JUDGMENT NO. 141 YEAR 2019

In this case, the 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 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 solely 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. The Court ruled that the challenged provisions were constitutional, comforted also by a review of how the issue has been addressed in other European countries.

[omissis]

THE CONSTITUTIONAL COURT

[omissis]

issues the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 3(1)(4), first part, and 3(1)(8) of Law No. 75 of 20 February 1958 (Abolition of the regulation of prostitution and the fight against the exploitation of the prostitution of others), initiated by the Court of Appeal of Bari in the criminal proceedings against G. T. and others, by referral order of 6 February 2018, registered as no. 71 in the Register of Referral Orders 2018 and published in the Official Journal of the Republic, no. 19, first special series, 2018.

Considering the entries of appearance filed by G. T. and M. V., the intervention of the President of the Council of Ministers and the interventions of Associazione Rete per la Parità and others and Associazione Differenza Donna Onlus;

Having heard Judge Rapporteur Franco Modugno at the public hearing of 5 March 2019;

Having heard Counsel Antonella Anselmo for Associazione Rete per la Parità and others, Counsel Maria Teresa Manente for Associazione Differenza Donna Onlus, Counsel Nicola Quaranta for G. T., Counsel Ascanio Amenduni and Gioacchino Ghiro for M. V. and State Counsel Gabriella Palmieri for the President of the Council of Ministers.

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Conclusions on points of law

1. – The Court of Appeal of Bari doubts the constitutionality of Articles 3(1)(4), first part, and 3(1)(8) of Law No. 75 of 20 February 1958 (Abolition of the regulation of prostitution and the fight against the exploitation of the prostitution of others), "insofar as it makes recruitment and the aiding and abetting of prostitution voluntarily and knowingly engaged in a criminal offence".

The referring court takes as its point of departure that in the current historical context, prostitution is not a homogeneous phenomenon. Alongside 'forced' prostitution and that engaged in 'out of necessity', there is also prostitution engaged in as a matter of totally free and voluntary choice, typically corresponding to the figure of an escort (by which is meant a paid companion, also available for sexual services): a figure unheard of at the time of the approval of Law No. 75 of 1958.

On this premise, the Puglia Court assumes that the decision to offer sexual services on a paid basis constitutes a form of expression of the freedom of sexual self-determination, protected by Article 2 of the Constitution as an inviolable human right. That freedom, of an intrinsically 'relational' nature, is said to be impaired by provisions that criminalise the activities of third parties who – without impinging on the self-determination of the person who is a prostitute – simply do no more than put the prostitute in contact with customers (as in the case of recruitment) or facilitate the prostitute's carrying of his or her activity (as in the case of aiding and abetting).

It is also argued that that would also violate freedom of private-sector economic initiative protected by Article 41 of the Constitution, of which engaging in voluntary prostitution is an example since it is a normally professional activity conducted for the purpose of making a profit. By precluding, through the spectre of criminal liability, forms of support for such initiative, like intermediation and facilitation, the rules complained of would arguably deprive the economic activity in question of the chance to develop on a par with any other entrepreneurial initiative.

It is further alleged that the challenged provisions could conflict with the principle that a crime must necessarily be offensive, which can be deduced from Articles 13, 25(2) and 27 of the Constitution. According to the most recent case law of the Supreme Court of Cassation, in fact, the good protected by the criminal provisions of Law No. 75 of 1958 should be identified not in the 'paternalistic' and anachronistic value of public morals and common decency but precisely in the free self-determination of the person who decides to prostitute himself or herself. From this standpoint it is argued the conduct of recruitment and aiding and abetting of prostitution freely engaged in is entirely harmless: the 'recruiter' and 'abettor' limit themselves in essence to facilitating the realisation of the choice of the person concerned, thereby advancing rather than damaging the protected interest.

A final question concerns solely aiding and abetting, which the referring court maintains 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. The wording in which the criminal conduct is couched – "whoever, in any way, aids and abets [...] the prostitution of others" – is said to be totally general, leaving the court with the task of identifying which conduct, from among that infinite range which could in theory fall within the provision, is detrimental to the protected interest.

Moreover, the criteria drawn up by the courts in this regard are said to be incapable of making up for the lack of precision in the provision but rather generate further uncertainty. The argument is alleged to be particularly valid for the case law distinction between aiding and abetting prostitution (punishable) and aiding the person who engages in prostitution (not punishable): a distinction to be considered conceptually unfair and that would end up giving rise to a disparity of treatment, in violation of the principle of equality (Article 3 of the Constitution).

2. – As a preliminary point, it should be noted this Court cannot take into account the arguments adduced by the party M. V. aimed at demonstrating that also the rule criminalising recruitment for the purpose of engaging in prostitution, contained in Article 3(1)(4), first part, of Law No. 75 of 1958, is flawed in as much as it breaches the principles of legal certainty and precision in criminal matters.

The referral order is unequivocal in limiting its complaint as regards the breach of the principles of legal certainty and precision in criminal matters solely to the offence of aiding and abetting, expressly ruling out that any similar problem of constitutionality exists in relation to the offence of recruitment (the legislative description of which needs only to 'update' the notion of "recruitment", historically linked to the legislative will to eliminate the exploitation of prostitution through "brothels").

Valid therefore is the principle, as consistently stated by this Court, that the subject matter of incidental proceedings concerning constitutionality is limited to the provisions and to the parameters indicated in the referral orders: with the consequence that one cannot consider further issues or aspects of constitutionality raised by the parties at the time but not adopted by the referring court as its own or aimed at widening or modifying the content of the referral orders in question at a later stage (amongst many, see Judgments nos. 194, 161, 12 and 4 of 2018 and no. 29 of 2017).

