

# Sex Work Between Paternalism and Autonomy

## A Critical Analysis of the ECtHR Judgment in “M.A. and Others v. France”

According to the Nordic Model, criminalising sex workers’ clients is intended to combat human trafficking and promote gender equality. While well-intentioned, this approach often overlooks sex workers’ rights. In an ECtHR decision, the Court deferred to national discretion, upholding this legal framework at the expense of sex workers’ autonomy and exposing them to health and safety risks. This paper examines the Court’s decision to sidestep the debate on prostitution, highlighting the limitations of human rights protection in highly politicised contexts.

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Citation:  
CRISTINA CAYO ASCENCIO, Sex Work Between Paternalism and Autonomy, sui generis 2025, p. 43

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DOI: <https://doi.org/10.21257/sg.275>

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## I. Introduction

- 1 In light of the European Court of Human Rights (ECtHR) decision in *M.A. and Others v. France*,<sup>1</sup> this paper critically examines the ruling and explores its potential implications for sex workers' rights under legal frameworks that partially criminalise prostitution.
- 2 In the context of a broader European debate on the nature of prostitution, section II, entitled "*Context and legal framework*", examines the two contrasting feminist perspectives that are currently at the centre of the debate. These are the "neo-abolitionist" approach, which regards prostitution as an inherently coercive practice, and the "pro-sex worker" approach, which emphasises sex workers' agency. This section further reviews the claims presented at the national level and the ECtHR's ruling, examining key human rights at stake, including the right to life, freedom from degrading treatment, and the right to privacy.
- 3 Section III, "*Critical analysis from a sex workers' rights perspective*", evaluates the ECtHR's decision to avoid engaging in the debate on the nature of prostitution and assesses its stance on the legitimacy of the French government's aims. Moreover, this section evaluates the Court's implementation of a broad margin of appreciation and the rationale behind the proportionality of the intervention assessment.
- 4 Finally, section IV, "*Implications*", addresses the broader impact of the ruling on three levels: the effect on individual sex workers' rights, the role of the ECtHR as a protective human rights framework, and the political dynamics that influence the ECtHR's decisions. This case is of particular significance as it illustrates the constraints imposed upon the Court by the principle of subsidiarity and the imperative for a broader margin of appreciation. However, this scenario carries the risk of enabling public policies that may have an adverse impact on individual rights. In this instance, the Court's decision not only fails to recognise the autonomy of sex workers, but it also has the potential to expose them to threats to their physical and mental well-being.

## II. Context and legal framework

### 1. Concepts and feminist perspectives

- 5 For this research, "prostitution" is understood as the act of selling sexual services, including intercourse and other activities involving sexual physical contact, but excluding

pornography, online sex services, and stripping. This research focuses on the debate surrounding adult prostitution, leaving aside the issue of child prostitution.

The term "prostitute" can be interpreted in various ways. Currently, two opposing feminist perspectives influence the debate, which this research identifies as the "neo-abolitionist approach" and the "pro-sex workers' approach".<sup>2</sup> The neo-abolitionist perspective views prostitution as the result of constrained choices, referring to those involved as "prostituted women" to emphasise the structural forces acting upon them.<sup>3</sup> In contrast, the pro-sex workers' perspective adopts the term "sex worker" as part of a feminist strategy to make feminised labour visible, which ultimately affirms their power to define the terms under which they work, including the right to reject sex work altogether.<sup>4</sup> Since this research adopts a pro-sex workers' perspective, the terms "prostitute" and "sex worker" will be used indistinctly.

The neo-abolitionist feminist perspective views prostitutes as victims of violence against women,<sup>5</sup> based on the argument that prostitution reduces women to "just" bodies, disregarding their humanity.<sup>6</sup> From this approach, prostitution is seen as a form of gender oppression, with men exploiting women's bodies, reinforcing the notion that it is inherently a gender issue.<sup>7</sup>

Supporters of this perspective argue that sexual abuse, child prostitution, pressing financial situations,<sup>8</sup> and an ongoing problem of violence – reflected by the high rates of rape and physical assault during sexual activities –<sup>9</sup> create conditions where women lack control, making real consent impossible.<sup>10</sup> As a result, prostitution is regarded as inherently coercive and exploitative.<sup>11</sup> Using the definition of "trafficking in persons" from the Palermo Protocol,

2 LUCRECIA RUBIO GRUNDELL, *The EU's Approach to Prostitution: Explaining the "Why" and "How" of the EP's Neo-Abolitionist Turn*, *European Journal of Women's Studies* 2021, p. 427.

3 CATHARINE A. MACKINNON, *Trafficking, Prostitution, and Inequality*, *Harvard Civil Rights-Civil Liberties Law Review* 2011, p. 273 f.

4 JUNO MAC / MOLLY SMITH, *Putas insolentes. La lucha por los derechos de las trabajadoras sexuales*, London 2018, p. 102.

5 DORIS BUSS / RUTH FLETCHER / DANIEL MONK / SURYA MONRO / OLIVER PHILLIPS, *Introduction to Sexual Movements and Gendered Boundaries: Legal Negotiations of the Global and the Local*, *Social & Legal Studies* 2005, p. 12.

6 SHEILA JEFFREYS, *Prostitution, Trafficking and Feminism: An Update on the Debate*, *Women's Studies International Forum* 2009, p. 318.

7 JEFFREYS (n. 6), p. 316 f.

8 CATHARINE A. MACKINNON, *Prostitution and Civil Rights*, *Michigan Journal of Gender & Law* 1993, p. 28.

9 MACKINNON (n. 8), p. 27.

10 MACKINNON (n. 3), p. 286.

11 MARCUS A. SIBLEY, *Attachments to Victimhood: Anti-Trafficking Narratives and the Criminalization of the Sex Trade*, *Social & Legal Studies* 2020, p. 705.

