sex Workers.' (2016) POL 40/4061/2016 12 <<https://www.amnesty.org/en/documents/pol40/4061/2016/en/>> accessed 15 October 2023.

<sup>136</sup> Amnesty International, 'The Human Cost of "Crushing" the Market, Criminalization of Sex Work in Norway' (n 108) 66.

<sup>137</sup> *ibid* 63–64.

<sup>138</sup> Amnesty International, 'Sex Workers at Risk.' (n 135) 13.

<sup>139</sup> *ibid*.

<sup>140</sup> Moeckli and others (n 117) 172–175.

<sup>141</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.

Police or other law enforcement authorities exercising state control over sex workers can result in human rights violations under partial criminalization models.<sup>142</sup> For example, in Ireland, which also has a criminalization of clients model, experiences of police abuse have been found. These experiences include physical intimidation during eviction proceedings, or humiliating treatment (laughter and denigrating phrases referring to sex workers' work) in unrelated proceedings.<sup>143</sup>

Interrelations between the prohibition of torture or inhumane or degrading treatment, and the right to liberty and security, covered by article 5 of the ECHR, have also been observed within partial criminalization systems. Such systems threaten these rights due to the arbitrary detentions faced by sex workers.<sup>144</sup> Correlations with the right to health have also been found, which will be discussed individually below.

The third human right to be analysed is the right to privacy. This protects people's autonomy to make their own choices, establish relationships with others, and live the life they want without interference.<sup>145</sup> Article 8 of the ECHR protects the right to privacy.<sup>146</sup>

The respect for the right to privacy is connected to the conception of the intrinsic dignity of human beings, people must be respected on their self-determination and autonomy to make their own decisions.<sup>147</sup> Partial criminalisation models constitute a massive intervention in the private lives of sex workers. By labelling them as victims, these models undermine their agency and autonomy in choosing sex work as a profession. This dignifies them as economically in-

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<sup>142</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) para 20.

<sup>143</sup> Amnesty International, "'We Live within a Violent System' Structural Violence against Sex Workers in Ireland.' (2022) EUR 29/5156/2022 35 <<https://www.amnesty.org/en/documents/eur29/5156/2022/en/>> accessed 22 October 2023.

<sup>144</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) para 19.

<sup>145</sup> Moeckli and others (n 117) 308.

<sup>146</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) para 15.

<sup>147</sup> Cunningham (n 121) 47.

dependent subjects.<sup>148</sup> From an expansive perspective, the right to private life also encompasses the protection of physical and mental well-being. This will be discussed in the following paragraphs.

The fourth human right to be analysed is the right to health, understood as the right to access the highest possible standard of health. This includes the provision of health services, as well as individuals' access conditions.<sup>149</sup> Even though the right to health is not directly protected by the ECHR, it can be constructed under articles 2, which would protect life expectancy and therefore access to health, and articles 3 and 8, which include physical and mental integrity, providing a shield against deprivation of medical treatment, insufficient sanitary conditions,<sup>150</sup> and humiliating treatment during medical examinations and other health-care services.<sup>151</sup>

In the case of criminalisation of sex services purchase, the right to health in its sexual and reproductive dimension is grossly violated. This is done by detrimental to health services and treatment access, higher vulnerability to sexually transmitted infections, and non-application of labour safety regulations that result in unsafe working conditions.<sup>152</sup>

Partial criminalisation systems replicate the precarious and unsafe work environment observed in total criminalisation models. For instance, sex workers have reported refraining from having an ample supply of condoms to avoid providing "evidence" during police inspections.<sup>153</sup>

The reduction in demand on clients' criminalisation models has affected sex workers' bargaining power, as mentioned above. Sex workers have faced difficulties requesting condom use from clients.<sup>154</sup> In the same direction, sex work

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<sup>148</sup> *ibid* 176.

<sup>149</sup> Moeckli and others (n 117) 197.

<sup>150</sup> Maite San Giorgi, *The Human Right to Equal Access to Health Care*, vol 53 (Intersentia 2012) 18.

<sup>151</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013. (A/HRC/22/53) 23, para 75.

<sup>152</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health's Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) paras 21–24.

<sup>153</sup> Shira M Goldenberg and others (eds), *Sex Work, Health, and Human Rights: Global Inequities, Challenges, and Opportunities for Action*, vol 15 (Springer 2022) 130.

