

PROSTITUTION IN ROMANIAN LEGISLATION

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Abstract: *An age-old profession, prostitution has always been a controversial subject. Although from the point of view of morality, prostitution is not an activity to honour those who practice it must be noted that it exists irrespective of whether society blames it or tolerates it.*

Key words: *prostitution, morality, criminality, incrimination.*

1. The notion and the evolution of prostitution

The juridical regulation of prostitution is to be found in article 328 Criminal Code and represents "a person's act which procures his/her means of livelihood or main means of livelihood by practicing for this purpose sexual acts with different persons".

Etymologically speaking, the term of prostitution comes from two Latin roots: pro – for or ahead and statuo, statuere – to stand, to be exposed to sight, the verb prostituere meaning at the beginning of its use public exposure of products for sale [1].

Being part of a category called offences that affect relationships regarding social cohabitation provided in Title IX from Criminal Code, the offence of prostitution has the relationships regarding social cohabitation as a general juridical subject. Lato sensu, the term of social cohabitation includes the majority of social relationships which are, to all intents and purposes, cohabitation relations of some persons together with other persons. Stricto sensu, this term refers to those relations

which imply close, direct, frequent contacts between persons and their breach implying moral suffering.

2. Constitutive content

The special legal object of the crime of prostitution is the relationship of social cohabitation, relationships involving the procurement of means of livelihood, observing the moral rules of a person's sexual life and the rules of public morality and the rejection of acts of sexual trade. The main social value affected by practicing this activity is the procurement of means of existence by honest work, but, as a secondary area, other values connected to the human being are being affected, such as his / her sexual moral life, dignity and social morality.

The offence of prostitution implies the practice of sexual acts with different persons to ensure the means of livelihood or roughly its main means. Thus, the material object of the offence is those goods obtained by practicing this activity, the law being ambiguous regarding money, jewelry, valuable goods or other goods.

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The partners' body subjects to sexual acts do not make the material object of this offence due to the fact that, considering the cases as isolated ones, they have nothing illegal. What is contrary to moral principles and law is their purpose, namely the procurement of means of or livelihood main means of livelihood. Likewise, the body of the person who practices prostitution cannot be considered to be the material object of the offence of prostitution as part of personal body trade, this being just the means of committing the act [2].

The direct *active subject or prostitution* is not circumstantiated, any person being capable to represent this type of subject, male or female, due to the fact that the law does not make any distinction for this purpose, and *ubi lex non distinguit, nec nos distinguere debemus*. But, in most of these case, this offence is committed by women.

Regarding the criminal participation the offence cannot be committed by two authors. If several persons, based on a prior agreement, practice prostitution at the same time and place, each of them will be convicted for his / her personal act, as sole author. It is generally accepted that prostitution can be committed under the form of instigation when a person coerces with intention another person to commit the act provided in the criminal law. Likewise, the offence can be committed under the form of complicity, moral or material, consisting in the person's activity who, with intention, facilitates or helps in any way the commitment of this act or who, before or during the act, promises to hide the goods resulted from this act or to favour the perpetrator, even though the promise is not kept after the act [3].

The passive subject of prostitution is the state, as the representative of a society threatened by violation of moral values by its citizens. The persons who take part as

partners during the sexual act do not have the quality of secondary passive subjects, for the same above-mentioned reason: sexual acts considered as isolated ones not being illegal.

Prostitution's material element is the perpetrator's act to procure his / her means of livelihood, even though they might be the main means of livelihood by practicing sexual acts with different persons for this purpose. Consequently, the material element of the offence presents two acts closely bounded. One of them constitutes the purposive act, namely the procurement of means of existence or main means of existence and the other one constitutes the middle act, namely practicing sexual acts with different persons. In this order of ideas, the first act represents the purpose, the finality of the incriminated offence, and the second one represents the means of achieving this finality [2].

The purposive act is presented under two alternative means of achievement, each of them being able to constitute the material element of the offence of prostitution.

- the first one is when the active subject of the offence procures all his / her means of existence by practicing sexual acts with different persons;
- the second is when the active subject procures only the main means of existence by practicing such relations.

The term „means of existence” designs those means which serve to satisfy a person's needs of living. The domain of these means is large, including all means which serve to satisfy material needs and spiritual ones [4].

