

The indirect criminalization of sex work in France

Victoria Bellami

Doctorante contractuelle, C.R.D.H., Université Paris II Panthéon-Assas

Mots clés : prostitution, pénalisation, France, obligations internationales

Résumé : Élaborée en réponse à l'appel à contributions de la Commission internationale des juristes de Janvier 2019 portant sur l'« Élaboration de principes visant à lutter contre les effets néfastes de la loi pénale sur la santé, le droit à l'égalité et les droits de l'homme, dans le contexte de la sexualité, la reproduction, la consommation de drogue et le VIH », cette note de recherche analyse brièvement la criminalisation indirecte de la prostitution/du travail du sexe en France.

1. Indirect criminalization of prostitutes/sex workers and international law

The focus of this contribution is on the “indirect” criminalization of prostitution/sex work¹, through the example of France, which, has subscribed to this model since 2016.

Indirect criminalization in the context of sex work/prostitution must be understood as the criminalization of the procurer and, in an increasing number of national policies, the client. This trend, also called “neo-abolitionism”, aims at the “disappearance of all forms of economic-sexual exchanges”. In public debate neo-abolitionism, which in Europe is often referred to as the “Nordic model”, is frequently opposed to “regulationism/regulatory politics” as embodied by the “Danish/German model”. Neo-abolitionism is not without issues, especially with regards to international law. Indeed, international law sources do not address the problem, leaving it to States to decide which policy to adopt.

When the issue of criminalization and prostitution is raised, the norms of international law seem rather unclear. The preamble of the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 starts with the following: “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”. Article 1 therefore encapsulates the obligation for States to “[...] punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person”. This text is interpreted as implying the de facto necessity to abolish prostitution as a whole. Regarding the UN Convention on the Elimination of Discrimination against Women (CEDAW), the terms coined in article 6 are subject to interpretation². Hence, as the International Commission of Jurists' (ICJ) Background Paper recalls, the practice of its treaty body sometimes supports criminalization of clients, the purchase of sexual services being thus constructed as “the exploitation of others”³.

¹ Although not strictly equivalent, these terms will be used interchangeably in the present submission.

² Full text of the article: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”. Hence, as the ICJ's Background Paper recalls, the practice of its treaty body somehow and sometimes supports criminalization of clients, the purchase of sexual services being thus constructed as “the exploitation of others”.

³ ICJ, *Report on the May 2018 Expert Meeting of Jurists. “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”*, 2018, p. 31, citing CEDAW, Norway, CEDAW/C/NOR/CO/8, 2012.

There seems to be a contradiction between international public health and development approach and standards, where all criminalization policies in the field of prostitution seem to be unwanted⁴ and international human rights standards, which clearly recommends a change only to prohibitionist policies – criminalizing the sex worker/prostitute themselves, and all activities surrounding prostitution⁵ –.

Special attention must also be given to States which are parties to one or more instruments and/or organizations. In the case of France, its politics are indeed constrained by its membership to the European Union (EU), whose political organs, in particular the Parliament, have confirmed their will to pursue abolitionist politics⁶. However its judicial organs, namely the European Court of Justice (ECJ), seem to adopt a more nuanced point of view. In a 2001 case, the Court decided that prostitution was covered by the European treaties as an economic activity⁷. It could therefore be argued that the Court is not opposed to regulatory politics⁸. French public policies are also influenced by the directions developed in the Council of Europe. Although the Parliamentary Assembly distinguishes between “forced prostitution” and “consented prostitution”⁹, it maintains a wide margin of appreciation for States. Recently, it invited States to consider, among other things, criminalizing the act of buying sexual services¹⁰, a proposal which showed an adherence to the abolitionist model. In a 2007 case against France, the European Court of Human Rights (ECtHR) unambiguously condemned prostitution when it is forced¹¹.