<sup>154</sup> Amnesty International, 'The Human Cost of "Crushing" the Market, Criminalization of Sex Work in Norway' (n 108) 51.

is taking place in more unsafe conditions, due to prohibitions on working with others or working indoors. This constrains them to work alone and capturing clients on the streets.<sup>155</sup>

Finally, the fifth right to be analysed is the right to work and work-related rights, especially the freedom to work, as an autonomous choice of occupation.<sup>156</sup> The right to work is also not directly protected by the ECHR. However, work-related rights can be constructed from the right to private life contemplated in article 8, since this right includes the development of their personality and fulfilment.<sup>157</sup> As already mentioned, sex work has a special value for sex workers, because it provides economic autonomy and the possibility to sustain their families.<sup>158</sup> Therefore, systems of partial criminalisation, which do not consider sex work as lawful employment, constitute a violation of the right to work, in terms of the right to privacy.

Within the right to work, the right to freedom of assemble and association protected by article 11 ECHR, is also inflicted by partial criminalisation models. Freedom of association shields against state interventions on individuals' will to form associations for common purposes,<sup>159</sup> in this specific case for labour purposes. Even though sex workers are not considered criminals, their associations should not be considered criminal associations by the law. However, the reality is that systems of partial criminalization include bans on sex workers working together. For example, in Norway, the broad concept of "promotion of prostitution" in criminal law, makes such associations illegal. This is even though there is enough evidence indicating that sex workers increase their safety when working together.<sup>160</sup>

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<sup>155</sup> UNAIDS Guidance Note on HIV and Sex Work (Updated April 2012) (n 105) 4.

<sup>156</sup> Moeckli and others (n 117) 249–251.

<sup>157</sup> Virginia Mantouvalou, 'The Protection of the Right to Work Through the European Convention on Human Rights' (2014) 16 *Cambridge Yearbook of European Legal Studies* 313, 328–329.

<sup>158</sup> Scoular (n 34) 111.

<sup>159</sup> Moeckli and others (n 117) 226–227.

<sup>160</sup> Amnesty International, 'The Human Cost of "Crushing" the Market, Criminalization of Sex Work in Norway' (n 108) 64.

## B. Relevant jurisprudence of the ECtHR

Regarding the characterization of prostitution as inherently exploitative, or considering the possibility of voluntary sex work, the court has not adopted any position. This leaves room for states to determine them. In 2007 in *V.T. v. France*,<sup>161</sup> the court, recognizing that there is a debate on the subject, explicitly stated its intention not to enter into this discussion.<sup>162</sup>

Despite the no engagement in the matter, it is interesting to note that in this particular case, the socio-economic conditions were not considered sufficient to establish prostitution as forced, even though it recognizes that the applicants' debts and her particular circumstances make it difficult for her to leave prostitution.<sup>163</sup> The justification is based on the fact that the administration does not require her to pay her debts with income derived from prostitution. She did not provide sufficient proof that there is no other option to generate income than prostitution, and the administration's possibility to provide payment options.<sup>164</sup> A contrario sensu, the court's threshold for considering socioeconomic conditions as elements of forced prostitution seems a priori quite high.

Following that decision, in 2010 in *Rantsev v. Cyprus and Russia*,<sup>165</sup> the court has been criticized for its decision since the conditions under which the court established the situation of human trafficking do not seem sufficient. The court linked the "artist visas" and that they were granted to persons who eventually worked in prostitution, as a basis to assume that Ms. Rantseva was a victim of trafficking. This disregards the knowledge and decision she eventually had in the matter,<sup>166</sup> knowledge supported by the Ombudsman's report.<sup>167</sup> Notwithstanding the criticism in the assessment of the fact, the court estab-

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<sup>161</sup> M.A. et Autres c. France ECHR (2023) 63664/19; 64450/19; 24387/20; 24391/20; 24393/20 para 26.

<sup>162</sup> Kirsty Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85 *The Modern Law Review* 1044, 1059.

<sup>163</sup> M.A. et Autres c. France ECHR (2023) 63664/19; 64450/19; 24387/20; 24391/20; 24393/20 (n 161) para 33.

