Press Office of the Constitutional Court

Press release of 7 June 2019

SEXUAL FREEDOM IS A RIGHT; HOWEVER, THIS CANNOT JUSTIFY THE AIDING AND ABETTING OF PROSTITUTION

Even at this particular time in history, and cases of "forced prostitution" aside, the choice to "sell sex" is almost always prompted by factors – of economic, but also affective, familial and social nature – that place limits and conditions on individual freedom of self-determination. In this context, the line between decisions that are genuinely free and those that are not is often tenuous and unclear.

This is a passage of the Constitutional Court's reasoning in declaring unfounded the questions, raised by the Court of Appeal of Bari, on the provisions of the "*legge Merlin*" ("Merlin Law") that punish recruiting into and aiding and abetting prostitution (Article 3(1)(4), first part, and Article 8 of Law no. 75 of 20 February 1958). In Judgment no. 141, filed today (Judge Rapporteur: Franco Modugno), the Court explains that these offences are intended to protect the fundamental rights of vulnerable persons and human dignity. This protection considers the dangers inherent in prostitution, which exist even if the decision to engage in prostitution appears to be free: in particular, these dangers relate to the fact that prostitutes become part of a structure that is difficult to leave voluntarily, and to the threats to bodily integrity and health that arise upon contact with clients.

Therefore, it is the legislator – in its capacity as the interpreter of the common sentiment of a particular moment in time – that perceives prostitution (including voluntary prostitution) to be a degrading and demeaning activity.

The Court of Appeal of Bari argued that the current social climate is different from that prevailing when the offences were introduced into the legal system: it alleges that today, in addition to "forced" prostitution and prostitution "for need", there is also a free and voluntary form of prostitution, such as that practiced by "escorts" (paid companions who are also willing to perform sexual services). According to

the referring court, these choices constitute an expression of the freedom of sexual self-determination, protected by Article 2 of the Constitution – a freedom that would be impaired if it were possible to punish third parties whose involvement is limited to putting "escorts" in touch with clients (recruiting) or facilitating their activities (aiding and abetting).

Instead, the Constitutional Court noted that Article 2 of the Constitution, which recognizes and protects "inviolable human rights", is closely related to Article 3(2), which requires the Republic to remove the economic and social obstacles that prevent the "full development of the human person", in order to make those very rights effective. Thus, the rights to freedom – which undoubtedly encompass sexual freedom – are recognized by the Constitution in relation to the protection and development of the value of the human person, and of the human person as a member of society.

However, prostitution is not at all a means through which the human person is protected and developed. Rather, it is merely a particular type of economic activity. Indeed, in this case, sexuality is nothing more than a "provision of services" for profit. The objection that fundamental rights remain such even when exercised for remuneration cannot avail. This would go too far: if the argument were to be accepted, then any entrepreneurial activity or self-employed work that can be linked to a constitutionally protected freedom would become an inviolable right to the extent that it requires the practice of constitutionally protected freedoms.

Nor – according to the Constitutional Court – is the freedom of private economic initiative violated if third parties are prevented from collaborating in the practice of prostitution in an organized or commercial manner. Indeed, this freedom is protected by Article 41 of the Constitution only to the extent that it does not compromise pre-eminent values such as human safety, freedom and dignity.

The offences established by the Merlin Law relate to these values.

Furthermore, the fact that the legislator identifies prostitutes as the weak parties in the relationship explains the choice not to punish them, while, on the other hand, third parties who participate in their activity are punished.

The Constitutional Court also declared that there has been no violation of the principle of harm [*principio di offensività*, according to which offences must be

committed against protected legal goods]. The identification of punishable facts falls within the legislator's discretion – to be exercised in a manner that is not manifestly unreasonable – because it calls for evaluations that are typically political in nature: this is particularly the case with regard to prostitution, which, as the historical and comparative record shows, may be dealt with in various ways.

In any event, the principle of "concrete" harm continues to apply to the legal framework in force. This principle requires courts to exclude that any crime has occurred if, due to the specific circumstances of the case, the conduct in question is concretely devoid of any capacity to cause harm.

Finally, the Court states that the provision establishing the crime of aiding and abetting prostitution does not contrast with the principles of legal certainty because any conflicts that may arise as to the criminal significance of certain minor types of aiding and abetment fall within the ordinary activity of judicial interpretation.

Rome, 7 June 2019