

## GEORGIAN REGIME OF REGULATION OF PROSTITUTION AND ITS WATCHDOGS

### ABSTRACT

Prostitution is prohibited by Georgian regime of prostitution, and a sex worker is punished, but not a client. The actions of third parties are also criminalized. Even today, the sex work is still considered in the moral context, and the addressee of criticism is both, the buyer of this service, and the sex worker, and all critics judge them from the standpoint of their subjective moral prism of admissibility or inadmissibility, and require the punishment of either one, or another. The purpose of the article is to review the regimes of prostitution and to select the best experience. Consideration of these issues is important for revision of Georgian regime of prostitution, which is the source of violation of human rights and unjustified police repression.

The purpose of this article is not to romanticize prostitution, but rather to identify the source of the harm (that is inherent to this work) and seek ways to reduce it in order to make the environment safe for sex workers, so that they enjoy all of the rights that are guaranteed to all by the Constitution.

The question of the constitutionality of the legislation defining prostitution in Georgia was brought to the Constitutional Court in 2018, although the claim has not been considered yet. Against this background, in this article, we will try to make our small contribution to the identification of the problem and the ways to solve it.

### I. INTRODUCTION

To decide with whom and under what conditions an individual will have sexual relations, is only up to the participants in this relationship. Interference by the state in personal relationships, which are based on the will of people, is unjustified and violates the right of a person to dispose of his/her own life and make decisions about it. Even today the sex work is considered from a moral point of view, and the addressee of criticism is both, the buyer of this service and the sex worker, and all critics judge them from the standpoint of their subjective moral prism of admissibility or inadmissibility, and require the punishment of either one, or another.

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\* Doctor of Law, Associate (affiliated) Professor of the Caucasus University [tgegelia@cu.edu.ge].

In Georgia, the question of constitutionality of the legislation defining prostitution arose, when the plaintiffs filed a claim in the Constitutional Court to review the constitutionality of the prohibition of prostitution,<sup>1</sup> although the claim has not been considered yet. Public Defender of Georgia submitted his amicus curiae opinion to the Court regarding the constitutional claim and supported recognition of the prohibition of prostitution as unconstitutional.<sup>2</sup> Against the background of the above, with this article we will try to make our small contribution into identifying the problem and searching its solutions.

The Georgian regime of prostitution, which is defined in the law of 1984,<sup>3</sup> has never become the subject of criticism and discussion in Georgian academic texts and circles. This article aims to criticize the regime and show the harm caused by the regulation of prostitution itself, and not the prostitution.

In the 60s of the 20th century, the law of many countries was reformed.<sup>4</sup> In this process, one of the most urgent issues of scientists was the reach the agreement on the criteria for restriction of criminalization. The *Hart-Devlin* debate also addressed this issue.<sup>5</sup> *Hart's* view that moral crimes, including prostitution, should be decriminalized, also received strong support in criminal law doctrine.<sup>6</sup>

Norms prohibiting circulation of adult pornographic materials were also criticized, and conservatives and radical feminists were among those, who supported punishment of pornography,<sup>7</sup> while liberal scholars, on the other hand, opposed to punishment, because they saw no legal interest in protection against pornography, and neither did they see the harm that would justify criminalization.<sup>8</sup> Today, circulation of pornography is regulated in the US and European countries, although there is no longer such an absolute and

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<sup>1</sup> Constitutional claim N1354 “S.M. v. the Parliament of Georgia”, 3 October 2018 <<https://www.constcourt.ge/ka/judicial-acts?legal=1426>> [last accessed on 16 May 2022].

<sup>2</sup> Amicus curiae opinion: Author - Public Defender of Georgia N1354 “A. S.M. v. the Parliament of Georgia”, March 4, 2020 a <<https://www.constcourt.ge/ka/judicial-acts?legal=10230>> [last accessed on 16 May 2022].

<sup>3</sup> Article 1723, Code of Administrative Offenses of Georgia, <<https://matsne.gov.ge/document/view/28216?publication=511>> [last accessed on 16 May 2022].

<sup>4</sup> Group of Authors, edited by Tamar Gegelia, *The Scope of Criminal Justice* (Open Society Foundation, 2021) (in Georgian).

<sup>5</sup> Herbert Lionel Adolphus, *Law, Liberty, and Morality* (Stanford University Press 1963); Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1959).