<sup>164</sup> *ibid.*

<sup>165</sup> *Rantsev v. Cyprus and Russia* ECHR (2010) 07/01/2010 1 25965/04 para 294.

<sup>166</sup> Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' (2012) 30 *Netherlands Quarterly of Human Rights* 163, 168-169.

<sup>167</sup> *Rantsev v. Cyprus and Russia* ECHR (2010) 07/01/2010 1 25965/04 (n 165) para 85.



lishes, by virtue of the “living instrument” feature of the ECHR, that victims of trafficking in persons are protected by Article 4 of the convention, under the prohibition of servitude and forced labour.<sup>168</sup>

Ten years later, in *S.M. v. Croatia*, the Grand Chamber addressed this issue again, confirming human trafficking inclusion in Article 4 of the ECHR, and determining the concept of forced prostitution. The Grand Chamber recognizes the different positions regarding the “exploitation of prostitution” and its implications on the concept of “prostitution” as inherent exploitative or in some cases consensual.<sup>169</sup> Then, the Grand Chamber explains that forced prostitution constitutes a type of serious exploitation that is aimed at being protected by the Article 4 of the ECHR under the notion of “forced or compulsory labour”,<sup>170</sup> where “force” can involve subtle forms of coercion.<sup>171</sup>

Two issues arise from this analysis: First, the Grand Chamber does not clearly state whether or not “exploitation of prostitution” and its implications for the concept “prostitution”, differ from “forced prostitution” as a type of forced labour. If we consider that the Grand Chamber has used both concepts to differentiate them, there is room to contemplate voluntary prostitution.<sup>172</sup> Second, contemplating forced prostitution within a framework of forced labour implies that prostitution would be defined by the scope of labour rights, which is precisely the pro-sex workers’ stance.<sup>173</sup>

Concerning the specific human rights affected, the analysis position is fundamental. If we adopt a neo-abolitionist position, the argument of human rights, and especially the positive obligations that emerge from them, creates a sword that compels the state to use criminal law,<sup>174</sup> in this case, the criminalization of payment for sexual services. The problem evident from this position is that by criminalizing conduct, the outcome can result in a violation of fundamental freedoms,<sup>175</sup> a circumstance that has been analysed in the first part of this re-

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<sup>168</sup> Stoyanova (n 166) 185–186.

<sup>169</sup> *SM v. Croatia* ECHR (2020) 25/06/2020 1 60561/14 para 298.

<sup>170</sup> *ibid* 300.

<sup>171</sup> *ibid* 301.

<sup>172</sup> Hughes (n 162) 1059.

<sup>173</sup> Carlotta Rigotti, ‘When the Law Meets Feminisms: The Shortcomings of Contemporary Prostitution Policies across the European Union’ (2021) 86 *Women’s Studies International Forum* 1, 8.

<sup>174</sup> Jannemieke W Ouwkerk, ‘Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?’ (2012) 3 *New Journal of European Criminal Law* 228, 238–239.

<sup>175</sup> *ibid*.

search and that supports the pro-sex workers position adopted. Nevertheless, it appears from the court's decisions that the ECtHR avoids engaging in policy analysis, focusing on a case-by-case approach.

Regarding the specific rights in conflict, the right to life can be identified as the positive obligation to protect by operational measures, in the case of "*Osman v. the United Kingdom*",<sup>176</sup> where the court found that the authorities did not take all reasonable measures to avoid the immediate risk to life that they knew or should have known about.<sup>177</sup> Applying this logic, later on, regarding the right to be free of torture and ill-treatment, the case "*O'Keefe v. Ireland*",<sup>178</sup> gives a standard on the knowledge requirement, where the establishment of legislation to tackle specific issues can reasonably imply the states' knowledge of the issues regulated.<sup>179</sup>

In this regard, protective measures may be counterproductive when the individual is not at imminent risk. According to the case "*Fernandes de Oliveira v. Portugal*",<sup>180</sup> states should avoid taking actions that may result in further impairment of the dignity and liberty of that person or others.<sup>181</sup> However, if the risk is immediate but has not materialized, the court has established that there are positive obligations to protect individuals at risk. This is contemplated in the case "*Makuchyan and Minasyan v. Azerbaijan and Hungary*".<sup>182</sup>

The Osman test is lowered when positive obligations imply general protection for society. This is where a potential or present risk is sufficient to trigger the positive obligation to fulfil.<sup>183</sup> This usually happens in cases of domestic violence where structural problems are identified, such as in "*Talpis v. Italy*".<sup>184</sup> Interesting from this case, is that the court extends the positive obligations to

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<sup>176</sup> Vladislava Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 *Leiden Journal of International Law* 601, 605.

