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CRIMINAL LAW ASPECTS OF PROSTITUTION

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The purpose *of the article is to analyse the provisions of Articles 203 and 204 of the Polish Criminal Code and Article 142 of the Polish Code of Petty Offences governing the crimes of: forcing to prostitution, procuring, facilitating prostitution for a profit, taking economic benefits from prostitution, and the petty offence referred to as «offering sexual services in an importunate way».* **Research methods:** *the main research method is the legal-dogmatic method.* **Results:** *the analysis covers various issues related to criminal liability for offences involving exploitation of prostitution, i.e. forcing to prostitution (Article 203 of the Criminal Code), procuring, facilitating prostitution for a profit, taking economic benefits from prostitution (Article 204 of the Criminal Code) and the petty offence under Article 142 of the Code of Petty Offences. The focus was mostly on the interpretation of the statutory elements of the offences in question, taking into account the interpretative discrepancies in this regard that have emerged among criminal law scholars. The main body of the study was preceded by general remarks concerning the concept of prostitution and an overview of the legal systems governing prostitution.* **Discussion:** *the concept of prostitution is not uniformly defined. Sometimes doubts arise whether certain sexual conduct may be referred to as prostitution. Due to the fact that prostitution as such is not a criminal offence in Poland, difficulties may arise in determining the legal interest protected by the provisions penalising acts involving the exploitation of prostitution. Other doubts may arise in the context of, among other things, whether a single act meets the criteria for facilitating prostitution for a profit; whether procuring and facilitating prostitution constitute formal offences (not requiring a consequence to occur) or material offences (requiring a consequence); and whether the offence of inducing another person to engage in prostitution can be committed with dolus eventualis.*

Keywords: *prostitution; forcing; taking economic benefits from prostitution; facilitating prostitution; procuring; racolage.*

Introduction. The phenomenon of prostitution has been present in human society since ancient times. Over the centuries, the perception and definition of this practice have changed. The very term ‘prostitution’ comes from the Latin word *prostitutio*, meaning sexual intercourse offered for money. Its origins are also traced back to the word *prostare*, understood as becoming someone’s belonging or offering oneself for sale [1, p. 33].

Concept of prostitution. The first attempts to define the phenomenon in question were made by Solon, who stated that any person offering their body for money was engaging in prostitution [2, p. 224]. Ulpian, on the other hand, associated prostitution with women who openly offered themselves to a large number of men for material benefit [3, p. 10]. I. Bloch defined prostitution as a form of extramarital sexual relations characterised by giving oneself to many people openly, on a permanent basis, most often for a consideration, in the form of professional selling of oneself by the person concerned [4, p. 48]. Ch.H. McCaghy listed

among conditions for considering an activity as prostitution the absence of emotional involvement during behaviours of a sexual nature and the fact that both parties aim their actions solely at the exchange of services (the transactional element, payment element) [5, p. 147].

One of the first Polish definitions of the term 'prostitution' was formulated by M. Jasińska. In her opinion, a prostitute is a person who satisfies the sexual needs of casual partners for money, without emotional involvement and without choosing a person for intercourse [6, p. 437]. Z. Lew-Starowicz, apart from the already established criteria, namely sexual relations without an emotional element and for profit, has pointed out that prostitution includes various heterosexual and homosexual contacts [7, p. 70]. K. Imieliński described prostitution as providing one's own body to more people to let them achieve sexual satisfaction and receiving remuneration for it [8, p. 14].

Taking into account the definitions referred to above, it should be assumed that the essential elements characterising prostitution include: regular or repeated sexual activities without emotional involvement, undertaken with different people in order to achieve financial benefit [9, p. 75]. It should be stressed that this approach to prostitution is currently becoming outdated. First of all, nowadays the use of the terms 'prostitution' and 'prostitute' is abandoned in many countries. The most common substitutes for these terms are 'sex work', 'sex worker', 'person offering sex services', and 'person offering paid sex'. The terminological changes are explained by negative connotations with the words 'prostitute' and 'prostitution'. It is usually argued that calling people 'prostitutes' is stigmatising. This fact is directly related to the cultural transformation of society, which less and less perceives the sphere of sexuality in terms of a taboo. Currently, the boundaries of decency have been shifted compared to the 20th century, when the first definitions of prostitution were created. Forms of prostitution have also been subject to change. With the digitisation of the world, prostitution has also adapted to new conditions, offering much better reach to potential customers [10, pp. 307–308]. The first novelty was sex-telephone businesses. After that, advertisements and recordings and portals of a sexual nature began to be established, where access to content depended on the purchase of a subscription [11, p. 61]. Previous definitions of prostitution indicated the occurrence of physical intimacy of at least two people, while the current phenomenon has many elements without direct physical contact. It is also emphasised that there are currently different forms of profit that a prostitute can earn. These do not have to be only cash, but e.g. funding a tourist trip, shopping or aesthetic medicine treatments. Doubts also arise regarding the lack of emotional involvement and the provision of services to an indeterminate number of people, especially in the case of financing a so-called kept person [12, p. 298]. It therefore seems necessary to reconsider the phenomenon of prostitution and to revise the concept, taking into account its new forms.