<sup>6</sup> Tamar Gegelia, ‘The Real Impact of the Harm Principle on the Liberalization of Criminal Law’ (2021) 2 *Central and Eastern European Legal Studies* 171-203 <<https://eplopublications.eu/publication/digital-edition/real-impact-harm-principle-liberalization-criminal-law>> [last accessed on 15 December 2022].

<sup>7</sup> Catharine A. Mackinnon, *Butterfly Politics, Hanging the World for Women* (2nd edition, Belknap Press, An Imprint of Harvard University Press 2019) 96-108.

<sup>8</sup> Camille Paglia, *Fee Women Free Men* (Canongate Canons; Main - Canons edition 2018) 85-91.

comprehensive ban, as it used to be years ago.<sup>9</sup> Regardless of moral concepts, societies have come to the realization, that a person should not be punished for using marijuana, for having different sexual tastes or orientation, for sadomasochistic sexual relations, etc.<sup>10</sup>. Similar moral crimes have been removed from the catalog of crimes defined by modern criminal law<sup>11</sup>. The process of abolishing moral crimes is moving forward, albeit slowly.

The fundamental transformation of the criminal law of Georgia took place with the abolition of the 1960 USSR Code and the adoption of the independent Georgian Criminal Code in 1999. The Criminal Code of 1999 was revised several more times, decriminalizing a number of offences (e.g., verbal abuse, defamation) and criminalizing many other offences (e.g., torture, trafficking, child pornography, domestic violence, etc.). Despite these changes, Georgian criminal law still faces major challenges in being in harmony with international human rights standards.<sup>12</sup>

The Code of Administrative Offenses of 1984, which is a ghost of the Soviet totalitarian regime in modern Georgia, has not been revised, and as of today, it is still an effective mechanism of police repression against citizens. This law has the lion's share in strengthening the militia regime of prostitution in Georgia.<sup>13</sup> There are two main norms, that prohibit prostitution and disobedience/insulting the police.

Criminal law in liberal democracies is subject to constitutional control. Criminal law should be based on the principle of individual autonomy and respect human freedom, therefore, it should only establish minimum prohibitions, which are necessary to protect the legal interest from the encroachment of others.<sup>14</sup> The harm principle<sup>15</sup> applies to administrative offenses as well, especially since the sanctions provided by the law of 1984 are largely criminal by their nature. For example, in Georgia, the punishment of a person for the use of marijuana has been decriminalized, and punishment either by criminal or administrative law is not justified, because personal use of the drug does not harm others.<sup>16</sup>

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<sup>9</sup> For critical analysis of existing pornography regulations, see Paul Kearns, 'The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights' (2012) 1 Irish Law Journal 56-92.

<sup>10</sup> For history and analysis of abolition of moral torts in various jurisdictions, see Group of Authors, *supra* note 4, Section 1 of Chapter 2.

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.* Ushangi Bakhtadze, *Criminological Analysis of the Criminalization Process* (Sabauni 2021) (in Georgian).

<sup>13</sup> Tamar Dekanosidze, *Gender-Based Violence against Sex Workers and Barriers to Access to Justice* (Open Society Foundation/GYLA 2018) (in Georgian).

<sup>14</sup> John Stuart Mill, *On Liberty* (1st edition 1859, Batoche Books Limited 2001)13; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013) 28.

<sup>15</sup> For an analysis of the harm principle, see Group of Authors, *supra* note 4, Section 1 of Chapter 2. Bakhtadze, *supra* note 12.

<sup>16</sup> The Constitutional Court of Georgia established the incompatibility of criminalization of marijuana

According to Georgian legislation, prostitution is punished administratively, and facilitating it is punished criminally. The arguments provided to justify criminalization/decriminalization vary depending on whether the proponent is a conservative, radical, or liberal feminist group. Liberal opinion supports its decriminalization, which is also supported in this article.

The purpose of the article is to review the regimes of prostitution and select the best practice model, which can serve as a guide for changing Georgian regime of regulation of prostitution, which is a source of human rights violations and unjustified police repressions. The purpose of this article is not to romanticize prostitution, but rather to identify the source of the harm (which is inherent to this work) and seek ways to reduce it in order to make the environment safe for sex workers and ensure, that they enjoy all rights granted by the Constitution. The purpose of the article is to discuss the issue of criminalization of prostitution and some actions related to it from the perspective of liberal philosophy, to question legitimacy of criminalization of such actions, and to show the reader, that the harm related to these actions is not necessarily linked with the sex work, but with the regime that prohibits prostitution. However, when the article talks about the position supporting complete decriminalization of prostitution, it keeps in mind only voluntary activities of an adult sex worker.