1 Judgement of the ECtHR 63664/19; 64450/19; 24387/20; 24391/20; 24393/20 of 25 July 2024 (*M.A. and Others v. France*).

the element of “abuse of power or a position of vulnerability” is seen as inherently present in prostitution.<sup>12</sup> Neo-abolitionists also argue that countries that legalise prostitution show higher rates of human trafficking compared to those with criminalisation systems.<sup>13</sup>

- 9 To address gender inequality and human trafficking, the neo-abolitionist approach advocates for the partial criminalisation of prostitution. This targets clients by criminalising the payment of sex services<sup>14</sup> while viewing prostitutes as victims. This model was first implemented in Sweden in 1999 and is often referred to as the “Swedish model” or “Nordic Model”.<sup>15</sup>
- 10 In contrast, the pro-sex workers’ feminist perspective challenges the idea that prostitution is inherently exploitative and questions the claim that sex workers cannot give valid consent to their work. They argue that this viewpoint infantilises sex workers<sup>16</sup> and perpetuates their stigmatisation.<sup>17</sup>
- 11 This perspective emphasises sex workers’ agency, autonomy, and right to self-determination, making a clear distinction between “forced” and “voluntary” prostitution.<sup>18</sup> While it acknowledges the difficult socio-economic conditions that may lead individuals into sex work, it views these as systemic issues.<sup>19</sup> From this approach, sex work can be seen as an option to improve these conditions, rather than inherently exploitative.<sup>20</sup>
- 12 Although the pro-sex workers’ perspective recognises the sexist perceptions surrounding sex work, they argue that, as with other professions traditionally seen as “women’s work”, what is needed is labour rights to protect sex workers from unsafe working conditions.<sup>21</sup>

12 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.

13 MACKINNON (n. 3), p. 304.

14 RUBIO GRUNDELL (n. 2), p. 427.

15 Amnesty International, *Sex Workers at Risk. A Research Summary on Human Rights Abuses against Sex Workers*, London 2016, p. 20.

16 SHARRON FITZGERALD / KATHRYN MCGARRY, *Problematizing Prostitution in Law and Policy in the Republic of Ireland: A Case for Reframing*, *Social & Legal Studies* 2016, p. 302.

17 JAY LEVY / PYE JAKOBSSON, *Abolitionist Feminism as Patriarchal Control: Swedish Understandings of Prostitution and Trafficking*, *Dialectical Anthropology* 2013, p. 337f.

18 MARJAN WIJERS, *Sex Workers Rights are human Rights: Or not? The Art of Stealing Back Human Rights*, in: Sanders/McGarry/Ryan (eds.), *Sex Work, Labour and Relations: New Directions and Reflections*, Cham 2022, p. 48.

19 MAC/SMITH (n. 4), p. 95.

20 MAC/SMITH (n. 4), p. 95.

21 MAC/SMITH (n. 4), p. 89f.

Equating voluntary prostitution with human trafficking is also seen as problematic. It undermines sex workers’ agency by promoting policies aimed at “rescuing” or “rehabilitating” them<sup>22</sup> while at the same time hiding real victims of human trafficking from the public eye, making it harder to address the problem.<sup>23</sup>

Recognising voluntary prostitution as legitimate work protects the human rights of sex workers and mitigates the potential negative consequences of partial criminalisation, as will be discussed in the following sections.

## 2. Case overview and court decision

Influenced by the Swedish model, France introduced a law in 2016 that criminalised clients, imposing fines and mandatory participation in “sensitisation training” for those who pay for sexual services.<sup>24</sup> Alongside criminalisation of clients, France also introduced rehabilitation programs aimed at supporting sex workers willing to leave prostitution.<sup>25</sup>

In 2018, the French sex worker’s union, along with various NGOs and individuals, submitted a request to the Conseil d’État to repeal Decree 2016-1709, which implemented the law. They argued that the legislative provisions were contrary to the French Constitution and Article 8 ECHR.<sup>26</sup> The Conseil d’État referred the question to the Constitutional Council, which ultimately determined that the harm to personal freedom was not disproportionate when weighed against the law’s objectives, namely safeguarding public order and preventing crime.<sup>27</sup> Considering the Constitutional Council’s reply, the Conseil d’État rejected the request for unconstitutionality.<sup>28</sup>

After exhausting national procedures, 261 sex workers submitted an application to the ECtHR in December 2019. They alleged that the French Law criminalising clients of sex services endangered the rights protected under Articles 2, 3 and 8 of the ECHR.<sup>29</sup>

22 CHI ADANNA MGBAKO, *The Mainstreaming of Sex Workers’ Rights as Human Rights*, *Harvard Journal of Law & Gender* 2020, p. 108.

23 MAC/SMITH (n. 4), p. 252.

24 MATHILDE DARLEY / MARION DAVID / VÉRONIQUE GUIENNE / GWÉNAELLE MAINSANT / LILIAN MATHIEU, France, in: Jahnsen/Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London et al. 2018, p. 95.

25 DARLEY et al. (n. 24), p. 95.

26 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, approved by the Swiss Federal Assembly on 3 October 1974, entered into force for Switzerland on 28 November 1974 (ECHR; SR 0.101); M.A. and Others v. France, para. 7f.

27 M.A. and Others v. France, para. 11.

28 M.A. and Others v. France, para. 12.

29 Press Release of the Registrar of the ECHR of 31 August 2023 (Court Declares Admissible Applications from Individuals Lawfully Engaged

- 18 On 25 July 2024, the ECtHR delivered its judgment, analysing the case primarily through the lens of Article 8, using it as a general framework to consider potential consequences that might also implicate Articles 2 and 3.<sup>30</sup> The Court recognised that the criminalisation of clients constituted an interference with the right to respect private life protected under Article 8.<sup>31</sup>
- 19 The French government justified this interference by citing the defence of public order and safety, crime prevention, and the protection of health and the rights and freedoms of others as legitimate aims.<sup>32</sup> Then, noting the lack of consensus among Council of Europe member states on the issue of prostitution, the Court acknowledged that states enjoy a broad margin of appreciation in determining the necessity and extent of interference under Article 8.<sup>33</sup>
- 20 Finally, when addressing the proportionality of interference, the Court found that the state had applied a fair balance between the interests at stake, concluding that there was no violation of Article 8.<sup>34</sup>

### 3. Legal framework

- 21 While the ECtHR primarily based its decision on Article 8, which protects the right to privacy, Articles 2 and 3 of the Convention will also be examined. The applicants invoked these articles to argue that the criminalisation of clients endangers both the right to life and the right to be free from torture and ill-treatment.
- 22 Starting with Article 8, the right to privacy encompasses individuals' autonomy to make decisions about their lives and relationships,<sup>35</sup> including their sexual lives.<sup>36</sup> The criminalisation of clients infringes on sex workers' right to privacy by conceptualising them as victims, which undermines their autonomy to choose to work in sex work. Although the right to work is not explicitly protected by the Convention, work-related rights are subsumed within the right to privacy, which safeguards the development of personality and fulfilment derived from work.<sup>37</sup> Many

in Prostitution and Claiming to Be Victims of Law Criminalising Purchase of Prostitution Services).

