M.A. and others v. France: The 'End Demand' model of Regulating Sex Work goes to Strasbourg

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In *M.A. and others v. France*, the Court's fifth section was called to decide on a particularly controversial issue: whether France's 2016 law, which criminalised the purchase of sex without exception, was compatible with Articles 2, 3 and 8 of the European Convention on Human Rights (ECHR).

The applicants were 261 sex workers, men and women of various nationalities, who noted that they were all lawfully and voluntarily engaged in sex work.[1] They complained that the French law required them to resort to clandestine and unsafe methods of meeting clients. This increased their risk of exposure to violence, further endangered their health and well-being and undermined their personal autonomy and sexual freedom. In a unanimous judgment, and after examining the claims solely under Article 8, the Court found the French law to be Convention-compliant.

After summarising the facts and the Court's analysis, this blog post critiques two aspects of the judgment: firstly, how the Court deployed European consensus to determine the margin of appreciation that would apply; and secondly how it carried out a procedural review of the legislative process leading up to the adoption of this measure.

Facts and background

Sex work is a contested issue across Europe and internationally, leading to different approaches to its regulation across Council of Europe member states. Some states have opted to criminalise all actors involved; others criminalise the sale, but not the purchase of sex. In the majority of states in Europe, however, neither the sex worker nor the client is legally liable when the exchange of sexual services for remuneration takes place between consenting adults in a private space (para. 69).

At issue in the present case was the 'End Demand' or 'Nordic model'[2] of regulating sex work, which permits the sale, but criminalises the purchase of sexual services. This model of sex work regulation is a minority approach in Europe and globally. Out of 46 Council of Europe member states, it has only been implemented in 5 states, as well as in Northern Ireland, one of three legal jurisdictions in the United Kingdom. The policy's aim is the abolition of prostitution

[1] The post will use the term sex workers to refer to the applicants. When discussing sexual services for money, we generally refer to sex work. The term 'prostitution' is used when discussing policy approaches that do not see sex work as work, as well as when it is the term used in the judgment or legislation.

[2] Legislation to criminalise buyers and decriminalise sellers of sexual services has gone by various names since its introduction in Sweden in 1999. We are using the terminology of 'End Demand' as it clearly states the policy's key goal and avoids both the confusion or conflation with other policies, as well as the implication that all Scandinavian countries criminalise buyers (sex work is legal in Finland and Denmark).

through the criminalisation of purchasing sex. Supporters of the End Demand approach view prostitution as a form of violence against women and an obstacle to gender equality. To its supporters, this makes End Demand a feminist policy, as it focuses on criminalising buyers, rather than sellers of sexual services, thus shifting criminal responsibility for prostitution to the demand side (see the third-party intervention discussed in para. 112 in the present judgment). Beyond its end goal of abolishing all demand for sexual services, the policy also purportedly contributes to the prevention of human trafficking and prostitution of minors (see paras. 33 and 163).

Detractors of the End Demand model argue that there is no evidence that this model achieves these aims at all or does so more effectively than legalisation or full decriminalisation as sex work is driven underground by criminalisation - regardless of whether this criminalisation is aimed at buyers or sellers of services. Critics present evidence that the criminalisation of buyers increases the danger for sex workers while making buyers of sexual services reluctant to come forward if they have concerns about suspected abuse. Additionally, research from Sweden and France highlights the negative effects of this policy on sex workers, both directly in terms of targeted policing, as well as more indirectly by increasing the risks associated with the sale of sexual services. Researchers note that those in favour of the End Demand model sometimes dismiss the increased social stigma and danger for sex workers caused by this policy as collateral damage in reaching the end goal of abolishing the demand for sexual services. It is in this complicated context, that the Court was asked to determine whether the End Demand policy adopted in France complied with the Convention.

The judgment

The Court began its analysis by determining that it would examine the case solely under Article 8. The Court justified this approach on the basis of the long-standing principle that it is not bound by the applicants' arguments as to the legal classification of the facts of the case and that it can rely on different Convention articles than those raised by the parties when examining a complaint. The Court concluded that the issues at stake were best examined through the lens of Article 8 as this would allow it to examine the complex phenomenon of prostitution as a whole and assess all the possible consequences of the impugned policy, including the issues originally raised under Articles 2 and 3.