## II. PROSTITUTION REGIMES

The essence of prostitution varies from country to country, which is explained by the historical, social or cultural contexts of a specific country.<sup>17</sup> The most common definition of prostitution is buying sexual services.<sup>18</sup> *Amnesty International* refers to prostitution as sex work and offers the following definition: “sex work is the exchange of sexual services (involving sexual acts) between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer”.<sup>19</sup>

Legal regulation of prostitution varies from country to country. In some countries it is punishable, while in others it is not, although the approaches differ here as well.<sup>20</sup>

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use with the Constitution of Georgia. see Judgment of the Constitutional Court of Georgia N1/13/732 “Citizen of Georgia Givi Shanidze v. Parliament of Georgia”, 30 November 2017 <<https://matsne.gov.ge/ka/document/view/3875278?publication=0>> [last accessed on 12 December 2022]; Judgment of the Constitutional Court of Georgia N1/3/1282 “Citizens of Georgia - Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia”, 30 July 2018, <<https://matsne.gov.ge/ka/document/view/4283100?publication=0>> [last accessed on 12 December 2022].

<sup>17</sup> Stuart P. Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford University Press 2020) 296.

<sup>18</sup> *ibid*, 298.

<sup>19</sup> Amnesty International Policy on State Obligation to Respect, Protect and Fulfil the Human Rights of Sex Workers (Amnesty International 2016) 3 <<https://www.amnesty.org/en/documents/pol30/4062/2016/en/>> [last accessed on 28 August 2022].

<sup>20</sup> Green, *supra* note 17, 295.

The scope of punishability is wider or narrower depending on what serves as basis for making certain actions punishable and what is the purpose of prohibition.<sup>21</sup>

Several models of regulation of prostitution can be distinguished: 1) According to one approach prostitution is illegal and punishable, and sex work is punished;<sup>22</sup> 2) Different regimes is established by the so-called Swedish<sup>23</sup> model, which is also referred to as neo-abolitionism.<sup>24</sup> Prostitution is illegal, though for sex work is punishable not a sex worker, but by buyers and other persons, who facilitate of prostitution.<sup>25</sup> According to this model, sex workers are victims of the circumstances, that a buyer exploits.<sup>26</sup> The lobbyists of this model are radical feminists;<sup>27</sup> 3) According to another approach, the sex work and actions of persons engaged in it are fully decriminalized, and sex work is minimally regulated by law, while the rights of sex workers are fully protected<sup>28</sup> (for example, New Zealand, Australia - New South Wales<sup>29</sup>); 4) Regulationism is an approach, where prostitution is legal and activities are strictly regulated by law (e.g., Germany, the Netherlands).<sup>30</sup>

<sup>21</sup> *ibid*, 315-323.

<sup>22</sup> Countries where this regime is introduced: Georgia, Russia, China, the United States. The exception is the state of Nevada where prostitution is legalized. For the analysis of the US model, see: Ronald Weitzer, 'Sex Work, Gender, and Criminal Justice' in Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex, and Crime* (Oxford University Press 2014) 514-518; Cecilia Benoit et al., 'Unlinking Prostitution and Sex Trafficking: Response to Commentaries' (2019) 48 *Archives of Sexual Behavior* 1973-1980.

<sup>23</sup> Countries where this regime is introduced: Sweden, Norway, France.

<sup>24</sup> For criticism of Swedish model see: Gillian M. Abel, 'A Decade of Decriminalization: Sex Work 'Down Under' but not Underground' (2014) 14(5) *Criminology & Criminal Justice* 588; Mariana Valverde, 'The Legal Regulation of Sex and Sexuality' in Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex, and Crime* (Oxford University Press 2014) 642-644; Janet Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29(2) *Harvard Journal of Law & Gender* 396-397, 400; Polina Bachlakova, 'How the Nordic model in France changed everything for sex workers' (Open Democracy 2020) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/long-read-how-nordic-model-france-changed-everything-sex-workers/>> [last accessed on 28 August 2022].