2. Indirect criminalization of sex work in France: legal framework and criticism

There has been a major shift in the way sex work is perceived. Prior to the 2016 Law¹², the legal framework on prostitution evolved. The 2003 Law put an end to the broad criminalization of prostitution which had existed since 1939 and penalized “soliciting” (*racolage*). It clearly targeted the visible manifestation of prostitution in public spaces. Problematically, according to both academic and NGO observers, the criminalization of “soliciting” complicated the investigation of trafficking cases¹³. In 2016, France chose to align with the Nordic model. Therefore, France now penalizes both the procurer and the client, in particular the buying of sexual services, and abolished “soliciting”.

In the debate preceding its adoption, the *Commission nationale consultative des droits de l’Homme* (CNCDH), an independent administrative authority, criticized the first draft adopted by the National Assembly¹⁴. On the other hand, the *Haut Conseil à l’égalité entre les femmes et les hommes* (HCEfh), a governmental agency, declared itself favorable to the law criminalizing clients¹⁵. However, among the people involved in the HCEfh’s report, none seemed to represent the community-based health providers nor sex workers themselves¹⁶.

Ever since its adoption, this Law has been highly criticized. The debate was recently revived with the launch of a judicial review of the law through the courts: the Priority Constitutional Question (PCQ, *Question prioritaire de constitutionnalité*(QPC)). The PCQ allows for an ex-post

⁴ See: UNDP, *HIV and the Law: Risks, Rights & Health*, New York, 2012, §3.2; UNAIDS, *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS/09/09F/JC1696E, Geneva, 2009, 27 p., where the agency recommends “regulationism” or legalization of prostitution.

⁵ Maffesoli S.-M., « Le traitement juridique de la prostitution », *Sociétés*, 2008/1, n°99, 2008, p. 35: “Prohibitionism is the criminal prohibition of prostitution; any actor commits an offense and therefore exposes himself to sanctions.” [translated by the author]. She notes that nowadays abolitionism tends to conflate semantically and politically with prohibitionism, since it aims to “abolish prostitution” (p. 37.)

⁶ EU, PE, *Elimination of violence against women*, P7_TA(2009)0098, November 26th 2009.

⁷ ECJ, *Aldona Malgorzata Jany*, Case C-268/99, November 20th 2001, §49.

⁸ Marguénaud J.-P., “Les droits de la femme prostituée à l’épreuve du proxénétisme de l’État”, *RTD Civ.*, 2007, p. 730.

⁹ CoE, PACE, *Resolution 1579 “Prostitution – Which stance to take?”*, October 4th 2007, §4.

¹⁰ CoE, PACE, *Resolution 1983 (2014) – Prostitution, trafficking and modern slavery in Europe*, April 8th 2014, §12.

¹¹ CoE, ECtHR, *V.T. v. France*, req. n°37194/02, September 11th 2007, §25

¹² Full text of the *Loi n°2016-444 du 13 avril 2016 visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées*: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032396046&categorieLien=id>.

¹³ See for example: Mathieu L., *Sociologie de la prostitution*, La Découverte, Paris, 2015, p. 41.

¹⁴ See: CNCDH, *Avis sur la proposition de loi renforçant la lutte contre le système prostitutionnel*, May 22nd 2014 [https://www.cncdh.fr/sites/default/files/14.05.22_avis_ppl_renforcant_la_lutte_contre_le_systeme_prostitutionnel_0.pdf]; for an analysis, see: Bourdier E., “La commission nationale consultative des droits de l’homme critique sur la proposition de loi renforçant la lutte contre le système prostitutionnel”, *Actualités droits et libertés, La Revue des droits de l’homme*, June 2014 [<https://journals.openedition.org/revdh/844?lang=es>].

¹⁵ HCEfh, *Avis sur la proposition de loi n°1437 renforçant la lutte contre le système prostitutionnel – Avis n°2013-1104-VIO-010*, November 2013 [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hcefh_avis_ppl_prostitution_20131105-3.pdf].

