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Criminal Laws and prostitution: The legal experience challenge for the concept of Legal Culture

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Abstract

This study, taking as its starting point Lawrence Friedman's and David Nelken's contribution to the elaboration of the concept of "Legal Culture", interprets some convergent judgments made by the Constitutional Court of three European countries—Italy, France, and Portugal—from the perspective of "legal culture". To avoid the tautology of explaining culture by invoking cultural norms, it seems possible either to leave "legal culture" in the background in empirical research or to refer to a more succinct concept, such as "legal experience". This approach is consistent with the theory of legal pluralism and projects the law into the broader field of cultural problems. From this perspective, the apparent uniformity and rationality of the decisions offered by the structural-functionalist analysis, especially its European version, is called into question. In the cases analyzed, concerning prostitution, we tried to focus on the legal experience, and we have found that the legal background to those rulings allows the formation in neo prohibitionist and abolitionist Countries, a common internal legal culture, which conveys a public ethic, defending human dignity, that has its roots in a common European civilization.

Key words

Legal culture; Constitutional Court; prostitution; legal experience

Resumen

Este estudio, tomando como punto de partida la contribución de Lawrence Friedman y David Nelken a la elaboración del concepto de "cultura jurídica", interpreta algunas sentencias convergentes dictadas por el Tribunal Constitucional de tres países europeos –Italia, Francia y Portugal– desde la perspectiva de la "cultura jurídica". Para evitar la tautología de explicar la cultura invocando normas culturales, parece posible

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dejar la "cultura jurídica" en un segundo plano en la investigación empírica o remitirse a un concepto más sucinto, como el de "experiencia jurídica". Este enfoque es coherente con la teoría del pluralismo jurídico y proyecta el derecho en el campo más amplio de los problemas culturales. Desde esta perspectiva, se cuestiona la aparente uniformidad y racionalidad de las decisiones que ofrece el análisis estructural-funcionalista, especialmente su versión europea. En los casos analizados, sobre la prostitución, hemos tratado de centrarnos en la experiencia jurídica, y hemos comprobado que el trasfondo jurídico de esas sentencias permite la formación, en los países neoprohibicionistas y abolicionistas, de una cultura jurídica interna común, que transmite una ética pública, defensora de la dignidad humana, que hunde sus raíces en una civilización europea común.

Palabras clave

Cultura jurídica; Tribunal Constitucional; prostitución; experiencia jurídica

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1. Legal culture and pluralism

This study interprets some convergent judgments made by the Constitutional Court of three European countries—Italy, France, and Portugal—from the perspective of "legal culture".[1] These three courts confirmed a certain orientation in European legal systems in the regulation and stigmatization of prostitution.[2] Prostitution is a particularly useful phenomenon, in our opinion, for testing the heuristic utility of the concept of "legal culture", insofar it highlights some "relatively stable patterns of legally oriented social behaviour and attitudes" (Nelken 2004, 1). Not only does this analytical framework test different approaches, but it may also facilitate new remedies to the issue.[3]

This study takes as its starting point Lawrence Friedman's indisputably brilliant contribution to the sociology of law in his elaboration of the concept of "Legal Culture." Friedman applied this concept to explain two apparently opposed and irreconcilable facts: (1) legal phenomena are understood and structured primarily by the jurists (clerics) and (2) the legal system is influenced by its social relations with non-jurists—i.e., laypersons. It follows, paradoxically, that a uniform class of jurists, such as the cohort that elaborates, interprets, and applies the law of the European Union, is not in a position to impose uniformity, at least in narrow terms, in the application of Community law on the individual Member States with different orientations toward the same rules. On the other hand, legal institutions created by different classes of jurists may show considerable similarities in application when common interests, needs, ideals, and feelings are internalized by the subjects of the rules, all belonging to the same Civilization. The former phenomenon could be explained by the process of social differentiation and division of labor that characterizes modern societies, while the latter could be understood by the organizational concept of "institutional isomorphism" (Di Maggio and Powell 1983, Quiroz Vitale 2016). However, only the coherent idea of "legal culture" really solves the paradox.

[1] We assume "legal culture" in the broad meaning set out by Friedman: it "refers to ideas, values, expectations and attitudes towards law and legal institutions" (1994, 117). Moreover, this concept becomes an instrument of sociological analysis, as Carlo Pennisi suggests, "insofar as it binds the discourse on law to the processes of institutionalisation and the continuous structuring of the conditions of social action. Under those conditions, research on legal phenomena opens up both to the action referred to legal norms (to its consequences and its presuppositions) and to the structures. Categories, definitions, norms, sanctions and entitlements – identified by the concept of legal culture – are provided and selected by institutionalised decisions in order to orient social action, as well as the presuppositions and consequences of this structuring (opening up, again, to the variability of the normative expectations of which the legal culture is the object by the social system)" (Pennisi 2018, 9).

[2] Following Alberto Febbrajo, constitutions operationally attribute to the constitutional court not only the role of a judicial body – bound by the need to interpret faithfully the law – but also the role of a political body, having wider innovative margins (Febbrajo 2008, 2017, Febbrajo and Harste 2013). "Legal systems are closely connected to political systems because they provide the legitimacy that the legal system requires. Furthermore, legal systems are closely connected to economic systems because both contribute to the enlargement of foreseeable social relations. The norm of the norms, i.e. the constitution, is from this perspective one of the most important instruments for connecting legal systems with political systems. An essential inter-systemic function of the constitution is rejecting legally inconsistent law and enhancing a politically better law. This draws up a political map of legally anchored rights and duties compatible with the functioning of both systems. (Febbrajo 2018, 38).

[3] It is no coincidence that David Nelken used the concept of "legal culture" analysing the phenomenon of "forced prostitution" (2010).

Friedman placed the concept of legal culture in the context of theories of legal pluralism, introducing a distinction between internal and external legal culture.[4] This made it possible to understand and reconcile two agents that simultaneously structure the law: jurists (as a class) and social forces. The presence of two processes, one operating endogenously and the other exogenously, makes it possible to understand the paradoxes mentioned: finding differences where you would expect uniformity and uniformity where (based on an abstract analysis and detached from empirical reality) you would expect differences. For many sociologists of my generation, the reading of Friedman's 1975 classic *The Legal System w*as a decisive step away from the purely theoretical view of law, in which our masters were partially imprisoned, toward the perspective that "[s]ocial forces are constantly at work on the law—destroying here, renewing there; invigorating here, deadening there; choosing what parts of 'law' will operate, which parts will not, what substitutes, detours, and bypasses will spring up; what changes will take place, openly or secretly. For want of a better term, we can call some of these forces, the legal *culture.* It is the element of social attitude and value" (Friedman 1975, 15). All this is another way to talk about legal pluralism, if you admit that not only the Legislator or the Jurists are working to create the law but also, directly, the social forces outside the palaces of institutions. The concept of legal culture, therefore, embodies a dynamic factor of a legal system as opposed to relatively static components: *Structure* and *Substance* (Friedman 1975, 14), although all these three elements have been subject to an accelerated change in a fluid-modern phase (Bauman 2000, Quiroz Vitale 2012) of postmodern society. The most marked difference, therefore, is that the elements that make up the culture, according to Friedman, are intangibles: "customs, opinions, ways of doing and thinking." These are ideals that, as part of the material and shared culture of a people (external legal culture) can constantly steer them toward law and shape its features. Equally immaterial is the internal legal culture—i.e., the characteristics of the jurists: their principles, values, and ideologies in their role as professionals who carry out specialized legal activities. I would agree that the subsequent debate on the concept of legal culture has led to many implicit or contradictory aspects of this first formulation, but I do not think that should overshadow the link between legal culture and pluralism which, to take up the definition of Carbonnier, is still one of the great hypotheses of the sociology of contemporary law (Carbonnier 1965).