30 M.A. and Others v. France, para. 75.

31 M.A. and Others v. France, para. 138.

32 M.A. and Others v. France, para. 144.

33 M.A. and Others v. France, para. 147.

34 M.A. and Others v. France, para. 166.

35 MICHAEL O'FLAHERTY, Sexual Orientation and Gender Identity, in: Moeckli/Shah/Sivakumaran (eds.), *International Human Rights Law*, 4<sup>th</sup> edit., Oxford 2022, p. 308.

36 Judgement of the ECtHR 7525/76 of 22 October 1981 (Dudgeon v. The United Kingdom), para. 41.

37 VIRGINIA MANTOUVALOU, The Protection of the Right to Work Through the European Convention on Human Rights, *Cambridge Yearbook of European Legal Studies* 2013-2014, Vol. 16, p. 328 f.

individuals who enter sex work due to challenging socio-economic conditions find that sex work offers them economic independence and the means to support their families.<sup>38</sup> The impact is reflected in the applicants' testimonies, where they express that the law forces them into more precarious situations, dictates their sexual conduct, and compromises their ability to provide for their families.<sup>39</sup>

Regarding Article 2, the right to life includes the right to live with dignity and the right to be free from any act or omission that could result in unnatural death.<sup>40</sup> Stigmatisation poses a direct threat to human dignity.<sup>41</sup> Systems that label sex workers as victims in need of rescue or as a threat to public order reinforce and perpetuate this stigma,<sup>42</sup> dehumanising them in the process.<sup>43</sup> Under systems of partial criminalisation, sex work is seen as incompatible with human dignity, implying that sex workers lose their humanity by engaging in the sale of sex.<sup>44</sup> On the contrary, a system that acknowledges socio-economic inequalities and grants sex workers labour rights can give them better work conditions, mitigate stigma and recognise them as subjects while selling sex.<sup>45</sup>

The criminalisation of clients reduces sex workers' bargaining power by lowering demand, which forces them to accept riskier clients and unsafe working conditions.<sup>46</sup> This, combined with clients' fear of being caught, creates an environment that further exposes sex workers to violence, including life-threatening situations.<sup>47</sup>

Under Article 3, which protects individuals from torture and ill-treatment, individuals are safeguarded from deliberate infliction of severe physical or mental pain or suffering for purposes of coercion, intimidation, discrimination, or humiliation, in situations of abuse of power.<sup>48</sup> Although sex workers themselves are not criminalised, systems of partial criminalisation have led to situations of police abuse<sup>49</sup> and arbitrary detentions, which also

38 JANE SCOLAR, *The Subject of Prostitution: Sex Work, Law and Social Theory*, Oxford et al. 2015, p. 111.

39 M.A. and Others v. France, para. 6.

40 CARLA FERSTMAN, Integrity of the Person, in: Moeckli/Shah/Sivakumaran (eds.), *International Human Rights Law*, 4<sup>th</sup> edit., Oxford 2022, p. 180.

41 STEWART CUNNINGHAM, *Sex Work and Human Dignity: Law, Politics and Discourse*, Oxford et al. 2020, p. 139.

42 Amnesty International, *The Human Cost of "Crushing" the Market, Criminalization of Sex Work in Norway*, London 2016, p. 87.

43 CUNNINGHAM (n. 41), p. 159 f.

44 CUNNINGHAM (n. 41), p. 183.

45 CUNNINGHAM (n. 41), p. 181 ff.

46 Amnesty International (n. 42), p. 63 ff.

47 Amnesty International (n. 15), p. 12 f.

48 FERSTMAN (n. 40), p. 172 ff.

49 Amnesty International, *"We Live within a Violent System." Structural Violence against Sex Workers in Ireland*, London 2022, p. 35.



raise concerns regarding Article 5 of the Convention – the right to liberty and security.<sup>50</sup>

- 26 The right to access the highest possible standard of health, while not explicitly guaranteed by the Convention, can be constructed from Articles 2, 3 and 8. These articles protect life expectancy, access to healthcare services, physical and mental integrity, and sanitary conditions.<sup>51</sup> The applicants' testimonies illustrate that the loss of bargaining power has affected their ability to impose condom use, refuse drugs during sexual services, and has forced them to work as "mobile" sex workers, leading to interruptions in their medical treatments.<sup>52</sup>

### III. Critical analysis from sex workers' rights perspective

#### 1. Conceptual disengagement in legal reasoning

- 27 Both the neo-abolitionist and the pro-sex workers' perspective frame their arguments within a human rights rationale. While neo-abolitionists view prostitution as incompatible with human dignity and a form of gender-based violence, the pro-sex workers' perspective emphasises autonomy as fundamental to recognising the humanity of sex workers.<sup>53</sup> These contrasting perspectives shape national laws differently. From the neo-abolitionist standpoint, human rights serve as a sword, promoting the use of criminal law – specifically, the criminalisation of clients.<sup>54</sup> In contrast, from the pro-sex workers' perspective, human rights assume a defensive role, serving as a shield against the harms of criminalisation.<sup>55</sup>
- 28 As is evident, human rights discourse possesses significant rhetorical value, supporting both sides of the debate.<sup>56</sup> For this reason, a deeper involvement of the Strasbourg Court in this case could have led to a more comprehensive analysis, possibly avoiding some of the inconsistencies and oversights that will be examined later. The complexity of prostitution requires an understanding of

the lenses through which it is analysed to avoid interpretations based on assumptions or moral judgements.