<sup>25</sup> Katie Beran, 'Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform' (2012) 30(1) *Law & Inequality* 49-52.

<sup>26</sup> Benoit and others, *supra* note 22, 1910.

<sup>27</sup> E.g., Mackinnon, *supra* note 7, 162-179. For criticism of this approach see: Benoit, *supra* note 22, 1918; Also see: Alan Collins and Guy Judge, 'Client Participation in Paid Sex Markets Under Alternative Regulatory Regimes' (2008) 28(4) *International Review of Law and Economics* 297; Prabha Kotiswaran, 'Beyond the allures of Criminalization: Rethinking the regulation of sex work in India' (2014) 14(5) *Criminology & Criminal Justice* 570; Jane Scoular, 'What's Law Got to Do with It? How and Why Law Matters in the Regulation of Sex Work' (2010) 37(1) *Journal of Law and Society* 16-17.

<sup>28</sup> For the analysis of New Zealand model, see: Abel, *supra* note 24, 580-587; Green, *supra* note 17, 295.

<sup>29</sup> Benoit, *supra* note 22, 1916.

<sup>30</sup> Molly Smith and Juno Mac, *Revolt Prostitutes, The Fight for Sex Workers' Rights* (Verso 2018) 176-189.

Although different regimes of prostitution are established, such as, for example, the so-called Swedish model, that punishes a client and third parties (facilitators), and a legalization model (for example, the Netherlands, Germany, Austria), as demonstrated by various studies, they have similar results in reality, including the marginalization of street prostitution and leaving of vast majority of sex workers beyond regulation of the legal system.<sup>31</sup>

The regime of legalization (regulation) of prostitution legalizes only certain types of sex work, and at strictly defined conditions.<sup>32</sup> The criticism expressed towards this regime is multidimensional. It is criticized for normalizing the sex industry,<sup>33</sup> leaving the sex workers beyond regulation by law, and failing to provide them with a safe environment.<sup>34</sup> Regulations impose on sex workers compulsory taxes and require conducting of routine medical examinations, which creates an unbearable environment for sex workers,<sup>35</sup> due to which they are forced to go back into illegal environment. This system is also criticized, as it still serves the interests of others and not the sex workers,<sup>36</sup> and they are still neglected.

As for the Swedish model of prostitution, many studies have proved, that the situation of sex workers has worsened. This is caused by disappearance of a safe environment. A client for fear of strict sanctions is trying to avoid showing up for a long time, a sex worker no longer has the time to check a client, talk to him and agree to service him. In such an environment, a client himself offers specific terms to a sex worker. A client also sets a fee, which is much smaller than it was before.<sup>37</sup> According to studies, sex workers are forced to work longer in exchange for less pay.<sup>38</sup> For example, in Norway, where exists the so-called Swedish model of prostitution, sex work at home, as well as renting a room jointly with other sex workers, is prohibited by law, namely a provision, which prohibits brothels.<sup>39</sup> Under such prohibitions, a sex worker, without having opportunity of a friendly supervision of other sex workers, has an intercourse with a client in an isolated place, which, as practice has shown, encourages robbing of sex worker and

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<sup>31</sup> Laura Agustín, 'Sex and the limits of enlightenment: The irrationality of legal regimes to control prostitution' (2008) 5(4) *Sexuality Research and Social Policy* 74, 76, 82; Beran, *supra* note 25, 50-52; Valverde, *supra* note 24, 642-644; Lenore Kuo, 'Prostitution Policy: Revolutionizing Practice Through A Gendered Perspective' (2003) 30(3) *The Journal of Sociology & Social Welfare* 132.

<sup>32</sup> Smith and Mac, *supra* note 30, 178-179.

<sup>33</sup> *ibid*, 188.

<sup>34</sup> Kuo, *supra* note 31, 134.

<sup>35</sup> Smith and Mac, *supra* note 30, 176-184. For analysis of discrimination as a result of introduction of mandatory medical tests see Kuo, *supra* note 31, 129. In the same work, the author states that, for example, medical tests in the Netherlands are not mandatory, although there is the lowest rate of spread of venereal diseases, which the author ascribes to aggressive information campaigns. *ibid*, 131.

<sup>36</sup> Smith and Mac, *supra* note 30, 184-185.

<sup>37</sup> *ibid*, 148.

<sup>38</sup> Scoular, *supra* note 27, 20.

