Controversies traced out in the definition of prostitution in the Moldovan legislation

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Abstract

Practicing prostitution in the Republic of Moldova is an administrative offence. Thereat, any attempts of enticing, coercing or facilitating engagement of a person into practicing prostitution is regarded as an offence of pimping. Likewise regarded as an offence of pimping is the case when the offender is taking advantage of recruiting certain persons into practicing prostitution. In October 2018, the Parliament of the Republic of Moldova proceeded to pass a law giving the following definition to the notion of "prostitution" – gratification of sexual desire of a person by any method and/or means in return for money, including such as the use of information technologies or electronic means of communication. Thereat, one could derive that dissemination of the erotic webcam performances via the Internet for certain category of website visitors against payment might constitute prostitution. Clearly highlighted in present article was the fact that the like activities constitute pornography rather than prostitution. Prostitution require a physical contact. The authors have demonstrated that the definition of prostitution provided by the law contravenes to the case law of the Constitutional Court of the Republic of Moldova as well as to some of the regulations passed under the auspices of the Council of Europe and European Union. Finally, the authors suggested a new wording for the notion of prostitution, i.e.: engaging in sexual activity with different individuals benefiting on the services provided by female or male prostitutes, the latter thus pursuing to acquire the means of subsistence or the main source of livelihood.

Keywords: *prostitution, cyberprostitution, pornography, erotic video-chat, erotic shows, sexual services online, case law divergences, predictability.*

JEL Classification: K14, K19, K38

1. Introduction

Proliferation of information technologies and communications has fuelled the emergence and expansion of such a phenomenon as video-chat. According to Florin Marcu, the "chat" should be understood as the "software that allows for online conversations accompanied by (almost) instantaneous transfer of messages; conversations *per se*".[3] According to Wikipedia, "a video-chat is a web service that allows Internet users to communicate using video (+ audio) mode in addition to

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[3] Florin Marcu, *Marele dicționar de neologisme* (*Big Dictionary of Neologisms)*, Saeculum I.O., Bucharest, 2004, p. 181.

text messaging. Separately standing is the erotic video-chat, also called cam girl – an activity implying exposure of a model (female or male) for a certain period of time in front of the webcam, in return for money or free of charge".[4]

Back in October, and accordingly, in November 1995, appeared on a website hosted by one of the United State of America servers were the very first erotic video-chat performances (the so-called "live nude video teleconferencing").[5] Since that time, the things kept scaling up. The like activities are no more *rara avis*. Anyway, the erotic video-chat is a relatively new "business" creeping into the market of "services" offered in the Republic of Moldova. The agencies dealing with the aforementioned services are grooming girls by placing online announcements while promising them impressive financial rewards in exchange to exposure of their "beauty." Online announcement panels are plagued with appeals[6] inviting girls to provide erotic services on the internet (*i.e.* to go nude in front of a webcam, to stimulate one's own genitals, etc.) in exchange for money. This phenomenon has long since drawn public, mass media and researchers' attention. Some consider it as a kind of "masked prostitution"[7] or "prostitution in second life",[8] while others consider it to be "cyberprostitution",[9] "online prostitution"[10] or "virtual prostitution."[11]

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[4] *Video-chat*. Available at: https://goo.gl/dVY1yS (accessed at 12 December 2018).

[5] Donna Hughes, *The Internet and the Global Prostitution Industry*. In: Susan Hawthorne and Renate Klein (eds.), Cyber Feminism: Connectivity, Critique and Creativity, Spinifex, North Melbourne, 1999, p. 175-176.

[6] One of such appeals (placed on one of the most visited Moldova sites at the onset of 2011) contained the following message: "we recruit video chat models at the domicile. Benefit on a generous commission and forget about your financial problems by earning from 500 to 2000 USD. Work from home was never ever that profitable; do not hesitate to contact us for more information. Announcement valid across the country!"*. Yet another case: appeared on a number of sites under the heading "Work and study", subheading "Jobs, vacancies", were the announcements reading as follows: "Erotic video chat – 80 to 100% guaranteed!" and "We are looking for video chat models – we offer a 300 bonus upon employment!"** (it is unclear what the 300 means: Euro, USD, etc.).

* *Apud: Masked prostitution: erotic video chat*. Available at: https://goo.gl/D7XjXs (accessed at 19 January 2019).

** *Apud:* Judgment of the Supreme Court of Justice of the Republic of Moldova of 29 May 2018. Casefile no. 1ra-813/2018. Available at: https://goo.gl/QCz1Ti (accessed at 19 January 2019).

[7] *Masked prostitution: erotic video chat*. Available at: https://goo.gl/D7XjXs (accessed at 19 January 2019).

[8] Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, Vanderbilt Journal of Entertainment and Technology Law, 2008, vol. 11, no. 8, p. 68.

[9] Chris Ashford, *Sex Work in Cyberspace: Who Pays the Price?* Information & Communications Technology Law, 2008, vol. 17, no. 1, pp. 37-49; Chris Ashford, *Male Sex Work and the Internet Effect: Time to Re-evaluate the Criminal Law?* "The Journal of Criminal Law", 2009, vol. 73, pp. 258-280; Bela Bonita Chatterjee, *Pixels, Pimps and Prostitutes: Human Rights and the Cyber-Sex Trade*. In: Mathias Klang and Andrew Murray (eds.), Human Rights in the Digital Age, Glass House Press, London, 2005, pp. 11-26; Brooke Campbell, *Is Cyberprostitution Prostitution? New Paradigm, Old Crime*. Available at: https://goo.gl/vEj25E (accessed at 19 January 2019); Matthew Green, *Sex on the Internet: A Legal Click or an Illicit Trick?* California Western Law Review, 2002, vol. 38, no. 2, pp. 527-546; D. James Nahikian, *Learning to Love "Te Ultimate Peripheral" – Virtual Vices Like "Cyberprostitution" Suggest A New Paradigm to Regulate Online Expression*, Journal of Computer & Information Law, 1996, vol. 14, pp. 779-815; Nicolas Suzor, *The Role of*

Back in 2011, a number of representatives of the like "enterprises" (managing erotic video-chat activity in the Republic of Moldova) have stated to one of the daily news reporters that they do issue employment cards to their employees and so there are no grounds to set at doubts the "lawfulness" of the "webcam models' activity." In a comment, a functionary from within the Ministry of Labour and Social Protection of the Republic of Moldova proceeded to highlight that the "webcam model" activity does not appear in the Occupational Classifier of the Republic of Moldova[12], and therefore, it is illegal. *Ad similis*, a prosecutor from within the Chisinau Municipality Prosecutor's Office shared his opinion on that the activity in question is illegal, while failing to explain why.[13] Four years later (in 2015), when the phenomenon in discussion took the alarming proportions,[14] the Prosecutor's Office of the Republic of Moldova attempted to investigate cases of "sexual services offered online."

Thus, it is essential to note that the video-chat activity (especially, such as erotic video-chat) does not have the socialization connotation alone but also means a way of gaining certain income. In such circumstances, it would be appropriate to question ourselves as to what extent this type of activity is legal.

2. Regulatory framework concerning video-chat activity

Conditions created in Romania pursued the objective of bringing the video-chats into the "legislative environment." So, the following definitions were included in Article 2 of the Law of Romania no. 196 of 13 May 2003 on prevention and combating of pornography[15] (hereinafter referred to as the Law of Romania no. 196/2003): "For the purpose of this law, pornography is regarded as the acts of obscenity as well as any attempts of reproducing or disseminating such products"

the Rule of Law in Virtual Communities, Berkeley Technology Law Journal, 2010, vol. 25, pp. 1817-1886; Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, Washington and Lee Law Review, 2009, vol. 66, pp. 1127-1174.

[10] Donna M. Hughes, *Prostitution online*, Journal of Trauma Practice, 2004, vol. 2, iss. 3-4, pp. 115-131.

[11] David Cardiff, *Virtual Prostitution: New Technologies and the World's Oldest Profession*, Hastings Communications and Entertainment Law Journal, 1996, vol. 18, no. 4, pp. 869-900; Litska Strikwerda, *When Should Virtual Cybercrime Be Brought under the Scope of the Criminal Law?* In: Marcus Rogers and Kathryn C. Seigfried-Spellar (eds.), Digital Forensics and Cyber Crime: 4th International Conference, ICDF2C 2012, Lafayette, IN, USA, October 25-26, 2012, Revised Selected Papers. Springer, Heidelberg, New York, Dordrecht, London, 2013, p. 133.

[12] Classification of occupations in the Republic of Moldova, enacted by the Order of the Minister of Labour, Social Protection and Family no. 22 of 3 March 2014, published in the Official Gazette of the Republic of Moldova No. 120-126 of 3 March 2014.

[13] *Are erotic video-chats legal?* Available at: https://goo.gl/3sHjo1 (accessed at 19 January 2019).

[14] Rather surprisingly but more persons ended up in hosting erotic video chat activity in public libraries. *See:* Judgment of the Supreme Court of Justice of the Republic of Moldova of 21 June 2016. Casefile no. 1ra-805/2016. Available at: https://goo.gl/W5CuFk (accessed at 19 January 2019).

[15] Romanian Law no. 196 of 13 May 2003 on the prevention and combating of pornography, published in the Official Gazette of Romania no. 342 of 20 May 2003.

[para. (1)]; "Regarded as the acts of obscenity should be the explicit sexual gestures or behaviours, performed individually or in a group, images, sounds or words, which through their significance offend the modesty, as well as any other forms of indecent manifestation of sexual life, if such is manifested in public" [para. (2)]; "Referred to obscene materials are different objects, engravings, photos, holograms, drawings, writings, printouts, emblems, publications, movies, video and audio recording, advertising spots, information programs and applications, musical works as well as any other such forms of expression explicitly unveiling or suggesting sexual activity" [para. (3)]. Under Article 4 of the Law of Romania no. 196/2003: "(1) The individuals that own or manage the premises presenting striptease or erotic shows have to meet the following conditions: a) conducting these activities in spaces inaccessible for peeping from the exterior; b) banning minors access to such premises. (2) Premises managed by the persons referred to in para. (1) must meet the following conditions: a) to have a surface of minimum 100 square meters; b) to provide for reliable security guard; c) have at least one stage; d) abstain from using indecent street advertising; e) be located at a distance of not less than 250 m away from the schools, residential institutions or places of worship." In accordance with Article 10 letter h) of the Law of Romania no. 196/2003, constitute a contravention and subject to a penalty worth from 5.000 to 25.000 RON "initiating, organizing, financing or displaying certain manifestations or shows or performances of erotic nature while failing to comply with the provisions set out in Article 4."

Per a contrario, in case when the provisions of Article 4 of the Law of Romania no. 196/2003 are duly observed, the activity confined to initiating, organizing, financing or displaying certain manifestations or shows or performances of erotic nature shall not be punishable.

Amended relatively recently was the regulatory framework underpinning video-chat activity. Herewith we refer to the Law of Romania no. 81 of 30 March 2018 on governing the telework activity[16] (hereafter referred to as the Law of Romania no. 81/2018). Provisions enunciated in Article 2 letter a) of herewith mentioned law, prescribe that the "telework" shall be understood as "a form of arranging the work in such a way that the employees fulfill regularly or voluntarily their duties associated with the respective function, occupation or trade in a place other than the main job offered by the employer for at least during one day per month, while using information and communication technology." So, in compliance with the provisions set out by the Laws of Romania no. 196/2003 and no. 81/2018, a video-chat model appears as an employee legally obtaining due income. On the other hand, the one who signs contract with the video-chat model acts as an employer.

In the Republic of Moldova, there are no regulations similar to such as contained in the Laws of Romania no. 196/2003 and no. 81/2018. The sole definition of pornography appears in the Law of the Republic of Moldova no. 30 of

[16] Romanian Law no. 81 of 30 March 2018 on governing the telework activity, published in the Official Gazette of Romania no. 296 of 2 April 2018.

