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## Prostitution, harm and the criminalisation of clients

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### 1. Introduction

In order to reduce the demand for prostitution and in turn the prostitution itself, the Swedish model of regulation of prostitution focuses on the criminalisation of clients of prostitutes. Sweden was in fact the first European country to criminalise the use of a prostitute's services, i.e. services of an otherwise voluntary prostitute.<sup>416</sup> The purpose of 1998 law,<sup>417</sup> which criminalised the users, is to criminalise the demand and stems from the belief that prostitution is a form of violence against women and therefore needs to be abolished completely. The official discourse does not differentiate between voluntary and forced prostitution in this respect, as all types of prostitution are considered violence.<sup>418</sup> It draws upon the radical feminist perspective, which advocates this line of reasoning and is in Sweden also very powerful in the political sense. The latter sees prostitution as a violation of the women's rights and often emphasises that prostitution cannot be entered into voluntarily, but that it is in fact a phenomenon ridden with violence and exploitation of women in a patriarchal society. France seems to be following the Swedish path with the National Assembly approving a cross-party, non-binding resolution (due to be followed by a bill in January 2012) that envisages a six-month prison sentence and a fine of 3,000 euros for clients of prostitutes.<sup>419</sup> In Belgium, similar ideas have been recently voiced by CDH (a political party in the Brussels Parliament), proponents of which consider, *inter alia*, prostitution as such to be violence towards women (and refer a lot to their Swedish counterparts).<sup>420</sup> Such a conception of prostitution, it will be argued, is misleading; it is legally-philosophically untenable, criminologically problematic and the proposed solution to the "prostitution problem", that is the criminalisation of clients of prostitutes – not a solution at all (but a rather misguided societal reaction to this social phenomenon).

The structure of the article is the following: the first part of the article will state the main tenets of the argument for the criminalisation of clients and suggest some counterarguments, particularly focusing on deconstructing the harm-claim, i.e. the claim that prostitution equals harm or that prostitution *per se* is violence. Is there any inherent harm-to-others in prostitution and, if yes, what sort of harm would it be? The second part will look more closely at the criminalisation as a tool for regulation of social reality, expounding the characteristics and pitfalls of this technique of social regulation. In the third part, some additional criminology-based arguments against the proposed criminalisation will be explored, followed by a concluding thought on criminalisation and the role of criminal law in solving such societal "problems".

Throughout the chapter, the term "prostitution" will be used to refer exclusively to the voluntary or consensual prostitution. Any type of forced prostitution falls neatly under the Palermo Protocol's definition of trafficking in human beings,<sup>421</sup> which is why the term trafficking in human beings is preferred when referring to forced prostitution, as it is a justifiably stronger term and emphasises the exploitation dimension of the crime. The term prostitution (without any adjective) shall, on the other hand, refer to voluntary prostitution alone; voluntariness defined as the law generally defines it, i.e. as the absence of force or threat.<sup>422</sup>

## 2. Arguments based on harm

There are several other reasons why criminalisation of clients may not be such a great idea – some of them will be listed later in the text –; however, we shall here mostly focus on what seems to play the most important, largely assumed, crux of the matter: the harm of the prostitution. We shall focus on the proponents' logic of argumentation behind it to see whether their position is a tenable one and place their endeavours within the realm of penal ethics – more concretely, in the realm of legitimate grounds for criminalisation in a modern criminal legal system.

The main argument of the proponents of criminalisation of clients is based on two claims. The first claim or the first part of the argument states: "Prostitution is violence, i.e. harm." The second part, already taking the first claim for a fact, moreover asserts: "As the supply (the prostitution/violence) is influenced by the demand for it, we should cut the demand by criminalising clients, thereby cutting prostitution/violence".

### 2.1 "*Prostitution equals harm*"

The first part of their argument claims that prostitution equals harm or violence. In the light of the harm principle – the only widely accepted, unproblematic principle of criminalisation in a modern criminal legal system or country respecting personal liberty –, this claim is the strongest if "harm" is understood as "harm to others". Before we proceed by countering this claim, an explanation of the two mentioned concepts may be useful. The harm principle, as expounded by American philosopher Joel Feinberg, states that "[i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is no other means that is equally effective at no greater cost to other values".<sup>423</sup> It is based on J.S. Mill's "principle of liberty"<sup>424</sup> and it simply means that harm to others – i.e. "harm" (not, for example, paternalism or moralism) and "to others" (to persons other than oneself) – is a legitimate grounds for criminalisation of someone's conduct.