<sup>177</sup> *Osman v. the United Kingdom* ECHR (1998) VIII 1 23452/94 para 116.

<sup>178</sup> *O'Keefe v. Ireland* ECHR (2014) 28/01/2014 1 35810/09 para 168.

<sup>179</sup> *Stoyanova* (n 176) 609.

<sup>180</sup> *Fernandes de Oliveira v. Portugal* ECHR (2019) 31/01/2019 78103/14 para 112.

<sup>181</sup> *Stoyanova* (n 176) 615.

<sup>182</sup> *Makuchyan and Minasyan v. Azerbaijan and Hungary* ECHR (2020) 26/05/2020 17247/13; Amnesty International, 'M.A. and Others and France and Amnesty International ECHR, Written Submissions on Behalf of the Intervener.' (2023) EUR 21/7154/2023 para 31 <<https://www.amnesty.org/en/documents/eur21/7154/2023/en/>> accessed 2 November 2023.

<sup>183</sup> *Stoyanova* (n 176) 612.

<sup>184</sup> *Talpis v. Italy* ECHR (2017) 02/03/2017 41237/14.

protect individuals from torture or degrading treatment committed by private individuals, and not only state actors.<sup>185</sup>

However, following the case “*Fernandes de Oliveira v. Portugal*”,<sup>186</sup> the threshold of proof is higher than individual measures, since it must be demonstrated that the violation in the specific case results from a causal connection with the systemic problem.<sup>187</sup>

Regarding the protection of the right to respect for privacy life, the case law shows protection within sexual life. The standard is settled by the well-known case “*Dudgeon v. the United Kingdom*”, where the court emphasised that legislation that prohibits sexual activity between consenting males constitutes an interference in the personal sphere of individuals protected by Article 8 of the ECHR.<sup>188</sup> However, not all criminalisation of consensual sexual activity is protected.<sup>189</sup> For example, in “*Stübing v. Germany*” regarding incest, the court found that despite the interference with private life, the imposition of criminal liability was rooted in the risk that this act poses to family dynamics, public health, and self-determination.<sup>190</sup> In the same line, in “*Laskey, Jaggard and Brown v. the United Kingdom*”, the court found no violation of Article 8 for the criminalisation of sadomasochistic practices, since it was a state matter of concern to regulate through criminal law activities that involve a significant amount of actual or potential harm.<sup>191</sup>

Regarding the protection of the right to health, the Grand Chamber in “*Vavříčka and Others v. the Czech Republic*” recognized the positive obligation of states to take appropriate measures to protect the health of individuals within their jurisdiction.<sup>192</sup> However, the approach to positive obligations in the right to health maintains a fairly broad threshold, for example in “*Cyprus v. Turkey*”<sup>193</sup> the Grand Chamber did not find a violation of the right to life, because while recognizing interference in access to health care by the Greek-

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<sup>185</sup> Amnesty International, ‘M.A. and Others and France and Amnesty International ECHR, Written Submissions on Behalf of the Intervener.’ (n 182) para 32.

<sup>186</sup> *Fernandes de Oliveira v. Portugal* ECHR (2019) 31/01/2019 78103/14 (n 180) para 107.

<sup>187</sup> *Stoyanova* (n 176) 615.

<sup>188</sup> *Dudgeon v. The United Kingdom* ECHR (1981) A45 1 7525/76 para 41.

<sup>189</sup> ECHR, ‘Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence. Prepared by the Registry.’ (2022) 47.

<sup>190</sup> *Stübing v. Germany* ECHR (2012) 12/04/2012 43547/08.

<sup>191</sup> *Laskey, Jaggard and Brown v. the United Kingdom* ECHR (1997) 21627/93; 21628/93; 21974/93.

<sup>192</sup> *Vavříčka and Others v. the Czech Republic* ECHR (2021) 08/04/2021 47621/13; 3867/14; 73094/14; 19298/15; 19306/15; 43883/15 para 282.