Nevertheless, the Court has refrained from engaging in the current debate on prostitution. In *V.T. v. France* (2007),<sup>57</sup> the Court acknowledged the varying approaches to the conceptualisation of prostitution, but explicitly stated that it would not enter the broader debate.<sup>58</sup> However, in that case, where the issue was whether socio-economic conditions alone could meet the threshold of coercion, the Court held that such circumstances did not constitute the level of force or compulsion necessary to prevent someone from exiting prostitution. This ruling established a notably high standard for determining when coercion is present.<sup>59</sup>

Contrarily, in *Rantsev v. Cyprus and Russia* (2010),<sup>60</sup> the Court took a different approach, assuming that Ms. Rantseva's entry into Cyprus on an "artist visa", was a basis for considering that she was a victim of sex trafficking, without taking into account her knowledge or decision-making in the matter.<sup>61</sup> Moreover, in this case, and then ten years later in *S.M. v. Croatia* (2020), the Court held that victims of trafficking and forced prostitution are protected under Article 4 of the Convention because these practices constitute forms of forced or compulsory labour.<sup>62</sup> Controversially, this recognition of forced prostitution as a form of labour exploitation is in line with the pro-sex workers' view that voluntary prostitution constitutes work.<sup>63</sup>

These cases illustrate how the Court's reluctance to engage in the conceptualisation of prostitution has led to inconsistencies in its jurisprudence, resulting in an unclear legal framework. It is reasonable to conclude that the absence of consensus among member states forces the Court to adopt a more passive stance, allowing member states to exercise their own legislative discretion in finding human rights solutions.<sup>64</sup> However, a more comprehensive approach – one that recognises how the conceptualisation of prostitution shapes both case outcomes and

50 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, 30 September 2021, para. 19.

51 MAITE SAN GIORGI, The Human Right to Equal Access to Health Care, Rotterdam 2012, p. 18.

52 M.A. and Others v. France, para. 6.

53 WIJERS (n. 18), p. 48 f.

54 SHARRON FITZGERALD / JANE FREEDMAN, Gender, Equality and Social Justice: Anti-Trafficking, Sex Work and Migration Law and Policy in the EU, Oxford et al. 2022, p. 9.

55 FRANÇOISE TULKENS, The Paradoxical Relationship between Criminal Law and Human Rights, Journal of International Criminal Justice 2011, p. 578.

56 WIJERS (n. 18), p. 64.

57 Judgement of the ECtHR 37194/02 of 11 September 2007 (V.T. v. France).

58 M.A. and Others v. France, para. 156.

59 KIRSTY HUGHES, Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR, The Modern Law Review 2022, p. 1060.

60 Judgement of the ECtHR 25965/04 of 7 January 2010 (Rantsev v. Cyprus and Russia).

61 VLADISLAVA STOYANOVA, Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case, Netherlands Quarterly of Human Rights 2012, p. 168 f.

62 Judgement of the ECtHR [GC] 60561/14 of 25 June 2020 (S.M. v. Croatia), para. 300.

63 CARLOTTA RIGOTTI, When the Law Meets Feminisms: The Shortcomings of Contemporary Prostitution Policies across the European Union, Women's Studies International Forum 2021, p. 8.

64 TILMANN ALTWICKER, Non-Universal Arguments under the European Convention on Human Rights, European Journal of International Law 2020, p. 122.

human rights implications – might have offered the Court a stronger foundation to engage with the broader issues at stake without necessarily requiring it to adopt a definitive position on the nature of prostitution itself.

## 2. Legitimate aims

- 32 The Court determined that the aims invoked by the French Government to justify the criminalisation of purchasing sexual acts fall under Article 8 § 2 of the ECHR, identifying them as legitimate grounds for interfering with the right to respect for private and family life.<sup>65</sup> These include the protection of public order and safety, the prevention of criminal offences, and the safeguarding of health and the rights and freedoms of others.<sup>66</sup>
- 33 The French Government’s arguments assert that the law in question is consistent with France’s understanding of prostitution, where those engaged in it are considered victims of violence.<sup>67</sup> The government based the law on two primary considerations. First, it argued that reducing the demand for prostitution is the only viable means of combating human trafficking.<sup>68</sup> Second, prostitution is understood as inherently violent, as it commodifies the human body, thereby violating human dignity.<sup>69</sup>
- 34 The link between prostitution and trafficking is highly contested. Some opinions suggest a direct correlation between the demand for prostitution and human trafficking, as evidenced by statistics on street prostitution in France provided by the Central Office for the Repression of Human Trafficking (OCRTEH). These statistics, although lacking consolidated data, suggest that the vast majority of individuals involved in prostitution are connected to trafficking networks.<sup>70</sup> Supporting this view, the UN Special Rapporteur on violence against women indicated that countries with decriminalisation or legalisation systems experience an increase in trafficking due to the higher demand for sex services.<sup>71</sup>
- 35 On the opposing side, other perspectives emphasise the absence of reliable data on the trafficking phenomenon, making it difficult to establish a causal link with voluntary prostitution. Critics argue that criminalising clients may further obscure the visibility of trafficking, making it harder to identify victims. This view is supported by organisations such as the French National Advisory Commission

on Human Rights (CNCDH),<sup>72</sup> the Group of Experts on Action against Trafficking in Human Beings of the Council of Europe (GRETA),<sup>73</sup> and NGOs such as Amnesty International, Human Rights Watch, La Strada International and the Global Alliance Against Traffic in Women (GAATW).<sup>74</sup>

The French Government further argued that the law aligns with the state’s positive obligations under Articles 2, 3 and 4 of the Convention, referencing the Court’s decisions in *V.T. v. France* and *S.M. v. Croatia*.<sup>75</sup> In these rulings, the Court found that coercion or force in prostitution was incompatible with human rights. However, it did not extend this finding to voluntary prostitution.

