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M.A. and others v. France: Critical Criminological and Postcolonial Reflections

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Photo by Sally T. Buck, CC BY-NC-ND 2.0; "35. My Rights are Sex Workers' Rights"

In this post, we examine the latest European Court of Human Rights (the Court) decision on sex work – *M. A. and others v France* – a notable case in which the applicants, over 250 sex workers from different nationalities, challenged the so-called Nordic model (Judgement of 25.07.2024). The model criminalises the purchase of sexual services. However, the selling of sex remains non-criminalised. The model aims to categorise sex work as violence and further eradicate sex work from society. The applicants argued that the State's interference into the sphere of sex work constitutes a violation of Article 8 of the European Convention on Human Rights (the ECHR). The Court found that the French government stayed within its margins of appreciation and struck a fair balance between the state's interference with the right to respect for private life and the societal interest of the gradual elimination of prostitution.

While some human rights researchers, such as Lídia Balogh, embraced a more neutral approach to the ECtHR position, others have seen it as problematic. Fleur van Leeuwen and Marjan Wijers pointed out that the choice of the ECtHR to only try the case concerning Article 8 of the ECHR led to the narrowing of the case to the issue of consent to sex work and personal autonomy. At the same time, the alleged violations of the rights to life, health, and freedom from inhuman and degrading treatment remained unexamined. Another major point the abovementioned authors raised was the problematic use of the concept of human dignity to justify the oppression of a certain group of citizens, such as sex workers. Dimitrios Kagiaros and Inga Thiemann, too, noted that under Articles 2 and 3, there was a possibility to assess how the model harms sex workers and impairs their rights, while addressing Article 8 allowed the Court to focus on the abstract debates around various policies on sex work in light of the applicants' rights to personal autonomy and sexual freedom. Further, in their opinion, the ECtHR failed to properly evaluate consensus on sex work criminalisation between member states, emphasising moral debates instead. In turn, this led to shortcomings in the proportionality test and in giving the State a broader margin of appreciation in the matter. The lived experience of 261 sex worker applicants was disregarded.

This blog aims to further examine the decision of the Court to uncover structural power imbalances that the Court failed to acknowledge and tackle. We engage with the problematic aspects of the decision, which

have not been previously discussed, yet are crucial for understanding the trends in the ECtHR jurisprudence. We use a critical criminology lens and a postcolonial approach to engage with the text of the decision.

The Effects of Client Criminalisation

Throughout the history of criminalising the purchase of sex, sex workers have voiced their objections due to the harmful effects of such criminalisation. The criminalisation of clients originated in 1999 Sweden, when the first client criminalisation model was introduced. Sex workers' voices are rarely heard when discussing the laws regulating sex work (Benoit et al., 2021). An exception to this was in New Zealand and Belgium, where the full decriminalisation[1] model was made together with sex workers, activists, and NGOs (Abel, 2014; UTSOPI, n/a). Full decriminalisation is not only defended by sex workers or sex worker-led organisations, but also by a strong empirical body of research. Essentially, the criminalisation of clients "reproduce[s] the harms created by the criminalisation of sex work" (Krüsi, 2014).

The criminalisation of clients has always been framed as protecting women; however, it has resulted in extensive harm inflicted on sex workers. A strong body of empirical research studies that focus on the effects of the laws and the experiences of sex workers themselves show that the client criminalisation and any type of criminalisation have extremely severe consequences on the lives, health, mental health, and physical safety of sex workers (e.g. Platt et al., 2018). Migrant sex workers working in France have reported increased violence and health risks, impoverishment, and financial precarity. The client criminalisation model has also limited the time sex workers have to assess their safety and their ablity to negotiate the terms and choose clients (Krüsi, 2014; Le Bail et al., 2019; Sonnabend & Stantmann, 2019). Further, sex workers are pushed to work in more risky and dangerous conditions, such as decreased use of condoms and HIV treatments (Le Bail et al., 2019). In Canada, the model has made it difficult for sex workers to implement safety strategies (Krüsi, 2014). In addition, the model has resulted in displacing sex work activities to outlying places and, hence, increased the risks of violence and condomless sex (ibid.). Repressive policies are associated with HIV/STI, increased risks of violence and condomless sex (Platt et al., 2018). In Sweden, the client criminalisation has resulted in punitive regulation of migrant sex workers and their exclusion

from state services (Vuolajärvi, 2019). The criminalisation of clients has also been used as a basis of racial profiling in both France and Sweden. In France, police have used the client criminalisation as a reason to racially profile, frisk, and investigate sex workers of colour (Giametta et al., 2022). In Sweden, police have targeted migrant sex workers for deportation by posing as clients in the name of "crime prevention", "offering help", and preventing human trafficking.

M. A. and others v France is not the only time sex workers have challenged the government legislation on partially criminalising sex work. In 2007 Canada, three sex workers challenged the government legislation partially criminalising sex work for the harmful effects of the law. *Canada v Bedford* was ruled in favour of the sex workers by striking down the three laws partially criminalising sex work. The Court interestingly stated that "[p]arliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes" (paragraph 136).