3. – State Counsel objects as to the inadmissibility of the questions in two distinct respects.

3.1. – Firstly, according to State Counsel the Court of Appeal failed to make the required attempt to interpret the disputed provisions in a manner consistent with the Constitution, raising the questions for the sole purpose of obtaining support in interpretation.

That objection is unfounded.

The hypothetical consistent interpretation alluded to by State Counsel, without specifying what that might actually be, would clearly imply holding that recruitment as well as the aiding and abetting of prostitution remain, even now, exempt from punishment when the recruited or aided person has freely chosen to work as a prostitute. This is because it would be conduct that does not fall within the contours of the offence or, possibly, because of the operation of the defence of lawful consent on the part of the person so entitled (Article 50 of the Criminal Code).

Both interpretative solutions however contrast with the living law. The case law of the Supreme Court of Cassation has never doubted that the crime in question can be committed regardless of the mental element exhibited by the prostitute and the latter's possible full consent to prostituting himself or herself (in this vein, expressly, see most recently Supreme Court of Cassation (Third Criminal Division) Judgments no. 14593 of 17 November 2017 - 30 March 2018 and no. 5768 of 19 July 2017 - 7 February 2018). A conclusion that moreover appears in line not only with the undifferentiated literal wording of the criminal provisions but also – as we will soon have occasion to verify – with the very logic of the model of intervention adopted by Law No. 75 of 1958.

One cannot therefore reproach the referring court for not having expressly questioned the practicability of alternative interpretations, which would clearly be eccentric compared to the way in which the provisions at issue have 'lived' for sixty years. It is this Court's well-settled case law that in the face of an established line of case law authority the court concerned, even though free to depart from that line and propose its own interpretation, may deem that the challenged interpretation constitutes "living law" and, on that basis, seek a ruling as to whether it is constitutional (amongst many, Judgments no. 39 of 2018, no. 259 of 2017 and no. 200 of 2016 as well as Order no. 201 of 2015). Such without being able to criticise the referring court for not having followed an interpretation more in keeping with constitutional dictates since that duty exists solely in the absence of conflicting living law (amongst others, Judgments no. 122 of 2017 and no. 11 of 2015): in the hypothesis considered, in fact, "the rule now lives in the legal system in such a deep-rooted way that it is difficult to imagine a modification of the system without the intervention of the legislator or [of the] Court" (amongst others, Judgment no. 191 of 2016; in an analogous vein, Order no. 207 of 2018).

3.2. – The other objection as to inadmissibility raised by State Counsel in its brief is based on the wide discretion that, according to this Court's well-settled case law, the legislator enjoys in establishing what conduct is to be punished.

It is, moreover, more properly a matter for the merits of the case.

4. – As to the merits, the approach to the issue for decision calls for a preliminary overview of the relevant legislative framework and associated case law.

4.1. – Prostitution – a term that denotes at its most general level the rendering of sexual services for remuneration, normally in a habitual and indiscriminate manner (i.e. without a prior limitation to specific partners) – is one of the most problematic issues for the legislator in the criminal field. Obviously the issue does not concern 'forced' prostitution or trafficking for the purposes of sexual exploitation: scenarios in which it is the need to protect the person that clearly and indisputably calls for punitive measures. But when it comes to voluntary prostitution, any historical-comparative analysis proves very reluctant to express constants and offers rather, depending on the time and place, a very wide range of differentiated responses about whether there should be any criminal liability in the first place and if so how the criminal law should actually operate.

At the heart of the variety of legislative solutions are two contrasting visions as a point of departure.

From one standpoint, 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. Therefore, the legal system should let individuals be generally free to engage in prostitution, to avail of the sexual service and to facilitate it. If anything, it is only a question of properly regulating the carrying on of that activity in order to tackle the 'dangers' inherent in it, similarly to what happens for all economic activities that involve 'risks permitted' by the system (so-called *regulationism* model).

From another standpoint, on the contrary, 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. Those effects can be witnessed in a variety of respects: that of the fundamental rights of the vulnerable; that of human dignity (understood in an objective sense, i.e. as a principle that asserts itself regardless of the will and convictions of the individual); that of individual and collective health (not only in relation to the danger of the spread of sexually transmitted diseases but also in relation to the greater risks of drug and alcohol addiction as well as of physical and psychological trauma, depression and mental disorders, to which prostitutes are exposed); that, finally, of public order (taking into account the illegal activities that are frequently associated with prostitution, such as, for example, in addition to human trafficking, also drug trafficking and organised crime).

From this point of view, prostitution thus falls within the realm of rules designed to 'discourage' a practice and which are variously calibrated depending on who it is decided to punish: both the parties to the sexual transaction (prostitute and client: so-called *prohibitionist* model, adopted, for example, in the United States, with certain exceptions); just one of the parties (the client under more recent solutions: so-called *neo-prohibitionist* model); or, again, only conduct parallel to prostitution, i.e. the conduct of the third parties who interact with prostitutes by inducing them to engage in it, aiding and abetting it or profiting from it (so-called *abolitionist* model).

4.2. – The Italian rules on the matter prior to Law No. 75 of 1958 were informed by the so-called *classic regulationism* model of French origin (to distinguish it from *contemporary regulationism*, more about which later), based on the system of brothels that went by the name of so-called "*maisons de tolérance*" (literally 'houses of tolerance').

The basic underlying idea is that prostitution represents a 'necessary evil', which cannot be eliminated but which is capable and deserving of being regulated for the purposes of protecting public order and health (an idea also reflected in the word "tolerance" in the above term for brothel). In this model, prostitution is therefore conceived as an activity subject to police control, subordinate to the issue of a permit to the single prostitute and a permit for working as part of a group, and which must take place in special buildings meeting a series of requirements.