It is then necessary to start with pluralism and its conceptual clarification by Georges Gurvitch in Chapter Five of *La déclaration des droits sociaux focuses* on *Pluralisme comme fait, comme ideal et comme technique.* This strong socio-legal interpretation is, therefore, opposed to the prevailing approach among jurists, because it emphasizes, in the first place, the social and varied roots of legal phenomena. "Every right is an attempt to realize one of the many aspects of Justice in the most diverse and various social contexts,

[4] "In fact, a legal culture can be 'internal' or 'external' to a legal order, according to at least three different elements: the actors who (...) might or might not belong to a legal institution, the criteria of their decisions, which might or might not be based on arguments relevant to official legal reasoning and the objects of their attention, which might or might not be relevant from a legal point of view. In different situations, each of these elements may be internal or external, regardless of the others. So we have a fully 'internal' legal culture if the three main indicators – i.e. the 'actor', the 'object' and the 'criteria' – are all internal to the legal order, as, in the case of a judge who applies formally suitable legal criteria to decide legally relevant objects of conflicts. Otherwise, a legal culture can be only partially external or internal, according to the different combinations of its internal and external elements" (Febbrajo 2018, 29–30).

provided that they are able to guarantee with their existence a minimum of validity to the rules thus established. Every coercive system and every power to be legitimate must be based on a pre-existing right in the social reality, which organizes them. State law is an island, more or less extensive, a vast ocean of legal systems of different kinds" (Gurvitch 1946, 70). The pluralist perspective, therefore, imbues meaning to the concept of legal culture. Nevertheless, it is necessary to distinguish between pluralism as fact, value, and technique. For Gurvitch, pluralism is, first, a fact present in society and, as such, observable. Thus, there are social groups that are empirically identifiable and accurately described. These groups are in continuous tension and, over time, achieve autonomy or self-declaration at one another's expense, hence establishing themselves in hierarchical or equal statuses. Second is pluralism as a value, which must be distinguished from "fundamental pluralism in fact." This facet embodies a moral and juridical ideal that allows for the harmonization of multiplicity and unity and is inseparable from the democratic principle. This dimension of political pluralism is intertwined with modern democracy that is "founded on the principle of equivalence between the personal values and the values of the groups, which is realized by means of variety in unity, which means that the democratic ideal has its source in the pluralist ideal" (Gurvitch 1946, 68). But the fundamental point of Gurvitch's argument is the third distinction: pluralism as a technique. This legal technique allows the realization of new combinations and balances between social groups and, subsequently, between such groups and the State "to serve human freedom, the democratic ideal and the general interest in its many aspects" (Gurvitch 1946, 70).

Not coincidentally, David Nelken (2016) proposed a very similar tripartition: legal culture can be considered as a fact, a value, or an approach. In the first instance, he highlights the difficulty of identifying which factual elements can be included in the description of the legal culture. If there are too many material and immaterial and organizational and structural elements, the distinction between the analytical concept and the object of analysis will be lost. Legal culture can also identify not only facts, but also an ideal. Nelken recalls that his assertion that every legal culture expresses a value, provoked different reactions: negative responses from those who considered the term "culture" as suspect as "race" but positive from those who identified in legality the term *proprium* of legal *culture*.[5] If, as seems necessary to me, we consider the close link between pluralist theory and the concept of culture, many of these problems vanish.

[5] For example, Nelken (2004), in his study on the delay in the conduct of trials in Italy, includes in the concept of legal culture "facts about institutions," "the number and role of lawyers," "ways Judges are Appointed and controlled," "litigation," and "prison rates," although these elements may in part be ascribed to normative elements (substance) and above all to "structure," which is normally placed in opposition to culture. It is not surprising that scholars often disagree on what is cultural and what is structural (Friedland and Mohr 2004). If in general what Gans (2012) states is true—that the phenomena described as values, frames, scripts etc. seem to appear from nothing, ignoring the possibility that they may be responses to structural dynamics, in the socio-legal field (where there is a preponderance of structural elements, of which the legal institutions are typical expressions) then it is possible to distinguish between cultural elements (immaterial) and structural (material). This is clearly the difference between judicial ideology and the organization and organization of judicial offices. As for the problem that sometimes material and immaterial elements are closely intertwined, I will answer infra *by proposing* to return to the concept of "legal experience."

From the pluralist perspective, "Legal Culture" is a fact in that it embodies the ethos of social groups that are able to produce binding rules—i.e., they are set as sources of production of legal norms. Thus, in factual terms, there exists some national legal culture, a Western legal culture, a legal culture of the Church, etc. Moreover, there are as many cultures as there are legal production centers, in synchronous terms, but also in a diatonic sense there may be successions of legal cultures (medieval, modern, or contemporary legal culture). In the light of pluralist theory, the concept in question also conveys the value of tolerance in that no legal culture can be said to express absolute values. Rather, all encompass a tension, imperfect and partial, toward a common ideal that makes them juridical—a tension toward what Gurvitch called "an attempt to realize one of the multiple aspects of Justice in the most diverse and various social contexts." In any given case, this element, which is undoubtedly axiological, allows a distinction between the elements of culture from those of other cultural manifestations such as economics, medicine, art, literature, and philosophy itself that, unlike legal culture, are not characterized by tension toward the realization of justice. The term "culture of legality (Nelken 2016, 53) certainly expresses this movement toward justice and is an integral part of the value dimension of legal pluralism, as we have understood it.

The last element of the legal culture is technical. As Nelken explains "The term legal culture is also an approach to the study of law in society rather than simply an object of enquiry... It offers a way of looking beyond doctrinal and, more generally, court-centered ways of thinking, so as to bring together the 'legal' and 'social'" (Nelken 2016, 49–50). In the virtual workshop "Legal culture and Empirical research,"[6] it was stressed that, in Friedman's work, the concept of legal culture has considerable heuristic value because it "captures an essential intervening variable in influencing the type of legal changes that follow on large social transformations such as those following Technological breakthroughs." In addition, "culture determines when, why and where people turn for help to law, or to other institutions, or just decide to 'lump it.' It would be a finding about legal culture if French but not Italian women were reluctant to call the police to complain about sexual harassment." Nelken himself utilized this concept in his empirical research "as one way of describing relatively stable patterns of legally oriented social behavior and Attitudes. The Identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways Judges are Appointed and controlled, to various forms of behavior such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are, not just what we do" (Nelken 2004, 1).