Likewise, the offence of prostitution exists even though the aim is only to ensure essential needs of living, such as the need to have a place to live, food, clothes, the last ones representing only „the main means of existence”. In the

absence of this purpose there is no offence of prostitution. Thus, the act of one person who earns his / her living by work, to gain additional earnings by practicing sexual acts with different persons does not meet the constitutive elements of the offence of prostitution.

In practice, it was established that since the offender, although capable of working, continues to have a parasitical life by committing the offence of prostitution there are no necessary guarantees that performing work as punishment will produce its sought effect, thus the punishment by imprisoning her will be executed in detention [5].

The character or type of earning gained by practicing sexual acts with different persons is not important, these being in the form of money, jewelry, objects of art, payment of some debts or any other form. The essential condition is that all these have a patrimonial content, to be assessable in money and to serve for procuring the means of existence or main means of existence.

The middle act consists in practicing sexual acts with different persons. In connection with the meaning and domain of the term „sexual acts”, different points of view have been presented in specialized literature. Thus, according to Vintilă Dongoroz and Siegfried Kahane, the offence exists only in case of practicing normal sexual acts with persons of different sexes, but the sexual pervert acts will be sentenced according to provisions of art.201 Penal Code. Based on other opinions, also agreed by Șt. Daneș, O.A. Stoica, Octavian Loghin and Tudorel Toader, Ghe. Nistoreanu and Vasile Dobrinioiu, the term „sexual acts” implies: normal sexual acts, sexual acts with persons of the same sex, pervert sexual acts.

This last opinion seems to be more credible due to the fact that, although the

legislator draws a clear distinction between sexual acts, sexual relations and other sexually pervert acts, this distinction has juridical importance only in the case of sexual offences provided in chapter III of Title II from the Criminal Code, and the offence of prostitution is not part of this category. Likewise, in order to determine the types of sexual acts for which there is the offence of prostitution one must take into consideration the special juridical object of the offence. It is certain that in this last situation the law does not forbid the possibility of concurrence of offences, if the constitutive elements of another offence are met. For example, if the act of prostitution is committed in public or causes public scandal, the act will constitute a concurrence of offences of the offence of prostitution and sexual perversion provided in art.201 Criminal Code.

The nature of the aim of the act, represented by the procurement of means of existence or main means of existence, also determines the nature of the offence as being usually qualified as an offence. From the provisions of the legal text which incriminates the act of practicing sexual acts in order to obtain the above-mentioned material benefits there results the idea that the text takes into consideration, as an essential condition of the offence, sexual repeated acts, systematically practiced, and not isolated, accidental acts, due to the fact that only due the common practice of such acts for the purpose showed by the legislator, the person can procure those goods with patrimonial value, included in the term of „means of existence” or of „main means of existence”. The law does not provide the number of acts necessary to constitute the offence, specifying only that it must be constant to draw the conclusion that the act is being regularly committed, as a habit or job.

Another essential condition to prove the offence of prostitution is for the sexual acts to be practiced with different persons, by emphasizing the common feature of obtaining earnings by practicing sexual acts. Thus, the legislator takes into consideration the sexual acts in which the partner is chosen at random just for obtaining material benefits. Consequently, if the sexual acts are performed with the same person, the legal element is not met, even if the purpose is the procurement of means of existence or main means of existence. This situation represents just a violation of moral norms.

The immediate result of committing the offence of prostitution is the creation of a dangerous status for the social cohabitation relations related to the assurance of livelihood by work, of an unsecured social status, insecurity which derives from this immoral means of gaining the means of living. This dangerous result is produced by the commitment of the act itself. In relation to the offence of prostitution [6].

The Constitutional Court was notified to resolve the objection of unconstitutionality provisions of art. 328 Criminal Code. For the motivation of the exception, it is stated that the provisions of art. 328 which incriminate prostitution are, in their essence, contrary to art. 26 from the Constitution, because they limit the right of a person to dispose of himself / herself, and at the same time they contravene in respect of art. 38 from the fundamental law regarding the right of a person to freely choose the job and place of work. However, it must be observed that the exercise of some rights or liberties can be restrained according to the Constitution (art. 49 paragraph 1). One first condition which must be put into effect in order to restrain the exercise of rights and liberties is that this restraint should be provided by law. Such a restraint is represented by the provisions of art. 328 Criminal Code

which are constitutional because prostitution is a social parasite act, and the social relations of social cohabitation are being violated by committing this type of offence [7].

