PROPOSALS FOR ESTABLISHING THE LEGAL SETTLEMENT OF PROSTITUTION

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Abstract

The present study discourses a series of conclusions regarding legal provisions for prostitution, as a phenomenon in the context of having a succession of criminal and administrative regulations and giving the prospect of a more permissive legislation in which prostitution could be practiced as an authorized occupation in Romania.

Key words: prostitution, Penal Code, authorized occupation.

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Following the idea of a non-incriminated prostitution activity, by abrogating the relevant legal provision regarding this criminal deed, a redefinition of the notion comes as a necessity, trough:

- sanctioning the phenomenon with administrative tools, in its whole or taking into consideration only some of its manifestations that would affect public order (for example activities like attracting clients, practicing prostitutions in locations situated near public authorities headquarters, schools, cultural or religious establishments etc.) or public behavior (for example obtaining incomes from high class prostitution and not subjecting them to public taxes);
- enforcing a legal permissive regulation system, in order to increase legal activities of prostitution and decrease illegal activities of such kind;

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enforcing a criminal or administrative offence for illegal practicing of prostitution, when the term in defined.

In our opinion, the current legal definition of the prostitution is a satisfactory one, as we find in the legal text of our Penal Code, taking into consideration that the text dates from the beginning of the '90s.

The double punishing standard, both penal and as an administrative offence (even if the administrative part should be only about attracting clients), led to various effects, mostly negative ones, creating an unfortunate image of the legal system in this matter and also allowing the enforcement authorities to choose between the sanctionatory regime that they would apply in each situation (since the law claims the necessity of proving the occupational nature of the offence). A legal clear definition of the notion comes as mandatory for the future and this could be done as a general rule, taking into consideration the necessity of a permissive or a restrictive provision regarding *modus operandi* and social effects of the prostitution. A future legal provision regarding prostitution should make a clear distinction between the prostitution activities and other activities that may have an artistic, educational, cultural, medical, erotically, sexual, pornographic or entertaining purpose but also may have some common features with prostitution (e.g. Pornographic productions with paid actors, video chat, erotic massage etc.).

The enforcement of a permissive regulation comes as mandatory towards the idea of preventing this activity to be controlled by criminal organizations representing a real danger for public order, the prostitutes, their families and sometimes, even for the clients.

We appreciate that a good definition of this social phenomenon would be the following: prostitution consists in a person's action of committing sexual activities with one of more persons, for the purpose of obtaining material advantages, outside and artistic, educational, medical or scientifical environment.

The legal provisions has to establish warranties for the purpose of:

- Assuring restrictive penal regulations punishing human trafficking for sexual purposes, panderism that involves constraining or deceiving the victims or situations in which someone takes advantage of a person being unable to defend herself or expressing his or her will;
- Maintaining a moderate penal sanctionatory provision for committing unauthorized prostitution and panderism that doesn’t involve constraining or deceiving of the prostitute, but his or her free will;

- Enforcing an administrative sanctionatory system for the infringement of legal activities of prostitution.

In the development of this social phenomenon, we observe two forms of prostitution: the ordinary one and the luxurious one. The second category can produce outrageous incomes giving the way they are being obtained. Regarding this aspect, in a future permissive regulation, we could take into consideration the Belgian provision that limits the maximal value of the requested fees. Therefore, our future regulation should provide the right of a person to request money for sexual services, but the fee for an hour shouldn’t be higher than minimal wage, regardless of the activity of the prostitution.

A non incrimination in the criminal legislation combined with administrative sanctions will not be enough to control this social phenomenon.

It is only a coherent legal provision for this activity, enforced after observing regulations form other states and taking into consideration the Romanian legal expertise in this matter, both before and after World War II, that can lead to transforming a negative social aspect into an acceptable activity for society, economy, fiscality and public health.

In our opinion, the only way to improve the lifestyle of the Romanian prostitutes and to provide control over this activity is enforcing a legal permissive system, including special provisions for protecting the rights and freedoms of prostitutes. Such legal provisions should include:

- Protection for the person practicing prostitution towards her employer and client;

- Creating a contractual relation, legal and moral, between the prostitute and the client, in order to protect both their interests and the interests of third parties;

- An obligation for the prostitute to return the fee to the client in case the sexual service is not provided and the right to request the fee in the opposite situation;

- Interdiction for the employer and client to force the prostitute in providing a sexual service;
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- The right of the prostitute to select the clients and to refuse a certain type of sexual service;
- The possibility for the prostitute to claim the payment of the fee in a court of law, personally, without the involvement of the pander;
- In case of a employer – employee relation, the obligation for the parties to close a written employment contract, so that the employee can have a right to social care and pension;
- Express obligation for the employer to pay taxes including to social care and pension funds;
- Legal provisions for prostitutes that want to practice this activity as a liberal profession (having to pay takes like an employer);
- Limiting the legal responsibility of the prostitute or the pander, if they prove they obey all the legal regulations;
- Public authorities and local administration having to authorize the prostitution activity;
- Obligation for the prostitute to periodically (monthly) medical visits;
- Sanitary and public order verifications made at certain periods of time;
- Minimal age both for prostitutes and clients at 18 years old.