Given the varying perspectives on the relationship between prostitution and trafficking, the argument that reducing demand for prostitution is the only way to combat trafficking is questionable. The applicants referred to a study indicating that trafficking victims in France constitute only 7% of sex workers – a proportion comparable to that of neighbouring countries.<sup>76</sup> Moreover, international studies by La Strada International and Amnesty International, which critically assess the reliability of commonly cited statistics, have found no conclusive evidence that the criminalisation of clients effectively reduces human trafficking.<sup>77</sup> This lack of empirical support raises significant concerns about the justification of the legal measure.

Furthermore, the French Government claimed that the legislation would also assist those engaged in prostitution.<sup>78</sup> In light of the second consideration, namely the inherently violent nature of prostitution and the categorisation of the majority of prostitutes as victims of trafficking, it becomes pertinent to examine the criteria for determining who is a victim and to what extent vulnerability factors can be considered grounds for coercion in the context of prostitution.

As previously stated, this conceptualisation of prostitution may itself contravene the right to privacy, as it undermines individual autonomy and self-determination. Various organisations, including UN bodies, such as the UN Special Rapporteur on contemporary forms of slavery

<sup>65</sup> M.A. and Others v. France, para. 140.

<sup>66</sup> M.A. and Others v. France, para. 144.

<sup>67</sup> M.A. and Others v. France, para. 83.

<sup>68</sup> M.A. and Others v. France, para. 83.

<sup>69</sup> M.A. and Others v. France, para. 83.

<sup>70</sup> M.A. and Others v. France, para. 31.

<sup>71</sup> M.A. and Others v. France, para. 53.

<sup>72</sup> M.A. and Others v. France, para. 38.

<sup>73</sup> M.A. and Others v. France, para. 59.

<sup>74</sup> M.A. and Others v. France, para. 61.

<sup>75</sup> M.A. and Others v. France, para. 84.

<sup>76</sup> M.A. and Others v. France, para. 78.

<sup>77</sup> La Strada International, Policy Paper: The Impact Of Criminalising The “Knowing Use” On Human Trafficking, Amsterdam 2022, p. 10f.; Amnesty International, Explanatory note on Amnesty International’s Policy on State Obligations to Respect, Protect and Fulfil The Human Rights of Sex Workers, London 2016, p. 44 ff.

<sup>78</sup> M.A. and Others v. France, para. 86.

and the UN Working Group on Discrimination against Women and Girls, have raised concerns about the misuse of anti-trafficking legislation to target sex workers.<sup>79</sup> They have also pointed out the harmful effects of laws that criminalise clients, which exacerbate issues related to privacy, health, safety, harassment and surveillance, among others.<sup>80</sup>

- 40 Although the French Government claimed that the law aims to eradicate prostitution without explicitly prohibiting it,<sup>81</sup> the question of whether eradicating prostitution can be considered a legitimate aim remains contested, particularly when voluntary and forced prostitution is clearly differentiated.

### 3. Necessity of interference

#### a) Margin of appreciation

- 41 Regarding the necessity of interference, the Court first examines the margin of appreciation that states are afforded under Article 8 of the Convention. The Court explains that when fundamental aspects of an individual's identity or existence are affected, states are granted a narrower margin of appreciation.<sup>82</sup> On the contrary, in cases where there is no consensus among member states on the interests at stake or the best means of safeguarding them, states enjoy a wider margin of appreciation, as they are considered better positioned to balance various interests and address moral issues.<sup>83</sup>
- 42 The Court recognises that there are different views on the nature of prostitution<sup>84</sup> and on whether criminalising clients is an effective tool to combat trafficking.<sup>85</sup> While recognising that France is one of a minority of countries that have implemented the "Nordic model",<sup>86</sup> the Court grants France a wide margin of appreciation given the ongoing debate on this issue at the European level.<sup>87</sup>
- 43 This approach highlights the relevance of the principle of subsidiarity within the framework of the ECtHR. The principle of subsidiarity states that the primary responsibility for human rights protection rests with the member states, assigning national authorities and courts the role of interpreting and applying domestic law in accordance

with the Convention.<sup>88</sup> Therefore, the Strasbourg Court does not replace domestic human rights protections and places high importance on member states' consensus in interpreting human rights.<sup>89</sup>

In the absence of a consensus, the Court is constrained to apply a wider margin of appreciation, as is the case when dealing with cases involving Article 8. This is in contrast to the narrower margin of appreciation observed in the Court's judgments in cases involving Articles 2 and 3 of the Convention.<sup>90</sup>

Critics argue that the margin of appreciation doctrine frequently grants excessive deference to national authorities, which can potentially undermine the consistency of human rights protections across member states.<sup>91</sup> In this case, a closer examination of potential violations under Articles 2 and 3 could have offered a more comprehensive understanding of the human rights implications within the context of Article 8, possibly justifying a narrower margin of appreciation. When states are regarded as better positioned to balance the interests at stake, the protective role of human rights risks being diminished, leaving vulnerable groups exposed to inconsistent protections across jurisdictions.

#### b) Proportionality of the interference

To assess whether the French government has exceeded the margin of appreciation in its interference with the right to privacy, two main arguments can be identified in the Court's decision.

The first argument concerns the extent to which the right to privacy is affected. The Court dismisses the applicant's argument that engaging in prostitution is protected by the principle of personal autonomy and the freedom to exercise one's sexuality, which justifies a narrower margin of appreciation.<sup>92</sup> Instead, the Court focuses its analysis on the applicants' claim that the law in question interferes with their ability to engage in prostitution as a profession.<sup>93</sup> However, the Court does not clarify why it regards sexuality and profession as distinct spheres of life. This distinction seems somewhat arbitrary, given that they are closely interconnected in this context. The assumption

79 M.A. and Others v. France, para. 49.

80 M.A. and Others v. France, para. 55.

81 M.A. and Others v. France, para. 92.

82 M.A. and Others v. France, para. 147.

83 M.A. and Others v. France, para. 147.

84 M.A. and Others v. France, para. 150.

85 M.A. and Others v. France, para. 152.

86 M.A. and Others v. France, para. 150.

87 M.A. and Others v. France, para. 153.

88 ECtHR, Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence, Strasbourg 2022, p. 6.

89 KANSTANTIN DZEHTSIAROU, European Consensus and the Legitimacy of the European Court of Human Rights, Cambridge 2015, p. 122.