¹⁶ However, one representative of the neo-abolitionist movement, the Mouvement du Nid was a member of the report’s commission and another from l’Amicale du Nid was the only person auditioned by the HCEfh.

control of laws already ratified with regard to the French Constitution (in the broad sense, including written and unwritten principles), in the context of an individual case brought before courts. This PCQ has been supported by several community organizations such as the STRASS (*Le Syndicat pour les Travailleur-r-se-s du Sexe*, the “Syndicate” for Sex Workers), but also several NGOs such as *Médecins du Monde* (MdM), who declared themselves interveners to the procedure. In particular, article 611-1, which prohibits the purchase of sexual services¹⁷ and was included in the Criminal Code following the law’s adoption, was targeted¹⁸. The hearings before the *Conseil Constitutionnel* were held last January 22nd¹⁹. The decision, which concluded the Law conformed to the Constitution, was published on February 1st²⁰.

Another feature of the 2016 Law has been hotly debated, but not put to test directly before the *Conseil Constitutionnel*. Indeed, even when the abolitionist strategy is not criticized in itself, some observers raise concerns regarding the “exit program”, primarily aimed at foreigners, designed in the social component of the Law. Indeed, it requires potential beneficiaries of this program to prove the abandonment of prostitution before entering it and to refrain from engaging in prostitution during the period their application is reviewed by the local board²¹, period that can last more than 6 months after filing it²². The low amount of resources and funds allocated to the program, as well as its unequal implementation within the French territory, as of April 2018, are also problematic²³. Finally, the 330€ monthly allowance²⁴ seems derisory compared with income from prostitution or common social

assistance schemes, such as the Active solidarity income (*Revenu de solidarité active*, RSA)²⁵.

More broadly, it is the general “hypocrisy” of the French system which is underlined. Despite the prohibition of the purchase of sexual services, it remains possible to sell them, and the revenues perceived from this activity are taxed by the government. Although sex workers contribute to State’s budget, they do not benefit from any social protection, apart from general schemes provided for the most vulnerable people, such as the Universal sickness cover (*Couverture maladie universelle*, CMU).

3. Rationale behind the 2016 French law

Disappearance of prostitution as a whole (political objective)

The title of the law in itself announces the main objective: “reinforce the fight against the prostituting system” (*système prostitutionnel/prostituteur* in French). This concept of “prostituting system” encapsulates the procurers, the “prostituting” clients, the “prostitute people” and society. It was devised by abolitionist proponents²⁶ in order to shift focus from the prostitute to the procurers and the clients²⁷. Another aim pursued by French legislation is to reinforce the fight against human sexual trafficking and exploitation. The Government’s counsel, defending the constitutionality of the 2016 Law during hearings before the *Conseil Constitutionnel* in the PCQ process, also invoked compliance with Directive 2011/36/UE on trafficking in human beings.

¹⁷ “Soliciting, accepting or obtaining sexual relations from a person who engages in prostitution, including occasionally, in return for remuneration, promise of remuneration, provision of a benefit in kind or the promise of such a benefit is punishable by the fine for contraventions of the 5th class. Natural persons guilty of the contravention provided for in this section also incur one or more of the complementary penalties mentioned in article 131-16 and in the second paragraph of article 131-17.” [translated by the author].

¹⁸ See for example STRASS’s press release: <http://strass-syndicat.org/decision-du-conseil-detat-un-premier-pas-vers-la-censure-de-la-loi-prostitution-de-2016/>.

¹⁹ See the streamed video of the hearings: <https://www.conseil-constitutionnel.fr/decision/2019/2018761QPC.htm>.

²⁰ See the full text of the decision: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2018761qpc/2018761qpc.pdf.

²¹ See the Round table organized by the French Senate with actors of those programs: http://videos.senat.fr/video.627942_5ace0a26648ec.table-ronde-sur-le-parcours-de-sortie-de-la-prostitution?timecode=1407000.

²² See the criticisms voiced by Maffesoli S.-M. in *Liberation* newspaper : https://www.liberation.fr/france/2018/04/12/sortir-de-la-passe-un-risque-d-impasse_1643026.

²³ See the *Round table*, *op. cit.*

²⁴ Full text of *Décret 2017-542* adopted on April 13th 2017: <https://www.legifrance.gouv.fr/eli/decret/2017/4/13/FDFA1703439D/jo/texte>.