In case internal authorities should choose a permissive legal system for practicing prostitution in Romania, we appreciate that expertise of countries like Belgium, Germany, Austria, Holland, Spain, Denmark, Switzerland, Hungary, Greece, Turkey, Mexico, Columbia, Venezuela, Australia and New Zealand should be analyzed, and also the causes for which there have been some legal changes in U.S.A., United Kingdom, France, Italy, India, China, Japan, Brazil and Argentina.

In case of such a legal regulation for the sexual workers acting in brothels or other special location for paid sexual services (west European system\(^1\)), the provision of the Criminal Code should include an exception of appliance for persons that found or work in those location, in the conditions provided by the relevant special law.

The legal texts regarding prostitution must exclude pejorative formulations (e.g. prostitute or person practicing prostitution). The legal text could include

\(^1\) E.g. Spanish, Belgian system or German System – Eros Centers.
expressions like: sexual worker, provider, authorized person, authorized person for providing sexual services and others.

The legal terminology mustn’t exclude the possibility for men to practice this activity and shouldn’t create discriminative situation for men in this matter.

A permissive regulation for legally practice of prostitution has to be enforced along with a penal one regarding prison punishments for illegal practice of this activity. There is also a possibility for instating an administrative sanction for prostitution, but it wouldn’t be as efficient as a penal one regarding prostitution.

In order for Romania to be forced to withdraw herself from The Convention on Action against Trafficking in Human Beings, the prostitution activity should be legally authorized as an independent profession and less as an activity that involves getting hired in a brothel (that would be owned and financed by another person) or working in an Eros Center, in which parts of a real estate is rented for practicing sexual activities. Also, there is the need of taking this activity away from the criminal groups that control it in the present time, that exploit and traffic the prostitutes.

After analyzing the foreign provisions, we have come upon restrictive, permissive, limitative or prohibitive legislations, that are concentrated in some distinctive directions:

- a severe sanctionatory legal system (in Iran, Afghanistan, North Korea, South Arabia, Tanzania, Kenya, Egypt, Vietnam and others);
- a moderate legal system, sometimes conditioning the repeating of the practice in order to be sanctioned (Romania at the moment, Russia, Ukraine, Haiti, Japan, Thailand, South Africa and others).

In some countries, only the client is punished (Sweden, Norway, Iceland and others) or both parties (Illinois, Alaska, Colorado, Texas, New York and others);

- a generally permissive system with administrative sanctions for some manifestations of the deed (Romania after enforcing the New Criminal Code, United Kingdom, France, Spain, Italy, Canada, Bulgaria, India, U.S.A. – Arizona, Columbia, Brazil, Argentina, Israel, Dominican Republic, R.D. Congo, Ethiopia and others);
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- a permissive system, precisely regulated, sometimes doubled by a fine punishment or even penal sanctions for practicing prostitution in non authorized conditions (Germany, Holland, U.S.A. – Nevada, Switzerland, Austria, Greece, Hungary, Turkey, Columbia, Venezuela, Ecuador, Peru, Chile, Uruguay, Paraguay, Bolivia, Mexico, New Zealand and others). A future permissive legal system of this activity should use the expertise gathered from enforcing the mentioned above provisions by making a detailed analyses of their social effects.

A future legal system should include provisions regarding the condition for obtaining the authorization form local authorities as well as from the Ministry of Internal Affairs, local bureaus of the Ministry of Health. Also, persons practicing prostitution should be noted in the data bases of fiscal authorities in order for them to pay both income and authorization taxes. Local authorities could establish areas in which locations for sexual services would be founded.

In this regulation, the person practicing prostitution would have to assure the confidentiality regarding the client’s identity. This aspect mustn’t be mentioned or made public, excepting the cases involving judiciary or administrative procedures, sanitary aspects and at the request of a court of law, police or public order authorities, administrative authorities.

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