7 March 2013 on the protection of children against the negative impact of information.[17] Pursuant to Article 1 of herewith mentioned law, "pornography"[18] means "presenting in a vulgar or brutal manner the sexual contacts of any type between persons of different or same gender, other indecent manifestations of sexual life as well as displaying one's genital in an impudent manner." Even though the title of herewith-mentioned law is apparently conveying the idea that the definition given could be applicable to the infantile pornography alone, we do believe that this definition is valid, *mutatis mutandis*, for the case of adult pornography as well. There are no legal impediments at all and there is no reason to interpret it otherwise. Hence, it follows that displaying one's genitals in front of a webcam matches the legal notion of pornography. With regard to the liability, it is important to note that pursuant to Article 90 of the Contravention Code of the Republic of Moldova[19] (hereafter referred to as the CC RM), "Producing, selling, distributing or storing pornographic products for sale or distribution by the individuals shall be penalized with a fine of from 24 to 30 conventional units while applicable to the legal entities shall be a fine worth 60 to 90 conventional units."[20]

3. Prostitution *versus* pornography: case law divergences

Actually, it is not always, that the erotic video-chat activity becomes the subject of sanctions provided by Article 90 of the CC RM. Analysis of certain cases available in the judicial practice of the Republic of Moldova[21] clearly shows

[17] The Law of the Republic of Moldova no. 30 of 7 March 2013 on the protection of children against the negative impact of information, published in the Official Gazette of the Republic of Moldova no. 69-74 of 5 April 2013.

[18] The challenge in defining the term pornography was, perhaps, most famously described by the United States Supreme Court Associate Justice, Potter Stew. In his concurring opinion in *Jacobellis v. Ohio* (1964)*, Justice Stewart described his effort to define hard core pornography when he wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it"**. Justice Stewart did not go beyond "I know it when I see it" in *Jacobellis* itself. But he stayed true to the aspiration he spoke of at the outset of the opinion and continued "trying to define what may be indefinable"***. Concerning the difficulties in defining the notion of "pornography", *see:* James Lindgrent, *Defining pornography*, University of Pennsylvania Law Review, 1993, vol. 141, no. 4, pp. 1153-1257.

* *Jacobellis v. Ohio* (1964). Available at: https://goo.gl/mZ1P5n (accessed at 19 January 2019).

** *Apud:* Eric W. Owens, Richard J. Behun, Jill C. Manning and Rory C. Reid, *The Impact of Internet Pornography on Adolescents: A Review of the Research*, Sexual Addiction & Compulsivity, 2012, vol. 19, iss. 1-2, p. 103.

*** Paul Gewirtz, *On "I know it when I see it"*, The Yale Law Journal, 1996, vol. 105, p. 1027.

[19] The Contravention Code of the Republic of Moldova no. 218 of October 24, 2018, published in the Official Gazette of the Republic of Moldova no. 3-6 of 16 January 2009.

[20] Article 34 para. (1) of the CC RM provides as follows: "One conventional unit applied in the Republic of Moldova is equivalent to approximately 12 Romanian lei (RON).

[21] Judgment of the Chisinau Court of Appeal of 12 October 2016. Casefile no. 1a-1641/2016. Available at: https://goo.gl/MHf46L (accessed at 19 January 2019); Judgment of the Chisinau Court of Appeal of 18 October 2016. Casefile no. 1a-1780/2016. Available at: https://goo.gl/aXQeNT (accessed at 19 January 2019); Judgment of the Chisinau Court of Appeal

that this activity is regarded as practicing prostitution, which falls under the incidence of Article 89 of the CC RM. At the same time, regarded as the offence of pimping[22] [offence provided by Article 220 of the Penal Code of the Republic of

of 7 June 2017. Casefile no. 1a-721/2017. Available at: https://goo.gl/KCxUPj (accessed at 19 January 2019); Judgment of the Chisinau Court of Appeal of 12 December 2017. Casefile no. 1a-768/2017. Available at: https://goo.gl/Ruszkq (accessed at 19 January 2019); Judgment of the Chisinau Court of Appeal of 13 February 2018. Casefile no. 1a-2003/2017. Available at: https://goo.gl/SpZF9W (accessed at 19 January 2019); Judgment of the Supreme Court of Justice of the Republic of Moldova of 21 June 2016. Casefile no. 1ra-805/2016. Available at: https://goo.gl/W5CuFk (accessed at 19 January 2019).

[22] Pursuant to Article 220 of the Penal Code of the Republic of Moldova, the pimping means encouraging or inducing a person to practice prostitution or facilitating prostitution or gaining benefits from practicing prostitution by another person implies, provided such action does not imply any elements of human trafficking. The like offence, pursuant to Article 220 para. (1) of the Penal Code of the Republic of Moldova, is punishable with a fine worth from 650 to 1350 conventional units of with 2 up to 5 years' term of imprisonment. At the same time, practicing prostitution is a contravention and, hence, punishable pursuant to provisions of Article 89 of the CC RM, with a fine of 24 to 36 conventional units or with an unpaid work in favour of the community worth 20 to 40 hours. Given the case, highlighted in one of the applications* filed with the Constitutional Court of the Republic of Moldova was the fact of a discriminatory treatment, whereby the first person (in case of pimping) is being considered as offender while the second (in case of practicing prostitution) is considered as subject to contravention. Through its Decision of 31 May 2018**, the Constitutional Court of the Republic of Moldova has ruled inadmissibility of the aforementioned application. In substantiation of its ruling, the Court provided that the pimping is posing an enhanced degree of social threat, higher than that of practicing prostitution. Stated in the comparative law is a difference, on the one side, between the act of pimping punishable under criminal law and, on the other side, an act of practicing prostitution. The latter is not being penalized in some the European Union states (*e.g.* Belgium, Czech Republic, Denmark, Switzerland, Germany, the Netherlands, etc.). Moreover, pursuant to the case law of the Court of Justice of the European Union, the prostitution is deemed as a direct exchange of sexual services for money is hence matching the notion of the "economic activities"***. Of course, this statement is valid only in the states that have legalized the practicing of prostitution. The act of pimping is incompatible with the human dignity value of a human as otherwise a person is considered as means rather than the scope. Incriminating an act of pimping pursues protection of a person vulnerable from the standpoint of sexual exploitation. However, as per provisions of Article 89 of the CC RM, a person decides to practice prostitution, without being exploited by pimps. Therefore, the pimping should be penalized much tougher compared to practicing prostitution. A person engaged in pimping does not happen to be in the situation similar to that of a person practicing prostitution. Therefore, the Constitutional Court of the Republic of Moldova considered unfounded the critics on the alleged infringement of the principle of equal treatment***.

By the way, the Constitutional Court of Romania had to deal with the similar issue. A new Criminal Code become effective in Romania as of 1 February 2014. This regulatory act has brought up practicing prostitution from the area of penal unlawfulness. Still, the criminal charges for pimping are being provided for in Article 213 of the Code. Paragraph (1) of herewith-mentioned article provides that determination or facilitation of practicing prostitution or obtaining any material gains from practicing prostitution by one or more persons is punishable by two to seven years of imprisonment while forbidding the exercise of certain rights. Under this aspect, through its Decision no. 874 of 15 December 2015****, the Constitutional Court of Romania established that the action of determination is an instigation while the action of facilitation, in its turn, stands out as a kind of complicity. Therefore, as supported by the Constitutional Court of Romania, the critics concerning infringement of the principle of equal treatment of citizens before the law and public authorities, without any privileges and discrimination – given that a person practicing prostitution is

Moldova[23] (hereafter referred to as the PC RM)] was engagement in the initiation, setting up and financing of erotic video-chat. The advocates of such a comprehensive notion of prostitution, contained in Article 89 of the CC RM as well as in Article 220 of the PC RM, were driving from the idea that the online pornography is a prostitution rather than pornography, although none of the associated national or international regulatory enactments distinguished between online and filmed (stored) pornography.

Following this case-law (majority) opinion, the courts were relying exclusively on a reply offered to criminal prosecution body by the State Agency for the Protection of Morality. Stated in the reply was that "the actions implying exposure and arousal of the intimate parts of human body, including such with the use of sex toys, performed as part of a live shows using webcams and chats, is *de facto* illegal activity, which could be defined as offering sexual services for payment. A "sexual act" should thereat mean obtaining sexual gratification through sex or sexual activity. In this context, the "sex" does not necessarily mean genital organs but other parts of human body that are meaningful from the standpoint of sensuality. The sexual act means sexual practice that physiologically, is capable of producing an orgasm. Different body manipulations in front of the webcam and through the chats, pursuing the objective of sexual gratification of the interlocutor

not criminally liable while an instigator and accomplice are, we do have a case of violation of the principle of equality, suggesting same punishment to all parties of a crime – and hence it cannot be retained. The Constitutional Court of Romania has stated that meant here are two different acts participating in which are the author, that is the person engaged in prostitution as well as the one who determines or facilitates practicing prostitution, since participation in prostitution by way of acting as an instigation or accomplice is clearly incriminated as an autonomous act in which clearly traced out could be the acts of participation. Hence, the pimp is the author of a crime *per se*, while the provisions on criminal participation remain inapplicable by referring such to practicing of prostitution, which does not constitute criminal offence pursuant to the 2014 version of the Criminal Code of Romania, without any infringement of the principle of equality of citizens before law. By superimposition, one could notice that the Constitutional Court of Romania as well as the Constitutional Court of the Republic of Moldova have ruled similarly.

* Application no. 62g of 25 May 2018 on the exception of unconstitutionality of certain provisions of Article 220 of the Criminal Code of the Republic of Moldova. Available at: https://goo.gl/U7CNbM (accessed at 19 January 2019).

** CJEU, Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, Judgment of 20 November 2001, § 49. Available at: https://goo.gl/YhnL5o (accessed at 12 December 2018). For an economic approach to prostitution, *see:* Eva-Maria Heberer, *Prostitution: An Economic Perspective on its Past, Present, and Future*, Springer Fachmedien Wiesbaden, 2014, pp. 73-163.

*** Decision of the Constitutional Court of the Republic of Moldova no. 49 of 31 May 2018 of the inadmissibility of the Application no. 62g/2018 regarding the exception of unconstitutionality of certain provisions of Article 220 of the Criminal Code (pimping), published in the Official Gazette of the Republic of Moldova no. 285-294 of 3 August 2018.

**** Decision of the Constitutional Court of Romania no. 874 of 15 December 2015 on the exception of unconstitutionality of the provisions of Article 213 para. (1) of the Criminal Code, published in the Official Gazette of Romania no. 170 of 7 March 2016.

[23] The Criminal Code of the Republic of Moldova no. 985 of 18 April 2002, published in the Official Gazette of the Republic of Moldova no. 128-129 of 13 September 2002.

and/or gaining income from this activity, could be defined as practicing prostitution".[24] *Bref*, the activity of female models engaged by the perpetrators is definitely a prostitution, since the customers get sexual gratification while the models receive payment for that. Hence, as believed by the State Agency for the Protection of Morality, obtaining income from the respective activity by the offenders falls under the incidence of Article 220 of the PC RM – an article, which establishes criminal liability for the offence of pimping. It is worth noticing, that no reference in this statement implies any of the national or international regulatory enactments that would reinforce the opinion voiced. This issue finds its reflection in the legal literature.[25] Probably, the "experts" from the State Agency for the Protection of Morality were guided by some kind of own "moral compass", making certain excerpts from the relevant regulatory enactments (both national and international). Still, the majority of the courts (especially the court of appeals) have never put at doubts the opinion shared by the aforementioned Agency and adhered to it without any reservations. In other words, for these judicial bodies the opinion in question turned into a piece of "law".

By contrast, in other cases,[26] engagement in erotic video-chart activity was classified as pornography, thus falling under the incidence of Article 90 of the CC RM. In this case law (minority) guidance the courts mentioned that considered as prostitution could be just an infringement meeting the following conditions: 1) maintaining sexual acts with different persons benefiting on the services of prostitution; 2) purchasing means of subsistence or main livelihoods as a result of practicing sexual activity with the like persons. The sexual activity implies a physical contact – an interaction between human bodies or its parts rather than a virtual interaction. Although pornographic performances disseminated online as well as sexual discussions, virtual fulfillment of sexual fantasies of the customers, appearing nude or wearing sexual and porn accessories, using sex toys, imitating sexual activity and other such actions with a tinge of sexuality or pornography, etc. could satisfy certain sexual desires of a person, this infringement constitute

[24] *Apud:* Judgment of the Chisinau Court of Appeal of 12 October 2016. Casefile no. 1a-1641/2016. Available at: https://goo.gl/MHf46L (accessed at 19 January 2019); Judgment of the Chisinau Court of Appeal of 12 December 2017. Casefile no. 1a-768/2017. Available at: https://goo.gl/Ruszkq (accessed at 19 January 2019); Judgment of the Chisinau Court of Appeal of 13 February 2018. Casefile no. 1a-2003/2017. Available at: https://goo.gl/SpZF9W (accessed at 19 January 2019); etc.