Even for this third characteristic, the parallel with pluralist theory seems decisive. Similarly, there is a link between the three dimensions of pluralism but it is not linear (Gurvitch 1946, 69–70, Chiba 1989) just as it is possible to highlight an equally complex link between the dimensions of "legal culture." On the one hand, it is possible to note that legal pluralism brings with it the recognition that (always in factual terms) there are many different "legal cultures" linked to as many centers of legal production, which can occupy, also synchronously, a similar politically uniform spatial dimension (such as the

[6] Keynote address to the International Virtual Workshop "Legal Culture and Empirical research" at the International Institute of Sociology of Law of Oñati 20–21 May 2021.

presence of different national legal cultures within the common European area). Turning to the axiological profile, the recognition of the legal culture is linked to affirmation of the value of tolerance and, concomitantly, the possible peaceful coexistence of different ways of interpreting the demands of justice. However, even if in fact you can recognize more competing legal cultures, it is not a given that the use of the concept of "Legal Culture" must necessarily characterize, in methodological terms, the analysis of problems that are the subject of empirical investigation. Obviously, different investigative tools can always be employed, radically avoiding the culturalist vicious circle. The "culturalist fallacy" is committed by scholars who, in their understanding of complex societies and their internal components, not only resort to "culture" as a descriptive term, but also as an explanatory one. The risk is that such an analysis loses its rigor and resolves itself in a tautology that confirms itself: cultures are different because their culture is different. As Gans (2012) observes, "culture," as an explanatory term, cannot be a cause of itself, in descriptive terms. This is obviously also true for sociologists of law and Nelken did well to emphasize the three-dimensionality of the concept, avoiding ambiguity and polysemy. Culturalist analysis cannot, therefore, provide decisive elements for confirming the existence or character of a legal culture.

Certainly, it does not incur, in the cultural fallacy, the empirical sociological research that uses, as an explanatory concept, "Legal Culture," if it is able to widen the object of analysis with respect to what the jurists say about law (demotics, general theory, professions, etc...), opening it to the traces of normativity present in daily life, in information, in politics, in the literature. We are aware that, even in these social fields, legal culture is generated in a manner that allows both laypersons to orient their social action to the law and jurists to construct the meaning applied to their specialized activity. We can therefore conclude that there is an internal link between pluralist techniques, which extend the law to supranational or infra-national centers of production of norms, and the reference to legal culture as an approach or explanatory concept, which allows better identification and understanding of those phenomena (Quiroz Vitale 2018, 37). This study on legal culture and prostitution (see paragraph 2) confirms the heuristic value both of the descriptive use of the legal culture (see paragraph 3) and of the explanatory use (see paragraph 4), finally it suggests adopting the concept of legal experience in order to grasp the different cultural influences from internal and external perspectives (paragraph 5).

2. Prostitution and legal culture

The decisions of judges and legislators are strongly influenced by elements of value and culture and, in particular, by the opinions and customs, the ways of doing, and the thinking prevalent in the relevant social system. This fact is particularly evident with regard to prostitution (O'Connell Davidson 1998, Quiroz Vitale 2018). On this issue, opposing regulatory systems have been created that reveal two very different cultural horizons.

2.1. Models

The term prostitution means, in legal terms, the provision of sexual services in return for consideration, normally in a habitual and non-discriminatory manner. Not only does prostitution represent a problematic issue for the criminal legislator, but it is also a social

practice that is difficult to study, even from a sociological or criminological perspective, with regard to its various manifestations (Pettiway 1997, Leonini 1999, Barnao 2013). The problem is greatly complicated by the pervasive spread of types of "forced" prostitution or the "trafficking in human beings" for the purpose of sexual exploitation (Quiroz Vitale 2017, Bartolomei 2020). In the so-called "regulatory" model, the *range* of permitted choices widens and the legal system leaves individuals free to practice prostitution, enjoy sexual services, and facilitate it. The State still has a "regulatory" function: that of regulating the exercise of such activities to manage the "dangers" inherent in selling sex, as happens with all economic activities deemed "dangerous" by the legal system but which involve "permitted risks" (Quiroz Vitale 2018b). The contractual exchange between sex and money is, in any case, legal. In socio-legal terms, this refers to a set of activities not already criminal, but falling within the (gray) economy, whose economic managers certainly do not have a good reputation and whose workers cannot avoid forms of stigmatization, but without either incurring criminal penalties. The gray economy also facilitates the shift by economic actors toward illegality (e.g., forced prostitution or trafficking) and vice *versa* (Ruggiero 2006). An example of a "neo-regulatory" legal system has been instituted in the Netherlands since 2000, but has had little follow-up in Europe. At present, similar regulations are in force only in Germany, in Switzerland in some *Länder of Austria*, in Greece, and in Turkey. By contrast, in most European countries, prostitution is being rejected legally, but gradually differentiated in terms of what actors are to be punished. Consequently, at least three different legal models have been constructed: prohibitionist, neo-prohibitionist, and abolitionist.

In the prohibitionist model, both parts of sexual merchandise (prostitute and client) are criminalized, in addition to panders (adopted in many Slavic and Balkan countries such as Serbia, as well as in Russia). The neo-prohibitionist model criminalizes the client and the pimps but not the prostitute. Sweden has introduced this kind of system, which has made prostitution a crime against women the target of criminalizing the client; notably, this model was recently adopted in France after a significant legislative reform in 2014.[7] Lastly, the abolitionist model, while prohibiting state brothels and providing programs to help prostitutes reintegrate into mainstream society, does not resort to criminal law except to punish so-called parallel prostitution—i.e., third parties who induce, encourage, or exploit an individual to engage in such activity. It should be stressed, however, that the legal system of abolitionist countries such as Italy, Portugal, and Spain reserves disapproval of the merchandise of sex, which is considered a null contract because it is contrary to public morality and, as such, not productive of legal effects. In Figure 1 we provide an overview of European cultural areas in the field of prostitution.

[7] On 14 April 2016, the new law for "the fight against the prostitution system and the accompaniment of prostitutes" n. 2016-444 of 6 April 2016 was published in the *Journal Officiel* introducing various changes to the French legal system including the punishment of the customer with a fine of up to 1,500.00 Euro or synopsis 3,750.00 Euro in case of recidivism.