In our legal system, the relevant rules – particularly rigid and comprehensive – were contained in the Consolidated Law on public security (Articles 190 *et seq.* of Royal Decree No. 773 of 18 June 1931 on the "Approval of the Consolidated Law on public security") and in the associated regulation (Articles 345 *et seq.* of Royal Decree No. 635 of 6 May 1940 on "Approval of the regulation for the implementation of the Consolidated Law on public security No. 773 of 18 June 1931"). Habitual prostitution was allowed only in premises declared to be a brothel by the public security authorities, checked from a health standpoint, exhibiting particular characteristics (a single exit and shutters always closed), subject to specific opening hours and on which the State collected regular taxes. Outside a brothel, prostitution could only be engaged in at a non-fixed location since prostitution in an indoor location not authorised beforehand was a crime. Prostitutes were recorded in a special register, given a personal booklet and were subject to mandatory medical checks.
In this context, criminal law protection had a much narrower scope than at present. The matter was regulated in Title XI of Book II of the Criminal Code, dedicated to the "crimes against public morals and common decency". Prostitution in itself was not punished in the Rocco Code although obviously there were crimes against forced prostitution, However, conduct 'parallel' to voluntary prostitution – such as inducement, aiding and abetting and pimping – constituted a crime only under certain circumstances: as regards the first two situations (inducement and aiding and abetting), depending on who the client was (minors, the infirm and mentally handicapped, close relatives of the perpetrator: Articles 531 and 532 of the Criminal Code) and as regards the third situation (pimping), linked to the fact that a veritable parasitic 'living' was made at the expense of the prostitute (that was how the courts ordinarily understood concept of being "maintained" by a prostitute, referred to in Article 534 of the Criminal Code).
Such a regime was, moreover, largely unsatisfactory. While recognising a semblance of legitimacy to the work of the women who were prostituting themselves, it did not in the final analysis seek to protect them. Behind the veneer of tolerance was, in fact, legislation that fostered 'ghettoisation': confined inside brothels that went by the name of "*case chiuse*" (literally 'closed houses'), registered and subjected to compulsory health checks, prostitutes were actually forced to engaged in their activity in debasing and degrading conditions as well as in a situation of exploitation and submission to the manager of the 'house'.
4.3. – In the meantime, a new model for governing prostitution had come to the fore at European level, originating from a movement that had emerged in Great Britain: so-called *abolitionism*.
Its point of departure is that prostitution is detrimental to the dignity of the people engaged in it, who would unlikely have made such a choice under different and more favourable economic and social conditions. The State should not therefore regulate this activity, let alone implement measures, such as brothels and compulsory medical checks, which in reality are but limitations on the personal freedom of the prostitute.
Rather, in the long term, prostitution should be eliminated. However, that result should not be achieved by punishing those who engage in prostitution because that would end up damaging twice those who are actually victims of the social system; nor by punishing the client, because that would entail shifting on to the mere user of the service a responsibility that belongs to the State. By contrast, the objective should be achieved, on the one hand, by removing the social causes of prostitution and, on the other hand, by severely repressing the activities associated with it – such as inducement, pandering, pimping or even simple aiding and abetting ('parallel conduct') – so as not to allow prostitution to develop and to proliferate. These ideas have found a significant echo in the Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others,

adopted by the General Assembly of the United Nations on 2 December 1949 and opened for signature at Lake Success-New York on 21 March 1950, which Italy ratified on 18 January 1980 by depositing the relevant instrument on the basis of the authorisation issued through Law No. 1173 of 23 November 1966.

In our country adaptation to abolitionist principles took place through Law No. 75 of 1958 (so-called *Merlin Law*, after the name of its sponsor): legislation whose title is significantly "Abolition of the regulation of prostitution and the fight against the exploitation of the prostitution of others".

The reform radically changes the perspective of the pre-existing model. Ever apart from motivations of a more properly ethical and moral nature (which the parliamentary history of the legislation bears ample witness to), basically the view – in line with the above mentioned abolitionist principles – is that the decision to prostitute oneself has its roots in a condition of vulnerability linked to individual and societal causes (such as "the destruction of family life, inadequacy of education, need", "special risks inherent in certain professions" or an "environment" of looser morals). The person who sells sexual services is thus potentially a victim and the aggressor is society as a whole. From that stems the need for the State to refrain from participating in the 'sex industry': "it is not lawful for the State, which has the same duties towards all citizens, to sacrifice a part of the population, the weakest and the most miserable one, to the men who want to abuse it" (to quote from Senator Boggiano Pico's report of 21 January 1955 to the first permanent commission of the Senate of the Republic).

The need to safeguard human dignity (which the preamble of the abovementioned United Nations Convention also refers to) is also – correlatively – mentioned. The way that the matter was previously regulated is considered to be in conflict, in particular, with the principles of "equal social dignity" and promotion of the substantive equality of citizens in view of the "full development of the human person" (Article 3 of the Constitution), with the limit of "respect for the human person" in the provisions on compulsory health care (Article 32 of the Constitution) and the limits of liberty and human dignity to which freedom of private-sector economic initiative is subject (Article 41 of the Constitution) (as per the report to the bill submitted by Mrs Tozzi Condivi to the Speaker of the Chamber of Deputies on 6 April 1956, where it is also reiterated that people who have "fallen victim to prostitution" have "almost never done so as a result of their own decision and free will" but "instead have been dragged into that life due to family circumstances as well as for social and emotional reasons"). In that same report, the new legislation is presented as a measure which aims "not to suppress prostitution but only to suppress the regulation of prostitution", so as to avoid a situation "in which there may be authorised and regulated prostitution in the State" and that "there may be human beings earning a living by legally exploiting vice and misery".