<sup>39</sup> Smith and Mac, *supra* note 30, 146-163.

committing of various forms of violence against them.<sup>40</sup> Other sanctions, that can be imposed on sex workers for sex work, are eviction of home, confiscation of money and acquired items as illegal income, and deportation<sup>41</sup>. In such a legal environment, to claim, that the Swedish model decriminalizes actions of a sex worker and punishes only a client, is not true.

According to another study, for example, in Sweden, sex work in the indoor space is less likely to be under police control<sup>42</sup>, in contrast to street prostitution.<sup>43</sup> Therefore, according to researchers, the Swedish government's statement, that prostitution has decreased, is not accurate, as it simply has become more disguised, and this is promoted by modern technologies and Internet.<sup>44</sup> However, even the decrease of prostitution cannot be a solid argument for justifying criminalization of sex work. To justify the Swedish model and to counter the arguments of opponents, those, who support legalization of prostitution, along with increase of trafficking also point to correlation between these regimes<sup>45</sup>, but this is not supported by the obvious evidence of causality.<sup>46</sup> A regime that leaves sex workers unprotected, or forces them to circumvent strict regulations, creates fertile ground for exploitation. It should be noted, that New Zealand model was not subjected to similar criticism. An outstanding radical feminist, McKinnon<sup>47</sup> considers pornography and the sex industry as absolute evil, and in her latest works she praises the Swedish model, and in order to illustrate how trafficking and the number of sex workers have decreased in the countries with this regime, she refers for confirmation of this opinion to very old studies, reliability of which has already been doubted many times.<sup>48</sup> Georgian academic texts, when trying to show link between legalized prostitution and the increase in trafficking, either do not refer to any studies at all, or refer to unreliable sources.<sup>49</sup>

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<sup>40</sup> *ibid*, 146-163.

<sup>41</sup> *ibid*, 146-163; Kuo, *supra* note 31, 126.

<sup>42</sup> A total of 500 clients have been punished for buying sex in Sweden during 10 years. See Scoular, *supra* note 27, 19.

<sup>43</sup> Scoular, *supra* note 27, 18-19. For analysis also see Agustín, *supra* note 31, 76; Beran, *supra* note 25, 52-53.

<sup>44</sup> For analysis of this issue see: Beran, *supra* note 25, 51-52.

<sup>45</sup> Max Waltman, Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape, Working Paper No. 2010:3, Stockholm University Department of Political Science 21-22.

<sup>46</sup> Max Waltman, Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape, Working Paper No. 2010:3, Stockholm University Department of Political Science 21-22.

<sup>47</sup> Catherine McCinon considers the term sex work incorrect, and she mentions it ironically in public speeches. According to her academic texts, in her opinion, there is no equal sex in heteronormative relationships, and especially, if a woman is paid for sex. According to her assessment of prostitution, a woman is exploited. For example, see her public lecture <<https://www.youtube.com/watch?v=zpYegz1OqHA>> [last accessed on 17 May 2022].

<sup>48</sup> Mackinnon, *supra* note 7, 177.

<sup>49</sup> For example, see Irine Sarkeulidze, "Supply - Demand Market in the sphere of Trafficking - Reality, Threats and Trends to Reduce It" (2018) 2 German-Georgian Journal of Criminal Law 40-41, note 21.

It is noteworthy, that New Zealand, where prostitution is fully decriminalized, has not become a hotbed of trafficking<sup>50</sup>. A number of other studies have also found that jurisdictions where prostitution is criminalized, it has not declined.<sup>51</sup>

Based on the above facts and analysis, it can be said that finally, the reality in the countries, which follow Swedish model is, that in the regime supported by carceral feminism, whose stated goal is to protect sex workers from sexual exploitation, the regulations weaken and degrade those, whom they are supposed to protect. Therefore, this regime is counterproductive and does not deserve support.