Arguments countering this claim could assert, *firstly*, that prostitution is not harm. In fact, it will be claimed that prostitution is (highly) risky but that it is not the same as harm or violence. And *secondly*, that even if, *arguendo*, prostitution were equal to harm, this harm would be only self-harm not harm-to-others (as required by the harm principle); the latter not traditionally being a legitimate grounds for criminalisation.

Regarding the first counterargument: does prostitution really equal violence, i.e. harm? Is prostitution violence or is it rather that prostitution is a high-risk profession where "employees", if insufficiently protected, can be exposed to physical as well as psychological violence – which rather warrants better oversight, regulation and protection of prostitutes than outright prohibition? Janice G. Raymond argues that "[t]o understand how violence is *intrinsic* to prostitution, it is necessary to understand the sex of prostitution. The sexual service provided in prostitution is most often violent, degrading, and abusive sexual acts, including sex between a buyer and several women; slashing the woman with razor blades; tying women to bedposts and lashing them till they bleed; biting women's breasts; burning the women with cigarettes; cutting her arms, legs, and genital areas; and urinating or defecating on women."<sup>425</sup> *Firstly*, it is doubtful whether the cases mentioned here really do represent the bulk or the most frequent types of sexual transaction between the prostitute and the client. Empirical research available on this issue can turn up with a very different picture.<sup>426</sup> *Secondly*, acts that have not been consented to on the part of prostitute (and "slashing the woman with razor blades" or cutting her in any way was most

likely not part of the deal) or in the extent that they supersede, either in form or in intensity, her consent are not an inherent part of prostitution or of the “sex of prostitution” – they are criminal acts, they are crime and as such already justly penalised. Abuse of prostitution is not prostitution; it is abuse. The fact that these incidents happen within prostitution does not mean that they are intrinsic to it. These things also happen within marriages, but are we then allowed to conclude that marriage is a crime or violence? Another example: from the fact that A lives alone in a house, into which B breaks and rapes A, it does not follow that living in a house or living alone entails rape. Prostitution or living alone may be more risky and its subjects more vulnerable to victimisation but that does not mean that violence is *intrinsic* to those practices in the sense that they are *per se* harmful (and that they should, for this reason, be criminalised). What it should mean, however, is that the society ought to work on diminishing those risks by, for example, better regulation and supervision, by equipping prostitutes or their premises with safety devices, allowing them to work together,<sup>427</sup> warning them of certain clients with known violent record or stimulating them to work in establishments that have been inspected and granted some sort of official approval based on their reaching of certain (high enough) standards<sup>428</sup> and so forth.

The proponents’ arguments based on harm to others therefore do not hold water. Yet, are their arguments really harm-based, as they purport to be? Although they use the language of harm, it seems they rather try to reinstate legal moralism as a legitimate ground for criminal-law prohibition (through giving it a legitimising coat of harm). Issues of sexual morality between consenting adults are traditionally not considered a legitimate basis for state or public intervention through criminal law, as legal moralism is not considered a legitimate ground for criminalisation. Coaching the issue in terms of harm, on the other hand, takes the debate – on the surface, at least – out of the sphere of legal moralism into the sphere of the harm principle. However, it seems that what lies behind the rhetoric and the caring language, the language of protection and harm, is often more moralistic in nature than harm-based.<sup>429</sup>

Another indication of the moralism hiding underneath it can be found in the prohibitionists’ interests in males’ motives for going to a prostitute. Should we, in the context of criminalisation, be interested in the clients’ reasons for going to the prostitute, interested in men’s motives? These reasons are important, i.e. hold any value, only if we allow the possibility that the using of sexual services is not harmful, i.e. does not represent violence to women, *per se*. Only if violence/harm is content-dependent on the clients’ reasons, then reasons need to be examined in order to decide on a legitimate criminalisation of clients, i.e. of their conduct (the purchase or use of prostitute’s services). If one believes that prostitution (the conduct) *per se* harms prostitutes, understanding clients’ motives is not necessary for condemning prostitution through criminalisation. If offering sexual services to a client causes harm to the prostitute, then it does not matter whether the client came to her out of loneliness or out of his perverse sexual desire or the need to have his insecurities about his manhood and potency satisfied. It should not matter whether the client’s motives are more benevolent or more sinister, as it is the conduct that purportedly causes harm to others and is as such a legitimate object of criminalisation.