To that end, the law therefore prohibits brothels and provides for the closure of existing ones (Articles 1 and 2 of the Law No. 75 of 1958). It also expressly prohibits any form of registration of the women who engage in prostitution, ruling out that they can be obliged to report periodically to the public security or health authorities (Article 7). At the same time, it provides for measures for the re-education and social reintegration of the women who leave brothels behind (Articles 8 and 9).

On the criminal law level, it is still the case that no liability attaches to either the prostitute – unless the latter's conduct is such as to amount to the new offence of solicitation or invitation to licentiousness under Article 5 of Law No. 75 of 1958 (an offence that was then decriminalised by Legislative Decree No. 507 of 30 December 1999 on "Decriminalisation of minor offences and reform of sentencing pursuant to Article 1 of Law No. 205 of 25 June 1999") – or the client who goes no further than avail of the sexual

service (punishability would later be envisaged solely in cases of juvenile prostitution by Article 600-*bis* of the Criminal Code, as amended by Law No. 269 of 3 August 1998 on "Regulations against the exploitation of prostitution, pornography and sexual tourism to the detriment of minors, as new forms of enslavement").
The ultimate goal of abolitionist policies also shines through with the 'sweeping' criminalisation of conduct parallel to prostitution. Prostitution is considered as an activity that in itself is lawful but all around it becomes 'scorched earth' so to speak, such that any third party interaction with it is criminalised, be it material (in terms of promotion, facilitation or exploitation) or moral (in terms of inducement).
The provisions of Articles 531 to 536 of the Criminal Code are replaced in this regard by those of Article 3 of Law No. 75 of 1958, which, in its eight numbered subparagraphs sets out a detailed and polychrome list of criminal conduct, all punished with robust terms of imprisonment from two to six years in addition to a fine (currently ranging from € 258 to € 10,329).
The list of criminal conduct also includes the two cases that are the subject matter of the current questions of constitutionality: recruitment of "a person to the end of having them engage in prostitution" (Article 3(1)(4), first part, and the aiding and abetting "in any way" of the prostitution of others (Article 3(1)(8), first part).
By "recruitment" is meant in essence procuring somebody as a prostitute: and this regardless of the fact that the person so recruited already engages in prostitution or up to then does not do so. In light of how the courts have interpreted the law to date, recruitment occurs when the agent takes steps to make the prostitute available to the person who intends to benefit from the activity of prostitution. Therefore, to commit the crime it is sufficient to look for a person to recruit and to persuade the latter – through portraying the advantages to be gained – to go to a certain place and remain there for a certain amount of time to the end of fulfilling the requests for sexual services of clients (amongst many, including most recently, see Supreme Court of Cassation (Third Criminal Division) Judgments no. 15217 of 20 October 2016 - 28 March 2017 and no. 12999 of 12 November 2014 - 27 March 2015).
Aiding and abetting (set out in subparagraph 8 as an alternative to pimping) is in turn a residual 'catch-all' offence aimed at tackling all that conduct designed to create favourable conditions for prostitution that could otherwise escape incrimination given the very specific language used to describe the offences in the preceding subparagraphs. The broad wording of the provision means that it lends itself to suppressing a wide variety of behaviour that serves to make prostitution by others easier, more comfortable, safer or more profitable.
4.4. – Recent developments have witnessed the emergence at European level of further models of regulation of prostitution, which it would not be inappropriate to mention here for the purposes of a comparative view of the phenomenon.
Those stem from a response to problems that have arisen in relation to the abolitionist model in attaining its set objectives. It has been ascertained that no significant decline at all has been recorded in prostitution in the countries that have adopted that model and, secondly, the model apparently ends up perpetuating the condition of social weakness of prostitutes and exposing them to greater risks as regards their personal health and safety.
The solutions for tackling those critical issues have, moreover, been sought out in two opposing directions.
On the one hand, it is maintained that the ambiguity of abolitionism in a 'liberal' direction should be superseded, i.e. that voluntary prostitution should be considered as a legitimate economic activity comparable to other sources of income and the generator of ordinary economic and social rights (as well as tax obligations) for those who engage in it. From

this standpoint, the legislator's attention should basically focus on 'limiting the damage', so to speak, in the sense of curtailing the adverse consequences that the sale of sexual services may entail. This approach is at the root, fundamentally, of *neo-regulationism* legislation of various kinds introduced since the 1990s in countries like the Netherlands, Germany, Austria and Switzerland.

In a diametrically opposite sense, abolitionism is accused of 'not doing enough' to protect prostitutes from the exploitive conduct of others, including the client. Therefore, a more robust barrier would need to be erected against taking advantage of a condition of vulnerability said to characterise people who prostitute themselves.

It is in the wake of this critical stance against abolitionism that the recent neo-prohibitionist policies adopted by some European countries have developed: policies that have found, to a certain extent, support also from the institutions of the European Union. According to these policies legislators in the sphere of criminal law should intervene to protect the weak person (also) from the one who, through his or her 'demand' for sexual services, feeds that exploitation, i.e. the client.

In the more 'temperate' version of this model, the 'consumer' is punished only when he or she purchases sexual services from a person who is a victim of forced prostitution (this is the solution adopted in the United Kingdom with the Policing and Crime Act 2009). That type of measure is echoed in Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on "preventing and combating trafficking in human beings and protecting its victims", which specifically invites Member States to commit themselves to reducing the 'demand' that underlies trafficking in human beings, including by considering taking measures to establish as a criminal offence the use of services which are the object of exploitation when the agent knows that the person is a victim of trafficking (Article 18(4)).