FIGURE 1

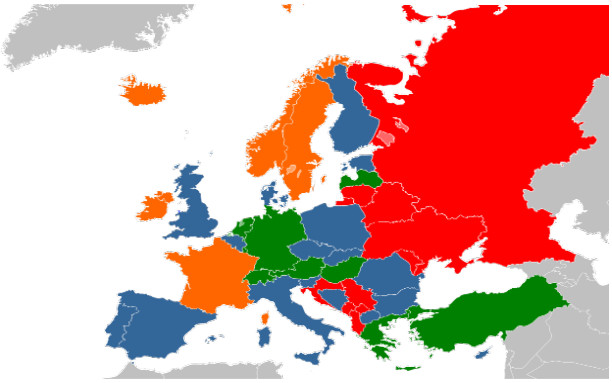

Figure 1
Green: Regulationist; Red: Prohibitionist; Orange: Neo-prohibitionist; Blue: Abolitionist.

These systems correspond to very different values and anthropological and cultural perspectives (George *et al.* 2010). The opposition to the practice of prostitution is widespread in many countries and corresponds to deep motivations that we can summarize as follows.

2.2. Paradigms

Despite the variety of specific criminal disciplines in European countries, two culturally alternative views can be outlined. The first view holds that prostitution should be considered a choice pertaining to self-determination in sexual matters by the individual, which can also be a legal economic activity (paradigm of self-determination). In sociological terms, however, the problem is that the social actor, according to the increasingly invoked model of elective action, can always choose (within a range of predetermined options) provided that the chosen courses of action are considered adequate and legal (Quiroz Vitale 2018b). On the other hand, according to the second alternative—i.e., the paradigm of human dignity (Becchi 2009)—prostitution is subject to criminal law both for its negative effects on the individual and for its negative social impact. The political motivations supporting these choices are argued on various grounds. First, prostitution is to be discouraged because it violates the fundamental rights of vulnerable persons. Second, it poses individual and collective health risks, not only in relation to the danger of the spread of sexually transmitted diseases, but also in relation to the increased risks of drug and alcohol addiction, as well as physical and psychological trauma, depression, and mental disorders. Third, prostitution is considered a social pathology that must be eliminated given the requirements of public order, taking into account the illicit activities frequently associated with prostitution, such as trafficking in persons, drug trafficking, and organized crime, along with morality in countries where criminal law maintains the function of "carrying out the moral purposes of its own tradition" (Rostow 1960, 174).

Here are several traditional arguments against prostitution (Primoratz 1993) and new arguments presented by human rights scholars (Barry 2013, Quiroz Vitale 2019):

1. Prostitution is dysfunctional for society (for venereal diseases, family break-up, corruption of young people).

2. Harmful for prostitutes (unpleasant, humiliating, violent behavior of clients; exploitation by "madams" and pimp; low social status of prostitutes, and societal contempt and ostracism).
3. Mercenary sex infringes the social convention that there are many goods that cannot or must not be bought and sold (e.g., human beings, political influence and office, criminal justice, freedom of speech and thought, various prizes and honors, love and friendship, and religious creeds).
4. Prostitution involves degradation or oppression of women and men.
5. Prostitution embodies and helps maintain the oppression of women.
6. By reducing human beings to a commodity, prostitution is an abusive act of power. It violates the person's human dignity and obliterates their human rights.
7. Prostitution is the main expression of new slavery in the world.

Neither the traditional reasons to reject prostitution, forced and voluntary, nor the newer arguments have been fully rebutted and they continue to influence legal culture.

3. Legal Culture and Constitutional Courts' decisions in Europe (2016-2019)

3.1. Two different "Legal Cultures"

The European legal system reflects the debate against prostitution. We can count, as explained *above,* several concurring models, but I think they can be reduced to two main Cultural Paradigms: (1) Self-Determination paradigm and (2) Human Dignity paradigm.

SCHEME 1

CULTURAL PARADIGMS	LEGAL MODELS
Self-determination **Prostitution is to be regarded as a choice stemming from self-determination in sexual matters of the individual, which gives rise to a legal economic activity.**	A) Regulationism model The legal system should let individuals be generally free to engage in prostitution, avail sexual services, and facilitate them. If anything, it is only a question of properly regulating the carrying on of that activity to tackle the dangers inherent in it, similar to what happens for all economic activities that involve "risks permitted" by the system
	B) Neo-regulationism (green in Figure 1) The legal system should limit the damage by curtailing the adverse consequences that the sale of sexual services may entail. This approach inspired the various types of legislation introduced since the 1990s in countries such as the Netherlands, Germany, Austria, and Switzerland.

<table>
<tr><td rowspan="3">Human Dignity

Prostitution is viewed as something to be opposed, including through recourse to the criminal law, because of its negative repercussions on an individual and societal level</td><td>C) Prohibitionist model (red in Figure 1)

The legal system must “discourage” that practice punishing both the parties to the sexual transaction (prostitute and client) in addition to people whose conduct is considered “parallel” to voluntary prostitution—such as inducement, aiding, and abetting and pimping.</td></tr>
<tr><td>D) Neo-prohibitionist (orange in Figure 1)

The legal system must discourage the practice of punishing just one of the parties to the sexual transaction: only the client and those who induce, pander, pimp, or even simply aid and abet prostitutes.</td></tr>
<tr><td>E) Abolitionist model (ox in Figure 1)

The legal system must “discourage” the practice punishing only third parties who interact with prostitutes by inducing them to engage in it, aiding and abetting it, or profiting from it.</td></tr>
</table>

Scheme 1. Legal Models and Cultural Paradigms on Prostitution.

Despite the presence of different sub-models, from 2016 to 2019 the Constitutional Courts of three different European countries belonging to the Second Paradigm have faced attempts to radically alter prostitution-related regulations, albeit indirectly, through getting penal norms on parallel conduct or on clients’ conduct to be declared unconstitutional.

This happened in France in the context of a clear political action promoted by "advocacy associations,"[8] in Portugal in the course of a typical criminal proceeding,[9] as well as in Italy in a criminal context that revealed distinct political agendas.[10]

3.2. Three Rulings

With regard to the solutions based on Model E (Abolitionism), in Judgment No. 641/2016 of 21 November 2016, the Constitutional Court of Portugal—a country in which the legislation reflects the abolitionist model)—ruled that there was nothing unconstitutional about Article 169 of the Criminal Portuguese Code. The title of this Article is "lenocínio", which is equivalent to the English expression "procuring" or "pandering." The Article says that anyone who, professionally or for purposes or profit or incentive, facilitates or promotes the exercise of prostitution by another person, shall be subject to punishment extending from six months to five years in jail. The second paragraph of this Article lists other circumstances that serve to make the crime more serious (e.g., use of force, authority's abuse, taking advantage from some special vulnerable condition, etc.) and, consequently, the jail term longer.