As for the model of full decriminalization of prostitution - the New Zealand model, this regime is focused on creation of a safe environment for sex workers, and reduction of social stigma and resulting harm,<sup>52</sup> it is neither focused on economic benefits, nor does it envisage medical testing, which undermines personal autonomy of a person (as in the legalization model). It also does not cause harm to sex workers' safe environment by criminalizing a client and third parties (as is the case with the Swedish model). In case of full decriminalization regime, sex work is decriminalized, and neither the provider of sex services, nor the recipient of these services, or third parties are punished. Under this regime, there is almost no interest to facilitate sex work, the sex workers organize their own activities without any fear, as there is no police terror.<sup>53</sup> The regime sets regulations in a small dose, and that too is in the interests of sex workers, as such regulations focus on sex workers, who plan to leave the sex industry, and in such a case they are entitled to immediately receive social assistance.<sup>54</sup> Also, the regulation obliges clients to use condoms. Although social stigma and stigmatization of street sex work remains a challenge, the researchers point to examples of reduction of stigma and better protection of rights of sex workers, which would not have occurred under the old regime.<sup>55</sup> Of course, New Zealand regime is not perfect either, and it is also

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<sup>50</sup> To show the viciousness of New Zealand model, Catherine McKinnon only points to the fact, that it has not reduced violence and social stigma, and points to a 2008 report as evidence. Mackinnon, *supra* note 7, 178. It should be noted, that in New Zealand the new regime came into force in 2003 and 5 years later new studies (see note 52) show, that situation has improved.

<sup>51</sup> Kuo, *supra* note 31, 125.

<sup>52</sup> Smith and Mac, *supra* note 30, 198.

<sup>53</sup> In New Zealand, studies conducted after the Prostitution Reform Act (2003) revealed, that verbal and physical abuse of sex workers by passers-byes in the street still occurs, but an important finding is, that more and more sex workers apply to the police to protect their rights, and the police adequately responds to such requests. See Lynzi Armstrong, 'Who's the Slut, Who's the Whore?: Street Harassment in the Workplace Among Female Sex Workers in New Zealand' (2016) 11(3) *Feminist Criminology* 295-296. The author of the study points out, that despite many benefits, that decriminalization model has brought to sex workers, there is still much to be done in terms of changing social norms. Strengthening policies to change entrenched stereotypes about women and their sexuality, is essential to making streets completely safe for (and not just) sex workers. *ibid*, 298.

<sup>54</sup> Smith and Mac, *supra* note 30, 196.

<sup>55</sup> Fraser Crichton, *Decriminalizing Sex Work in New Zealand: Its History and Impact*, 21 August 2015



criticized for ignoring migrants, but it is more humane than all other regimes and it causes less harm<sup>56</sup>. In addition, the drawback of this regime is not something inherent, which cannot be corrected.

### III. LEGAL INTEREST PROTECTED BY PROHIBITION OF PROSTITUTION

Different reasons are provided as justification of criminalization of prostitution, depending on the ideology or philosophical view of the author.<sup>57</sup> According to one of the opinions, punishment of prostitution is justified from the point of view of protecting the health of the population,<sup>58</sup> which is important for prevention of spread of venereal diseases.<sup>59</sup> To justify punishment, they also point to the threat of weakening of the institute of family, propaganda of promiscuity and etc.<sup>60</sup> These views are moralistic, which indicates to prohibition of prostitution on the moral basis, and that it does not protect from encroachment of legal interest by others.

According to radical feminists, prostitution should be punished to protect women's rights, because the impunity of prostitution normalizes violence against women and their abuse.<sup>61</sup> Supporters of this opinion are a part of feminists, who consider sex workers as victims and support prohibition of prostitution for this reason.<sup>62</sup> According to them, as long as gender-based, social and economic inequality exists, sex work will always be a form of women's oppression and objectification.<sup>63</sup> According to their assessment, exploitation, oppression, degradation<sup>64</sup> and causing other harm to women are inherent in prostitution.<sup>65</sup> That is why they support criminalization of

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<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/decriminalising-sex-work-in-new-zealand-its-history-and-impact/> [last accessed on 21 January 2023].

<sup>56</sup> Smith and Mac, *supra* note 30, 199.

<sup>57</sup> Green, *supra* note 17, 313; Peter de Marneffe, *Liberalism and Prostitution* (Oxford University Press 2009) 3.

<sup>58</sup> Matthew Lippman, *Essential Criminal Law* (SAGE Publications 2013) 271; Green, *supra* note 17, 313.

<sup>59</sup> According to studies, the initiative to use safe sex, specifically condoms, comes from sex workers, and if they have to compromise, it is only to retain clients. see Beran, *supra* note 25, 27.

<sup>60</sup> Lippman, *supra* note 57, 271; Green, *supra* note 17, 313.

<sup>61</sup> Catharine A. MacKinnon, *Only Words* (Harvard University Press 1996) 37.