<sup>193</sup> *Cyprus v. Turkey* ECHR (2014) 12/05/2014 25781/94 paras 219–221.

Cypriot and Maronite population as compared to the general population, there was no evidence of a deliberate impediment on the part of the Turkish government.<sup>194</sup>

As for the right to work, “*Niemietz v. Germany*”<sup>195</sup> recognizes the importance of professional and business relations and considers them protected under Article 8 of the ECHR, as they encompass a fundamental element of private life and self-realisation.<sup>196</sup> In the same vein, “*Sidabras and Dziautas v. Lithuania*”<sup>197</sup> the court recognizes that difficulties generating income create such repercussions that constitute an interference with the enjoyment of private life.<sup>198</sup>

### **C. A possible consequence under the ECHR legal framework**

The case *M.A. and others v. France* was initiated on 06 December 2019, with 261 sex workers who submitted an application to the ECtHR after exhausting national procedures. They wanted to declare articles 225 12-1 and 611-1 of the French Criminal Code unconstitutional. These articles refer to the criminalisation of sexual relations purchases, which was adopted on 13 April 2016.<sup>199</sup>

At the final national stage, the French Constitutional Council considers the articles of the Criminal Code mentioned as not being unconstitutional, alleging that the right to respect private life is not excessively affected, taking into consideration the general interest of tackling procuring and human trafficking.<sup>200</sup> On August 31, 2023, the court declared the application admissible and now is awaiting a ruling on the merits.

Articles 2 and 3 of the ECHR are invoked by the applicants to argue that the criminalisation of purchase forces them to work alone and hidden from the public eye, impairing their mental and physical integrity and putting their lives at risk. In respect to art 8 of the ECHR, the applicants allege that their freedom to make their own decisions, in the sphere of personal autonomy and sexual

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<sup>194</sup> San Giorgi (n 150) 104.

<sup>195</sup> *Niemietz v. Germany* ECHR (1992) 16/12/1992 13710/88 para 29.

<sup>196</sup> *Mantouvalou* (n 157) 328.

<sup>197</sup> *Sidabras and Dziautas v. Lithuania* ECHR (2015) 23/06/2015 50421/08; 56213/08 para 48.

<sup>198</sup> *Mantouvalou* (n 157) 323.

<sup>199</sup> ECHR Press Release Issued by the Registrar of the Court: Court Declares Admissible Applications from Individuals Lawfully Engaged in Prostitution and Claiming to Be Victims of Law Criminalising Purchase of Prostitution Services (2023) ECHR 238.

<sup>200</sup> *ibid.*

freedom is affected, because the sexual services that they provide occur in private places and between consenting adults.<sup>201</sup>

Following the initial explanation of this research, regarding the different doctrinal feminist positions on prostitution conceptualization, it is relevant to consider the position to be eventually adopted by the ECtHR. This is of the utmost importance, given that both doctrinal positions adopt a human rights-based rationale, creating a sword by recourse to criminal law in the case of the neo-abolitionist approach, or creating a shield that protects from criminal law in the pro-sex workers approach.

As already explained in the second section of this research, France took a neo-abolitionist approach at the time to introduce the ban on sexual services purchases, intending to “rescue” women involved in prostitution. The French government argues that the law has been adopted because most prostitutes are victims of human trafficking and/or other forms of coercion.<sup>202</sup> Contrario sensu, voluntary prostitution is recognized. It has, however, been challenged the legitimate aim raised by the government, since it is contested that most prostitutes are victims of trafficking or are in situations of extreme vulnerability. The applicants even refer to a study that indicates that trafficking victims in France account for about 7% of sex workers. This is a number that is similar to other neighbouring countries.<sup>203</sup>

Faced with this scenario, one of the first things that the court will have to take into account is the conditions under which prostitution is considered to be forced. If the court adopts a pro-sex workers approach, the human rights shielding effect becomes more plausible since the number of sex workers who would be considered voluntarily involved in prostitution is enlarged. Therefore, the French law does not seek to protect them but indirectly affects their rights.<sup>204</sup>

Another significant implication is that the neo-abolitionist approach considers violence as an inherent aspect of sex work,<sup>205</sup> making it difficult to identify the

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<sup>201</sup> *ibid.*

<sup>202</sup> M.A. et Autres c. France ECHR (2023) 63664/19; 64450/19; 24387/20; 24391/20; 24393/20 (n 161) para 24.