Legal systems on prostitution. From a criminal law perspective, there are four distinct systems governing the approach to prostitution. The oldest is the prohibitionist system, under which the practice of prostitution is prohibited and punishable by law. Subsequently, a regulatory system developed, involving the control of prostitution, namely the general registration of prostitutes and subjecting them to compulsory medical examination. Under the neo-regulatory system, however, brothels and police registration of prostitutes were abolished, and a sanitary and medical registration system was introduced. In the 1870s, an abolitionist movement emerged in England, which advocated, among other things, the abolition of any registration of prostitutes, the closure of brothels, and the introduction of strict criminal liability for all forms of exploitation of prostitution. Abolitionist views were reflected in Polish criminal legislation through the criminalisation of offences such as forcing to prostitution, facilitating prostitution for a profit, procuring and taking economic benefits from prostitution [3, pp. 27–32].

Criminal liability for crimes related to the exploitation of prostitution under the Polish Criminal Code of 1997. The first type of criminal offence related to the exploitation of prostitution is the crime under Article 203 of the Criminal Code, according to which: «§1. Whoever, using a relationship of dependency or critical situation, causes another person to practise prostitution, shall be pun-

ished by imprisonment from one year to 10 years; §2. Whoever, using violence, unlawful threat or deception, causes another person to practise prostitution, shall be punished by imprisonment from 2 to 15 years».

The subject of protection under Article 203 of the Criminal Code is the sexual freedom of a person forced into prostitution. The literature indicates that the individual subject of protection as regards the crime under Article 203 of the Criminal Code is human dignity [13, p. 57].

The subjective side of the crime under Article 203 of the Criminal Code covers causing another person to practise prostitution using a relationship of dependence, a critical situation of the victim, or the use of violence, unlawful threat or deception by the perpetrator. It is a material crime (determined by its result), which occurs once the person is caused to engage in prostitution, i.e. when the victim is already forced to start or continue prostitution, e.g. by beating, or taking a passport or other ID documents [14, p. 109]. The criterion of «causing» covers the existence of a causal link between the behaviour of the perpetrator and undertaking the activity specified in the provision. The causing implies that the perpetrator must be the initiating party in this relationship, causing the victim to undertake a specific behaviour [14, p. 101]. The literature discusses various definitions of violence, but the majority of criminal law scholars associate violence with the use of physical force. The unlawful threat is, under Article 115 §12 of the Criminal Code, the threat of committing a crime (criminal threat), the threat of initiating criminal proceedings or other proceedings in which an administrative fine may be imposed, as well as the threat of spreading information to the detriment of the dignity of the threatened person or their closest person. There is no threat of criminal proceedings or other proceedings in which an administrative fine may be imposed if the intention is solely to protect a right infringed by a crime or conduct punishable by an administrative fine. In turn, deception consists in misleading or exploiting the victim's error in terms of motivational reasons that affect the decision-making of the victim (narrow approach) or misleading or using the victim's error, and exploiting or causing the victim to make a mistake and thus leading the victim to a state in which he or she could not make or implement a decision of will due to disabling the apparatus of decision-making or motion (broad approach) [15, p. 105]. The elements of the crime under Article 203 of the Criminal Code also include the use of a relationship of dependence or critical situation. The relationship of dependence may be legal or factual, permanent or transient. It may occur e.g. in the following relations: child – actual or legal guardian, employee – employer, doctor – patient, student – teacher. 'Critical situation', on the other hand, means a difficult life situation of the victim, which usually entails a danger to the victim. This danger does not have to be caused by the perpetrator and does not have to concern only the victim's life or health; it is enough that a relationship of dependence is created between the perpetrator and the victim, wherein the perpetrator somehow decides the fate of the victim, e.g. where the provision of financial (e.g. a loan) or other assistance by the perpetrator would allow the victim to avoid adverse consequences [14, pp. 107–108].