90 ALTWICKER (n. 64), p. 118.

91 DZEHTSIAROU (n. 89), p. 131.

92 M.A. and Others v. France, para. 157.

93 M.A. and Others v. France, para. 157.

that sexuality and work occupy separate domains is rooted in cultural beliefs, often reflecting a perception that monetary transactions compromise intimacy.<sup>94</sup> Prostitution challenges this duality, and the criminalisation of prostitution reflects the fear that boundaries between the private and public spheres are being transgressed.<sup>95</sup>

- 48 The second argument relates to the alleged harmful effects of the law. The Court highlights the lack of consensus on whether the law directly causes the health and safety risks cited by the applicants, whether these risks are inherent to prostitution, or whether they result from various social factors.<sup>96</sup> It notes that these risks were discussed during the parliamentary debates preceding the law's establishment and that they were addressed in the final version of the legislation. This led the Court to place weight on respecting national democratic processes.<sup>97</sup> Although the Court acknowledges the positive step of decriminalising prostitutes to combat stigmatisation,<sup>98</sup> it also recognises the applicants' concerns regarding insufficient resources and inconsistencies in the measures intended to address health and safety risks. Nevertheless, it deems these shortcomings insufficient to challenge the law.<sup>99</sup>
- 49 By failing to address the factual negative consequences of the law, the Court overlooks its detrimental impact on sex workers, a critical consideration when assessing whether the law infringes upon rights protected under Articles 2, 3, and 8 of the Convention. A more comprehensive understanding of the complexities surrounding prostitution could challenge the assumption that violence is inherently part of sex work.<sup>100</sup> This would highlight the state's obligation to implement labour rights or establish an effective framework to safeguard sex workers from violence.
- 50 A final observation concerns the Court's emphasis on the French government's stance that prostitution is tolerated because it is not legally prohibited. This position is particularly confusing, given that the law's ultimate objective is its own abolition.<sup>101</sup> Such contradictions highlight the need for the Court to engage with the conceptualisation of prostitution and the potential impact this has on the stigmatisation of individuals, as previously discussed.

94 CUNNINGHAM (n. 41), p. 177.

95 JANE SCOLAR, 'The "Subject" of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory', *Feminist Theory* 2004, p. 346.

96 M.A. and Others v. France, para. 155.

97 M.A. and Others v. France, para. 159f.

98 M.A. and Others v. France, para. 162.

99 M.A. and Others v. France, para. 165.

100 Amnesty International (n. 42), p. 67.

101 M.A. and Others v. France, para. 164.

## IV. Implications

### 1. Impact on sex workers' rights

In its decision to refrain from examining the alleged harmful effects of the law, both its foundational gender-based and anti-trafficking justifications, as well as the unresolved health and safety risks in practice, the Court reinforces a paternalistic framework that fails to protect sex workers.

The Court missed an opportunity to explore the consequences of assigning sex workers a victim status, despite clear connections between this "victim discourse" and the undermining of autonomy. Despite approaching the case through the lens of Article 8, the Court ultimately avoided a detailed examination of the specific impact on the right to privacy, relying instead on a broad margin of appreciation and maintaining the view that sexuality and work are separate spheres. Given the complexities of prostitution, an Article 8-based approach might have distinguished between forced and voluntary sex work, recognising that many individuals choose sex work as an autonomous response to structural socio-economic challenges. For some, sex work offers a means to combat these inequalities and achieve economic independence.<sup>102</sup>

By ignoring these socio-economic factors, the law exacerbates the harm by eliminating one of the few viable sources of income for sex workers. Economic pressure and reduced demand create a context in which sex workers are further exposed to health and safety risks. A more thorough analysis of the isolation and hazardous working conditions faced by sex workers, including life-threatening situations and limited access to safe sex practices, rather than retreating due to the lack of consensus,<sup>103</sup> could have provided greater clarity on the implications for rights under Articles 2 and 3 of the Convention.

A law that presents significant shortcomings in mitigating these harms leaves sex workers unprotected. The Court not only acknowledges the inadequacy of harm reduction measures - such as access to housing, residence permits, labour integration, and health care for those willing to leave prostitution - but also notes that these programs are poorly implemented and lack adequate resources.<sup>104</sup> Moreover, there is an absence of support for sex workers who do not intend to leave prostitution.<sup>105</sup> Despite this knowledge, the Court prioritised legislative discretion,

102 MAC/SMITH (n. 4), p. 95; CUNNINGHAM (n. 41), p. 182.

103 M.A. and Others v. France, para. 155.

104 M.A. and Others v. France, paras. 40 and 165.

105 CALOGERO GIAMETTA / HÉLÈNE LE BAIL, 'The National and Moral Borders of the 2016 French Law on Sex Work: An Analysis of the "Prostitution Exit Programme"', *Critical Social Policy* 2023, p. 216.



giving more weight to the national legislation than to the practical impact of the law on sex workers. As a result, the concrete, negative effects on sex workers remain unaddressed.

discrimination and further limiting their life chances,<sup>113</sup> thereby reinforcing their marginalisation.

## 2. Role of the ECtHR as a human rights protector

The ECHR functions as a living instrument, requiring an evolving interpretation to remain an effective and relevant protector of human rights.<sup>114</sup> Legal certainty in new interpretations is often grounded in European consensus. However, in cases where such consensus is lacking, the margin of appreciation serves as the Court's primary tool for ruling.<sup>115</sup> Through the margin of appreciation and grounded in the principle of subsidiarity, the Court typically adopts a process-based review,<sup>116</sup> granting deference to national authorities, which are considered better placed and democratically legitimated to safeguard human rights.<sup>117</sup> In this case, the Court's decision reflects its commitment to this broader framework of human rights protection, which is central to the ECtHR's function and its relationship with national legal systems.