In the most recurrent and radical version, on the contrary, it is chosen to punish the client *sic et simpliciter*, i.e. regardless of the characteristics of the person who offers the sexual services and the condition of subjugation or necessity that the person concerned may find himself or herself in. This is the so-called *Nordic* model, since such a strategy was first adopted first in Sweden at the end of the 1990s and then followed by other countries in Northern Europe, including most recently France, moreover.

Recourse to such a model is also favourably looked upon in the European Parliament's resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI), paragraph 29).

4.5. – Definitely worth noting for the present purposes is how both the legislative solutions inspired by the abolitionist model and those inspired by the neo-prohibitionist model in the most radical version – which, through punishment of the client, further expands the 'scorched earth' boundaries around prostitution – have been considered constitutional by the constitutional courts of other European countries as regards challenges that largely overlap with the issues submitted for the examination of this Court.

With regard to the solutions based on the first model, in its Judgment no. 641/2016 of 21 November 2016 the Constitutional Court of Portugal (a country in which the legislation also reflects the abolitionist model) ruled out that there was anything unconstitutional about a provision that makes so-called *mere pandering* (Article 169(1) of the Portuguese Criminal Code, as amended) a crime, committed by whoever "professionally or however for the purpose of profit, foments, fosters or facilitates the engagement in prostitution by another person".

As for the second model, in its recent decision no. 2018-761 QPC of 1 February 2019 the French Constitutional Council ruled out that there was anything unconstitutional about Article 611-1 of the French Criminal Code, as introduced by Law No. 2016-444 13 April

2016, which punishes (by means of a fine) a prostitute's client irrespective of whether it is a case of forced prostitution or otherwise.

5. – Turning now, in the wake of the above excursus, to the examination of the question of constitutionality raised by the referring court, attention must first and foremost be focused on Article 2 of the Constitution.

In connection with the alleged violation of that provision, the Puglia Court takes as its point of departure the current historical context – quite different from the post-war one in which Law No. 75 of 1958 was conceived – that is said to be characterised by the existence of totally free and voluntary prostitution not due to either coercion by others or a state of necessity of the prostitute: *elite* prostitution so to speak aimed at wealthy customers, emblematically embodied by the figure of the so-called escort (a paid companion also available for sexual services). And it is in light of this new social reality that it is surmised that the constitutionality of the solutions adopted by the legislator in 1958 should be checked.

According to the referring court the decision to prostitute oneself, where free and voluntary, is actually an expression of "freedom of sexual self-determination", classifiable as an inviolable human right protected by Article 2 of the Constitution. From that stems the alleged constitutional need to remove any obstacle to the full realisation of the choice made: an obstacle that conversely has supposedly been erected by provisions such as those challenged here, which repress the conduct of third parties intended to promote and facilitate the activity of the prostitute, in agreement with the latter's own wishes.

It is a conclusion that, if well founded, would have a far-reaching effect that clearly goes beyond the cases of recruitment and aiding and abetting. In fact, by that logic all of the other punitive provisions of Article 3 of Law No. 75 of 1958 that combat specific forms of 'cooperation' in the prostitution of others, remunerated or not, would also be destined to fall foul of the Constitution. Contrary to what the referring court and the parties who entered an appearance in the proceedings assert, even the constitutionality of the offence of inducement of prostitution (Articles 3(1)(5) and 3(1)(6) of Law No. 75 of 1958), where free from violence, threat or deception (conduct that in the scheme of Law No. 75 of 1958 constitutes special aggravating circumstance: Article 4(1)) would be called into question. By reasoning in these terms it would be impossible to understand why persuading a person to choose one option rather than another, in the context of the range of possible methods of exercising an inviolable human rights, should attract punishment.

5.1. – The view of the referring court cannot be shared.

Article 2 of the Constitution commits the Italian Republic to recognising and guaranteeing the "inviolable rights of the person", both as an individual and in the social groups within which human personality is developed and requires that the mandatory duties of political, economic and social solidarity be fulfilled. The provision is closely linked to that of the subsequent Article 3(2), which, with the aim of making such rights effective, also commits the Republic to removing the economic and social obstacles that prevent "the full development of the human person".

Article 2 of the Constitution therefore links inviolable rights to the value of the person and the principle of solidarity. The rights of freedom are recognised, that is, by the Constitution in relation to the protection and development of the value of the person, and that value refers not to the isolated individual but to a person who is the holder of rights and duties and as such included in social relations. Contemporary constitutionalism is moreover inspired by the idea that the system must not be limited to guaranteeing constitutional rights but must actually work for their development. Hence a conception of the individual as a person who is entitled to 'freedom of' and not only 'freedom from'.

It is true that in its Judgment no. 561 of 1987 – cited by the referring court in support of its view – this Court held that the catalogue of the inviolable rights enshrined in Article 2 of the Constitution includes "sexual freedom". It was noted, in fact, that sexuality represents "one of the essential means of expression of the human person", with the consequence that "the right to exercise it freely is without doubt an absolute individual right, comprised among those directly protected by the Constitution and included among the inviolable human rights that Article 2 of the Constitution dictates must be guaranteed". But the statement was made in relation to a case in which the negative dimension of that freedom was highlighted, namely the right to oppose undesired 'intrusions' of others into one's sexual sphere, and with regard to claims for compensation arising out of the violation of that right. In fact, on the occasion, the complaint was that the law on war pensions ruled out the compensability of non-economic loss suffered by the victims of rape committed during the war.