Both parties recognised that there was an interference with the applicants' Article 8 rights and that this interference was prescribed by law for the defence of public order and safety, the prevention of criminal offences and the protection of the health and the rights and freedoms of others. The parties disagreed, however, with regard to the proportionality of the measure. In particular, they disagreed about whether the policy achieved its aims and whether the correct balance had been struck between the objectives of the policy and the negative effects it would have on the applicants.

To determine the appropriate standard of review, the Court first had to ascertain the applicable margin of appreciation. The Court noted that while states usually have a narrow margin of appreciation in cases concerning matters relating to the identity of an individual (in this case, the applicants' sexual freedom and personal autonomy), states benefit from a wide margin of appreciation where there is no consensus on a specific issue. In this respect, the Court

emphasised that there are divergent opinions on the very sensitive moral and ethical questions raised by prostitution. Additionally, there is no consensus at the European or international level as to whether the End Demand model does, in fact, achieve its intended aims. The lack of a common European approach led the Court to conclude that the State had a wide margin of appreciation in determining how to regulate sex work.

In assessing the necessity of the interference with the applicants' Article 8 rights, the Court recognised the stigma and risks the applicants experienced due to their engagement with sex work. It went on to observe that these issues had existed before the introduction of this policy and there was no unanimity on whether the End Demand model had exacerbated them. It also noted that it was appropriate for the Court to defer to the French legislature as it had considered carefully the implications of this model and engaged with the views of multiple stakeholders before adopting it. The Court highlighted that an in-depth examination of the issues was carried out by two special commissions that were established for the purpose of examining the issues and these commissions held out numerous hearings and studies to issue reports detailing the respective concerns (para.158). Consequently, the Court determined that it should demonstrate caution and not interfere with the democratic decision-making processes underlying this policy. For these reasons, the Court found no violation of Article 8 but noted that domestic authorities should keep this policy under constant review and consider the evolving consensus on the issue at both the European and the international level.

Commentary

a. The choice of applicable rights and the vagaries of consensus analysis

The decision to examine the case exclusively under Article 8 relieves the Court from addressing the more complex and controversial of the claims, namely whether the policy in question increased the risk for the applicants to be exposed to treatment contrary to Articles 2 and 3. As a result, rather than identifying and addressing the concrete harms the applicants experienced following the introduction of this model in France, the Court's focus shifts to the more abstract debate surrounding policies to decriminalise, regulate or abolish prostitution and their effect on the applicants' rights to personal autonomy and sexual freedom.

The Court's approach to consensus is also worthy of closer inspection. The selection of the question for which the Court carries out a comparative analysis to determine the existence or lack of a European consensus plays a crucial role in the outcome of the case. In the present case, the Court primarily placed its emphasis on whether there is consensus on the ethical and moral implications of sex work and its regulation *in general* (para. 149), rather than on the more *specific* question of whether there is consensus on the criminalisation of the purchase and selling of sex. While it is correct that, in general, there are a range of approaches to the regulation of sex work that point to no consensus, a dominant approach has emerged in Europe as a clear majority of states have moved away from criminalising *both* the selling and buying of sexual services (27 states along with England, Wales and Scotland in the UK according to the Court's own comparative analysis in para. 69). This is an important aspect of the regulatory framework in Europe that the Court could have considered when determining the applicable margin as it would have better represented the current trends of using criminal law to penalise sex workers and/or their clients. These trends point to consensus *against* the criminalisation of both the sale and purchase of sex. Instead, the Court noted that this is an issue on which reforms in Europe are ongoing, ultimately concluding that the End Demand model fell within the range

of acceptable responses to prostitution. This approach to consensus provides the Court with the justification to demonstrate full deference to the respondent state and serves as an illustration of how the applicable 'level of generality' in consensus analysis (namely, whether the Court will opt for a more general or more specific question to carry out the comparative analysis associated with consensus), can impact the margin of appreciation afforded to the State and the eventual outcome of the case.

Additionally, while the judgment includes (sometimes harrowing) testimonies from the applicants on how the introduction of the End Demand model exposed them to further harm (para. 6), the Court takes a neutral stance on the policy's consequences. It notes that there is conflicting evidence and no consensus as to whether these harms are directly related to the policy itself or to sex work more generally. However, the fact that there is conflicting evidence on whether the End Demand model exposes sex workers to more violence, suggests that there is at least some credible evidence that it does. Due to the wide margin, the Court foregoes establishing clearer standards as to the degree of precaution states would be expected to demonstrate to ensure that marginalised groups affected by policy changes are not exposed to further harm. The credible risk of harm could have also prompted the Court to demand the respondent state to produce very compelling evidence that this model does not endanger sex workers, especially since sex work continues to be legal in France. This is where an examination of the issues under Articles 2 and 3 would have been particularly useful. Nonetheless, even under Article 8, the margin of appreciation goes hand in hand with European supervision (Handyside v. UK, para. 49) and, due to the gravity of the issues at stake, the Court could have clarified the necessary precautions that states would be expected to adopt, or the types of evidence states should produce, to ensure their policies of regulating sex work do not increase stigmatisation and violence against sex workers.