Nevertheless, assessing the long-term effectiveness of the ECtHR raises the question of whether the principle of subsidiarity may limit the Court's ability to protect human rights uniformly. As noted by Judge Françoise Tulkens, Judge Christine Van den Wyngaert is widely credited with the concept of the "shield" and "sword" effects of human rights, where criminal law can serve as both a protective tool and a potential threat to rights.<sup>118</sup> When criminal law poses a threat, a defensive role for human rights is necessary to mitigate the harmful effects of criminalisation.<sup>119</sup> When the Court relies on subsidiarity to justify non-intervention, it avoids fully addressing the specific human rights impacts alleged and thus misses an opportunity to establish a protective framework for sex workers facing the adverse effects of criminal law.

This "shield" effect is essential for the protection of marginalised groups such as sex workers. Still, the Court's reliance on subsidiarity limits its ability to provide the substantive protection needed in cases where criminal laws may cause harm. In this case, there are two key implications for the system of human rights protection that call into question the effectiveness of the ECtHR. Firstly, conflicting interpretations of sex workers' rights across member states create a dichotomy between victimisation

55 On top of this framework is a normative moral view that sexual relationships are only genuine if they are free from economic considerations, making it implausible that one could consent to sex work for financial reasons.<sup>106</sup> This underlying assumption is at the root of the stigmatisation of sex workers, who are often seen as either "morally compromised" or "lacking agency".<sup>107</sup>

56 It is precisely financial reasons – often rooted in limited socio-economic opportunities – that lead individuals to engage in sex work. However, from a pro-sex workers' perspective, such structural constraints do not negate their agency; instead, this perspective underscores the importance of respecting decisions made within structural limitations.<sup>108</sup> By rejecting moralistic assumptions, this perspective reframes sex work as comparable to other forms of precarious labour. It highlights that not everyone has the privilege of well-paid or meaningful employment; many non-sexual jobs are equally exploitative.<sup>109</sup> In comparison, sex work may offer better chances of improving one's living conditions than cleaning, laundry, or domestic work.<sup>110</sup> From this standpoint, individuals should not be required to demonstrate that their work holds intrinsic value to be entitled to safety and dignity at work.<sup>111</sup>

57 Accordingly, the state's positive obligations can be understood to operate on two levels: first, to ensure labour rights and protections within the sex industry, and second, to guarantee an adequate standard of living. However, the lack of explicit recognition of these rights under the ECHR complicates their legal protection.<sup>112</sup> Unfortunately, the Court did not address these issues. Its reliance on the existing legal framework, along with its disengagement from the conceptualisation of prostitution, prevented a more comprehensive understanding of the phenomenon as a whole.

58 Ultimately, stigmatisation has serious consequences, perpetuating socio-economic inequalities by pushing sex workers further down in social hierarchies, increasing

106 SCOLAR (n. 95), p. 346.

107 Amnesty International (n. 42), p. 87.

108 MAC/SMITH (n. 4), p. 92.

109 MAC/SMITH (n. 4), p. 90.

110 MAC/SMITH (n. 4), p. 94 f.

111 MAC/SMITH (n. 4), p. 103.

112 MANTOUVALOU (n. 37), p. 317; CLARE JAMES, *Food, Dignity, and the European Court of Human Rights*, *The Society of Legal Scholars* 2024, p. 536.

113 CUNNINGHAM (n. 41), p. 160.

114 DZEHTSIAROU (n. 89), p. 138.

115 DZEHTSIAROU (n. 89), p. 138.

116 ROBERT SPANO, *The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law*, *Human Rights Law Review* 2018, p. 484 f.

117 ALTWICKER (n. 64), p. 124.

118 TULKENS (n. 55), p. 577.

119 TULKENS (n. 55), p. 578.

and agency, leading to divergent legal frameworks and threats to sex workers' rights, as discussed above. Secondly, the lack of a consistent approach exacerbates the unresolved issue of trafficking. Various institutions and organisations have highlighted how criminalising clients can reduce the visibility of trafficking victims, hiding the problem rather than addressing it. Without a comprehensive analysis of these different approaches and their human rights implications, both sex workers and victims of trafficking are left without effective protection.

- 62 The principle of subsidiarity is a significant limitation to the protection of human rights due to inconsistent interpretations between countries, resulting in unequal treatment of sex workers. This underscores the role of the ECtHR in ensuring that national policies strike a fair balance between different interests and protect vulnerable individuals from the unintended consequences of majoritarian policies.<sup>120</sup> A thorough review of the law's factual outcomes – especially given evidence of its negative impacts –<sup>121</sup> would have counterbalanced the weakened protections that result from a process-based approach, helping to avoid the validation of laws that are primarily based on well-intentioned goals but lack substantive safeguards.

### 3. Political challenges

- 63 As mentioned in the ECtHR's judgment, France is among the few countries that have adopted the "Nordic model", alongside Ireland, Sweden, Norway, Northern Ireland (United Kingdom), and Iceland. However, the regulation of prostitution remains a widely debated issue at the European level.<sup>122</sup> In September 2023, the European Union (EU) at the European Parliament passed a non-binding resolution titled "Regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women's rights".<sup>123</sup> Although this resolution does not call for the adoption of the "Nordic model" as such, it adopts a neo-abolitionist approach,<sup>124</sup> supporting the link between trafficking and prostitution<sup>125</sup> and promoting the criminalisation of clients.<sup>126</sup>

Although the EU is a distinct institution and outside the ECtHR's jurisdiction,<sup>127</sup> EU member states are also part of the Council of Europe (CoE), to which the ECHR applies. The CoE has also addressed this issue. In September 2024, the Parliamentary Assembly's Equality and Non-Discrimination Committee adopted a draft resolution: "Protecting the human rights and improving the lives of sex workers and victims of sexual exploitation."<sup>128</sup> This resolution encouraged states to adopt a human rights-centred approach, recognising the autonomy of sex workers and emphasising the need for access to health care and safe working conditions.<sup>129</sup> Despite the favourable reception of this draft resolution by numerous international organisations, the Parliamentary Assembly opted to refer the report back to the Committee in October 2024.<sup>130</sup> This was due to the absence of sufficient political support and the considerable divergence of opinion on the subject matter.<sup>131</sup>

These opposing stances create a complex political landscape for the ECtHR, where balancing human rights protection with respect for democratic processes and national sovereignty becomes especially challenging. The lack of consensus among member states constrains the Court, often leading it to refrain from intervening. In such cases, the Court typically defers to national authorities, moving away from universal interpretations of human rights to avoid potential political backlash or perceptions of overreach.<sup>132</sup>

This scenario leaves individuals without clear human rights protection. In this particular case, the Court's judgment validates a legal framework that reinforces the narrative of sex workers as victims, thereby perpetuating stigmatisation and impacting their autonomy. Without an in-depth analysis of the law's practical implications, there is a risk that public policies will be implemented without adequately considering the potential adverse effects on individuals' rights, particularly when perspectives on the issue remain highly polarised.