The criminalization of incitement to, or procurement for, prostitution is a criminal policy option that is primarily justified by the normal association between the forms of conduct incorporated into that concept and the exploitation of the economic and social needs of the persons who turn to prostitution to earn income. The fact that the legal provision

[8] On 13 November 2018, the Constitutional Council, in the conditions provided for by Article 61-1 of the Constitution, received an application for a priority preliminary ruling on the issue of constitutionality raised by the Conseil d'État (decision no. 423892 of 12 November 2018). This application was made on behalf of the Médecins du monde, Syndicat du travail sexuel, Aides, Fédération parapluie rouge, Les amis du bus des femmes, Cabiria, Griselidis, Paloma, and Acceptesst associations, and on behalf of Thierry S., Giovanna R., Marie S., Christine D., and Marianne C. It relates to the conformity with rights and freedoms that the Constitution guarantees in 9 Article 131-16, Article 225-12-1, in 9 Article 225-20, and Article 611-1 of the Criminal Code, in their formulation resulting from Act No. 2016-444 of 13 April 2016 aiming to strengthen the fight against prostitution and to help people working as prostitutes.

[9] The appellant in the case No. 641/16 was a woman involved in the practice of pimping. Her legal defence team argued that the norm under which "incitement to" or "procurement for" prostitution disproportionately compresses the constitutional rights to free personal development, including sexual freedom and the right to work. Her position was that there should be no unlawfulness in fostering or favouring sexual relations when they are engaged in freely (without coercion, violence or serious threat, constraint, deception or fraudulent manipulation, abuse of authority or taking advantage of a victim's psychological incapacity or special vulnerability) by adults in a place that is not public and the parties' privacy is Preserved, even when the procurer acts on a professional basis and money changes hands in the process. She even accepted that in their own right, the facts involved in such a practice "might be the object of minimal criticism, not fit into the normal way in which a society does things, and not represent the behaviour that might be desired of both parties," but she disputed the view that they were so significantly negative as to justify the intervention of the Criminal Law.

[10] The Italian Constitutional Court in 2019 decided over a case concerning the organization of meetings with women occasionally or professionally engaged in prostitution, so called "escorts, in favour of the Prime Minister in charge Silvio Berlusconi." A number of provisions of Law No. 75 of 20 February 1958 (so called "Legge Merlin") were criticized, specifically those making recruitment and aiding and abetting of prostitution criminal offences in circumstances where prostitution itself was not generally criminalised. Both provisions were challenged on the basis that they potentially contrasted with freedom of sexual self-determination protected under Article 2 of the Constitution, infringed freedom of private-sector economic initiative under Article 41 of the Constitution and conflicted with the principle that a crime must necessarily be offensive, deducible from Articles 13, 25(2) and 27 of the Constitution.

before the Court does not expressly require there to be a concrete exploitative relationship to typify this crime does not mean that preventing such relationships is not the fundamental reason for criminalization. The Court held that "the criminal policy reason which justifies making incitement to or procurement for prostitution a crime and legitimizes a penal intervention in this respect is based on the Grounded assumption that prostitution-related situations entail a high and unacceptable risk that persons who are experiencing hardship and a lack of social protection will be exploited and economically taken advantage of by third parties. These are situations that endanger the autonomy and freedom of the agents who prostitute themselves."

It is worth referring to this ruling for the interesting reasoning adopted: (a) the application of criminal law to this act does not represent legal protection of a moral perspective but, rather, the protection of the freedom and autonomy required to ensure the dignity of persons who prostitute themselves; (b) freedom of conscience is not at stake here, because such freedom does not include a dimension that involves taking advantage of other people's unmet needs or making a profit from someone else's sexuality; (c) the fact that prostitution itself is not prohibited appears to be irrelevant. Even if one were to take the view that prostitution might be an expression of the free availability of individual sexuality, for third parties to take economic advantage is an intervention that entails intolerable risks, to the extent that it corresponds to the use of a specifically intimate dimension of the first party, not for his/her own ends, but for those of third parties; (d) there are other cases in criminal law in which a person's autonomy, or consent to certain acts, does not in itself justify the behavior of those who assist, instigate, or facilitate that person's behavior. Such crimes include helping another person commit suicide and disseminating child pornography.

Lastly, the Portuguese Court is also clear on the basis for imposing limits to the economic system: "there are duties of respect and solidarity in one's relations with others that are derived from the principle of the Dignity of the human person and go beyond a mere non-interference with a person's autonomy." Starting from this assumption, we have to recognize that:

> there is no constitutional imperative to criminalize a certain professional activity' whose object includes the specific negation of this type of value, and that criminalization is not contrary to the Constitution. The freedom to engage in an occupation or economic activity is subject to limits and to a framework composed of values and rights that are directly associated with the protection of the autonomy and dignity of other human persons. This is why activities that can affect people's life, health, and moral integrity are particularly subject to conditions when they are undertaken in the form of work or enterprise.

As for the model D (neo-prohibitionist),[11] in decision No. 2018-761 QPC of 1 February 2019, the French Constitutional Council ruled out that there was nothing

[11] Article 611-1 of the Criminal Code, in its formulation resulting from the aforementioned Act of 13 April 2016, stipulates: "The act of soliciting, accepting, or obtaining relations of a sexual nature from a person who engages in prostitution, including on an Occasional basis, in exchange for remuneration, promise of remuneration, Provision of benefits in kind or the promise of such benefits is punishable by the fine provided for Petty Offences of the 5th class. Natural persons found guilty of the Petty offence in this article are also subject to one or several additional penalties mentioned in Article 131-16, and in the second section of Article 131-17."

unconstitutional about Article 611 (subsection 1) of the French Criminal Code, as introduced by Law No. 2016-444 13 April 2016, which punishes a prostitute's client through a fine, whether the act involves forced prostitution or otherwise. Several advocacy associations, which were intervenors in the proceedings, claimed the disputed provisions would have the consequence of increasing the isolation and illegality of persons working in prostitution and so expose them to an increased risk of violence from their clients, hence forcing them, should they continue to work in prostitution, to accept health conditions that would harm their right to the protection of their health.

The Constitutional Council was invoked on November 13, 2018 by the Court of Cassation to address as a matter of priority the question of constitutionality relating to the conformity with the rights and freedoms that the Constitution guarantees. This issue was related to several provisions arising from law n. 2016 444 of April 13, 2016 that aimed to further restrict the system of prostitution and to support prostitutes. In particular, the first paragraph of Article 611-1 of the penal code established a contravention against soliciting, accepting, or obtaining relations of a sexual nature from a person who engages in prostitution, including occasionally, in exchange for remuneration, a promise of remuneration, providing a benefit in kind, or making a promise of such a benefit. The first paragraph of Article 225-12-1 of the same code criminalizes these same acts when they are committed in a situation of legal recidivism. The applicants, joined by certain interveners, criticized these provisions for repressing any purchase of sexual acts, "even when they are performed freely between consenting adults and even when these acts take place only in a private space." The ruling, whose details we cannot explore here, is very interesting for the reasoning adopted: in particular, we can highlight these arguments: (a) it is the legislator's responsibility to reconcile the constitutional duty of preserving public order and the prevention of offenses with the exercise of freedoms guaranteed by the Constitution, among which is the protection of personal freedom in Articles 2 and 4 of the Declaration of Human and Civic Rights of 1789; (b) the legislation is based on preparatory work that, by criminalizing the purchase of sexual favors, the legislator has used a means that is not manifestly inappropriate for applied public policy: fighting against prostitution, human trafficking for sexual exploitation, and criminal activities founded on force and servitude; (c) the legislator has thus ensured the respect of the dignity of human beings, safeguarding them from these forms of servitude, and supports the constitutionality of preserving public order and preventing offenses;[12]

