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OCTOBER 24- 25 2018
MADRID-ESPAÑA

Regulation of Prostitution: Guarantee of Dignity or Legal Consecration of Indignity

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Abstract: This article intends to address a contemporary topic in Portuguese political, social and legislative arenas: the adequacy of keeping the exploitation of prostitution as a crime or, otherwise, the pertinency of making it a legal activity, subject to regulation. The main methodology used will address the analysis of Portuguese internal laws (such as penal, labour and human rights laws) as well as international binding norms, in order to establish the ascertain legal option. In conclusion, the maintenance of the criminalization seems to be the coherent option.

Keywords: prostitution – exploitation of prostitution – regulation of the exploitation of prostitution – human dignity (especially female dignity) – normative change

1 Introduction

The regulation of prostitution is an issue that is set in the current Portuguese legal-political panorama.

Regulating prostitution, rigorously regulating the legal exploitation of prostitution, is by some sectors defended as inherent in guaranteeing the human dignity of prostituted persons.

On the other hand, prostitution, the exploitation of prostitution and human trafficking for sexual exploitation are topics that are often related with normative and judicial practice, which leads to the conclusion that the legal exploitation of prostitution should be postponed, exactly to guarantee the human dignity of these same prostituted persons.

This is a theme that appeals to the boundaries between law and morality, between the traditional and the modern, between what can or cannot be legally permitted or prohibited, where human rights and human dignity are concerned. As it is statistically shown that prostituted persons are mostly female, a gender issue can also be considered in legal studies about this subject.

In this investigation, the normative evolution of the Portuguese criminal law over the last decades towards prostitution and exploitation of prostitution will be addressed, with a special focus on the changes that have occurred throughout the 20th century. It will also be presented some current arguments favourable to the regulation of prostitution, as well as positions adopted in recent jurisprudential decisions on the subject. Next, some legal paradoxes will be dealt with at the national and international normative level, such as labour law, criminal law or human rights law, which may be confronted with a hypothetical future regulation of the exploitation of prostitution. The aim of adopting this methodology is to establish from a juridical point of view the problem formulation and to, subsequently, present some solutions for that problem.

2 Problem Formulation

In Portuguese legal system prostitution is not forbidden, only its exploitation is.

Portuguese Penal Code criminalizes the exploration of prostitution as the act of professionally or for profit, encourage, favor, or ease the exercise by another person of prostitution (article 169 n°1 of the Penal Code, which is one of the crimes against sexual freedom [1]). This behavior is punished with a superior penalty if it is carried out in certain circumstances such as violence, serious threat, ruse, fraudulent maneuver, abuse of authority resulting from a family relationship, guardianship, or hierarchical, economic, or work dependency, or exploitation of mental incapacity or of a situation of special vulnerability of the victim (article 169 n°2 of the Penal Code [2]).

Meanwhile, in the Portuguese Labour Code, the concept of an employment contract is regulated as that by which an individual undertakes, by way of payment, to provide his or her activity to another person or persons, within the organization and under the authority of these (article 11 of the Portuguese Labour Code [3]).

Given this legal framework, it becomes something controversial how it is feasible to make exploitation of prostitution not only legal but a natural object of an employment contract.

This is a perplexity that is reinforced when one considers crimes such as human trafficking that criminalizes whoever offers, delivers, enlists, entices, accepts, transports, lodges or accommodates persons for the purpose of exploitation, including sexual exploitation, by means of violence, abduction, serious threat, fraud or fraudulent maneuver, with abuse of authority resulting from a relationship of hierarchical, economic, work or family dependency, or taking advantage of the psychic incapacity or situation of special vulnerability of the victim, or by obtaining the consent of the person having control over the victim (article 160 n°1 of the Portuguese Penal Code, which is one of the crimes against personal freedom [2]). Being especially important to note that the consent of the victim of human trafficking does not exclude the wrongfulness of the conduct (article 160 n°8 of the Portuguese Penal Code [1]).

This formulation of the problem will direct the investigation by researching statistical and legislative elements that demonstrate the quantitative relevance of the prostitution as a social phenomenon and the domestic and international normative developments concerning it.

3 Problem Solution

The legislative paradox shown by a future hypothetical regulation of prostitution (making it subject to an employment contract), in the view of present Portuguese legislation and international binding norms, will require in-depth legislative analysis that crosses present and past laws as well as current norms internally and internationally. Only after such analysis it will be possible to ascertain the viability of the regulation of the exploitation of prostitution as (one more) legal activity and thus formulate a solution to the problem formulated.

The solution chosen cannot neglect the gender issue underlying this problem since it is well established that the exploited individuals are mostly women.

4 Conclusion

With the research developed, it is intended to demonstrate, at a legal-axiological level, the denial of human dignity (especially female) that would result from a hypothetical regulation of the exploitation of prostitution. At a juridical-pragmatic level, this research intends to highlight the unfeasibility of the coexistence of a regulated activity of exploitation of prostitution with a series of other internal legal directives and even of international legal obligations assumed by the Portuguese State.

References:

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