The subject targeted by the act under Article 203 of the Criminal Code may be any person forced to prostitution, regardless of gender and previous involvement in prostitution.

Forcing to prostitution is a general-perpetrator crime. It may be committed by any person who meets the general conditions of criminal liability. However, as regards the exploitation of the relationship of dependence, it will be an individual-perpetrator crime, as this relationship may only be exploited by the perpetrator who is part of the relationship.

On the subjective side, the crime under Article 203 of the Criminal Code is an intentional crime, in principle committed with a direct intention (*dolus directus*), although it seems impossible to rule out committing it with *dolus eventualis*.

As regards penalisation of so-called prostitution-related crimes, applicable is also Article 204 of the Criminal Code According to its provision: «§1. Whoever, acting in order to obtain a material benefit, incites or facilitates another person to practise prostitution, shall be punished by imprisonment from 3 months to 5 years; §2. The penalty referred to in §1 shall apply to those who derive financial benefits from the exercise of prostitution by another

person. §3. If the person referred to in §1 or §2 is a minor, the perpetrator shall be punishable by imprisonment of between one and 10 years». This provision specifies:

- procuring (*stręczycielstwo*) - inducing another person to practise prostitution in order to gain a material benefit,
- taking economic benefits from prostitution (*sutenerstwo*) - deriving material benefit from someone else's prostitution,
- facilitating prostitution (*kuplerstwo*) - enabling other one's prostitution, for example by providing premises for the provision of sexual services, driving to a meeting place [16, p. 391].

In §3 there is an aggravated type of the abovementioned offences, which increases the degree of punishment in the case where a minor is incited to undertake prostitution, where financial benefits are derived from the activity of a minor, or when prostitution of such a person is facilitated.

The legal values protected by Article 204 of the Criminal Code include morality, dignity of the victim and, in the case of a minor, sexual freedom and psycho-physical development [17, p. 101]. The literature also refers to the protection of public order. According to M. Rodzynkiewicz, this protection is achieved by protecting society from the spread of prostitution, which is a phenomenon classified among social pathologies [18, p. 696].

The objective side of the crime of procuring covers inducing another person to practise prostitution in order to gain material benefit. Scholars in the field generally assume that the behaviour involving inducing should be understood in the same way as incitement. Inducing into prostitution involves influencing another person's psyche so that they have the intention to engage in the activity concerned or so that they abandon their intention to cease engaging in it. The inducing must be directed at a specific person or persons. It will not be an offence under Article 204 §1 of the Criminal Code, if an unspecified group is being encouraged to engage in prostitution [19, p. 80].

The crime referred to as facilitating prostitution consists in enabling another person to practise prostitution (e.g. providing a place for meetings and arranging these meetings, driving to a meeting place, intermediating between a prostitute and a client). The aim of the perpetrator, as in the case of procuring, is to obtain a financial benefit. This is a behaviour which objectively facilitates the practice of prostitution, corresponding to the elements of aiding and abetting within the meaning of Article 18 §3 of the Criminal Code. Although falicitating may be committed in the form of omission, the wording contained in the final part of Article 18 §3 of the Criminal Code («A person who, contrary to the legal, special obligation to prevent the commission of an offense prohibited by his behaviour, facilitates the commission of the offense by another person») cannot be referred to the practice of prostitution. This is justified by the fact that practising prostitution is not an offence and there is no legal, specific obligation to prevent a behaviour that is not penalised. The possibility of committing facilitation in the form of omission results from the actual possibility of facilitating through passive behaviour (the facilitator would be e.g. an administrator of vacant premises who, knowing that there are sexual services provided in the premises, does nothing to prevent them, expecting the financial benefit associated with this activity) [19, p. 81]. There is no consensus among criminal law scholars as to whether the elements of facilitating prostitution may be a one-off behaviour or whether multiple acts of facilitation are necessary to classify it as such. It seems that the prevailing position in the case-law is that the offence of facilitating prostitution is not a one-time act, but should be of a permanent nature [19, pp. 82–83]. Another issue that stirs controversy among scholars in the field is whether the offences of procuring and facilitating prostitution are formal (not determined by consequence) or material (determined by consequence) crimes. This dispute reflects the difference of opinion regarding the consequential or inconsequential nature of incitement and aiding/abetting. Most scholars support the formal nature of these crimes, arguing that consequentiality is not one of their constitutive elements.