There is no doubt, however, that the above statement could well also be considered as applicable to the positive dimension of the freedom in question, which implies that each individual can make free use of sexuality as a means of expression of his or her own personality within the limit of respect for the rights and freedoms of others.

5.2. – If it is the link with the development of the person that characterises the guarantee given by Article 2 of the Constitution, it is not possible to maintain that voluntary prostitution constitutes an inviolable right – the exercise of which should accordingly not only be unhindered but even, if necessary, facilitated by the Republic – on the basis of the mere fact that it involves the sexual sphere of those who engage in it.

One cannot share the referring court's assumption in accordance with which voluntary prostitution is a "means of self-affirmation of a human person, who perceives his or her own self in terms of delivering his or her corporeity and genitals (and associated pleasure) in return for receiving a gain of some sort".

The offer of sexual services for valuable consideration is not at all an instrument of protection and development of the human person but constitutes – much more simply – a particular form of economic activity. The sexuality of the individual is nothing else in this case than a means to attain a profit: a "provision of services" within the framework of a synallagmatic exchange. Indeed prostitution has been classified as a "provision of paid services" falling within the scope of "economic activities" engaged in by self-employed persons by both the Court of Justice of the European Communities in its Judgment of 20 November 2001, Case C-268/99, *Jany and others*, cited by the parties to the proceedings; and by the Supreme Court of Cassation in judgments – cited by the referring court and by the parties themselves – which held that the proceeds of that activity could be taxed (Supreme Court of Cassation (Fifth Civil Division), Judgments no. 22413 of 4 November 2016, no. 15596 of 27 July 2016, no. 10578 of 13 May 2011 and no. 20528 of 1 October 2010). Even if there are people who consider it personally gratifying to engage in prostitution, this does not change the substance of things.

In this regard, there is no merit in arguing that a fundamental right remains such even if exercised for valuable consideration. The argument goes too far: by reasoning in these terms, any entrepreneurial activity or self-employment would constitute an inviolable human right to the extent that it requires the exercise of some constitutionally guaranteed freedom.

The referring court itself moreover shows that it is aware of all of this when it cites, as a further parameter for the scrutiny of constitutionality, Article 41 of the Constitution on freedom of private-sector economic initiative.

The above points are all the more valid, on the other hand, in relation to questions of constitutionality like those raised today, within the framework of which the protection of

the person who prostitutes himself or herself is only of indirect concern since the allegation of unconstitutionality seeks to safeguard first and foremost the third parties who have a hand in the activities of that person or who lend their cooperation. Paradigmatic in this regard is the manner in which the referring court – albeit in the context of alleging a violation of Article 2 of the Constitution – views recruitment for the purposes of engaging in prostitution, observing that it falls within the scope of a "free meeting of supply and demand on the sex market": therefore, a form of intermediation pertinent to a typically 'commercial' context.

In conclusion, the question is unfounded because the cited Article 2 of the Constitution is not a relevant parameter with regard to (involvement by third parties in) engaging in prostitution.

6. – The reference to Article 41 of the Constitution is by contrast relevant in light of what has been said above: a parameter moreover expressly mentioned (with its prohibitions) in the parliamentary history of Law No. 75 of 1958, where it was also stated that the purpose of the law was to put an end to the involvement of the State in the 'prostitution industry'.

That which the referring court complains of, on the other hand, is that the challenged criminal provisions – inhibiting as they do cooperation by third parties through threatening punishment – prevent prostitutes from engaging in their activity in an organised way and possibly also in the form of a veritable enterprise.

6.1. – However, that question is also unfounded.

On the basis of Article 41(2) of the Constitution, freedom of economic initiative is protected on condition that it does not compromise 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".

In the present case, 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.

It is in fact irrefutable that even nowadays, even when it is not a case of a veritable form of forced prostitution, the decision to 'sell sex' is rooted, in the vast majority of cases, in factors that condition and limit an individual's freedom of self-determination, reducing – sometimes drastically – the range of existential options open to that individual. These can be not only economic factors but also situations of discomfort on an affective level or in connection with family circumstances and social relations, capable of weakening the natural reluctance towards pursuing a 'life choice' like that of offering sexual services for remuneration.

Nor is it worth arguing that from this standpoint the challenged provisions – in their absoluteness – exceed their purpose insofar as they supposedly prohibit any cooperation even with those people who prostitute themselves on foot of a totally free and conscious decision: a situation that however rare it may be, nonetheless deserves to be treated differently.

In this regard, one must consider that in 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).

As regards the concurrent aim of protecting human dignity, it is indisputable that in the framework of Article 41(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.

6.2. – The very fact that the legislator – in agreement with the postulates of the abolitionist model – views the prostitute as the 'weak party' in the relationship also explains why it has been decided to intervene through the criminal law not against the prostitute but against third parties who 'interact' in the prostitution of others.

As also noted by the Constitutional Court of Portugal in the decision referred to above, there is no irreconcilable contradiction in the distinction drawn between the judgment on the basic conduct of the prostitute and that on the conduct of the third party that facilitates – or exploits or induces – the activity.

That is not an isolated stance.

In the same way, in fact, this Court has held that there is nothing unconstitutional about the way that consumers of narcotic substances are treated from suppliers thereof: the former remain immune from punishment (subject only to administrative sanctions: Article 75 of Decree of the President of the Republic No. 309 of 9 October 1990 on the "Consolidated Law on drugs and psychotropic substances, the prevention, treatment and rehabilitation of drug addiction"); the latter are subject to harsh criminal sanctions (Article 73 of Decree of the President of the Republic No. 309 of 1990) (Judgment no. 296 of 1996).