²⁵ For more details on the “exit program” and sex workers’ opinions and experiences, see : MdM and al., *Que pensent les travailleur.se.s du sexe de la loi prostitution?* – *Enquête sur l’impact de la loi du 13 avril 2016 contre le “système prostitutionnel”*, April 2018, pp. 56-67 [<https://www.medecinsdumonde.org/sites/default/files/Rapport-prostitution-BD.PDF>].

²⁶ See the definitions provided by the Mouvement du Nid, a strong French neo-abolitionist movement: <http://www.mouvementunid.org/Quelle-difference-entre#>.

²⁷ On the construction of the client as a “public problem” in the French debate, see: Mathieu L., 2015, “Des monstres ordinaires. La construction du problème public des clients de la prostitution”, *Champ pénal/ Penal field*, vol. XII, 2015 [<https://journals.openedition.org/champpenal/9093>].

Compliance with international and European standards (legal objective)

One of the aims invoked by the French government was also to align internal law with the obligations subscribed by France at the international level, in particular the 1949 Convention (see above).

4. Impact of the French framework on sex workers and clients

Considering that international law as a whole remains unclear on the criminalization of clients, the question is: do neo-abolitionist policies have the same effect on the sex workers and their health, as prohibitionist policies do? Equally, do those policies force sex workers to go underground in order to pursue their activities?

It is important to remember though that in the context of indirect criminalization of prostitution, two categories of people are criminalized: the client directly and the sex worker indirectly. Activists, grass-root level organizations, and sex workers themselves tend to focus on the impact of the law on sex workers, and have thus produced a lot of data on the subject.

According to some community or field working associations' feedback, such as l'Association du bus des femmes (operating in Paris and its surrounding areas), l'Association Paloma (based in Nantes), corroborated by several studies identified in a January 2016 meta-study and consultation brought by the *Haute autorité de la Santé* (HAS, High authority for Health), an independent administrative authority focused on public health, both direct and indirect criminalization tend to have similar effects²⁸. Furthermore, this meta-study has clearly identified "clandestine situation related to the legal framework on prostitution" as a probable sanitary vulnerability factor in terms of sex workers' health status²⁹.

Several concerns regarding the impacts on health of the 2016 Law have been voiced by sex workers. In a 2018 survey conducted by MdM, through various interviews, these included: more risk taking in the sexual practices such as the imposition by the client of condom-free sex, breakdown of HIV/AIDS treatments, psychosomatic stress, addiction to various substances (alcohol, tobacco, drugs...), increased violence³⁰.

More specifically, both grass-root level organizations and academics insist on the specific dangers encountered by particular groups among sex workers, whose situation is even more precarious since the adoption of the 2016 Law, and the interplay with other features of the criminal laws and system. For instance, STRASS and other community-based organizations shed light in August 2018 on the murder of Vanessa Campos, a trans*, Peruvian sex-worker, and the difficulties in obtaining justice and reparations³¹.

As a side note, the criminalization of both clients and procurers also precludes a debate on other topics closely linked, sometimes willingly by abolitionist movements, to sex work such as sexual assistance for physically and/or mentally disabled people³².

5. Need for principles at the international level

A set of principles on the question may help gain a better understanding of the articulation and interplay of public health and human rights concepts and principles. It is also a way to structure and formalize thought and reasoning. In the context of my PhD research, it will provide an authoritative source from which to develop proposals for hard law and reflect upon the current state of the law.

It provides an opportunity to clear and strengthen the international consensus. It allows us to bridge the gap between various conflicting sources of international law and practices on the matter (see above). Since the scope of States' obligations is rather unclear, depending on whether they are party to one, another or multiple conventions and/or organizations, they, including France, may use this overlap in order to justify peripheral criminalization of sex work, notwithstanding its possible deleterious effects on both sex workers and clients.