Last but not least, the Italian Constitutional Court (Decision No. 141/2019) has addressed the constitutional legitimacy of the crimes of "recruitment" and "aiding and abetting" prostitution, as proposed by the Court of Appeal of Bari. The Puglia Court casts doubt on the constitutional legitimacy of Article 3, number 4, first part, and 8, of Law no. 75 February 20, 1958. The court assumes that the decision to offer sexual services on a paid

[12] The applicants, joined by plenty of intervenors, sustained that such total and complete prohibition would violate the personal liberty of persons working as prostitutes as well as that of their clients. This violation would likely not be justified as preserving public order, supporting the fight against procuring and human trafficking, or the protection of persons working as prostitutes. This results in a violation of the respect of personal privacy, as well as the right of personal autonomy and the right to sexual freedom that comes from it. It also results in a violation of the right of free enterprise and the freedom of contract. Lastly, it is submitted that the punishing of all practices of prostitution would go against the principles of necessity and proportionality of penalties.

basis constitutes an expression of sexual self-determination, protected by Article 2 of the Constitution as an inviolable human right. The applicants criticize the provision of the Penal Code "when [sexual acts] are performed freely between consenting adults and even when these acts take place only in a private space." The provisions also disregard freedom of private-sector economic initiatives protected by Article 41 of the Constitution, where engaging in voluntary prostitution represents a professional activity conducted for profit. The goods protected should be self-determination, freedom of contract, and the principle of necessity. Furthermore, the legislation could drive prostitution underground, hence exposing prostitutes to greater risks of violence from clients, and infringing the right to protection of health through worse hygienic conditions. The right to protection of health is enshrined in the eleventh paragraph of the Preamble of the Constitution of 1946. In fact, the Puglia Court argued that recruitment and aiding and abetting of voluntary prostitution should be considered harmless. This assertion is based on the principle that the "Recruiters" and "Abettors" are persons who facilitate the expression of the choice of the person concerned, advancing the latter's protected interests. From this perspective, the choice of prostitution has a double nature (sexual and economic) with the related constitutional protection previously noted. The causal links between the behavior of facilitating prostitution and the threat to freedom, security, and dignity of the prostitutes are challenged by the Court of Bari. According to the applicant court, the notions of human dignity and vulnerability are inappropriate for the functions required for the "legal goods" in criminal matters and that the two concepts applied paternalistically. In fact, the criticized norms are considered in contrast with the principle of necessary offense of the crime. Finally, to face the risks of criminal law as "guardian of protected adults," the court calls for a reconsideration of the relationship between sexual self-determination and the dignity of the person according to a general principle of secular principles.[13]

This objection of unconstitutionality expresses, in a clear way, the clash between the two opposing paradigms summarized above.

The Italian Constitutional Court not only echoed the decisions of French and Portuguese Supreme judges, but clarified the values and principles of the legal culture that inspire criminal provisions against pimping and other conduct that aids and abets prostitution.

An important part of the ruling addressed the economic system: "freedom of economic initiative is protected on condition that it does not promise other values which the Constitution considers pre-eminent: it cannot, in fact, be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human Dignity"

[13] The Italian constitutional Court heard a referral order from the Court of Appeal of Bari questioning the constitutionality of a number of provisions of Law No. 75 of 20 February 1958, specifically those making recruitment and aiding and abetting of prostitution criminal offences in circumstances where prostitution itself was not generally criminalised. Both Provisions were challenged on the basis that they potentially contrasted with the freedom of sexual self-determination protected under Article 2 of the Constitution, infringed freedom of private-sector economic initiative under Article 41 of the Constitution, and conflicted with the principle that a crime must necessarily be offensive, deducible from Articles 13, 25(2), and 27 of the Constitution. As regards the offence of aiding and abetting, it was surmised that the provision could well infringe the principles of legal certainty and precision in criminal matters in accordance with what can be deduced from Article 25(2) of the Constitution. Also raised, again as regards just aiding and abetting, was a potential disparity of treatment in violation of the principle of equality enshrined in Article 3 of the Constitution.

and in relation to pimping, "the limitation of the opportunity to develop prostitution activities that derives from the challenged Provisions is instrumental to the Pursuit of objectives that involve the values mentioned just now. These objectives are the protection of the fundamental rights of the vulnerable and of human Dignity, identified in particular also in the light of the aforementioned indications to be found in the Parliamentary history of Law No. 75 of 1958."

The Italian Court confirmed the range of discretion of the legislature to impose criminal provisions—in other words, criminalization of "conduct parallel to prostitution" is not imposed by the Italian Constitution and the legislature could instead have decided to tackle the dangers inherent in prostitution through a different strategy, but, in its discretion, the law challenged in the proceeding "falls within the range of the possible options of criminal policy, not in contrast with the Constitution." (Luciani 2002).

Pimping as a social practice has been legally re-elaborated in a very "cultural oriented" way: "[I]n this matter the dividing line between genuinely free decisions and decisions that are not so is already fluid on a theoretical level, meaning that it cannot easily be translated on a legislative level using abstract formulations and also, accordingly, meaning that problems will arise on a practical level when the question is Determined ex post by the criminal courts. In addition to this, there are also concerns about protection of the very people who prostitute themselves—in theory—as a result of a free and conscious (at least initially) choice. This is in consideration of the dangers to which they are exposed in the Pursuit of their activity: dangers connected to their entry into a circuit from which it will then be difficult to voluntarily leave, given the ease with which they can suffer undue pressure and blackmail, as well as connected to the risks for their physical safety and health, which they inevitably run when they are isolated with the customer (risk of physical violence, coercion to perform unwanted sex acts, Contagion resulting from unprotected sex and so on)." Finally, the core of the ruling is centered in the respect of human dignity: "As regards the concurrent aim of protecting human Dignity, it is indisputable that in the framework of Article 41(section 2) of the Constitution the concept of 'Dignity' is to be understood in an Objective sense: it is not of course a matter of the 'subjective Dignity' as conceived by the individual entrepreneur or the individual worker. It is thus the legislator that—by Interpreting the common social sentiment at a given historical moment—views prostitution, even that engaged in voluntarily, as an activity that degrades and debases the individual in that it reduces the most intimate sphere of one's corporeity to the level of goods at the client's disposal. All points that thus explain and justify on a constitutional level the choice made by the Italian legislator—a choice by no means isolated, as we have seen, in the international arena—of outlawing through the challenged Provisions the possibility that the carrying on of prostitution can be a business activity."