It is worth noting in another respect that while it is true that current law does not prohibit in and of itself the offer of paid sex, this does not mean that it is an expression of a constitutionally protected right. Significant in this regard is that an agreement for sexual services in return for something of value is traditionally held to be a null and void contract due to the illegality of the cause, as contrary to good morals (Article 1343 of the Civil Code), the only legally relevant effect of which is *soluti retentio*, i.e. the right of the prostitute to keep the sums received from the client (Article 2035 of the Civil Code), without however being able to take legal action in the event of spontaneous non-payment (Supreme Court of Cassation (Second Criminal Division) Judgment no. 9348 of 17 January 2001 - 5 March 2001; see also Supreme Court of Cassation (Fifth Civil Division) Judgment no. 15596 of 27 July 2016).

The circumstance – on which both the referral order and the parties that entered an appearance in the proceedings insist – that the case law of the Supreme Court of Cassation now considers the proceeds of prostitution to be taxable is very insignificant. Currently, in fact, the tax system generally taxes also proceeds originating from events, acts or activities which can be classified as civil, administrative or criminal offences if not subject to seizure

or confiscation (Article 14(4) of Law No. 537 of 24 December 1993 containing "Corrective measures to the public finances"). Likewise as regards this aspect there is thus no contradiction between treating the proceeds of prostitution as taxable and the fact that, even without punishing it directly, the law adopts indirect measures of a criminal nature intended to stem the development of the taxed activity by striking against third parties who lend their cooperation.

Finally, no argument in support of the alleged violation of Article 41 of the Constitution can be drawn from the previously mentioned Court of Justice Judgment of 20 November 2011, Case C-268/99, *Jany and others*. It classified prostitution as an economic activity engaged in by a self-employed person, but only to rule out that engaging in that activity may be considered as conduct serious enough to warrant restrictions on access to or residence in a Member State of a national of another Member State in the event that the first State (in that case, the Netherlands, a country the legislation of which is informed by the regulationism model) has not adopted repressive measures in instances where the same conduct is engaged in by one of its own nationals.

7. – The points made above also reveal the groundlessness of the further question raised in connection with the principle that a crime must necessarily be offensive.

7.1. – In accordance with this Court's well-settled case law, the decision as to what constitute punishable acts and the penalty for each one of them is a matter entrusted to the discretion of the legislator. Any assessment regarding 'appropriateness' and 'need for punishment' – hence regarding the desirability of resorting to protection under the criminal law and on the optimal levels thereof – are in fact by their very nature typically political (Judgments no. 95 of 2019 and no. 394 of 2006). The legislative choices on the subject will thus be objectionable in terms of their constitutionality solely if they are manifestly unreasonable or arbitrary (amongst many see Judgments no. 95 of 2019 and nos. 273 and 47 of 2010, Orders nos. 249 and 71 of 2007 as well as, with particular regard to the issue of punishment, Judgments no. 179 of 2017 and nos. 236 and 148 of 2016).

Those statements are all the more valid in relation to a phenomenon like prostitution, which, as noted in the opening remarks, lends itself to a wide variety of different assessments and strategies for intervention.

As regards more specifically the limitation to legislative discretion that stems in any case from the need to respect the principle of offensiveness, this Court has long clarified how this principle "operates on two distinct levels. On the one hand, as a precept addressed to the legislator, which is obliged to limit criminal repression to acts that in the abstract offend goods or interests considered worthy of protection (so-called offensiveness 'in the abstract'). On the other hand, as an interpretative-applicative criterion for the courts, which in verifying that the facts of the case actually fit the crime in the abstract, must avoid that the criminal provision covers behaviour not susceptible to being harmful (so-called offensiveness 'in concrete') (Judgments no. 225 of 2008, no. 265 of 2005 and nos. 519 and 263 of 2000).

As regards the first aspect, the principle of offensiveness 'in the abstract' does not imply that the only constitutional form of intervention is that of *crimes of harm*. In fact, it falls within the discretion of the legislator to afford protection in advance, which tackles aggression against protected values at the stage of mere exposure to danger, and accordingly also to establish the threshold of danger that will attract a punitive response (Judgment no. 225 of 2008): a perspective from which in principle recourse to the model of *crimes of presumed danger* is not precluded (Judgments no. 133 of 1992, no. 333 of 1991 and no. 62 of 1986). In this case, however, in order for the principle in question to be considered respected, it is necessary "that the legislative assessment of the dangerousness of the criminalised act not be irrational and arbitrary but respond to the *id quod plerumque*

accidit (Judgment no. 225 of 2008; analogously, Judgment no. 333 of 1991)". (Judgment no. 109 of 2016).

7.2. – In the present case, the case law of the Supreme Court of Cassation fluctuates significantly as regards the legal good that is protected by the criminal provisions of Law No. 75 of 1958.

For a long time in fact it identified the object of protection – in accordance with the original approach of the Criminal Code – as common decency and public morals (hence, a 'metaindividual' and inalienable interest). The year 2004 witnessed a change in that stance when some decisions asserted that the law in question in reality aims mainly at safeguarding the dignity and freedom of determination of the person who prostitutes himself or herself (Supreme Court of Cassation (Third Criminal Division) Judgment no. 35776 of 8 June 2004 - 2 September 2004; places on an equal footing that individual interest with the protection of common decency and public morals: Supreme Court of Cassation (Third Criminal Division) Judgment no. 1716 of 9 November 2004-21 January 2005). And it is precisely by emphasising the reference to free self-determination of a person in the sexual sphere (moreover in combination with dignity) made in the new line of case law authority, that the referring court denies that the challenged provisions can be held to respect the principle of offensiveness: if a person has freely chosen to prostitute himself or herself, whoever helps the latter to achieve that choice advances rather than damages the protected interest in question.