One Frame Fits None: Rethinking Sex Work and Trafficking

The ECtHR stated that the French government, in its interference with Article 8 of the ECHR, pursued the following aims (order of listing the aims is kept as in the judgement): protection of public order and safety, prevention of crime and protection of the health, rights and freedom of others, with the emphasis on combating human trafficking. The Court found these aims legitimate (paras 140-144 of the decision).

However, the anti-human-trafficking framework has long been and remains a highly problematic and contested area of regulation for several reasons. Firstly, while the anti-trafficking framework does address all situations of exploitation and forced labour and not necessarily those involving moving people through state parties' borders, historically, the disproportionate attention has been given to moving women through the borders for the purpose of sexual exploitation, and this discourse persists. In a renowned postcolonial legal scholar Ratna Kapur's words,

> While the definition of trafficking in the UN Trafficking Protocol extends beyond the specific issue of prostitution, it retains its focus on prostitution

and violence against women in the broader public arena. States throughout the world have enacted legislation in response to the anti-trafficking campaign. However, this response has invariably lapsed into the use of sexual and moral surveillance techniques over women while also betraying a visceral concern over border security.

The disproportional focus on 'sex trafficking' is overwhelmingly used for border securitisation regimes, and for excluding and governing migrant and queer bodies. As a continuation of colonial violence, anti-trafficking laws constitute the female migrant subject as either a victim to be protected, or as a 'sinful contaminant' to be removed beyond the state borders,[2] while the states are constructed as 'saviours'. Moreover, anti-trafficking discourse implies that there are 'proper' and 'bad' victims. As Siobhan Brooks puts it,

One of the main problems with the anti–sex trafficking position is its construction of an innocent victim who is forced into prostitution against her will and the assumption that these victims (and not women who "choose" to participate in the sex industry) are the only ones deserving of help.

Moreover, as Lucrecia Rubio Grundell argues, the neo-abolitionist 'End Demand' model in the EU contributes to securitisation discourse, thus strengthening it even more. In this narrative, the harm to the state inflicted by sex workers crossing its borders, in addition to a threat of 'organised crime', consists of damaging the 'gender equality' of the state.[3] Further, Elizabeth Bernstein demonstrated how anti-trafficking and 'prostitution' abolitionists' rhetoric serves state interests in expanding carceral control. These 'feminist' arguments on 'the need to save women' have a strong connection with evangelical Christianity arguments on the 'impunity' of sex workers and the threat to public order.[4] Finally, Vladislava Stoyanova examined how the IHRL hyperfocus on the trafficking framework made the states neglect more effective and more human-rights-centred norms on slavery, servitude and forced labour[5].

While slavery, forced labour, and exploitation are a huge human rights problem both in the world and in the Council of Europe member states, there is an overwhelming body of research pointing out that the anti-trafficking framework, for example, the UN Palermo Protocol or the Council

of Europe Anti-Trafficking Convention, is not the most effective instrument to rely on in eliminating these issues. They focus on states' security, disregard victims' human rights, and reproduce colonial violence. The use of the human trafficking framework in justifying choices in policies around sex work is simply inadequate.

In the judgment on *M.A. and others v France*, there are 185 mentions of human trafficking ('traite', in French) in the text, a remarkable amount in the case that was *not* about trafficking *nor* 'forced prostitution', but voluntary sex work. Moreover, the ECtHR adheres to the anti-trafficking framework and seconds the French government in its securitisation rhetoric. It is remarkable how the Court, completely omitting the harm done to sex workers, turns to the protection of public order in the first place (see paras 140-144 of the decision), which reinforces the regimes designed to keep away the dangerous other / the non-agential victim from impregnating the innocent, in this case, the state of France. Thus, harm in anti-trafficking measures is being displaced. Instead of a human, a state becomes a victim who is harmed by trafficking and needs protection and security.

In the bigger picture, this decision fits into the latest trends of the ECtHR restrictive approach, especially on the issues of borders and migration, control over the (women's) bodies, such as in the veil cases and the Court's stance on reproductive rights, The Court's abstaining from evaluation of the actual effects of the law, and the harm that is created through these laws, makes us question *which* actors the Court is protecting. In this manner, the Court becomes the guardian of the states rather than a guardian for the rights of the people who are harmfully affected by these laws.

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[1] In our text by full decriminalisation we refer to the type of regulation model found in New Zealand and Belgium, where all laws criminalising the purchase or selling sex have been removed. Note, however, that selling sex as a migrant is usually grounds for deportation, even if selling itself would be decriminalised.

[2] Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Pub, Inc 2018) 100.

[3] Lucrecia Rubio Grundell, *Security Meets Gender Equality in the EU: The Politics of Trafficking in Women for Sexual Exploitation* (Palgrave Macmillan 2023).

[4] Elizabeth Bernstein, *Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex* (Nachdr, Univ of Chicago Press 2008).

[5] Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017).

Article 8 ECHR, criminalisation, critical criminology, ECHR, ECtHR, forced labour, France, human rights, M.A. & Others v. France, postcoloniality, sex work, trafficking

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