4. Socio-legal analysis of constitutional processes

Applying the concept of legal culture in "descriptive terms" has made it possible to draw on different legal cultures that express different legal corpora concerning this ethically and socially controversial issue. We have also highlighted how among countries sharing a similar culture—Italy, France, and Portugal—the constitutional courts, confronted with similar issues, have developed coherent and intertwined legal arguments and ideologies aimed at confirming and strengthening the respective models of regulation

(abolitionists or neo-prohibitionists) consistent with a legal culture centered on human dignity. A similar paradigm of human dignity, restricted to a descriptive level, is thus an obstacle to the interpretation of prostitution as an economic activity like the others and tends to punish all those who benefit from the meretricium: the exploiters, as well as the customers, and even the prostitutes in some cases of strict prohibition.

The socio-legal analysis of constitutional procedures relating to the defense of fundamental rights, within the framework of similar legal cultures described in this way, can also be analyzed using a non-cultural theoretical framework. For example, one can take an approach inspired by the socio-legal tradition of the functional-structuralism approach, which certainly provides adequate tools to interpret and understand such phenomena.

In the cases before the Constitutional Courts concerning the alleged violation of fundamental rights, the functional exchange between the main social sub-systems (the political, economic, and legal) is represented almost panoramically. As effectively argued by Aldo Mascareño (2011) with regard to fundamental rights, the specialization and autonomization of the economic subsystem has played an essential role in the onset of modernity to establish the institutionalization of the private property and the work of free men, just as politics has been central to the emergence of political rights and the legal system for the affirmation of human dignity and equality before the law. The three systems are linked, therefore, by mutual interaction (and that we can represent in first approximation like *inputs* and *outputs*) that condition and stabilize normative expectations. As Mascareño wrote:

> When a right to freedom, to property or to work emerges, a political system is needed that can guarantee these rights with a sanctioning power, but also an economic system in which they can be realized in a concrete way. It is not possible to achieve such stabilization where such fundamental rights are legally formulated, but the State limits the freedom of labour or individual ownership. This stabilization is an enduring form of interdependence. (Mascareño 2011, 53)

The interpretation of the rulings of the constitutional courts, although set within their respective legal cultures, can easily be framed in a structural-functionalist unitary perspective, without applying an approach of legal culture. A functionalist explanation considers fundamental rights as normative expectations that allow social actors to participate in all differentiated areas of social life without having to enjoy particular "safe-conduct" or without being members of elite or privileged castes. Hence, freedom, equality, and political rights have the potential to be institutionalized only within the framework of differentiated structures to test and exercise their effectiveness. Indeed, a functional differentiation in which fundamental rights are ineffectual cannot long be sustained for long, as was made clear during the imposition of state emergencies for COVID-19. In fact, if the rights of freedom, or equality, or property, or work, or voting are suspended, even temporarily, the political temptation to impose *de facto* decisions of power in every social sphere inevitably arises. That is what other authors have called, in philosophical terms, "State of Exception" (Agamben 2003), taking up the well-known Schmittian categories. However, the qualifying element is sociology analysis at work or the individuality of property. This stabilization is a lasting interdependence *a là* Luhmann (1986) that

> the institutionalization is based on a double circular movement: in a sense it rotates the concretization of these rights in the mutual strengthening of politics and law; but in another it turns in the opposite direction, through their violation, that is with negative value. Formal legal procedures are those that link the two circuits. In this way, any violation of rights has the possibility of being observed and corrected from the procedural point of view in the inner positive circle. There is therefore an infringement and restitution unit. (Mascareño 2011, 55–56)

Returning to the judgments on the constitutional legitimacy of the criminal laws on prostitution, the demands to abolish the rules that criminalize the activities of exploitation and facilitation are therefore addressed to the political system to be recognized as "Fundamental Right of Enterprise," meaning the exchange of sex (more properly put to inspection of the body) for money over utility. In the cases examined, the attempt to violate the fundamental right of human dignity submitted to judicial scrutiny is justified by a series of rhetorical expressions, ideologies, legal reasoning, and references to values belonging to legal cultures and relevant cultic models, other than those of the culture to which they belong. The constitutional courts have once again closed the circle confirming the political legitimacy of the laws that criminalize any commercialization of the body or sex. In particular, the explanatory statement of the judgment of the Italian Constitutional Court acknowledges the possibility that the political system invokes law to project and implement policies aimed at confining prostitution to individual choices that may be tolerated but are still not considered socially appropriate. In this case, the mutual strengthening of constitutional processes through the alliance of political system and the legal system is evident, as well as the re-defining, recursively, of the right to conduct economic transactions. Economic freedom and the social value of individual profit are subordinated to the rights expression of human personality, consistent with the framework of the external legal culture shared by the three countries considered, and by prohibitionists and abolitionists. Therefore, recursively, constitutional procedures strengthen the foundation of opinions, values, or ways of penance and action. The beliefs and the same stigmatization processes that make up the cultural *background* that is an obstacle in prohibitionists or abolitionists Countries to the equalization of prostitution to a job or a normal economic activity thus strengthens the legal culture against Regulationist model.

5. The prospect of legal experience

To avoid the tautology of explaining culture by invoking cultural norms, it seems easier to leave "legal culture" in the background in empirical research and explicative sociology studies, which nevertheless constitute a productive frame of meaning. In fact, alternative hypotheses may be explored that connect, causally or in a more precisely functional manner, a specific cultural context and the juridical phenomena that may, in my opinion, refer to a more succinct concept, such as "legal experience." This allows not only an analysis of the phenomena in its components and an explanation on the basis of their interaction, but also empirical identification of values, opinions, and ways of thinking and acting that, in legal experience, are incorporated into the social action of the subjects who are part of the interaction. In this way, the relevant cultural profiles related to what Nelken defined as "nebulous aspects of ideas, values, aspirations and mentalities" can be objectively and empirically studied. Indeed, since the very first, and little known, sociological work of Renato Treves (*Introducción a las investigaciones sociales*,