In this context, another line of work could be the devising of precise working definitions. Indeed, confusion remains around the terms "sex work", "[sexual] exploitation", "voluntary/forced prostitution", etc. The international and regional norms do not clearly define them, and the practice of human rights protecting bodies remains unclear, as the ICJ's Background paper recalls³³. This allows for their voluntary misuse in public debate, and systematic assimilation. The need to refine must be accompanied by

²⁸ HAS, *Évaluation de santé publique – État de santé des personnes en situation de prostitution et des travailleurs du sexe et identification des facteurs de vulnérabilité sanitaire*, January 2016, p. 47 [https://www.has-sante.fr/portail/upload/docs/application/pdf/2016-04/rapport_etat_de_sante_des_personnes_en_situation_de_prostitution_et_des_travailleurs_du_sexe_vf.pdf].

²⁹ *Ibid.*, p. 50.

³⁰ MdM and al., *Que pensent les travailleur.se.s du sexe de la loi prostitution? (...)*, *op. cit.*, pp. 6-7 [<https://www.medecinsdumonde.org/sites/default/files/Rapport-prostitution-BD.PDF>].

³¹ See STRASS's press release: <http://strass-syndicat.org/notre-college-vanessa-campos-a-ete-assassinee/>

³² As noted by Gamaleu-Kameini C., "Peut-on légiférer à propos de l'assistance sexuelle en France?", *Médecine & Droit*, 2013, p. 185.

³³ ICJ, *op. cit.*, p. 31

a strong stance according to which defining does not mean ignoring nor “excusing”. On the contrary, better defining and understanding the multiple facets of prostitution will allow for better legal responses and action plans.

Those principles would also help in assessing States’ compliance with both public health and human rights standards, from an academic perspective and also in terms of advocacy (by NGOs, community associations, politicians, etc.).

6. Potentialities and limits of the “pragmatic” public health argument

Some field workers argue that a “dispassionate” but pragmatic perspective on sex work should be adopted, meaning in this case the abandonment of ideological, political and moral stances³⁴. They emphasize various human rights and principles such as: free and informed consent, privacy, harm, security, freedom of enterprise, etc. Although the trend in international law to decriminalize sex work as a whole partially relies on a public health perspective – a rather effective way to promote a scientific and reasoned perspective on the issue of sex work –, this perspective as a basis for decriminalization can also be used with the opposite effect. Indeed, during the debate before the *Conseil Constitutionnel*, counsels representing the neo-abolitionist movement argued that the mental and physical pain caused by prostitution³⁵ on individuals was sufficient to justify the criminalization of clients³⁶. Therefore, principles and work related to decriminalization of prostitution should always acknowledge the pain some people involved in prostitution, a fortiori when forced into it, may suffer, yet without denying their capabilities and agency. Strengthening the link between decriminalization and both individual and collective health is of utmost importance.

7. Recommendations to States regarding indirect criminalization of sex work

Based on the French experience, States should ensure a truly diverse dialogue with all stakeholders, when designing or implementing laws in the area of sex work/prostitution. When the strategy of neo-abolitionism is adopted, although raising questions in itself, the State must ensure that all appropriate means are directed to the “exit program”, and that in practice unnecessary and sometimes dangerous requirements are not imposed on people wishing to benefit from those programs. States

must not use those types of law and budgeting to prevent the action and funding of non-abolitionist community-based associations working on the field³⁷. ■

³⁴ See the recording of MdM’s press conference following the verdict: <https://www.youtube.com/watch?v=MF2Jk1Z0Dm8>.

³⁵ See also the following column: <https://www.lejdd.fr/Societe/tribune-penalisation-des-clients-affirmer-que-la-loi-de-2016-aggrave-la-situation-des-personnes-prostituees-ne-fait-aucun-sens-3624821>.

³⁶ See the streamed video of the hearings: <https://www.conseil-constitutionnel.fr/decision/2019/2018761QPC.htm>.

³⁷ See the polemic on the funding of the MdM’s program Lotus Bleu: <https://www.lejdd.fr/Societe/tribune-penalisation-des-clients-affirmer-que-la-loi-de-2016-aggrave-la-situation-des-personnes-prostituees-ne-fait-aucun-sens-3624821>