However, there have been subsequent developments in the case law of the Supreme Court of Cassation. In fact, according to the most recent decisions on the subject the good protected by Law No. 75 of 1958 is neither public morals nor the free sexual self-determination of the person who prostitutes himself or herself, which, if it were violated against his will, would give rise to completely different crimes. The protection is said to focus by contrast solely on the dignity of the person expressed through the performance of the sexual activity, which cannot be negotiated (Supreme Court of Cassation (Criminal Division) Judgments no. 14593 of 17 November 2017 - 30 March 2018 and no. 5768 of 19 July 2017 - 7 February 2018).

This new course correction is criticised by the parties who entered an appearance. They claim that it is a mere expedient to avoid having to find that the challenged provisions are unconstitutional and that the reference to the concept of dignity – which in the framework of the most recent line of case law authority clearly takes on an objective connotation – in essence masks an exhumation of the old perspective of protection of prevailing morals: a value, it is argued, not susceptible to protection by the criminal law because it conflicts with the principle of the secularity of the State, which prevents certain conduct from being subject to punishment solely because it is considered by the majority to be ethically incorrect.

7.3. – Moreover, decisive in this regard is that the criminal provisions that this Court's scrutiny concern are in any case reconcilable with the principle of offensiveness 'in the abstract' from the standpoint of protection of the fundamental rights of the vulnerable and of the persons who engage in prostitution by choice, in the terms already explained: a perspective from which the criminal provisions in question are respectful of the canons indicated by the case law of this Court mentioned just now.

However, the above does not mean – as is evident – that criminalisation of conduct parallel to prostitution is a constitutionally imposed solution and that the legislator cannot in its discretion decide to tackle the dangers inherent in prostitution through a different strategy. The one under examination simply falls within the range of the possible options of criminal policy, not in contrast with the Constitution.

In relation to the law in force, in any case, the principle of offensiveness in its concrete projection still operates and hence also the power-duty of the courts to rule out that a crime has been committed where the conduct in the specific circumstances proves not to have any actual potential to cause harm.

8. – Also groundless is the last question alleging, solely with reference to aiding and abetting, that there is a breach of the principles of legal certainty and precision in criminal matters.

This Court has already had occasion to declare a similar question unfounded, raised after the entry into force of Law No. 75 of 1958, also with regard to the case of pimping (Judgment no. 44 of 1964, reiterated by the subsequent Order no. 98 of 1964). The conclusion must be confirmed here.

It is well-settled case law of this Court that "the inclusion, in the wording describing the wrongdoing, of summary expressions, words having many meanings, general clauses or 'elastic' concepts does not entail a breach of the constitutional provision invoked when the overall description of the offence allows the court – having regard to the aims pursued by the offence and to the wider legal context in which it is placed – to establish the meaning of that element by means of an interpretative exercise not exceeding the ordinary task entrusted to it: that is, when that description allows a judgment to be made matching the actual case to the abstract case, supported by an interpretation open to review; and accordingly permits the addressee of the rule to have a sufficiently clear and immediate perception of the relative preceptive value" (Judgment no. 25 of 2019; in the same vein Judgments no. 172 of 2014, no. 282 of 2010, no. 21 of 2009, no. 327 of 2008 and no. 5 of 2004).

In the present case, the description of the offence in its 'succinctness' – "whoever in any way aids and abets [...] the prostitution of others" – hinges, however, on a concept like aiding and abetting of widespread and proven use in the field of criminal law and that appears (even if without the expression "in any way") also in relation to the crime of juvenile prostitution (Article 600-*bis*, first paragraph, of the Criminal Code).

In this respect, the criminal provision is by no means any more indeterminate than the general provision on aiding and abetting of persons in an offence (Article 110 of the Criminal Code), also couched in succinct terms ("[w]hen more than one person participates in the same offence"). Moreover, aiding and abetting is nothing other than a form of material complicity in the prostitution of others (even if with the particularity that, for the reasons already highlighted, solely the abettor is punished and not the person who commits the act).

Contrary to what the referring court believes, no argument in support of the view that the criminal rule is indeterminate can be derived from the line of case law authority in accordance with which, for the purposes of punishability, the conduct of aiding and abetting must have resulted in aiding prostitution and not the prostitute (amongst many Supreme Court of Cassation (Third Criminal Division) Judgments no. 7338 of 4 February 2014 - 17 February 2014 and no. 36595 of 22 May 2012 - 21 September 2012). That assertion is in fact in tune with the wording of the challenged provision – which requires that the criminal conduct aid the activity and not the person engaged in the activity – and aims precisely to avoid undue expansion in the scope of application of the criminal offence. The existence of doubts or contrasts with regard to the concrete application of the principle in relation to certain cases does not operate in itself to demonstrate that the rule lacks preciseness, since that is something that is part and parcel of judicial interpretation.

And with that one can also dismiss the alleged violation of Article 3 of the Constitution, from the point of view of the supposed unjustified unequal treatment of similar situations.

9. – In light of the above considerations, the questions must therefore be declared unfounded in relation to all the constitutional provisions invoked.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares unfounded the questions of constitutionality of Articles 3(1)(4), first part, and 3(1)(8) of Law No. 75 of 20 February 1958 (Abolition of the regulation of prostitution and the fight against the exploitation of the prostitution of others) raised with reference to Articles 2, 3, 13, 25(2), 27 and 41 of the Constitution by the Court of Appeal of Bari in the referral order mentioned in the headnote hereof.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 6 March 2019.