For those who claim that prostitution as such is violence against women, i.e. harm, the reasons should therefore not matter, unless they derive the “harm” of prostitution from the vested motive of the client’s conduct, not the conduct itself. Yet, funnily enough, many abolitionist studies do very much dwell on the question of male reasons. Even if their major claim against prostitution is often couched in terms of harm, their focus regarding the clients’ motives is on the *immorality* of their conduct, not the *harmfulness* of it. What they derive (and can only be derived) from reasons/motives is the moral/immoral component of

conduct, i.e. the wrongness of it, not the harmfulness of it. Of course, the criminal harm need be a wrongful harm, meaning that harm that is not wrongful ought not to be criminalised, yet a wrong that is not harmful ought not to be criminalised either.<sup>430</sup>

Regarding the second counterargument stated above, one could claim that even if *arguendo* prostitution were harmful, such harm would be to prostitutes themselves. It would be self-harm not harm-to-others – as required by the harm principle. Criminalising voluntary prostitution (even if only in the form of criminalising the demand) for the prostitutes’ “own good” amounts to so-called legal paternalism, which is not considered a good basis for criminalisation in a modern democratic liberal society<sup>431</sup> – even if it may be considered good grounds for other state intervention, such as social and education policy. According to the only widely-accepted principle of criminalisation, the harm principle, only harm that someone caused or may cause to the other may represent a legitimate grounds for criminal-law prohibition – which is why we do not, for example, find it legitimate to criminalise smoking or criminalise those who sell tobacco (we do not conceive poor smokers as victims of harm and deploy criminal-law strategies to prevent them from meeting up with sellers), even though smoking has over the years proven to be undoubtedly harmful to oneself.

Any such harm would therefore be self-inflicted (self-harm) or harm to which they consented – that is after all the definition of “voluntary prostitution”. And as long as the harm is consented to, it is not “wrongful” – idea encapsulated in the Latin maxim “*volenti non fit iniuria*”. If the harm is not wrongful, however, it is not “criminal harm”. Such an act loses the “criminal” quality and does not justify criminalisation. For example, boxing is often harmful, yet not considered wrongful as any harm resulting from it (and inflicted upon the boxing parties) is considered consented to; hence, it is not criminalised.

## 2.2 “Criminalisation is The solution”

The second part of the above mentioned two-pronged argument of the proponents of criminalisation of clients, already resting on the assumption that prostitution is harm and that, in order to reduce the harm, we have to therefore reduce or eliminate prostitution, asserts: “As demand influences supply, we should cut the demand by criminalising clients”. This is often seen as a softer, more prostitutes-friendly option, as it does not directly target or victimise the prostitutes but rather their clients.

Now, the proponents of such criminalisation are certainly right to try to bring more light onto the role of the users – mostly male – in this story. There have not been to date many studies exploring the demand side of prostitution, which is why an important facet has remained hidden.<sup>432</sup> Such research often helps dispel stereotypic notions, such as one of a dirty, HIV-infected prostitute, as studies reveal that often it is the prostitute who needs to be protected, health-wise, against the clients who are often promiscuous, unhygienic and reckless in wearing a condom (as it “ruins the experience” or as not wearing one “reinforces their masculinity”), thus spreading sexually-transmitted disease.<sup>433</sup> Also, it is admittedly a good thing for the law to acknowledge the importance of economic factors driving the social phenomena (i.e. the influence of demand on the supply and consequently on the size of some undesirable social phenomenon). One could argue that in the idea of criminalisation of clients the economic reasons for prostitution are successfully acknowledged by the law – that law here recognises the importance of economic demand and its influence on the supply.