[25] Sergiu Brînza, *Din nou despre interpretarea noțiunii de prostituție în practica judiciară a Republicii Moldova* (*Once again on the interpretation of the notion of prostitution in the case-law of the Republic of Moldova*), Revista Națională de Drept (The National Law Journal), 2016, no. 6, p. 6.

[26] Judgment of the Centru District Court of 3 August 2015. Casefile no. 1-279/2015. Available at: https://goo.gl/4Lpx48 (accessed at 19 January 2019); Judgment of the Ciocana District Court of 14 July 2016. Casefile no. 1-449/2015. Available at: https://goo.gl/aNVSSy (accessed at 12 December 2018); Judgment of the Ciocana District Court of 16 August 2016. Casefile no. 1-138/2016. Available at: https://goo.gl/QZigwn (accessed at 19 January 2019).

pornography rather than prostitution.[27] Hence, the courts (especially first tier tribunals) were bearing on the legislative definition of the notion of "pornography" contained in Article 1 of the Law of the Republic of Moldova no. 30 of 7 March 2013 on the protection of children against the negative impact of information (the earlier cited Article). With regard to the opinion shared by the aforementioned State Agency for the Protection of Morality (pursuant to which engaging in erotic video-chat activity is a prostitution), the courts have highlighted that this cannot bear the nature of a compulsory interpretation. This opinion comes from the authority that was not vested with the competency to interpret or suggest legal appreciation to the infringements provided by the contravention or criminal legislation. Indeed, the State Agency for the Protection of Morality is a specialized public body within the Ministry of Culture of the Republic of Moldova, meant to ensure protection of culture and morality by countering the channels/trends of propagating pornography, sadism and culture of violence in art, literature and mass media.[28] Therefore, the prevalence was given to law rather than to the opinion shared by the State Agency for the Protection of Morality, the opinion, which otherwise, bears a consultative nature and, what is more important, comes in contradiction with law.

In globo, the case-law study shows that the legislative issue discussed was resolved in a number of different ways. The judgments of the courts "do not speak in a single voice",[29] while the differences are of the essence rather than that of the nuance. Thus, tarnished is the role of the judges as the "advocates of human rights and fundamental freedoms".[30] The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's rights outlined in Article 7 of the European Convention on Human Rights (hereafter referred to as the ECHR) (which guarantees application of the legality principle incrimination and legality of criminal accounting) with regard to the defendant.[31] In addition, the presence of a nonhomogeneous case law constitutes a

[27] Judgment of the Ciocana District Court of 16 August 2016. Casefile No. 1-138/2016. Available at: https://goo.gl/QZigwn (accessed at 19 January 2019).

[28] Government Decision of the Republic of Moldova no. 1400 of 17 December 2001 on the State Agency for the Protection of Morality, published in the Official Gazette of the Republic of Moldova no. 158 of 27 December 2001.

[29] House of Lords, Opinions of the Lords of Appeal for judgment in the cause *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant). Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*. Al Skeini, [2007] UKHL 26, § 67. Available at: https://goo.gl/P9iPUM (accessed at 19 January 2019).

[30] *See:* § 58 of the Judgment of the Constitutional Court of the Republic of Moldova no. 23 of 25 July 2016 on the exception of unconstitutionality of Article 27 of Law no. 151 of 30 July 2015 on the Government Agent (Action in Regression) (Applications no. 25g/2016 and no 57g/2016), published in the Official Gazette of the Republic of Moldova no. 361-367 of 21 October 2016.

[31] ECHR, Case of *Del Río Prada v. Spain* [GC], Application no. 42750/09, Judgment of 21 October 2013, § 93. Available at: https://goo.gl/U5yZqM (accessed at 12 December 2018).

factor of destabilizing the judicial stability and credibility of justice contrary to the guarantees instituted by law in an equitable process.[32]

Under such conditions, it would be appropriate to bring an appeal in the interest of the law.[33] Although in compliance with Article 7 para. (9) of the Criminal Procedure Code of the Republic of Moldova[34], "the judgments of the Criminal Collegium of the Supreme Court of Justice pronounced after review of the appeal in the interest of law, shall be mandatory for the courts to the extent that the factual and legal situation on the case remains the same as existed at the time when the appeal was reviewed." At the same time, as follows from the provisions of Article 465[1] para. (2) of herewith mentioned Code, the Chairman of the Supreme Court of Justice, the Chairman of the Criminal Collegium of the Supreme Court of Justice, and the Prosecutor General or the Chairman of the Union of Advocates are the ones vested with the competencies to request from the Criminal Panel of the Supreme Court of Justice their statement on the legal issues that were differently treated by the courts vested with the competencies of solving the case in the court of last resort. However, none of these decision-making authorities proceeded to exercise the respective competences.

So far, it does not seem possible to give any wording to an appeal in the interest of law. This is because one of *sine qua non* conditions for filing an appeal in the interests of law implies existence of certain contradictory judgments pronounced by the supreme instance on the same issue of law. For different reasons, not all of the court judgments are appealed before the Supreme Court of Justice. As at the date when these lines were edited (January 2019), there is only one judgment through which the supreme instance endorsed the ruling of the court of appeal, stipulating that the erotic video-chat activity counts as prostitution. We hereby refer to the case of *Briscoe and Zagnitco*.[35] It is also worth mentioning the case of *Godorog*,[36] in which the Supreme Court of Justice supported the judgment of the court of appeal (pursuant to which the erotic video-chat activity would have counted as prostitution). However, in this case the Supreme Court failed to analyse whether the legal qualification of this offence was correct. One expected that the Supreme Court of Justice would make its judgment in that part which refers to the proportionality of the applied punishment.

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[32] ECHR, Case of *Lupeni Greek Catholic Parish and Others v. România* [GC], Application no. 76943/11, Judgment of 29 November 2016, § 116. Available at: https://goo.gl/hrVspM (accessed at 19 January 2019).

[33] Pursuant to Article 465[1] para. (1) of the Criminal Procedure Code of the Republic of Moldova, an appeal in the interest of the law means an extraordinary remedy through which ensured should be the unitary interpretation and application of the criminal law and that of criminal procedure across the entire territory of the country.

[34] The Code of Criminal Procedure of the Republic of Moldova no. 122 of 14 March 2003, published in the Official Gazette of the Republic of Moldova no. 104-110 of 7 June 2003.

[35] Judgment of the Supreme Court of Justice of the Republic of Moldova of 21 June 2016. Casefile no. 1ra-805/2016. Available at: https://goo.gl/W5CuFk (accessed at 19 January 2019).

[36] Judgment of the Supreme Court of Justice of the Republic of Moldova of 17 October 2018. Casefile no. 1ra-1208/2018. Available at: https://goo.gl/4mCBr5 (accessed at 19 January 2019).

On the contrary, with regard to the other three criminal cases that were given hearing by the Supreme Court of Justice[37], the latter has found sufficient grounds for cassation of the judgments issued by the courts of appeal (with the same solution and same arguments as in the first three criminal cases mentioned earlier) and ordered a retrial of the cases in another court hearing. In order to issue the like judgment, the Supreme Court of Justice, *inter alia*, highlighted that the court of appeal has to determine whether the offence of "providing sexual services online for payment to the users of certain sites, manifested through demonstration of own genitals in front of a webcam and/or satisfying sexual desires of the beneficiaries through pornographic performances" is a case of prostitution (within the meaning of Article 89 of the CC RM) or pornography (within the meaning of Article 90 of the CC RM).[38] Putting it in other words, the supreme instance failed to accept the approach taken by the Chisinau Court of Appeal. It is worth mentioning that the court of appeal relied exclusively on the opinion shared by the State Agency for the Protection of Morality (pursuant to which the offence in discussion would be counted as prostitution) while making no attempt to negate the arguments produced by the ordinary courts (that have chosen in favour of framing the offence in discussion as the pornography rather than prostitution). The Supreme Court of Justice proceeded to notify the hierarchically inferior instances that the extensive unfavourable interpretation and application by analogy of the criminal/contravention laws is inadmissible. Thus, implicitly, the Supreme Court of Justice suggested that sanctioning the erotic video-chat activity on the grounds of Article 89 of the CC RM (*i.e.* practicing prostitution) means application of law by analogy, which is prohibited in the criminal matters. Would the appeal courts bear in mind this suggestion?

In one of these three criminal cases (*Bologan and Gurdis*), the Chisinau Court of Appeal repeatedly failed to take into consideration (the case was referred for review by the Supreme Court of Justice twice[39]) the opinion of the reviewer, although this is mandatory for the hierarchically inferior courts. Again, the Court of Appeal has reiterated that the exposure and/or arousal of genitals in front of a webcam in return for payment would have counted as prostitution. Concomitantly, the court of appeal has ruled suspension of proceedings[40] bearing on the provisions of the Law on amnesty in connection with the 25th Anniversary since the

[37] Judgment of the Supreme Court of Justice of the Republic of Moldova of 19 July 2016. Casefile No. 1ra-999/2016. Available at: https://goo.gl/rEXVwz (accessed at 19 January 2019); Judgment of the Supreme Court of Justice of the Republic of Moldova of 29 May 2018. Casefile no. 1ra-813/2018. Available at: https://goo.gl/QCz1Ti (accessed at 19 January 2019); Judgment of the Supreme Court of Justice of the Republic of Moldova of 3 July 2018. Casefile no. 1ra-1241/2018. Available at: https://goo.gl/sNh8ng (accessed at 19 January 2019).

[38] *Ibidem*.

[39] Judgment of the Supreme Court of Justice of the Republic of Moldova of 19 July 2016. Casefile no. 1ra-999/2016. Available at: https://goo.gl/rEXVwz (accessed at 19 January 2019); Judgment of the Supreme Court of Justice of the Republic of Moldova of 21 March 2017. Casefile no. 1ra-260/2017. Unpublished.

[40] *See:* The agenda of the hearings of the Chisinau Court of Appeal in Casefile no. 02-1a-9932-05052017. Available at: https://goo.gl/r7niGr (accessed at 19 January 2019).

proclamation of the independence of the Republic of Moldova no. 210 of 29 July 2016.[41] This judgment has not been challenged before the Supreme Court of Justice.

In another case (*Baraboi and Gabura*), through its judgment of 4 October 2018, the Chisinau Court of Appeal[42] manifested the difference in retrial of a case with respect to the judgment delivered by the Supreme Court of Justice. More specifically, the court of appeal has ruled that carrying out erotic video-chat activity is a matter of pornography while the liability should apply on the grounds of Article 90 of the CC RM[43]. Thus, the justice has been done. Finally, the third case (*Nunez*) is still pending with the Chisinau Court of Appeal.[44] We shall see what judgment the court of appeal will deliver.

The Supreme Court of Justice just missed a good chance to put an end to the divergences encountered in case law application. When a wrong legal appreciation is given to an offence, the Supreme Court is entitled to intervene and dismiss the judgment of the court of appeal, giving the correct solution (provided the situation of a person does not get aggravated and the right for defence is not compromised). This is an important legislative issue that the Supreme Court of Justice could resolve without the need to refer the case for retrial. For example, in a different context, regardless of the fact that the primary court as well as the court of appeal have shared the opinion that infringement of the rules of legal possession of firearms is a matter of criminal offence (Article 291 of the PC RM; based on the provisions of this purview a person was sentenced to 18 months of imprisonment), the Supreme Court of Justice shared a different opinion. Therefore, it overturned the judgments of hierarchically inferior courts and after a new hearing of the case, ruled that the offence in question was an administrative contravention (Article 361 of the CC RM) and freed the person in question from the prison.[45] The list of the like examples could go on. However, due to inexplicable reasons, in the three of the aforementioned criminal cases, the Supreme Court of Justice has chosen another way. It "has thrown the ball in someone else's yard" and left with the Court of Appeal the burden of deciding whether the erotic video-chat activity constitutes prostitution or pornography while "whisper whistling" the correct solution. It looks like the Supreme Court had no desire to resolve this legal issue positively. Hence,

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[41] Law no. 210 of 29 July 2016 on the amnesty in connection with the 25th anniversary of the proclamation of the independence of the Republic of Moldova, published in the Official Gazette of the Republic of Moldova no. 293-305 of 9 September 2016.