The last type of offence relating to the practice of prostitution is taking economic benefit from prostitution, as defined in 204 §2 of the Criminal Code. The elements of the offence of taking economic benefit from prostitution are fulfilled by deriving material benefit from the practice of prostitution by another person. The verb 'derives' points to

a certain degree of repetitive nature in the perpetrator's behaviour. Receiving a one-off benefit does not meet the criteria of this offence. There is no doubt that deriving financial benefit from another person's prostitution need not be the perpetrator's sole source of income. Taking economic benefits from prostitution is a material offence, the intended effect of which is earning a material benefit [19, p. 84].

The perpetrator of the offences of procuring, facilitating prostitution and taking economic benefit from prostitution of others may be any person who, by virtue of their age and mental capacity, is capable of bearing criminal liability. These are therefore offences of generally-defined perpetrator.

All types of offences provided for in Article 204 of the Criminal Code are intentional. Procuring and facilitating, due to the perpetrator's aim of obtaining material benefit, may only be committed with a direct intent, whereas taking economic benefit from prostitution of others may also be committed with *dolus eventualis*.

Article 204 §3 of the Criminal Code provides for aggravated forms of the offences of procuring, facilitating and taking financial benefits from prostitution of others. Pursuant to this provision, if the person who is induced to engage in prostitution, or for whom such an activity is facilitated, or from whose activities material benefit is derived, is a minor, the perpetrator is subject to more severe criminal liability. The aggravating element is the fact that the person to whom the perpetrator's conduct relates is a minor. As defined in the provisions of the Polish Civil Code, a minor is a person who has not reached the age of 18 (Article 10 §1 of the Civil Code).

Finally, it should be noted that with the entry into force of the Code of Petty Offences in 1971, the extent of penalisation relating to prostitution was broadened through the introduction of Article 142, regarding a behaviour sometimes referred to as *racolage*.

Remarks on the petty offence under Article 142 of the Code of Petty Offences. Article 142 of the Code of Petty Offences (Chapter XVI «Offences against public decency») penalises the behaviour involving persistent, intrusive manner or otherwise violating public order, proposing to another person to commit an indecent act with the aim of obtaining a material benefit. This act is punishable by the penalty of detention, restriction of liberty or a fine.

The value protected by this provision is public morality. The petty offence under Article 142 of the Code of Petty Offences is not aimed directly against prostitution, but penalises those of its manifestations that disturb public order at the same time [20, p. 726]. The agentive act of the petty offence in question is described as proposing. Proposing should be understood as encouraging the use of something, offering something [21, p. 897]. The agentive act of proposing is to be carried out in a specific way, entailing liability and at the same time indicating both the reasons for penalisation and the social danger posed by the behaviour of the perpetrator. A mere proposal that the perpetrator should commit an indecent act, even in exchange for a financial benefit, does not fall within the scope of Article 142 of the Code of Petty Offences. The agentive act must be carried out in an intrusive, importunate or other manner that breaches public order. An intrusive behaviour is the insistent demanding something in an intrusive, persistent, pushy, imoprtunate, annoying, bothering, and even aggressive way [22, p. 1058]. It can take the form of aggression, e.g. using a threat, repeating proposals several times, despite refusal, intruding several times or demanding to take part in an indecent act. As stated by A. Gubiński, the perpetrator pursues the goal regardless of the circumstances and situation, irrespective of an opinion of either the victim or people around [23, p. 344]. To be intrusive means any action which, in a defiant, conspicuous manner, constitutes a proposition to perform an indecent act [24, p. 330]. Other behaviours that violate public order include solicitation, incitement, loudly atracting attention to oneself and one's proposal, blocking somebody's way, tugging at clothes, pulling [25, p. 650]. The term 'indecent act' (*czyn nierządny*) was sourced from the 1969 Criminal Code. Under the Criminal Code currently in force in Poland, the concept of indecent act was replaced with the terms 'sexual intercourse' and 'other sexual act'. 'Sexual intercourse' is the act of mating and its surrogates. 'Another sexual act' is a behaviour, which is not part of the concept of sexu-

al intercourse, being related to the broadly understood human sexual life, consisting in the perpetrator's bodily contact with the victim or at least on the bodily and sexual involvement of the victim. It should be assumed that under the legislation currently in force, 'indecent act' includes both 'sexual intercourse' and 'other sexual act'.

Due to the manner in which the agentive act under Article 142 of the Code of Petty Offences is formulated, this offence may only be committed by action.

The petty offence in question is of a formal nature; the occurrence of a consequence is not one of its constituent elements. It is deemed to have been committed as soon as a proposal to engage in an indecent act is made to another person (or persons) (provided, of course, that it is made in an insistent, intrusive manner or in any other way that breaches public order). For the petty offence to exist, neither does the proposal need to be accepted by the addressee, nor – even less so – an indecent act needs to be committed [26, p. 483].