However, the reduction of some less desirable (or undesirable) social phenomenon need not necessarily take the form of criminalisation. Criminal-law theorists always ask

themselves why it is so that criminalisation always seems to be a kind of knee-jerk reaction to various social problems (or what is perceived as social problems). Why is the criminal law seen as the best way, even if it is often proven to be neither effective nor justifiable? Using such a blunt tool as the criminal law to do the work instead of educational and social security measures (tackling the real causes of not all, but the majority of prostitution) can do more harm than good. For example, the criminalisation of prostitution users can make the situation worse for prostitutes as by criminalising it potentially scares off their better customers. Although it is not the prostitutes themselves who are being criminalised, they are secondarily victimised by the state in the sense of having to suffer the financial loss (due to the loss of some part of clients), possibly resulting in them having to work longer hours or accept customers whom they otherwise would not receive, which can, in turn, make them more exposed and vulnerable to violence. Furthermore, by focusing on the punishment, one focuses less on what may actually help those who have found themselves in the profession due to the lack of alternatives, i.e. on providing alternative employment opportunities, education opportunities, social and health care and so forth.

What one has to bear in mind is that criminal law is an imprecise instrument that penalises people. It is a morally loaded tool as it carries with it censure. Censure or moral reprobation is namely what distinguishes punishment, i.e. criminal legal sanction, from other types of sanctions.<sup>434</sup> The power to criminalise certain human conduct is an immense power that shapes our values, divides the population into criminals and non-criminals, limits people's liberty of action and can make (through imposing sanctions on certain conduct) some people's lives significantly worse, which is why it should – despite being primarily a political process – be guided by legal principles, rules and standards.<sup>435</sup> The enforcing of criminal statutes, as Schonscheck argues, “is the most intrusive and coercive exercise of domestic power by a state. Forcibly preventing people from doing that which they wish to do, forcibly compelling people to do that which they do not wish to do – and wielding force merely attempting to compel or prevent – these state activities have extraordinarily serious ramifications. Indeed, no state institutions are likely to have more profound an impact on the lives of individual citizens than those of the criminal justice system. [...] As a consequence, these state activities are in special need of moral warrant.”<sup>436</sup>

As criminalisation precedes enforcement, what Schonscheck says about the enforcement of criminal statutes also holds true for its “previous stage”, i.e. the making of criminal statutes. Criminalisation not only defines certain human conduct (act or omission) as a criminal offence and assigns to it a certain criminal-law sanction; in its normative dimension, criminalisation has a moral character, as “to make some action a crime is to declare that it should not be done”.<sup>437</sup> The act of criminalisation thus charges criminal law with condemnatory disposition, which is discharged every time the courts use it to punish someone. Through punishment criminal law not only inflicts pain; it inflicts pain in a condemnatory way. It is unsurprising therefore that Bentham saw it as an “evil”.<sup>438</sup> As such it represents in itself a “cost” to be weighed against the possible benefits of criminalisation.

### **3. Other downsides and counterarguments to the criminalisation of clients**

Apart from the mentioned flaws in harm-based argumentation against prostitution, there are several other reasons why criminalisation of clients is not such a blindingly brilliant idea: (a) this “solution” seems to show amazing trust in generally preventive or deterrent capabilities of law, which, however, runs contrary to empirical evidence. The history of prohibition of e.g. alcohol and other criminalised conduct has shown that the conduct of

this nature when criminalised will mostly end up being displaced (to less policed areas or countries) or go underground, resulting in lesser visibility and consequently lesser protection of prostitutes. In the case of Sweden and Romania (both prohibitionist countries), the research has revealed that the legislative constraints had an effect on prostitution in the sense of moving it mainly indoors,<sup>439</sup> while anti-kerb crawling initiatives in the UK have reduced choice for prostitutes and their clients about where to solicit and have sex, leading to new and less safe locations to be sought;<sup>440</sup> (b) the proponents of such criminalisation are not keeping in touch with the social reality or empirical research on clients that has been produced to date or selectively use only those data that support the grim picture of prostitution; (c) such a “solution” sidesteps the *volenti* maxim and ignores the will or power of consent that, legally speaking, gets in the way of portraying all prostitutes as victims; (d) it ignores the fact that sex is a natural or biological need and so people will always look for it in some way or the other, which means that the demand can never really be extinguished, not even if criminalised under severe punishment; (e) it ignores the fact that availability of prostitution can also do a lot of good by allowing some groups (handicapped, elderly etc.) that would otherwise find it difficult to satisfy their sexual needs and desires; and (f) that clients are in a position to notice whether some prostitute is a victim of trafficking or not and can report it to the police thereby being a valuable source of information and of consequent help to the trafficked victim – the source that will cease to exist if the clients are to be criminalised.<sup>441</sup>