The lack of consensus and the concomitant wide margin of appreciation also relieves the Court from having to conduct an in-depth assessment of the suitability of this measure to achieve the legitimate aims pursued. Thus, the applicants' claims that this policy had failed to achieve its aims and that there were already other measures in place in France to combat trafficking into forced prostitution and the exploitation of minors were not addressed by the Court.

b. 'Procedural review' and the choices of the French legislature

Procedural review involves the Court considering the quality of the legislative process leading to the adoption of a policy that is under challenge, or the quality of the administrative or judicial procedure that led to the alleged violation that is at issue before the Court. Where a specific policy adopted by the legislature is under examination, the Court will not be quick to second-guess the conclusions that the democratically elected legislature reached if the legislative process allowed for an in-depth consideration of the key issues and a careful balancing of the competing interests. In cases where the interests of minorities or other social groups that face exclusion and have a limited political voice are at issue, scholars have noted the importance of considering whether legislative processes did, in fact, contain sufficient avenues for participation for these groups (see indicatively, here and here). In the present case, the Court endorsed the process in France, noting that it allowed for all arguments to be aired and that legislators considered the concerns of sex workers when introducing this model. Nevertheless, there are convincing claims to the contrary.

In their compelling analysis of the political debates leading to the adoption of End Demand legislation in France, Calderaro and Giametta note how opponents of this approach were given significantly fewer opportunities to contribute to the debate while also being exposed to obstacles that undermined their effective participation (see in particular pages 166-169). They draw convincing parallels between the adoption of this policy and the adoption of various laws banning certain forms of religious dress in France noting that in both cases the views of the subjects of these laws were "delegitimised" for "their alleged inability to speak for themselves" during the drafting process (on this, also see Brems' discussion here, highlighting the lack of empirical evidence and consultation with affected parties prior to the introduction of a face veil ban in France). They also highlight how the debate on the adoption of this model reflected anxieties about immigration and included racist tropes about certain segments of the French population who were presented as "very likely to exploit (their) women by buying sex from them, pimping or trafficking them" and therefore had to be stopped.

The fact that the applicants belong to a group that has traditionally been excluded from political processes to represent their interests should have invited the Court to conduct a more searching review of the legislative process and to consider the political climate under which it was conducted. The degree of deference to the political branches of the state that the Court demonstrated in the present case, while appropriate in other circumstances, can seriously disadvantage applicants who face exclusion from key avenues of political participation.

Conclusion

It is telling that in the aftermath of this judgment, rapporteurs within the UN special procedures framework have come out both in support of and to condemn the Court's approach. This reflects the contested nature of the issues the Court was asked to assess. The Court's framing of the applicants' claims as part of an abstract debate on the ethical and moral implications of prostitution allowed it to avoid a more concrete assessment of the impact of the policy on the applicants. The focus on the abstract debate on prostitution rather than on the lived experience of the applicants allows the Court to invoke its subsidiary role, thus depriving the applicants of the opportunity to have their most serious claims under Articles 2 and 3 addressed.

More generally, legal interventions in the area of sex work have been criticised for adopting a "non-realist perception of legal reform - a belief that the intent of the law, once enacted, translates into its desired goal, without sufficient attention to unintended consequences, complex impact on bargaining power and impact on the ground". Additionally, such legal interventions are characterised by "a tendency to focus on criminal and labour law, disregarding multiple other relevant fields of state and non-state governance". The Court was certainly put into a difficult position when asked to address these concerns. In anticipation of this judgment, scholars had noted that it would serve as 'a litmus test' for sex worker rights in Europe. Indeed, a finding of a violation in this case would have had enormous policy implications beyond France as it would have affected all CoE states that have adopted versions of this model. Nonetheless, while the applicants were unsuccessful in this instance, the Court's warning that the relevant authorities should keep this policy under constant review suggests that this is not the final word on the End Demand model.

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