[42] *See:* The agenda of the hearings of the Chisinau Court of Appeal in Casefile no. 02-1a-16818-06082018. Available at: https://goo.gl/VGnEQB (accessed at 19 January 2019). Judgment of the Chisinau Court of Appeal of 4 October 2018. Casefile no. 1a-1649/18. Unpublished.

[43] This judgment is appealed to the Supreme Court of Justice; the next hearing being scheduled for 5 February 2019. *See:* The agenda of the Supreme Court of Justice sittings in Casefile No. 1ra-2191/2018. Available at: https://goo.gl/tvYu55 (accessed at 19 January 2019).

[44] *See:* The agenda of the hearings of the Chisinau Court of Appeal in Casefile no. 02-1a-14528-06072018. Available at: https://goo.gl/eMoeBK (accessed at 19 January 2019).

[45] Judgment of the Supreme Court of Justice of the Republic of Moldova of 18 October 2016. Casefile no. 1ra-1427/2016. Available at: https://goo.gl/S2zybc (accessed at 19 January 2019).

phrasing of an appeal in the interest of law with the view of unifying the case-law in the domain is a matter of time.

4. The Decision of the Constitutional Court of the Republic of Moldova no. 36 of 19 April 2018

In order to ensure unitary interpretation and application of the law, chosen was another instrument. To that end, on 27 December 2017, and accordingly, on 28 March 2018, filed with the Constitutional Court of the Republic of Moldova was Application no. 173g on the exception of unconstitutionality of certain provisions contained in Article 220 of the Criminal Code and Article 89 of the Contravention Code[46] (hereafter referred to as the Application no. 173g/2017) and Application no. 37g of 28 March 2018 on the exception of unconstitutionality of certain provisions contained in Article 220 of the Criminal Code[47] (hereafter referred to as the Application no. 37g/2018). The authors of the applications pointed out to the lack of predictability of the term "prostitution" (used in Article 89 of the CC RM and in Article 220 of the PC RM), and hence, its incompliance with the provisions set forth in Article 1 para. (3) (setting out the defining features of the rule of law), Article 22 (guaranteeing the principles of *nullum crimen sine lege, nulla poena sine lege*) and Article 23 para. (2) (provision instituting quality criteria that any of regulatory enactment should comply with, *i.e.* accessibility and foreseeability) of the Constitution of the Republic of Moldova. Likewise, the authors of the applications have claimed that giving legal definition of to the notion of "prostitution" is inescapable, as it applied, for example, in case of the Criminal Code of Romania in 2014. Pursuant to Article 213 para. (4) of the aforementioned Code, practicing prostitution shall be understood as maintaining sexual activity with different persons with the view of obtaining material advantages for oneself or for another person. Finally, the authors of the applications have submitted to the Constitutional Court of the Republic of Moldova an allegation proving that in the case-law there is no unitary standpoint with regard to the offence of providing online sexual services. Thereat, the courts are wavering between divergent solutions.

The Constitutional Court of the Republic of Moldova has rendered inadmissible the Applications no. 173g/2017 and no. 37g/2018. In this connection, in § 36 of the Decision no. 36 of 19 April 2018 on the inadmissibility of Applications no. 173g/2017 and no. 37g/2018 with regard to exception of unconstitutionality of Article 220 of the Criminal Code and Article 89 of the

[46] Application no. 173g of 27 December 2017 on the exception of unconstitutionality of certain provisions of Article 220 of the Criminal Code of the Republic of Moldova and of Article 89 of the Contravention Code of the Republic of Moldova. Available at: https://goo.gl/zAjsCP (accessed at 19 January 2019).

[47] Application no. 37g of 28 March 2018 on the exception of unconstitutionality of certain provisions of Article 220 of the Criminal Code of the Republic of Moldova. Available at: https://goo.gl/L1w5cM (accessed at 19 January 2019).

Contravention Code (pimping and practicing prostitution)[48] (hereafter referred to as the Decision of the Constitutional Court no. 36/2018), the Constitutional Court of the Republic of Moldova has stated that in the legal doctrine "prostitution" is countered as engagement in sexual activity with different persons,[49] the latter thus pursuing to acquire the source of subsistence or the main source of livelihood.[50] The Court stated that this definition is in line with the common sense (*i.e.* ordinary language) of the term ("prostitution").

Drawn could be the following conclusion: pursuant to the Constitutional Court of the Republic of Moldova, there is no need for the legislator to define the notion of "prostitution." If it were otherwise, then the Constitutional Court would have asked the Parliament to fill up this "legislative gap." The Constitutional Court do have such a prerogative but failed to exercise it in this particular case, probably because the understanding of the term "prostitution" raises no doubts with regard to its meaning from the perspective of a standard perceived by any reasonable person. On the one hand, the legislator was not obliged to suggest definitions for any term or a phrase used in the content of the rules of incrimination as long as the understanding of such could be derived by any person with average educational background by simple looking into the explanatory dictionary of the Romanian Language,[51] while on the other hand, the interpretation of law is the function of the judicial instances and a concern of a doctrine.[52] The criminal law cannot be overflown with explicative passages.[53] However clearly drafted a legal provision

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[48] Decision of the Constitutional Court of the Republic of Moldova no. 36 of 19 April 2018 of the inadmissibility of the Applications no. 173g/2017 and no. 37g/2018 with regard to exception of unconstitutionality of Article 220 of the Criminal Code and Article 89 of the Contravention Code (pimping and prostitution), published in the Official Gazette of the Republic of Moldova no. 195-209 of 15 June 2018.

[49] In the context of practicing prostitution, the sexual activity must be maintained with more than one person since the continuity of sexual activity with the same person generates, despite the nature of interest shared by these, a presumption of affection between the partners, some kind of stability, which brings these relations close to living in a relationship. *Apud:* § 20 of the Decision of the Constitutional Court of Romania no. 555 of 19 September 2017 on the exception of unconstitutionality of the provisions of Article 213 para. (4) of the Criminal Code, published in the Official Gazette of Romania no. 170 of 22 February 2018.

[50] In this respect, the Constitutional Court considered the definition of the term "prostitution" formulated by Sergiu Brînza. *See:* Sergiu Brînza, *Reflecții cu privire la necesitatea definirii legislative a noțiunii de prostituție (Reflections on the necessity to provide a legislative definition of a notion of prostitution)*, Revista Națională de Drept (The National Law Journal), 2015, no. 8, p. 4.

[51] *Ad litteram*, "prostitution" shall be understood as an "action through which a person chooses to maintain, in a usual manner, sexual relationship with an undetermined number of partners in exchange for money or certain advantages." *See:* Ion Coteanu, Luiza Seche and Mircea Seche (eds.), *Dicționarul explicativ al limbii române (The Explanatory Dictionary of the Romanian Language)*, 2nd edition, revised, Univers Enciclopedic Gold, Bucharest, 2012, p. 887.

[52] *Apud:* § 7 of the Decision of the Constitutional Court of Romania no. 449 of 28 June 2018 on the exception of unconstitutionality of the provisions of Article 299 para. (2) of the Criminal Code, published in the Official Gazette of Romania no. 719 of 21 August 2018.

[53] *See e.g.:* § 34 of the Decision of the Constitutional Court of the Republic of Moldova no. 49 of 31 May 2018 of the inadmissibility of the Application no. 62g/2018 regarding the exception of unconstitutionality of certain provisions of Article 220 of the Criminal Code (pimping), published

may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. Whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain.[54] Lack of a legal definition of a notion implies intention of a legislator to confer to such an understanding stemming from the common sense of the terms, the fact likewise confirmed by the Constitutional Court of Romania.[55]

The Constitutional Court of the Republic of Moldova has reiterated its position in yet another judgment, by adding that there are objective landmarks helping the legislator to establish the exact sense of the notion of "prostitution"[56] (as enunciated in Article 220 of the PC RM and in Article 89 of the CC RM). Hence, as stated by the Constitutional Court, the herewith discussed notion is foreseeable for the recipients of the law as well as for the applicants of such (criminal prosecution officers, prosecutors and judges).

With regard to the non-uniform nature traced out in the case-law, the following statement appears in § 45 of the Constitutional Court Decision no. 36/2018: "[...] [T]here are remedies of legal nature to which one should appeal with the view of unification of the case-law by the Supreme Court of Justice. These remedies could ensure the clarity and predictability of herewith-discussed legal provisions. In the event when the interpretation suggested by the Supreme Court of Justice (following court hearing of an appeal on the point of law) could raise the issues of constitutionality, the respective persons should still have a possibility to raise the issue of the exception of unconstitutionality". Hence, the Supreme Court of Justice is a supreme judicial instance meant to ensure correct and uniform application of legislation by all of the courts. Ensuring uniform application and

in the Official Gazette of the Republic of Moldova no. 285-294 of 3 August 2018; § 15 of the Decision of the Constitutional Court of the Republic of Moldova no. 74 of July 9, 2018 of inadmissibility of Application no. 86g/2018 on the exception of unconstitutionality of certain of the provisions of Article 349 para. (1^1) of the Criminal Code, published in the Official Gazette of the Republic of Moldova no. 424-429 of 11 November 2018.

[54] ECHR, Case of *Rohlena v. the Czech Republic* [GC], Application no. 59552/08, Judgment of 27 January 2015, § 50. Available at: https://goo.gl/zNqMn3 (accessed at 19 January 2019); ECHR, Case of *Seychell v. Malta*, Application no. 43328/14, Judgment of 28 August 2018, § 43-44. Available at: https://goo.gl/s7YwNy (accessed at 19 January 2019).

[55] *See e.g.:* § 14 of the Decision of the Constitutional Court of Romania no. 689 of 7 November 2017 on the exception of unconstitutionality of the provisions of Article 207 paragraphs (1) and (3) of the Criminal Code, published in the Official Gazette of Romania no. 99 of 1 February 2018; § 18 of the Decision of the Constitutional Court of Romania no. 449 of 28 June 2018 on the exception of unconstitutionality of the provisions of Article 299 para. (2) of the Criminal Code, published in the Official Gazette of Romania no. 719 of 21 August 2018.

[56] *See:* § 35 of the Decision of the Constitutional Court of the Republic of Moldova no. 49 of 31 May 2018 of the inadmissibility of the Application no. 62g/2018 regarding the exception of unconstitutionality of certain provisions of Article 220 of the Criminal Code (pimping), published in the Official Gazette of the Republic of Moldova no. 285-294 of 3 August 2018.

correct interpretation of laws by the supreme instances of any state is a legitimate target compatible with the ECtHR.[57]

Still, the Constitutional Court has managed to stay away from the formalism. It is axiomatic that the rights guaranteed by the Constitution must be practical and effective rather than just theoretical and illusionary. As it was stated by its President, in this case the Constitutional Court of the Republic of Moldova pursued the objective of effectively guaranteeing the human rights, while anticipating solution in such case when the Supreme Court would have considered (in its review from the standpoint of possible appeal on the point of law) that prostitution does not necessarily imply a physical contact.[58] The Constitutional Court shares the opinion that prostitution mandatory implies having physical contact,[59] and therefore, is different from the sexual services offered online.[60] In this context, the Decision of the Constitutional Court no. 36/2018 contains the following rather important statements:

> "37. [...] [T]here exist a scientific consensus on that prostitution cannot imply providing sexual services online. This is because providing sexual services online does not involve practicing of sexual activity with the persons benefiting on the prostitute's services. Providing the like services does not involve direct contact with the body of the one benefiting on such services. In other words, as soon as the physical contact is missing, the like actions, *i.e.* providing sexual services online, do not fall under the incidence of the notion of "prostitution" but under that of "pornography".
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> 43. [...] [T]he pornographic product is susceptible to distribution online. This rule applies not only for the case of child pornography, but also for the case of casual adult pornography. At the same time, [...] the online pornography (*i.e.* online sexual services) is not considered to be yet another form of prostitution since the two notions have different fields of application.
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> 44. Hence, under this assumption, if the criminal law would have been applied making an appeal to the unfavourable extensive interpretation or through the analogy, there would be a risk of violating provisions of Article 7 of the European Convention. Likewise, the legal statement pursuant to which the offence does or does not constitute prostitution, within the meaning of Article 220 of the Criminal Code, must be made by the judicial instances rather than by the executive bodies (see, *mutatis mutandis*, *Dmitriyevskiy v. Russia*, 3 October 2017, § 113)".