<sup>203</sup> *ibid* 28.

<sup>204</sup> Elisabeth Greif, ‘Sex Workers in Strassburg: How the ECHR Begins Assessing the French Sex Purchase Ban’ (2023) *Verfassungsblog* <<https://verfassungsblog.de/sex-workers-in-strassburg/>> accessed 15 October 2023.

<sup>205</sup> UN Special Procedures, The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’s Written Submissions, in the Matter between M.A. and Others and France. Ms. Tlaleng Mofokeng, 30 September 2021. (n 99) para 30.

harmful effects created by the law. The effects on physical and mental integrity alleged by the applicants, and the increased risk of falling into exploitative situations occur after the implementation of the law. This is not necessarily part of sex work.

Although it may be favourable for the protection of sex worker's rights for the ECtHR to adopt a position, the reality is that there is currently no consensus at the European level on this issue. This is why the principle of subsidiarity plays a fundamental role because the court is not in charge of promoting social change. On the contrary, it needs to consider some legislative discretion of the member states and respect that different human rights solutions can be equally legitimate.<sup>206</sup>

Turning to the specific rights in conflict, the applicants presented sixteen testimonies of sex workers to illustrate the alleged violations as a result of the legal implementation. Some of the facts presented in this case that would be subsumed under the right to life and the prohibition of torture and degrading treatment are the radical drop in demand that forces sex workers to accept clients that they would not accept before putting themselves at greater risk, being victims of beatings, strangulation, rape, robbery, and harassment from gang groups.<sup>207</sup>

Furthermore, the decline in demand makes it more difficult to impose condom use or refuse drugs during sexual encounters ("chemsex"), posing a direct threat to their health.<sup>208</sup>

For their clients not to be caught by the police, they have also been forced to provide sexual services in places they would not have previously agreed on. Working as a "mobile" sex worker has an impact on their medical care because traveling often implies losing medical appointments and interrupting health treatments.<sup>209</sup>

Their mental health has also deteriorated due to the traumatic events that have been victims since the implementation of the law. Stigmatization also affects their mental health, including feelings of valuelessness and suicidal thoughts. Stigmatizing them also extends to society's perception of them as

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<sup>206</sup> Tilmann Altwicker, 'Non-Universal Arguments under the European Convention on Human Rights' (2020) 31 *European Journal of International Law* 101, 122.

<sup>207</sup> M.A. et Autres c. France ECHR (2023) 63664/19; 64450/19; 24387/20; 24391/20; 24393/20 (n 161) para 6.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

victims in a state of incapacity.<sup>210</sup> Some of them have also reported starting to be dependent from third parties to avoid the risks that the implementation of the law has created.<sup>211</sup>

At this point, a clear violation of Articles 2 and 3 of the Convention can be identified. As assessed by the court's jurisprudence, states have a positive obligation to protect individuals under their jurisdiction. In this case, the legal system creates a structural problem that puts sex workers at increased risk. This has serious consequences evidenced by the testimonies and expert reports. The establishment of a new legal framework presupposes that the state took all the necessary steps to assess the risks. Therefore their knowledge of the harmful effects is difficult to deny. Against this backdrop, the court should consider that the state has failed to adopt the necessary measures to protect sex workers in adopting a legal framework. This has resulted in the affection of dignity and freedom of others.

The impact on the right to be respected in their private life can be submitted in the feeling of the applicants that the law is putting them in such a precarious situation, to force them to work on something else, instructing them about which sexual conduct they are allowed to have, and controlling their bodies. They also report a feeling of losing autonomy and being stripped of the value of being family providers.<sup>212</sup>

The infringement of Article 8 of the Convention implies the failure to comply with the negative obligation of protecting the individual from arbitrary interference in their private and family life. Contrary to the narrow margin of appreciation for the right to life and the right to the prohibition of torture, the states enjoy a broader margin of appreciation in the context of Article 8,<sup>213</sup> especially when there is a need for balance between private and public interests, or when sensitive moral or ethical issues arise.<sup>214</sup>

The court will have to analyse the political and social context. It will determine whether France, in this context, has overstepped its margin of appreciation with a legal measure that has a harmful impact in the specific case.<sup>215</sup> Invoking

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<sup>210</sup> *ibid.*

<sup>211</sup> *ibid.*

<sup>212</sup> *ibid.*

<sup>213</sup> Altwicker (n 206) 118.