120 SPANO (n. 116), p. 493.

121 Strasbourg Observers of 3 September 2024 (M.A. and Others v. France: The "End Demand" Model of Regulating Sex Work Goes to Strasbourg).

122 M.A. and Others v. France, para. 150.

123 Resolution of the European Parliament 2022/2139 (INI) 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).

124 Human Rights Watch of 18 September 2023 (EU: Harmful "Prostitution" Resolution Passes).

125 European Parliament, Regulation of prostitution in the EU (n. 123), para. AG.

126 European Parliament, Regulation of prostitution in the EU (n. 123), para. 41.

127 OLIVIER DUBOS / VICTOR Guset, European Protection of Human Rights, in: Kannowski/Steiner (eds.), *Regional Human Rights: International and Regional Human Rights: Friends or Foe?*, Baden-Baden 2021, p. 192f.

128 Amnesty International, Council of Europe: Open Letter in Favour of the Resolution on the Human Rights of Sex Workers, 2 October 2024.

129 Amnesty International (n. 128).

130 Press Release of the Parliamentary Assembly of the Council of Europe of 3 October 2024 (The Report on "Protecting the Human Rights and Improving the Lives of Sex Workers and Victims of Sexual Exploitation" Referred Back to Committee).

131 European Centre for Law and Justice, PACE: Controversial Resolution on Prostitution Referred Back to Committee!, 4 October 2024.

132 ALTWICKER (n. 64), p. 124; SPANO (n. 116), p. 486.

67 This case illustrates the limitations of the ECtHR in addressing human rights issues. In cases where issues arise under rights that permit restrictions if they are “necessary in a democratic society”, as is the case with Article 8, the protection of these human rights is highly politicised.<sup>133</sup> While this case would have benefited from a more comprehensive analysis that considered the intersection of Article 8 with Articles 2 and 3, as well as the consequences of the law in practice, the reality is that, given the complex political context, the potential to be perceived as overstepping was a determining factor. Here, the need to maintain the stability and credibility of the ECHR system took precedence, leaving the protection of sex workers’ rights across Europe uncertain.

## V. Conclusion

68 The Court faced the challenge of determining whether France’s criminalisation of the purchase of sex services was a legitimate interference and necessary in a democratic society. While this legal framework claims to address human trafficking and gender inequality, evidence suggests that it may instead drive trafficking further underground and increase risks for sex workers.

69 The judgment is set within a highly complex political debate; due to the lack of consensus among Member States, the Court was compelled to rely on the principle of sub-

solidarity to avoid engaging with the conceptualisation of prostitution and to apply a wide margin of appreciation.

While national deference is fundamental to the stability 70 of the ECHR system, this case reflects significant limitations on the Court’s ability to protect human rights. By failing to address the nature of prostitution, the Court missed an opportunity to analyse the impact of different approaches on the rights of sex workers. The decision’s reasoning fails to address evidence of health and safety risks, overlooks the socio-economic factors that lead individuals to sex work, and upholds a law with significant shortcomings.

In addition, the Court reinforces a paternalistic legal 71 framework that undermines sex workers’ autonomy. This framework, rooted in strong moral assumptions, makes it inconceivable that consenting adults can engage in sex for money without being seen as victims. The core issue, then, is where to draw the line between acknowledging structural socio-economic constraints and avoiding the pathologisation or infantilisation of individuals. Recognising agency does not mean ignoring inequality – it means building legal responses that protect rights without denying autonomy.

A more comprehensive perspective would have strengthened 72 the protection of sex workers’ rights. Ultimately, the decision risks opening the door to policies that may undermine fundamental rights, leaving the protection of sex workers across Europe uncertain.

<sup>133</sup> SPANO (n. 116), p. 483 f.

### Abstract

Gemäss dem Nordischen Modell soll das Verbot des Kaufs sexueller Handlungen den Menschenhandel bekämpfen und die Gleichstellung der Geschlechter fördern. Dieser Ansatz ist zwar gut gemeint, übergeht aber oft die Rechte von Sexarbeitenden. In einer Entscheidung hat der Europäische Gerichtshof für Menschenrechte auf den nationalen Ermessensspielraum verwiesen und das Sexkaufverbot auf Kosten der Autonomie von Sexarbeitenden aufrechterhalten, was sie Gesundheits- und Sicherheitsrisiken aussetzt. Dieser Beitrag bespricht die Entscheidung des Gerichtshofs, der Debatte über Prostitution auszuweichen, und zeigt die Grenzen des Menschenrechtsschutzes in stark politisierten Kontexten auf.

### Résumé

En criminalisant l’achat de services sexuels, le modèle nordique vise à lutter contre la traite des êtres humains et à promouvoir l’égalité entre les genres. Bien que portée par des intentions louables, cette approche tend à négliger les droits des travailleurs et travailleuses du sexe. Dans une décision récente, la Cour européenne des droits de l’homme a renvoyé la question à l’appréciation des États, faisant ainsi l’impasse sur les enjeux d’autonomie, de santé et de sécurité des personnes concernées. La présente contribution examine cette décision qui, en évitant de se prononcer sur le débat de fond relatif à la prostitution, révèle les limites de la protection des droits fondamentaux dans des contextes fortement politisés.