1942), written when he taught at the University of Tucumán, Sociology itself has been seen as "a historical and cultural discipline" aimed at understanding the contemporary era, determining the forces and trends that form and define the social environment in which we live and in which we are, somehow, obliged to operate (Quiroz Vitale 2018). However, Treves also deserves credit for having made consciously critical use of the concept of culture, applied to law since the Argentine period, thanks to the studies then published in Italy in 1947 under the title *Law and culture.* In these writings, as is well known, Treves proposed to overcome the empty formalism of the pure doctrine of Kelsenian law by placing at the center of the right-philosophical reflection the "legal experience" in its "totality and concreteness." The stated objective was to be able to study the actual life of law—i.e., the multiple, changing, and plural dimensions of the historical and social content of law and the ethical–political tendencies that guide, in every historical period, the content of the arc toward justice. This approach is therefore consistent with the theory of legal pluralism as outlined above. The change in the *focus* of research can be achieved, in the words of Treves, by looking at the legal phenomenon as "cultural experience," which is "fractionating" and "projecting" the law into the broader field of cultural problems. It can therefore be said that Sociology of Law, as well as General Sociology, has been a discipline of a cultural nature since its inception and has theorized its own object of study as an equally cultural phenomenon (Grindstaff *et al.* 2010) while moving toward the autonomous definition of its object: legal experience. Every sociological approach brings with it an anthropological vision (Shelsky 1971). The law that is the subject of sociological knowledge, as Treves taught, indeed has a more intense character because it is possible to grasp a more complete "legal experience"—the law is traced back to the sphere of life and human activity in which values are realized and in which natural phenomena acquire a pragmatic meaning for people. The primacy of culture, according to Cassirer (2008), leads to emphasis on the creative capacity of man, builder of forms, symbolic and historical, that are the origin of traditions so, therefore, culture is also a producer of history, through the constant reinterpretation of which it is subject and object. Human knowledge, Cassirer explained, is achieved through the mediation of linguistic forms, artistic images, mythical symbols, and religious rites. The symbolic function is essential for humankind since, unlike the animal, symbolism does not limit itself to passively receiving the stimuli of the environment, but reworks perceptual content into symbolic content. In so doing, due to culture, the environment is interpreted as a "human and intersubjective world": a reality that is characterized by an infinite variety of forms and irreducible contrasts, but finds its center of gravity in man's creative action. Legal experience is thus part of this creative and historical activity in which universal values find a concrete representation. This also applies to the law that is part of the culture and to the legal experience that Treves has presented as an object of sociological knowledge.[14]

[14] "I believe that the law as legal experience is irreducible both to the world of natural phenomena and to that of pure ideal values and actually belongs to the sphere of culture, the sphere of human life and activity where those values are realized and where those natural phenomena acquire a meaning—belonging to that world of human actions that according to Kant's teaching, as Cassirer observes, is in an intermediate position in that the intelligence of man, by his ability to distinguish the real from the possible, and therefore to create images and symbols, differs so much from the intelligence of animals, beings inferior to man who confined in the world of sensitive perceptions cannot have the idea of the possible and how much from the divine mind, of being superior to the man for whom all that is thought possible is real" (Treves 1947/1993, 114).

6. Conclusion

The socio-legal studies that attempt to use "Legal Culture" as an explanatory concept must, then, distinguish and impute the constituent elements of legal experience to the creative power of culture or the influence of that structure. From this perspective, the apparent uniformity and rationality of the decisions offered by the structural-functionalist analysis, especially its European version, is called into question if the sociological analysis focuses on the legal experience, such as the cases dealt with by the three constitutional courts of Italy, France, and Portugal.

The French procedure provides, for example, a framework for political action by opponents to the 2014 reform in the field of prostitution, which introduced a new legal prohibitionist model in which the protection of human dignity also mandates fines for the prostitutes' clients, effectively undermining the transaction of business. The opposing groups and activists have attempted to provoke a conflict in society by proposing an alternative political and legal model that rejects the anti-prostitution model and, on the contrary, affirms the appropriateness of a "regulatory" discipline, which leaves space for self-organized prostitution. During the same period, there was a media campaign aimed at presenting positive examples of "sex workers," while supporters of the 2014 law have mobilized social groups aimed at combating the *commodification* of the female body, because prostitution concerns, not exclusively, but primarily women. Moreover, the political choice to combat prostitution in France requires that sexual intercourse is not only wanted by the parties involved, but also "desired," placing the love connection beyond the perimeter of economic exchange. This element characterizes the French legal experience, which the constitutional court has courageously confirmed as a policy of the executive. This policy is aimed at strengthening a set of traditional ethical values, although it does not take into account the phenomenon of "new slavery" that, along with the drug and arms trade, is one of the major sources of profit in illegal markets. The possible alternative views put forward by civil society were therefore considered but not accepted, confirming government choices.

In contrast, the Portuguese case seems to respond more to a defensive logic developed in the framework of criminal proceedings involving illegal economic activities, including prostitution. In this case, the process takes into account requests coming from within the same legal system but formulated by social actors belonging to illegal or gray economies. This legal experience is characterized by the application and confirmation of the principles on which the legal order and the efficacy of fundamental rights are based. It is defined, in fact, by the need to confirm the distinction between legal and illegal economy, the former respectful of human rights and the latter posing a threat to said rights. Thus, the Court argues: "The freedom to exercise a profession or economic activity obviously has, as limits and framework, values and rights Directly associated with the protection of the autonomy and Dignity of another human being." It is therefore not in dispute that, in some regulatory countries, prostitution is considered a job—however, this does not make the sex market an acceptable economic sector. The choice of the legislature is therefore legitimate, confirmed due to the understanding of society[15]

[15] The Portuguese Court has expressly cited the work of Almiro Simoes Rodrigues (1984).

and, above all, it is reinforced by the Portuguese Court by the affirmation of fundamental rights:

> Such an option is intended to avoid the risk of such exploitation situations, a risk considered high and not acceptable, and is justified by the prevention of these situations, concluding by empirical studies that such risk is high and exists, effectively, in our country, insofar as prostitution situations are associated with high social needs (...) no such an option is inappropriate or disproportionate in order to protect personal legal assets related to autonomy and freedom.

The Italian process, which is certainly unique, is also part of the criminal defense but the social actors involved are, on the one hand, people belonging to the gray economy and gravitating in the orbit of the political sphere and, on the other hand, some high-end prostitutes. In this case, therefore, it is the political system that is directly involved in the violation of the norms, values, and ideologies that support the *personalist* principle of the Italian Constitution. The judgment, which comes last chronologically, refers to and summarizes the meaning of the other examined (judgment 641 of 2016 of the Portuguese Constitutional Tribunal and judgment 761 of 2018 of the French Constitutional Council) and it addresses, as a priority, instruction for the political system: the normative message that having membership of the political elite does not create positions of privilege and cannot legitimize behavior contrary to the founding values of civil society, guarded by fundamental and constitutional rights.[16]

The judgment n. 141 of 2019 of the Italian Constitutional Court also confirms the existence of an internal legal culture that extends beyond national borders and makes references to an *ethos* common to countries whose overall legal culture is similar. In each judgment analyzed, the constitutional judges reaffirmed that penal norms do not have the function of imposing specific morality, but the legal background to their decisions allows the formation of a common internal legal culture, which conveys a public ethic that has its roots in a common European civilization.

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[16] "The facts under judgment are constituted, in substance, «by having the defendants organized, in favour of the then Prime Minister S(...) B(...), meetings with prostitutes occasionally or professionally engaged in prostitution»: to be understood as «escort», according to «the most common and consolidated meaning of the term», «the escort or the person paid to accompany someone and who is also available for sexual services», with the exclusion, therefore, of forms of forced prostitution exercise or «necessitated by reasons of need». The conduct for which it proceeds would be placed, therefore, in a context that does not involve compulsions accidents on the determination of the prostitute to perform sexual services for a fee" (so writes the judge rapporteur in the aforementioned judgment of the Constitutional Court).

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