Many a discourse of the proponents of such criminalisation is gendered, which narrows the topic significantly as it ignores certain other types of problematic prostitution, e.g. prostitution of minors – boys. Moreover, by linking the “problem” of prostitution or abuse of prostitution with the “woman issue”, usually emphasising that it is affecting mostly women (and then carry on regarding harms women face today, extend it to pornography, lap dancing, portrayal in the media...), they are portraying a certain kind of femininity, a certain kind of a “woman” and thereby exclude other women, who do not belong to that category or agree with them, from “womanhood”, accusing them of being misled, of playing the man’s game and stripping them of the right to derive pleasure on their own terms. These groups re-define not only what is or means to be a “woman”, what womanhood means, but also what constitutes a woman’s pleasure, i.e. what *should* be (or rather what *should not be*) a woman’s pleasure.

Such radical, basically punitive discourse tends to quash other (feminist) debates, labelling them as pro-violence to women, patriarchal, anti-human rights. As with arguing against the prevailing security discourse, which increasingly legitimises over-reaching surveillance and intrusions into our privacy and other human rights (not to mention suspects’ procedural rights) in the name of security, where such arguments are often understood as arguing against security itself, arguing against the radical, over-criminalising, zero tolerance, prostitution-equating-with violence stance, is often impatiently and wrongly understood as defending or even legitimising the status quo, the dominant male discourse and perpetuating violence against women.

Such discourse can also be criticised for forcing victimhood on women or victimising<sup>442</sup> such women. It has a tendency to “capitalise on the image of women as victims”,<sup>443</sup> silencing those women discourses that stress a more active or even more equal and powerful (and empowering) role of women in shaping their own sexuality and consensual sexual conduct. Victimalisation of prostitutes, when it is unwanted, can be understood as a type of victimisation itself. There is and should be, therefore, room for alternative discourses outside the dominant two which, as Stoebenau succinctly summarises, “either victimise women as helpless sexual slaves or glorify them as proud



whores".<sup>444</sup> This bipolar view is misinformed and prejudiced, but difficult to change, as these stereotypes lead to and are the result of cognitive blindness, which cements a very limited black-and-white social representation of prostitution and consequently reduces the options or range of proper solutions in this area.<sup>445</sup>

Moreover, similar to monolithic understanding of all women engaged in all kinds of prostitution as voluntary sex workers, the perspective that sees all women in prostitution as victims also does little to clarify the separate, albeit connected, phenomena of prostitution and trafficking, little to distinguish the different shades of grey between the two extremes and little to give voice to all women-in-prostitution and their different experiences. In fact, it could be argued that forcing this one-dimensional view of prostitution on these women is as patronising as some of the (historically male or state) responses to prostitution and attitude to women in general have been in the past and present. These attitudes are based on the premise that "we know better" or that "we know what is good for you" and have been clearly displayed in the past when other (most likely moral panic-driven) solutions regarding "fallen women" were contemplated as well as when women were prohibited from enrolling into universities or prohibited from voting. Indeed, some even go on to argue that "the white western feminist projects of saving other women are grounded in the masculinist logic of protection",<sup>446</sup> which drives the protector, i.e. white Western feminists, to objectify and silence the other – the protected, i.e. foreign, exotic prostitutes, whose desire to be "saved" is presumed and their gratitude expected. Which is why some see the proponents of such criminalisation as engaging in a long dead discourse, as stifling all values and achievements of female emancipation and in fact betraying feminism in its core.