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[57] ECHR, Case of *Baydar v. the Netherlands*, Application no. 55385/14, Judgment of 24 April 2018, § 47. Available at: https://goo.gl/L8JiuE (accessed at 19 January 2019).

[58] Mihai Poalelungi, *Cazul Litschauer şi procedeul Curţii Constituţionale a Republicii Moldova (Litschauer case and the proceedings of the Constitutional Court of the Republic of Moldova)*. In: Valer Dorneanu and Mihai Poalelungi (eds.), Preeminenţa dreptului şi controlul de constituţionalitate între tradiţie şi modernitate (Rule of law and control of the constitutionality between tradition and modernity), Hamangiu, Bucharest, 2018, p. 10.

[59] The idea that prostitution must involve physical contact between a buyer and seller holds important implications for the multi-billion-dollar pornography industry. *Apud:* Stuart P. Green, *What Counts as Prostitution?* Bergen Journal of Criminal Law and Criminal Justice, 2016, vol. 4, iss. 1, p. 75.

[60] Mihai Poalelungi, *Litschauer case and the proceedings of the Constitutional Court of the Republic of Moldova*, p. 10.

We do agree with these conclusions as they are bearing on a extensive study of legislation, case-law and the legal doctrine. A brief journey through the foreign reference literature allows to conclude that there are many voices supporting that the so-called "cyberprostitution" or "virtual prostitution" is, actually, a pornography[61] rather than prostitution. Unlike prostitution, the cyberprostitution does not presume an interaction between human bodies or its parts (the touching element). In the case of sex show broadcast over the Internet, the viewer does not (and cannot) touch he/her.[62] In lack of a physical contact, there are no grounds to talk about prostitution. Accordingly, in lack of prostitution, the criminal liability for pimping cannot apply. A similar approach appears in a legal doctrine of the Republic of Moldova by Sergiu Brînza[63] as well as in the opinion shared by the Penal Law Department of the Law Faculty of the Moldova State University filed with the Constitutional Court at its inquiry. Likewise, pursuant to the opinion shared by the Academy of Science of Moldova filed with the Constitutional Court by the author of Application no. 37g/2018 – one of the mandatory elements of prostitution implies maintaining certain penetrative acts. The erotic shows fail to meet this condition. Thus, the Academy of Science of Moldova in its turn concluded that the erotic video-chat activity does not constitute prostitution.

These opinions find regulatory support in the legislation of the Republic of Moldova. More precisely, in Article 1 of the Law of the Republic of Moldova on protection of children from negative impact of information no. 30 of 7 March 2013 (earlier cited provision). Applying the logical law of excluded middle, one could deduce that displaying genitals or arousal of such in exchange of money in front of a webcam falls under the incidence of the notion of "pornography", referred to in Article1 of the Law of the Republic of Moldova no. 30 of 7 March 2013, rather than that of "prostitution". No sign of equality applies between these two notions,[64] as they have different fields of application. The appropriateness of this assertion also follows from the review of certain international regulatory enactments.

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[61] Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, Vanderbilt Journal of Entertainment and Technology Law, 2008, vol. 11, no. 8, p. 68; David Cardiff, *Virtual Prostitution: New Technologies and the World's Oldest Profession*, Hastings Communications and Entertainment Law Journal, 1996, vol. 18, no. 4, pp. 869-900; Brooke Campbell, *Is Cyberprostitution Prostitution? New Paradigm, Old Crime*. Available at: https://goo.gl/vEj25E (accessed at 19 January 2019); Matthew Green, *Sex on the Internet: A Legal Click or an Illicit Trick?* California Western Law Review, 2002, vol. 38, no. 2, pp. 527-546; Litska Strikwerda, *When Should Virtual Cybercrime Be Brought under the Scope of the Criminal Law?* In: Marcus Rogers and Kathryn C. Seigfried-Spellar (eds.), Digital Forensics and Cyber Crime: 4th International Conference, ICDF2C 2012, Lafayette, IN, USA, October 25-26, 2012, Revised Selected Papers. Springer, Heidelberg, New York, Dordrecht, London, 2013, p. 133; Jonathan Wallace and Mark Mangan, *Sex, Laws, and Cyberspace*, Henry Holt & Company, New York, 1996, p. 194.

[62] Bela Bonita Chatterjee, *Pixels, Pimps and Prostitutes: Human Rights and the Cyber-Sex Trade*. In: Mathias Klang and Andrew Murray (eds.), Human Rights in the Digital Age, Glass House Press, London, 2005, p. 15.

[63] Sergiu Brînza, *Once again on the interpretation of the notion of prostitution in the case-law of the Republic of Moldova*, p. 8.

[64] For more details, *see:* Anders Kaye, *Why Pornography is not Prostitution: Folk Theories of Sexuality in the Law of vice*, Saint Louis University Law Journal, 2016, vol. 60, pp. 243-292.

Thus, pursuant to Article 9 para. (1) of the Convention on cybercrime, "Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: a) producing child pornography for the purpose of its distribution through *a computer system* (highlighting by using the italics is done by the authors in the current example as well as across the entire study – *n.a.*); b) offering or making available child pornography through a computer system; c) distributing or transmitting child pornography through *a computer system*; d) procuring child pornography through *a computer system* for oneself or for another person; e) possessing child pornography in a computer system or on a computer-data storage medium."[65]

Also, under Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, "Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: [...] c) producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2."[66] In this connection, child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

According to the Handbook on the optional protocol on the sale of children, child prostitution and child pornography: "Article 3 requires States Parties to criminalize producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2. *Pornography can*, among other forms, *be represented in live performances*, photographs, motion pictures, video recordings and the recording or disseminating digital images."[67]

Last but not least, according to the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA: "In the context of criminalising acts related to pornographic performance, this Directive refers to such acts which consist of an organised live exhibition, aimed at an audience […]" [paragraph (8) of the Preamble]; "*pornographic performance* means *a live* exhibition aimed at an audience, including by means of information and *communication technology*, of: (i)

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[65] Convention on cybercrime, Budapest, 23.XI.2001. Available at: https://goo.gl/1Niec2 (accessed at 19 January 2019).

[66] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Available at: https://goo.gl/RLkxGf (accessed at 19 January 2019).

[67] Handbook on the optional protocol on the sale of children, child prostitution and child pornography, UNICEF, 2009. Available at: https://goo.gl/QCWvV6 (accessed at 19 January 2019).

a child engaged in real or simulated sexually explicit conduct; or (ii) the sexual organs of a child for primarily sexual purposes" [Article 2(e) of the Directive].[68]

With appropriate adjustments, these provisions (which the Constitutional Court of the Republic of Moldova has taken into consideration when issuing its decision no. 36 of 19 April 2018) could be extrapolated on adult pornography. Thus, there is the European consensus,[69] from which it follows that exposure of genitals and/or arousal of one's own genital organs (masturbation) in the context of video-chat activity is pornography. This aspect bears a heavy legal precedent.

Having regard to the foregoing, the Constitutional Court of the Republic of Moldova proceeded to pass over to the judicial instances an explicitly clear and blunt message: 1) under the assumption of applying Article 220 of the PC RM in case of initiation, setting up and financing of the erotic video-chat activity, violated were the provisions of Article 22 of the Constitution, which guarantees the principle of legality of incrimination of the offence and punishment (under the aspect of banning resort to analogy in application of the criminal law); 2) under the assumption of applying Article 89 of the CC RM for erotic video-chat activity, violated were the provisions of Article 22 of the Constitution (under the aspect of banning resort to analogy in application of the contravention law). Moreover, a reference made by the Constitutional Court to the *Dmitriyevskiy v. Russia* (this case refers to the criminal conviction of a person for the publication of two articles, the content of which was appreciated by a language expert as a "hate speech") case heard by the ECtHR, was not by mere chance. This way, whistled was an alarm in the sense that all legal matters must be resolved exclusively by the courts. These should not "blindly" bear on the response issued by the State Agency for the Protection of Morality (as some of the courts did); it especially refers to the hierarchically superior courts. Were the courts overall receptive to this message or not?

5. Case of *Litschauer v. Republic of Moldova*

Prior to giving the answer to the above question, it is worth mentioning that the issue of attributing erotic video-chat activity to prostitution (in the meaning of Article 89 of the CC RM) and, as a consequence, application of Article 220 of the PC RM in the assumption of initiation, setting up, financing and gaining benefits from erotic video-chat activity was also raised before the judges of the European Court of Human Rights (hereafter referred to as the ECtHR). Thus, on 13 November 2018, the ECtHR delivered its judgment on *Litschauer v. Republic of*

[68] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. Available at: https://goo.gl/KKZfX4 (accessed at 19 January 2019).

[69] On the importance of reaching a European consensus in legal argumentation bearing on the European constitutional law, see cases of *Ilnseher v. Germany* [GC], 4 December 2018, § 86, and *Naït-Liman v. Elveția* [GC], 15 March 2018, § 175.

Moldova case.[70] In this judgment stated was the violation of the applicant's Martin Litschauer rights provided by Article 5 § 1 of the ECtHR ("The right to liberty and security").

Actually, one could summarize the situation in *Litschauer* case as follows. At the time of the events the applicant was the owner of a company, incorporated in Moldova,[71] which ran an erotic video-chat business in Chisinau. It employed young female models who provided erotic shows via webcam to customers outside Moldova in exchange for payment. In 2015 the applicant was arrested (for a period of thirty days) and accused of pimping. The applicant appealed against the order and argued that his detention had not been based on a reasonable suspicion that he had committed an offence. He submitted that he could not be accused of pimping, in that the female models employed by him had not been engaged in prostitution. He argued that the prosecutor and the court which had ordered his detention had applied an extensive interpretation of the provisions of the Criminal Code concerning the offence of pimping. He also argued that the existing case law of the domestic courts did not contain anything which would enable erotic video-chat activity to be assimilated with prostitution and pimping. The applicant explained that, prior to starting the video-chat business, he had consulted a lawyer to make sure that the activity was legal in Moldova, and he had been assured that it was not illegal.

The Chisinau Court of Appeal dismissed the applicant's appeal and held that there had been grounds to believe that he might abscond or interfere with the investigation. The court did not respond to the applicant's argument about the lack of reasonable suspicion and the allegation of extensive interpretation of the criminal law. Later on, the court extended the applicant's term of arrest.

At the end of 2016, the Centrum District Court found the applicant guilty as charged but ordered that the criminal proceedings against him be terminated on the basis of an amnesty law (*i.e.* Law on amnesty in connection with the 25th Anniversary since the proclamation of the independence of the Republic of Moldova no. 210 of 29 July 2016). The applicant did not appeal against this judgment. In deciding the case, the court sought an opinion from the State Agency for the Protection of Morality as to whether the acts committed by the female

[70] ECHR, Case of *Litschauer v. the Republic of Moldova*, Application no. 25092/15, Judgment of 13 November 2018. Available at: https://goo.gl/ZUqDuA (accessed at 19 January 2019).