The Constitutional Court held in this matter by the decision no. 72 on July 5th, 1996 and rejected the non constitutional exception of provisions of art. 328 Criminal Code by specifying that the position of the Romanian legislator is supported by the preamble of the Convention for stopping the traffic in human beings and the exploitation of the prostitution, adopted by the General Meeting of the United Nations Organization on December 2nd, 1949, with Romania adhering to it according to Decree no. 482/1955.

In order to have an offence, we need to have a relation of causality between the act and the immediate result. The relation of causality always exists in the case of prostitution and it does not have to be proved because the social risk implicitly results from committing the illegal and immoral act.

The law does not stipulate the special place or time conditions for the offence.

On the subjective side, the offence of prostitution is committed with direct intention, meaning that the perpetrator foresees the result of his / her act and pursues its result by committing the act. The intention arises from the fact that the practice of sexual acts with different persons is committed for procuring means of existence or main means of existence. By proposing this aim, the author also intends the occurrence of the immediate result his / her act meaning the procurement of material resources necessary for living.. The lack of purpose leads to the absence of the offence because of the lack of an *actus reus* on the objective side. Therefore, the act cannot be committed by negligence or oblique intent

Being a crime which usually involves repeated acts, the crime of prostitution is not susceptible of preparatory acts. The multiple acts through which the material element of the crime is achieved cannot be considered as preparatory acts as they have no criminal value of their own but acquire criminal value just through repetition and by summing them up in one single action. In relation to its specific material element this is a controversial issue. . As a first opinion, it has been contended that up to the moment when the typical action is sufficiently extended so the forbidden act is repeated, the act is legal, without being considered an attempt, and when all previous conditions are met, the offence is already consumed [8].

In fighting this perspective, it was shown that in relation to usual criminal offenses to the extent to which there is established the offender's intention to repeat the act the contents of the attempt is fully realized. Thus there is the specific material element - an unfinished action - and subjective element - intent to commit the crime.

The offence is being consumed when a sufficient number of sexual acts with different persons have been performed in order to obtain material benefits. This leads to the absolute conviction that the perpetrator uses prostitution to ensure his / her means of existence or main means of existence. For the practical and concrete setting of the time of this moment, the author Vintilă Dongoroz proposes the following criterion: determining with precision the moment when the person is no longer working or exercising a profession which ensures him / her means of existence and the corroboration of this information with the fact that that person repeatedly practiced sexual acts with different persons to ensure necessary living earnings.

There are situations when the act attains the moment of consummation but it is not

discovered by the prosecution, and that is why there is an extension of delinquent activity, passing over the moment of consummation, up to the moment when this offence is being discovered by the authorities or up to the moment when that person will stop exercising this activity based on his / her own initiative. At this time, the offence has the form of an effete act. This situation does not have relevance to the existence of the offence or to its form, but contributes just to juridical individualization of the punishment.

The offence of prostitution is being punished, according to provisions of Criminal Code, with jail from three months to three years. When establishing the punishment, there were taken into consideration the specific elements of this crime, of social values affected by its commitment and also by its seriousness. In order to individualize the punishment, there will always be considered the duration of practicing the prostitution, of the social risk produced by committing the act.

2. Conclusions

By researching the gathered traditions, the conclusion can be drawn that prostitution, "an old profession", is seen as a tolerated evil and for some, even as a necessary evil, even being encouraged for some purposes. In a country with economic issues, the prostitution flourishes as a profitable commercial activity. So prostitution exists and is at alarming levels, contributing greatly to the proliferation of sexual diseases, the wild abuse and exploitation of women and children and maintaining a climate of promiscuity in the places of recruitment. The development of society has also multiplied the possibilities to practice this profession which brings an important amount of money for the ones who practice it. The genesis of modern

prostitution is strictly related to the beginning and evolution of urban and industrial process, which determined the rise of the economic independence and implicit sexual freedom of women. Prostitution can successfully be considered a commercial activity organized and characterized by a balance between demand and offer.

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