Given that the set of constituent elements of the offence includes a reference to a behaviour that breaches public order, it seems that this offence cannot be committed in private, i.e. in a place other than a public place, or in non-public circumstances.

The petty offence in question is of a generally-defined perpetrator nature. As M. Mozgawa rightly holds, the offender is usually a person engaged in providing sexual services for money, but one cannot exclude the liability of a person whose behaviour meets the criteria of the offence only once [26, p. 482]. However, a person who merely forwards from another person a proposal to engage in an indecent act with that other person is not the offender.

The offender must act with the aim to obtain a material benefit. This is why offender's liability is limited to intentionality and only in the event of direct intent (specific direct intent, *dolus coloratus*). The liability under Article 142 of the Code of Petty Offences does not cover those who, by accosting or otherwise violating public order, propose, even intrusively, to another person an indecent act with that person, if the former do not so in order to obtain a material benefit, but only for personal reasons, or do not bear in mind any benefits resulting from that behaviour. Similarly, a person who, even intrusively, by accosting people or otherwise violating public order, proposes another person an indecent act, offering a material benefit in return, does not meet the criteria of the offence.

Conclusions. The Polish legislature, as part of the implementation of obligations arising from international agreements, penalises in Chapter XXV of the Criminal Code («Crimes against sexual freedom and decency») the inducing of another person into prostitution (Article 203), procuring and facilitating prostitution (Article 204 §1), taking economic benefits from prostitution (Article 204 §2) and aggravated types of the above-mentioned offences (Article 204 §3). According to statistical data, the number of crimes found and classified under Article 203 of the Criminal Code in 2023 was small and amounted to eight cases. Clearly more offences were found in a given year under Article 204 of the Criminal Code, there were 184 of them. As regards final convictions for offences under Articles 203 and 204 of the Criminal Code in 2020 (the statistics of the Ministry of Justice are only available until this year), these statistics also confirm that these crimes are relatively rare in the practice of the judiciary. The number of convictions under Article 203 of the Criminal Code was only 7, and under Article 204 of the Criminal Code – 101 (under §1–24, under §2–67, and under §3–10). The properties of the types of crimes in question, however, allow us to suppose that the dark number in this category of offences may be significant.

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Метою *статті є проведення аналізу положень статей 203 та 204 Кримінального кодексу Польщі та статті 142 Польського кодексу про дрібні правопорушення, що регулюють такі злочини, як: примушування до проституції, звідництво, сприяння проституції з метою отримання вигоди, отримання економічної вигоди від проституції, а також дрібне правопорушення, що називається «нав'язливою пропозицією сексуальних послуг».* ***Методи дослідження:*** *основним методом дослідження є юридично-догматичний метод.* ***Результати:*** *аналіз охоплює різні питання, пов'язані з кримінальною відповідальністю за правопорушення, пов'язані з експлуатацією проституції, тобто примушування до проституції (стаття 203 Кримінального кодексу), звідництво, сприяння проституції з метою отримання вигоди, отримання економічної вигоди від проституції (стаття 204 Кримінального кодексу) та дрібне правопорушення за статтею 142 Кодексу про дрібні правопорушення. Основна увага приділялася тлумаченню законодавчих елементів відповідних правопорушень, враховуючи розбіжності в тлумаченні з цього приводу, що виникли серед дослідників кримінального права. Основній частині дослідження передували загальні зауваження щодо поняття проституції та огляд правових систем, що регулюють проституцію.* ***Обговорення:*** *поняття проституції не має однозначного визначення. Іноді виникають сумніви щодо того, чи можна певну сексуальну поведінку називати проституцією. Через те, що проституція як така не є кримінальним злочином у Польщі, можуть виникнути труднощі у визначенні правового інтересу, що захищається положеннями, що карають дії, пов'язані з експлуатацією проституції. Інші сумніви можуть виникнути, серед іншого, у контексті того, чи відповідає окрема дія критеріям сприяння проституції з метою отримання прибутку; чи є зведення та сприяння проституції формальними правопорушеннями (що не вимагають настання наслідків) чи матеріальними правопорушеннями (що вимагають наслідків); та чи може правопорушення, пов'язане зі спонуканням іншої особи до заняття проституцією, бути вчинене з можливим обґрунтуванням (*dolus eventualis*).*

Ключові слова: *проституція; примушування; отримання економічної вигоди від проституції; сприяння проституції; зведення; шахрайство.*

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