<sup>214</sup> ECHR (n 189) 8.

<sup>215</sup> Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' (2017) 15 *International Journal of Constitutional Law* 393, 406.

the margin of appreciation may imply that France is in a better position to protect the public interest, potentially jeopardizing the shielding effect.

An analysis is required to determine whether the legitimate aim and necessity in a democratic society are met. Coming back to the initial explanation of this subsection, France's argument about the number of prostitutes affected by coercive circumstances appears not to be based on objective reasonable grounds. Along the same lines, there is no evidence that criminalizing purchases reduces human trafficking. On the contrary, it has been found that decriminalization systems, are more effective at combating trafficking.<sup>216</sup>

If the ECtHR decides to follow the position of various international organizations and NGOs that promote human rights, we may see for the first time an engagement of the court in the definition of prostitution. Landmark cases such as "*Dudgeon v. the United Kingdom*" have allowed for a paradigm shift using human rights shielding against the criminalization of conduct. It is precisely this that pro-sex workers hope to see in "*M.A. and others v. France*". However, international human rights standards can be considered for interpretation, but cannot always be applied within the European context. European human rights standards appear to be quite low in this comparison. In front of the lack of consensus between member states, the principle of subsidiarity plays a major role.

In addition, the clear stance of the European Parliament shows the direction the debate is taking. This may lead to the court's decision not to address the issue of conceptualizing prostitution. In that case, a fair balance must be found by the court, emphasizing the need for mitigating actions to be taken by the state to deal with the effects of the law.

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<sup>216</sup> Amnesty International, 'M.A. and Others and France and Amnesty International ECHR, Written Submissions on Behalf of the Intervener.' (n 182) para 20.



## Conclusion

This research explored the complex relationship between human rights and prostitution. Different feminist perspectives on prostitution have influenced legal changes. Neo-abolitionists, on the one hand, advocate a more radical approach to human rights protection. The pro-sex worker approach, on the other hand, responds to these initiatives by highlighting the harmful consequences of criminalizing the purchase of sex services.

International organizations and NGOs have been emphatic in pointing out that the criminalization of the payment of sexual services violates the human rights of sex workers. This is because it replicates the harmful effect of total criminalization systems to a certain extent. However, the European legal debate, and especially the position of the EP, is leaning towards this kind of criminalization system. According to the current debate, many countries in Europe have adopted the system of criminalization of clients.

Within this context, the ECHR legal framework, and specifically the right to life, the prohibition of degrading treatment, and the right to respect for private life, can provide a shield to protect sex workers' rights. However, the lack of consensus among the member states makes the principle of subsidiarity and the margin of appreciation play a major role.

The ECtHR will soon have the opportunity to address this critical issue in the case "*M.A. and others v. France*". The violation of the rights in question is under review. If the court decides to align with the prevailing international legal trend, we could witness a landmark case where the court exercises a human rights shield. Yet, it cannot be ignored that the court rules only under the ECHR legal umbrella, and due to political and social context, the high international human rights standards seem difficult to apply. Whether the court is prepared to take this step, as seen in previous historical cases, seems unlikely due to the lack of consensus.

In this scenario, it is more likely that the court will focus on the specific human rights violations in the case. However, the court will respect the state's ability to create its national policies. Therefore, a shield for the "criminalisation of payment for sex services" as such, is unlikely to be constructed under the ECHR legal framework. Subsequently, the response in the European context to protect sex workers' rights remains uncertain.

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## Next Generation

Changes in the regulation of sex work have been observed over the last two decades. The trend towards the partial criminalization of sex work, targeting clients, has gained significant support at the European level under the arguments of gender violence and human trafficking. However, this regulatory approach has not adequately addressed the negative consequences for sex workers themselves. In order to determine whether the European Convention on Human Rights provides protection for sex workers in this context, this paper examines the contrasting feminist perspectives influencing the debate, the legal framework at the national, regional, and international levels, and case law. The case pending in Strasbourg, “M.A. and Others v. France” is analysed in the light of the potential protection of the right to life, the prohibition of degrading treatment, and the right to respect for private life.

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