[71] This raises two questions. Firstly, it is not clear what legal grounds served for incorporation of the applicant's company and, implicitly, what was the domain of its activity? Our perplexity lies with the fact that setting up erotic video chat activity in the Republic of Moldova is not recognized as a form of entrepreneurship. The authorities of the Republic of Moldova could not have (in a legal manner) incorporated a company having such domain of business as setting up erotic video chat activity. Most probable, pursuant to the instruments of incorporation, the applicant's company was obliged to carry out some other activities (allowed by the law). Secondly, what was the legal ground used by the applicant when hiring models for displaying erotic shows in front of a webcam, while the so-called profession of a "webcam erotic model" in the Classification of Occupations in the Republic of Moldova. All these serve to reinforce the presumption the applicant was aware that his activity was transgressing the legislation of the Republic of Moldova. It looks like the applicant used his company as a smokescreen for production and dissemination of pornography.

models employed by the applicant could be qualified as prostitution and, thus, whether the applicant's activity could be qualified as pimping. This opinion, which was the key element in convicting the applicant and was subsequently used in other similar cases, stated that the actions of the female models employed by the applicant could be considered acts of prostitution, in that their clients could obtain sexual gratification as a result of the models' performance and because the models were paid for those acts. Thus, the fact that the applicant obtained revenue from the above activity could be considered pimping.

Before the ECHR, the applicant complained, bearing on the provisions of Article 5 § 1 of the ECHR, on being arrested for fifty-five days in absence of any reasonable suspicion of allegedly committing an offence provided for by the criminal law.

A "reasonable suspicion" that a criminal offence has been committed, referred to in Article 5 § 1 (c) of the ECHR, has a factual aspect and a legal aspect.[72]

As to the factual aspect, a "reasonable suspicion" presupposes the existence of facts or information, which would satisfy an objective observer that the person concerned, could have committed an offence. As a rule, problems in this area arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred.[73]

As to the legal aspect, which is the aspect in issue in the present case, the existence of a "reasonable suspicion" requires that the facts relied on can be reasonably considered as constituting a criminal offence, that is, falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred. The issue in the present case is whether the applicant's detention was "lawful" within the meaning of Article 5 § 1 of the ECtHR. The Convention refers here essentially to national law, but it also requires that any measure depriving the individual of his liberty be compatible with the purpose of Article 5 of the ECtHR, namely to protect the individual against arbitrariness.[74]

It is crucial that the conditions of deprivation of liberty on the grounds of the national law are clearly defined while the application of the law is foreseeable. This requirement is imposed by the principle of legality. In this case, the ECtHR would need to check whether the facts alleged to the applicant were matching the definition of the offence of pimping and whether this was sufficiently accessible and foreseeable. It is an exercise similar to that conducted by the ECtHR in the context of Article 7 of the Convention.

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[72] ECHR, Joint dissenting Opinion of Judges Spano and Kjølbro in Case of *Litschauer v. the Republic of Moldova*, § 2. Available at: https://goo.gl/ZUqDuA (accessed at 19 January 2019).
[73] *Ibidem*, § 3.
[74] *Ibidem*, § 4.

The ECtHR has started its review by stating that the notion of "prostitution" is missing in the legislation of the Republic of Moldova. Furthermore, following review of *Briscoe and Zagnitco case*[75] (judged by the Supreme Court of Justice of the Republic of Moldova) as well as the case of *Isachi*[76] (judged by the Chisinau Court of Appeal), in which the courts have adhered to the opinion shared by the State Agency for the Protection of Morality (pursuant to which the erotic video-chat activity constitutes prostitution), the ECtHR underlined that "The debate concerning the interpretation of the notion of prostitution appears to be ongoing in Moldova, given the intervention of the Constitutional Court [in its Decision no. 36/2018], which expressed a different opinion [other than that of the Supreme Court of Justice in case of *Briscoe and Zagnitco*, as well as that of the Chisinau Court of Appeal in *Isachi* case] to the effect that, in the absence of physical contact, erotic video-chat performances could not be considered acts of prostitution. […] [I]t appears that the issue of whether erotic video-chat performances amount to sexual contacts and thus to prostitution [...] is still being debated".[77] ECHR has also ruled that the facts of the present case pre-date the case law (we hereby refer to *Briscoe and Zagnitco* case as well as to *Isachi* case) relied upon by the Government in support of their position.

Consequently, with five votes for and two against the ECHR holds: "[...] that the relevant legal rules did not provide sufficient guidance and were not formulated with the degree of precision required by the Convention so as to satisfy the requirement of "lawfulness" set out by the Convention [...]. Thus, the applicant could not have reasonably expected to foresee, even with appropriate legal advice, the consequences of his conduct. This being so, the Court comes to the conclusion that the applicant's detention was not lawful under domestic law and that there has been a breach of Article 5 § 1 of the Convention."[78]

The ECtHR's reasoning is questionable. Firstly, lack of the definition of prostitution in the domestic law is not decisive in order to conclude that the applicant's detention on the grounds of reasonable suspicion of committing an offence of pimping was unlawful pursuant to the domestic law. This fact cannot be considered an argument determining the ECtHR to condemn the Republic of Moldova. Some misunderstood this point.[79]

Secondly, lack of the relevant precedents is not decisive for determining whether the provision is foreseeable. Where the domestic courts are called on to interpret a provision of criminal law for the first time, an interpretation of the scope

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[75] Judgment of the Supreme Court of Justice of the Republic of Moldova of 21 June 2016. Casefile no. 1ra-805/2016. Available at: https://goo.gl/W5CuFk (accessed at 19 January 2019).

[76] Judgment of the Chisinau Court of Appeal of 13 September 2016. Casefile no. 1a-1546/16. Available at: https://goo.gl/oFuaqP (accessed at 19 January 2019).

[77] ECHR, Case of *Litschauer v. the Republic of Moldova*, Application no. 25092/15, Judgment of 13 November 2018, § 34-35. Available at: https://goo.gl/ZUqDuA (accessed at 19 January 2019).

[78] *Ibidem*, § 35.

[79] *See: The ECHR indictment // Moldova will pay 10 thousand euro for damages since the domestic legislation does not contain the definition of prostitution*. Available at: https://goo.gl/fVgcQF (accessed at 19 January 2019).

of the offence which was consistent with the essence of that offence must, as a rule, be considered as foreseeable.[80] A provision cannot be considered unforeseeable just because the judges are faced with a relatively novel legal issue, not yet clarified through judicial interpretation. Thus, the fact that the applicant committed an offence prior to having consolidated the case law on the definition of "prostitution"[81] cannot tip the balance towards the infringement of Article 5 § 1 of the ECHR. The ECtHR was expected to check whether the interpretation suggested by the courts was reasonable and compliant with committing the offence of pimping. The ECtHR has failed to do so.

Thirdly, the ECtHR has chosen to compare the approach taken by the Supreme Court of Justice in case of *Briscoe and Zagnitco* as well as such in case of *Isachi* with the Decision of the Constitutional Court no. 36/2018, whereby it has stated that these are totally opposed. Proceeding this way, the ECtHR equalled the Constitutional Court of the Republic of Moldova with the judicial instances exercising the justice. However, the Constitutional Court of the Republic of Moldova does not make part the domestic judicial system. This follows from § 50 of the Judgment of the Constitutional Court of the Republic of Moldova no. 6 of 16 May 2013 on the control of the constitutionality of Article 23 para. (4) of the Law no. 317 of 13 December 1994 on the Constitutional Court: "The Constitutional Court's case law nature makes applicable the principles of judicial independence, despite of the fact that the constitutional case law authority does not make part of the judicial system."[82] Hence, it would be groundless to assimilate the Constitutional Court of the Republic of Moldova with the judicial instances exercising justice.

At the same time, the ECtHR has asserted that due to "intervention" of the Constitutional Court the debates concerning interpretation of the notion of prostitution seem to roll on in the Republic of Moldova. In other words, the Constitutional Court of the Republic of Moldova has "muddied the waters". It could technically be claimed "guilty" for not being "clear" yet if the erotic performances displayed in the context of video-chat activity constitute a case of prostitution or not. This argument (which, otherwise, was the core argument of the

[80] ECHR, Joint dissenting Opinion of Judges Spano and Kjølbro in Case of *Litschauer v. the Republic of Moldova*, § 10. Available at: https://goo.gl/ZUqDuA (accessed at 19 January 2019); ECHR, Case of *Huhtamäki v. Finland*, Application no. 54468/09, Judgment of 6 March 2012, § 46-54. Available at: https:/e /goo.gl/nbjVeu (accessed at 19 January 2019); Case of *Perinçek v. Switzerland* [GC], Application no. 27510/08, Judgment of 15 October 2015, § 135. Available at: https://goo.gl/HUPNhd (accessed at 19 January 2019); Case of *Dmitriyevskiy v. Russia*, Application no. 42168/06, Judgment of 3 October 2017, § 82. Available at: https://goo.gl/qSn8FP (accessed at 19 January 2019); Case of of *Savva Terentyev v. Russia*, Application no. 10692/09, Judgment of 28 August 2018, § 58. Available at: https://goo.gl/frfxyW (accessed 19 January 2019).

[81] ECHR, Joint dissenting Opinion of Judges Spano and Kjølbro in Case of *Litschauer v. the Republic of Moldova*, § 8. Available at: https://goo.gl/ZUqDuA (accessed at 19 January 2019).

[82] Judgment of the Constitutional Court of the Republic of Moldova no. 6 of 16 May 2013 on the check of the constitutionality of Article 23 para. (4) of Law no. 317 of 13 December 1994 on the Constitutional Court (Application no. 17a/2013), published in the Official Gazette of the Republic of Moldova no. 119-121 of 31 May 2013.

ECtHR) is wrong. In fact, the things at the Supreme Court of Justice were not as clear as believed by the ECtHR. The ECtHR failed to take into consideration the fact that in about a month after the trial of case *Briscoe and Zagnitco*[83] the Supreme Court of Justice issued its judgment in case of *Bologan and Gurdis*,[84] in which the supreme instance has reversed the rulings of the inferior instances, referred the case for a retrial and made it clear to the courts of appeal that conducting erotic video-chat activity would arguably not constitute prostitution. Same message was also conveyed to the courts of appeal once the Constitutional Court has issued its Decision no. 36/2018, *i.e.* in case of *Baraboi and Gabura* as well as in case of *Nunez* (cited above). Eventually, if not for the Decision of the Constitutional Court no. 36/2018, then probably, the ECtHR would have stated that there existed a reasonable suspicion that the applicant had committed an offence provided for by the criminal law, which would have had been a lamentable mistake. Remaining in the sphere of assumptions, one could presume that if the Supreme Court of Justice would have had a well established case-law, pursuant to which the erotic performances displayed in the context of video-chat activity would have constituted prostitution then the ECtHR would have stated that the applicant had clearly committed the offence of pimping. The like approach would have contravened to Article 3 of the Optional Protocol to the Convention on the rights of the child on the sale of children, child prostitution and child pornography as well as to Article 2 letter e) of the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (the contents of these articles was described earlier). From here it follows that, as established earlier, that displaying genitals and/or arousal of one's own genital organs (erotic performances) in the context of video-chat activity represents pornography rather than prostitution. Unlike the Constitutional Court of the Republic of Moldova, the ECtHR failed to take into consideration these documents, adopted under the auspices of the Council of Europe and of the European Union respectively. The Court of Justice of the European Union has stressed that "[…] [T]he requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive […]. Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law."[85] Therefore, even if there existed the well established case-law of the Supreme Court of Justice, still contrary to the

[83] Judgment of the Supreme Court of Justice of the Republic of Moldova of 21 June 2016. Casefile no. 1ra-805/2016. Available at: https://goo.gl/W5CuFk (accessed at 19 January 2019).

[84] Judgment of the Supreme Court of Justice of the Republic of Moldova of 19 July 2016. Casefile no. 1ra-999/2016. Available at: https://goo.gl/rEXVwz (accessed at 19 January 2019).

[85] CJEU, Case C-441/14, *Dansk Industri*, Judgment of 19 April 2016, § 33-34. Available at: https://goo.gl/RpyT2N (accessed at 19 January 2019).

European consensus, and hence, incorrect, the ECtHR would have to condemn the Republic of Moldova.