#### 4. Conclusion

Principled, legal and ethical objections to the criminalisation of clients of prostitution, raised in this article have rested on the notion that only the harm principle is the unproblematic, legitimate basis for criminalisation, meaning that only wrongful harm (to others) may be legitimately criminalised. Harm that is not wrongful and/or a wrong (immoral conduct) that is not harmful fall short of this requirement. It has been shown that the "harm" that the proponent often find intrinsic to prostitution is rather something that follows behaviour that is marginalised, forced into hiding (or invisibility), less or inefficiently regulated and consequently "risky". While risk may be endemic to such a profession (that is more or less underground, invisible and not successfully monitored), there is no "harm to others" as such hidden in the voluntary prostitution. Anyone claiming otherwise, however, has the burden of proof, as in a country that respects human rights and civil liberties a presumption is and should be in favour of the individual and his or her autonomy or liberty. It has also been suggested that proponents of criminalisation of the demand side of prostitution, although on the face of it appealing to harm, are often really disguising paternalistic, at best, and moralistic reasons for prohibition, which are not really considered legitimate grounds for criminalisation in a modern criminal legal system. Criminological objections listed further in the text have, on the other hand, stressed the need for continuous research in this area and the importance of any criminal policy being based on such research. The media are quick to highlight some upsetting finding without mentioning the limitations of the study (e.g. its non-representativeness of the whole country) and tend to frame the topic in a bipolar fashion: prostitutes are portrayed as either proud whores/sexual delinquents or as victims of cruel pimps/traffickers. Once this black-and-white conception of prostitution becomes a common-sense theory,<sup>447</sup> misinformed and biased as it may be, it is rather hard to break. This blindness is particularly detrimental

when it narrows the vision (and imagination) of those who are entrusted with (criminal) policy making or with finding solutions for various social problems. As in other criminological areas, so in the area of prostitution, there is a need for a more systematic and methodologically rigorous inquiry to be carried out in order to correct “pop-criminology”,<sup>448</sup> often espoused by media, and provide a realistic basis for policy making. This is perhaps even more needed in the highly emotive topic of prostitution, where calls for criminalisation can be understood as a predominantly emotional rather than a rational response.

Whenever criminalisation is contemplated, it is worth bearing in mind that the criminal code should provide an “ethical minimum” (Jellinek),<sup>449</sup> a common denominator of morality that all could follow, not the maximum of morality, the highest ethical standards. This goes far in explaining why the harm principle is the most accepted criminalisation principle in Western democracies and the existence of a criminal-law principle of *ultima ratio*. In the absence of harm, that which is merely socially undesirable or less desirable or outside the usual moral norm, ought to be legally tolerated.

However, criminal law provides also a symbolic platform, expressing “our shared beliefs of what is truly condemnable”.<sup>450</sup> As such it is always vested not only with values but also with societal fears and insecurities. This is the social psychological dimension of criminalisation that should not be neglected. In the context of criminal law, the blood-thirsty appeals for criminalisation of some conduct or punishment of someone can sometimes better be understood in terms of ‘displacement’, where an unacceptable feeling or thought about a person, place or thing is redirected towards a safer target. Every-day ontological insecurities that have no single, clearly distinguishable “cause” or enemy to pinpoint, often channel into fear of crime and consequently – as a means of regaining control – into appeals for punishment of some convenient perpetrator (who here plays the “safer target”). An individual or a whole group is become a scapegoat – a hostile discrediting routine through which people displace their aggression onto a target person or a group, whom they inappropriately accuse or blame for various problems. A client of a prostitute seen in this light can play a scapegoat for all the evils of trafficking in human beings, of historic and modern exploitation of women or exploitation of the poor and vulnerable – of course, as long we see the prostitute and prostitution in general in these (oversimplified) terms alone.

The analysis of criminalisation can go far in revealing these psycho-social mechanisms and societal fears and insecurities hidden therein. It is up to criminal policy, however, to separate the wheat from chaff, as it were, to sift through all the social phenomena that worry people, filter them through the legitimate principles of criminalisation and limiting factors,<sup>451</sup> and come out justifiably proscribing (or suggesting prohibition of) only the worst, wrongful conduct that is significantly harmful to other people.

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