Finally, we cannot ignore the fact that pursuant to Article 28 para. (1) of the Law of the Republic of Moldova no. 317 of 13 December 1994 on the Constitutional Court, "Judgments of the Constitutional Court are legal provisions enforceable across the entire territory of the country for all of public authorities and for all of the legal entities and natural persons."[86] Pursuant to Article 28^2 of the same law, "failure to perform or undue performance, preventing effective execution of the judgments issued by the Constitutional Court entail the liability provided for by the effective legislation." The need to comply with the Constitutional Court judgments by all of the public authorities, including courts, was also specified in the Judgment of the Constitutional Court of the Republic of Moldova no. 18 of 2 June 2014, concerning constitutional review of the Law no. 109 of 3 May 2013 on the amendment and completion of some legislative acts:

> "100. The generally binding nature of the Judgments issued by the Constitutional Court is a paramount requirement underlying good functioning of the domestic rule of law, implying stability of the Constitution. Whether we relate to the common law courts or to the Parliament or Government, all are obliged to abide by the provisions of the Constitution and, implicitly, judgments of the Constitutional Court.
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> 101. An implicit consequence of disregarding directly or indirectly, in whatever form, the judgments issued by the Constitutional Court would inevitably lead to the derogation from the principle of supremacy of the Constitution, the principle of separation of powers and, implicitly, that of the state of law [...].
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> 102. Finally, [...] the binding power of the case law acts, and hence, judgments of the Constitutional Court, is being attached not only to the operative part but also to the considerations supporting the latter. Thus, the considerations as well as the operative part of the judgments issued by the Constitutional Court shall be generally mandatory, pursuant to provisions of Article 140 of the Constitution and shall be equally imposed to all subjects of law [...]."[87]

Unlike the Supreme Court judgment delivered in case of *Briscoe and Zagnitco* (which, otherwise, is not mandatory for other courts judging similar cases), the Decision of the Constitutional Court no. 36/2018 is mandatory for the courts, although through this decision of the Constitutional Court did not declare unconstitutional any of the legislative provisions. The Constitutional Court's judgments are "final". To that end, in *Konolos v. România*, the ECtHR has stated that "by virtue of the Constitution, judgments of the Constitutional Court arguing in favour of an exception of unconstitutionality shall be applicable immediately and mandatory for all public authorities, including for the judicial powers while

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[86] The Law of the Republic of Moldova no. 317 of 13 December 1994 on the Constitutional Court, published in the Official Gazette of the Republic of Moldova no. 8 of 7 February 1995.

[87] Judgment of the Constitutional Court of the Republic of Moldova no. 18 of 2 June 2014 for the check of the constitutionality of Law no. 109 of 3 May 2013 for the amendment and completion of some legislative acts (Law on the Constitutional Court and the Constitutional Court Code) (Statute of Judges, Powers and Procedure of the Constitutional Court) (Application no 34a/2014), published in the Official Gazette of the Republic of Moldova no. 256-260 of 29 August 2014.

producing *erga omnes* effect […]. Consequently, the like judgment of the Constitutional Court provides for the source of law […]."[88] Why then the ECtHR failed to apply same rationale in *Litschauer* case? Furthermore, in *Şahin Alpay v. Turkey*, the ECtHR stated that, if the Constitutional Court ruled that an individual's pre-trial detention was in breach of the Constitution, the competent courts should react in such a way as to ensure the individual's release, unless new reasons or evidence justified not doing so.[89] For another court to call into question the powers conferred on a constitutional court to give "final and binding" judgments ran counter to the fundamental principles of the rule of law and legal certainty.[90] Again, why then the ECtHR failed to apply same argument in *Litschauer* case? While not expecting any reply to this question, let us notice that in a number of cases against the Republic of Moldova[91] the ECtHR paid special attention to certain explanatory judgments of the Supreme Court of Justice, despite of the fact that these served as recommendations for the courts [Article 7 para. (7) of the Criminal Procedure Code of the Republic of Moldova]. Instead, in case of *Litschauer*, even if the Decision of the Constitutional Court no. 36/2018 is mandatory for the judicial instances, the ECtHR has never given it due consideration. It should have manifested a difference with regard to the statements made by the Constitutional Court. It should have stated that the issue reviewed under a magnifying glass was actually resolved by the Constitutional Court and the test of time would have brought the course of case-law in the right direction. Just to make it clear: the ECtHR should have stated the infringement of Article 5 § 1 of the ECHR in case of *Litschauer*, since the applicant was placed under arrest in the absence of a reasonable suspicion of committing an offence. He committed a contravention of producing and disseminating pornography. But with regard to a person that has committed a contravention such measure of detention as the arrest cannot apply.

Thus, we regret the twist taken by the ECtHR judgment in case of *Litschauer*. Still, there is a chance to "fix the mistake" in case of *Baraboi and Gabura*,[92] which is pending before the ECtHR. We hope that this time, the ECtHR will abstain from the superficiality as it was in case of *Litschauer*. We shall see.

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[88] ECHR, Case of *Konolos v. România*, Application no. 26600/02, Judgment of 7 February 2008, § 122. Available at: https://goo.gl/peqi21 (accessed at 19 January 2019)

[89] ECHR, Case of *Şahin Alpay v. Turkey*, Application no. 16538/17, Judgment of 20 March 2018, § 115. Available at: http://hudoc.echr.coe.int/eng?i=001-181866 (accessed at 19 January 2019).

[90] *Ibidem*, § 118.

[91] ECHR, Case of *Sara v. the Republic of Moldova*, Application no. 45175/08, Judgment of 20 October 2015, § 35. Available at: https://goo.gl/cqVBzv (accessed at 19 January 2019); Case of *Lazu v. the Republic of Moldova*, Application no. 46182/08, Judgment of 5 July 2016, § 38. Available at: https://goo.gl/AFyRJX (accessed at 19 January 2019); Case of *Manoli v. the Republic of Moldova*, Application no. 56875/11, Judgment of 28 February 2017, § 31. Available at: https://goo.gl/haiTF9 (accessed at 19 January 2019); Case of *Ialamov v. the Republic of Moldova*, Application no. 65324/09, Judgment of 12 December 2017, § 18-19. Available at: https://goo.gl/4gZACH (accessed at 19 January 2019).

[92] ECHR, *Baraboi and Gabura against the Republic of Moldova*, Application no. 75787/17. Available at: https://goo.gl/gprhYe (accessed at 19 January 2019).

Not all of the judges supported the judgment of the ECtHR delivered in case of *Litschauer*. In a dissenting opinion shared by the judges Spano and Kjølbro pointed out, *inter alia*, was that it is a matter of interpretation whether "prostitution" requires direct physical contact or whether it may also include the obtaining of sexual gratification as a result of a model's performance, displayed by means of erotic video-chat and in return for payment. In their view, there is nothing arbitrary or unreasonable in the latter and more extensive interpretation, adopted by the domestic courts in the applicant's case. Such an interpretation of the notion "prostitution" was in accordance with the opinion of the State Agency for the Protection of Morality and it seems consistent with the essence of the offence, which is to protect persons, in particular women, from sexual and economic exploitation. The statements of the Constitutional Court are not sufficient for driving to a conclusion pursuant to which the applicant was not detained on the grounds of a reasonable suspicion of having committed the offence of pimping. Hence, the dissenting judges believe that the applicant was detained in compliance with the law.[93]

The dissenting opinion shared by the Islandic and Danish judges was criticized by Mihai Poalelungi. He highlighted that the opinion of the two judges was not based on the European consensus shaped up with regard to interpretation of the notion of "prostitution", but rather on their personal convictions. Likewise, noticed was a possibility of drawing a number of eloquent parallels between the case of *Litschauer* and that case of *Dmitriyevskiy*. In both cases, there existed the "Ministries of Truth": the State Agency for the Protection of Morality, and accordingly, a language expert. In both cases, the domestic courts failed to resolve in an exclusive manner all of the legal issues. The last detail would have merited more attention on behalf of the two distinguished dissenting judges.[94] We also subscribe to these remarks.

Clearly separated from the abovementioned, let us herewith add that the ECtHR should have checked whether the interpretation of the courts was reasonable and consistent with the essence of the offense of pimping when they applied the arrest to the applicant, not when they found his guilt. This, because the applicant has lodged his complain before the ECtHR from the standpoint of provisions of Article 5 of the ECHR. And yet when the courts proceeded the arrest the applicant, they remained tacit with regard to the applicant's argument concerning lack of reasonable suspicion of having committed infringement provided for by the criminal law and of alleged extensive interpretation of the criminal law. Accordingly, the ECtHR could have determined violation of Article 5 § 1 of the ECHR for mere reason that the courts failed to produce the "relevant and sufficient" motives for placing the applicant under arrest. But it has chosen another line of rationale, which we consider questionable. Moreover, we believe that the

[93] ECHR, Joint dissenting Opinion of Judges Spano and Kjølbro in Case of *Litschauer v. the Republic of Moldova*, § 12. Available at: https://goo.gl/ZUqDuA (accessed at 19 January 2019).

[94] Mihai Poalelungi, *Case of Litschauer and proceedings of the Constitutional Court of the Republic of Moldova*, p. 10-11.

Strasbourg court judges could have taken a look on the other part of the Atlantic Ocean, into the case law of the Supreme Court of the United States of America,[95] in order to convince themselves that prostitution requires mandatory a bodily contact between the seller and buyer while the infringements referred to in case of *Litschauer* constitute pornography.

Against the background of all the considerations outlined above, it can be concluded that the ECtHR has treated this case in quite an insensitive manner without making a profound study of the legislation, case-law and the legal doctrine.

6. Impact of the Decision of the Constitutional Court no. 36/2018 as well as that of the case of *Litschauer* on the judicial practice

It is regrettably, that the judgment in case of *Litschauer v. Republic of Moldova* could produce a rather misleading effect onto the case-law in the Republic of Moldova. This practice continued to remain non-unitary even after the Decision of the Constitutional Court no. 36/2018 was passed on 19 April 2018. Serving as a proof are some of the judgments of the Supreme Court of Justice of the Republic of Moldova, delivered after 19 April 2018.

Thus, in one of the cases of judicial practice, the defence counsel has totally failed to respond and appeal the legal appreciation given to the offence by the courts. Consequently, the defendant G.D. was convicted of committing an offence provided by Article 220 para. (2) letter a) of the PC RM, *i.e.* pimping by engaging two or more persons. Actually, G.D., jointly with other persons, has prompted and forced B.G., P.A., G.E. as well as other unidentified persons to provide sexual services online in return for payment. These included exposure and arousal of one's own genitals in front of a webcam as well as gratification of sexual desires of the beneficiaries by pornographic performances.[96] In this case, the supreme instance failed to take into consideration the fact that pursuant to the criminal procedure legislation of the Republic of Moldova constitute an *ex officio* reason to reverse the judgment of the inferior court if the committed offence was given an incorrect legal appreciation [Article 427 para. (1) item 12 and Article 444 para. (1) item 12 of the Criminal Procedure Code of the Republic of Moldova]. The prerogative in discussion should have been viewed as an effective modality of assuring the principle of legality. Applicable here is an exception from the *non ultra petita* principle. This exception is being justified in the public interest. The

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[95] *See e.g.: California v. Freeman* (1989). Available at: https://goo.gl/EQHZQB (accessed at 19 January 2019); *Wooten v. Superior Court* (2001). Available at: https://goo.gl/7D7pB9 (accessed at 19 January 2019); *State v. Washington-Davis* (2016). Available at: https://goo.gl/4zyJ9Y (accessed at 19 January 2019) etc. In the leading case, *People v. Freeman*, the California Supreme Court holds that '[f]or a "lewd" or "dissolute" act to constitute "prostitution", the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other'. This conclusion was endorsed by the Supreme Court of the United States of America in *California v. Freeman*.

[96] Judgment of the Supreme Court of Justice of the Republic of Moldova of 17 October 2018. Casefile no. 1ra-1208/2018. Available at: https://goo.gl/4mCBr5 (accessed at 19 January 2019).

purpose of a criminal proceeding is to protect individuals, society and the state from crime and to protect individuals and society from illegal acts attempted by the officials in the course of crime investigation either alleged or committed so that any person who has committed an offence is punished to the extent of his/her guilt and none of the innocent persons are subject to criminal liability and convicted [Article 1 para. (2) of the Criminal Procedure Code of the Republic of Moldova]. Thereby, even if the judgment of the court of appeal was challenged by the state attorney alone (failing to agree with the sentence imposed), the Supreme Court of Justice could have reversed the judgments of the inferior courts and proceed to applying provisions of Article 90 of the CC RM. Our assumption is stemming from the review of the judgments issued by the supreme instance, in which the latter has mentioned that: "[…] [T]he prosecutor has challenged the judgment of the court of appeal to the disadvantage of the defendant, though the court is entitled to attenuate the position of the defendant or even order his acquittal. […] [T]he prosecutor represents the interests of the society while the interests of the latter are confined to application of justice seeking to establish the truth."[97] One thing remains unclear, and that is why not applying this rationale in the criminal proceedings bringing accusations to G.D.? The Supreme Court of Justice of the Republic of Moldova is not consistent in application of its case law.

Yet in another case, the defender has proven the required diligence. Thus, through the judgment of the Chisinau Court, an individual, N.J., was condemned on the grounds of Article 220 para. (2) letter a) of the PC RM. The latter has prompted and forced a number of females to provide sexual services online in return for payment. These included exposure and arousal of one's own genitals in front of a webcam as well as gratification of sexual desires of the beneficiaries by pornographic performances. The defendant's counsel has filed a claim on lifting the ordinance for bringing charges against the defendant because his actions of the latter do not comply with the constitutive elements of the imputed offence. This claim was rejected while the sentence against N.J. was maintained by the Chisinau Court of Appeal. Subsequently, the defendant's counsel has filed an ordinary appeal, requesting to overrule previously adopted judgments and dismiss the criminal procedure with regard to the defendant on the grounds that the offence committed by the latter do not comply with the constitutive elements of the imputed offence. The Supreme Court of Justice of the Republic of Moldova ruled to accept the ordinary appeal, fully dismissing the judgment of the court of appeal with regard to N.J. and disposing retrial of the case by the same court of appeal by the different panel of judges.[98] This case is pending before Chisinau Court of Appeal.[99]

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[97] Judgment of the Supreme Court of Justice of the Republic of Moldova of 7 February 2017. Casefile no. 1ra-319/2017. Available at: https://goo.gl/9KjjVL (accessed at 19 January 2019).

[98] Judgment of the Supreme Court of Justice of the Republic of Moldova of 29 May 2018. Casefile no. 1ra-813/2018. Available at: https://goo.gl/QCz1Ti (accessed at 19 January 2019).

[99] *See:* The agenda of the hearings of the Chisinau Court of Appeal in Casefile no. 02-1a-14528-06072018. Available at: https://goo.gl/eMoeBK (accessed at 19 January 2019).

It is worth noticing a more decisive position taken by the supreme instance under the following circumstances: through a verdict of the Chisinau Court, two persons B.D. and G.V. were condemned pursuant to Article 220 para. (2) letters a) and c) of the PC RM. Herewith mentioned two persons has set up online sexual services by four females in return for payment. Defender of the convicts proceeded to file an appeal against the sentence, requesting retrial of the case and delivery of new judgment through which the actions of the latter to be reframed bearing on the provisions of Article 90 of the CC RM. The court of appeal has rejected this request. The judgment of the court of appeal was challenged by defendant through an ordinary appeal requesting once again case retrial and delivery of new judgment, through which the actions of the latter to be reframed bearing on the provisions of Article 90 of the CC RM. In its turn, the Supreme Court of Justice of the Republic of Moldova has overturned the judgment of the court of appeal and referred the case for a retrial. In addition, the supreme instance requested the court of appeal to bear in mind the Decision of the Constitutional Court no. 36/2018.[100] Following retrial of the case, the Chisinau Court of Appeal has ruled that carrying out erotic video-chat activity is a matter of pornography, while charges have to be applied bearing on the provisions of Article 90 of the CC RM.[101] Thus, the court of appeal was receptive to the message of the supreme instance and took into consideration the Decision of the Constitutional Court no. 36/2018, which is a positive sign.

In addition to the case law of the Supreme Court of Justice of the Republic of Moldova, one could also see the two contradicting judgments delivered by one of the primary courts delivered after adoption on 19 April 2018 of the Decision of the Constitutional Court no. 36/2018.

So, through the judgment delivered by the Chisinau Court of 31 July 2018,[102] ruled was a dismissal of the criminal procedure on bringing charges against C.P. and C.A. of committing the offence of pimping. In substantiation of this solution, the court mentioned that the erotic video-chat activity does not imply any physical contact, and hence, there are no grounds to talk about prostitution; the offence of setting up and providing sexual services online (in the context of erotic video-chat activity) constitute a case of contravention (Article 90 of the CC RM) rather than that of criminal offence (Article 220 of the PC RM).[103] The court of appeal has overturned this verdict arising from the procedural reasons. However, it has holds that the legal classification of the offence of setting up erotic video-chat activity based on provisions of Article 90 of the CC RM (production and dissemination of pornographic materials) is a correct one. In order to strengthening its recitals, the

[100] Judgment of the Supreme Court of Justice of the Republic of Moldova of 3 July 2018. Casefile no. 1ra-1241/2018. Available at: https://goo.gl/sNh8ng (accessed at 19 January 2019).

[101] Judgment of the Chisinau Court of Appeal of 4 October 2018. Casefile no. 1a-1649/18. Unpublished.

[102] By the way, in this case (case of Cosyn), raised was one of the exceptions of unconstitutionality (Application no. 37g/2018) that served as the basis for the Decision of the Constitutional Court no. 36/2018.

[103] Judgment of the Chisinau District Court of 31 July 2018. Casefile no. 1-675/16. Unpublished.

court of appeal, *inter alia*, referred to the Decision of the Constitutional Court no. 36/2018.[104]

Through another ruling of the Chisinau District Court, M.N. was sentenced to three years of prison with a probation suspended sentence for a period of one year. In fact, he has purchased webcams, sex toys, notebooks, and offered an apartment to a number of persons with the view of providing sexual services online, manifested through the arousal of one's own genitals in front of the webcam in return for payment. In short, the offender has launched and set up the erotic video-chat activity. The Chisinau District Court has limited itself to specifying that these actions are legally matching the provisions of Article 220 of the PC RM (*i.e.* forcing into prostitution, facilitate practicing prostitution by another person, actions perpetrated with regard to a number of persons or by a number of persons) without giving any other details.[105] Neither the Chisinau Court or the Court of Appeal have made reference to the Decision of the Constitutional Court no. 36/2018. In present case, it was the prosecutor alone who contested the verdict of the tribunal of the first instance, stating that the sentence imposed to the offender by the Chisinau District Court is overly mild. Through its judgment of 13 November 2018,[106] the Chisinau Court of Appeal accepted the prosecutor's claim. The Court quashed the judgment in the part concerning the conditional suspension of the sentence of imprisonment. The court of appeal accepted the arguments brought forward by the prosecutor on the impossibility of conditional suspension of the sentence of imprisonment, bearing in mind the fact that M.N. is a foreign citizen and do not have temporary or permanent residence permit to stay in the territory of the Republic of Moldova (but the like approach is a discriminatory one, and therefore, contrary to the principle of equality of all persons before the law).[107] In the opinion shared by the court of appeal, a person in question should serve the term of imprisonment of three years in a penitentiary. On the day when the court of appeal delivered its judgment (*i.e.* 13 November 2018), the ECtHR in Strasbourg proceeded to condemn the Republic of Moldova in *Litschauer* case, because the applicant – guilty of setting up erotic video-chat activity – was kept in arrest during fifty-five days in lack of any foreseeable provisions from which it could be derived that the latter has committed an offence of pimping. The ECtHR has assigned to the applicant an amount worth 8.000 Euro as compensation for non-pecuniary damage and 2.000 Euro in respect of costs and expenses. A strange coincidence, isn't it?

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[104] Judgment of the Chisinau Court of Appeal of 11 October 2018. Casefile no. 1a-18855/18. Unpublished.

[105] Judgment of the Chisinau District Court of 24 July 2018. Casefile no. 1-457/2018. Available at: https://goo.gl/9rGvhA (accessed at 19 January 2019).

[106] Judgment of the Chisinau Court of Appeal of 13 November 2018. Casefile no. 1a-1644/18. Available at: https://goo.gl/GSAANF (accessed at 19 January 2019).

[107] In this regard, *see:* ECHR, Case of *Aleksandr Aleksandrov v. Russia*, Application no. 14431/06, Judgment of 27 March 2018, § 25-30. Available at: https://goo.gl/QSezkx (accessed at 19 January 2019).

So far, it does not seem possible to assert that the effectiveness of the Decision of the Constitutional Court no. 36/2018 has put an end to discussions concerning the formal interpretation of the notion of prostitution. We hereby refer not only to the controversial implications of the ECtHR judgment in *Litschauer v. Republic of Moldova*, we also refer to the effects produced by passing the Law no. 159 of 12 October 2018 on the amendment of some of the legislative acts (hereafter referred to as the Law no. 159/2018).[108] Amended through this law was Article 89 of the CC RM. The amendment in question gives the following definition to the notion of prostitution: "gratification of sexual desire of any person by any method and/or means, in return for payment, including by use of information technologies or electronic means of communication."

As can be seen, this legislative amendment implies ignoring the Decision of the Constitutional Court no. 36/2018. *A fortiori*, this legislative amendment contravenes to the provisions of Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (to which the Republic of Moldova is a signatory) as well as Article 2 letter e) of the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. It looks like the legislator had forgotten that "the Republic of Moldova has a commitment to bring its legislation in line with the regulatory framework of the European Union under the Association Agreement with the European Union."[109] The Parliament of the Republic of Moldova has wiped out the distinction between prostitution and pornography. It has taken the approach implying that: "the white is black and the black is white." It has distorted the genuine nature of things, which is worrisome indeed. But "the judge's ethos ought to be directed toward justice."[110] For these reasons, the courts would have to continue using the Decision of the Constitutional Court no. 36/2018 as a guidance alongside with herewith-mentioned international instruments rather than by the notion of "prostitution" provided in Article 89 of the CC RM.

It is worth mentioning that when delivering the judgment in *Litschauer* case, the ECtHR did not envisage the amendments introduced in Article 89 of the CC RM through the Law no. 159/2018. The ECtHR referred to the previous wording of Article 89 of the CC RM, envisaging that "practicing prostitution shall be penalized [...]." In this case, the ECtHR was not sufficiently circumspect. This status of things accredits serious reservations with regard to the legal accuracy maintained by the ECtHR when delivering the judgment discussed herewith.

Indeed, instead of casting some light, the judgment in *Litschauer* case could leave the courts of the Republic of Moldova amidst the fog. Moreover, we believe

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[108] The Law of the Republic of Moldova no. 159 of 12 October 2018 on the amendment of certain legislative acts, published in the Official Gazette of the Republic of Moldova no. 416-422 of 9 November 2018.

[109] Mihai Poalelungi, *The case of Litschauer and the proceedings before the Constitutional Court of the Republic of Moldova*, p. 10.

[110] Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, Oxford Journal of Legal Studies, 2006, vol. 26, no. 1, p. 10.

that the effects produced by the Decision of the Constitutional Court no. 36/2018 will be tempered by the amendments introduced in Article 89 of the CC RM through the Law no. 159/2018.

7. The eventual solution

In order to settle the differences between the legislative power and the Constitutional Court as well as to ensure coherence between the domestic law and the European consensus, we would recommend to the Moldovan legislator to redefine the notion of prostitution. Serving as the foundation for the new definition could be *de lege ferenda* proposal formulated by Sergiu Brînza. As believed by this author, the legislation of the Republic of Moldova should contain the following definition of the notion of prostitution: "Prostitution shall be understood as practicing sexual activity with different persons benefiting on the services of a prostitute, the latter acquiring this way means of subsistence or main livelihoods."[111] In this regard, a person practicing prostitution could be either female or male.

Consequently, we would recommend replacing the text in Article 89 of the CC RM, reading "gratification of sexual desire of a person by any method and/or means, in return for payment, including by use of information technologies or electronic communications" with "practicing sexual activity with different persons benefiting on the services provided by female or male prostitute acquiring, this way, means of subsistence or main livelihoods." Likewise, provisions of Article 89 of the CC RM (and, implicitly, provisions of Article 220 of the PC RM) will be brought back into the riverbed of the constitutionality.

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