<sup>62</sup> The mentioned model has been criticized for unjustified paternalism. See Halley, *supra* note 24, 400.

<sup>63</sup> For the arguments of radical feminists, see Benoit, *supra* note 22, 1908.

<sup>64</sup> Andrea Dworkin, 'Prostitution and Male Supremacy' (1993) 1(1) *Michigan Journal of Gender & Law* 5-6; Catharine A. MacKinnon, 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender & Law* 13-14.

<sup>65</sup> For analysis of the mentioned arguments, see Joanna N. Erdman, 'Harm Production: An Argument for Decriminalization' in Alice M. Miller and Mindy Jane Roseman (eds), *Beyond Virtue and Vice* (University of Pennsylvania Press 2019) 253; Marneffe, *supra* note 56, 3-4; Scott A. Anderson, 'Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution' (2002) 112(4) *Ethics, the University of Chicago Press Journals* 752-754; Beran, *supra* note 25, 36-43.

the actions of the facilitators of prostitution (clients, pimps). It must be noted, that the Swedish model, supported by them does not empower women, as mentioned above; on the contrary, in such setting a client sets the terms of sex services, and thus is empowered further.

The second group of feminists - liberal feminists, do not deny the problem of inequality between the sexes and the influence of patriarchal culture. They also do not deny the harm and dangers associated with prostitution, although they link the harm with the regime regulating prostitution, declaration of sex workers as outlaws, and establishing control over them, and according to them the solution would be changing of environment, and not criminalization of this activity.<sup>66</sup> Also, according to the supporters of this position, putting all sex workers under one umbrella and not seeing their free will is wrong.<sup>67</sup> Free will in the ideal sense of the word is rare, which does not in itself exclude free decision<sup>68</sup>. As many authors have rightly noted, the decisions we make in life are often not desirable, but that in itself does not preclude us from having free agency to make a choice.<sup>69</sup>

Radical feminists' demand to criminalize prostitution under the pretext of protecting the collective good – “women’s dignity” - ignores the desire and choice of an individual, even if it is one sex worker, which again and again hurts, damages and humiliates this individual, which is wrong. Defending women on the grounds of “their own best interests” is inherently anti-feminist.<sup>70</sup> Such special care for women has also historically been counterproductive.<sup>71</sup> Sexual exploitation is associated with harm, no one doubts the legitimacy of its criminalization, and it is true that, whether it is trafficking or other forms of sexual crimes, it is prohibited in Georgia, as well as in those countries where prostitution is legal. It is also legitimate to prohibit buying sexual services from victims of trafficking. But when we talk about prostitution, we are talking about free sex work for pay, not coercion. Sex workers are subjected to violence precisely because of the bad regime, which also reinforces the social stigma towards them. However, not all sex workers' decisions are driven by economic hardship (although many are), and this depends on the country and the context. Studies have shown, that even when the main

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<sup>66</sup> For arguments and analysis of liberal feminists, see Anderson, *supra* note 64, 757-758; Beran, *supra* note 25, 30-36.

<sup>67</sup> Suzanne Jenkins, ‘Exploitation: The Role of Law in Regulating Prostitution’ in Suzanne Shelley and others (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing; 1st edition 2009) 21-22.

<sup>68</sup> Nora Scheidegger, ‘Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception’ (2021) 22 *German Law Journal* 773.

<sup>69</sup> Robin West, ‘Sex, Law, and Consent’ in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) 237-238; Alan Wertheimer, ‘What is Consent? And Is It Important?’ (2000) 3 *Buffalo Criminal Law Review* 564.

<sup>70</sup> Kuo, *supra* note 31, 121.

<sup>71</sup> Paglia, *supra* note 8, 124.

motivator for performing sex work is economic problems, sex workers have a choice to opt for another job<sup>72</sup>. And if they have no other choice, will this choice appear by tightening the prostitution regime?

Combining the concepts of sex work and sexual exploitation is wrong, as this trivializes sexual exploitation and other violent practices, and does not help to improve the situation of sex workers, but on the contrary, it worsens it. It is artificial and false to equate voluntary sex work with trafficking or rape. Even if the radical feminists themselves believed this, why would they find it sufficient to fine a buyer/client of sex work, as envisaged by the Swedish model? This is not an adequate punishment for trafficking and rape.

The Swedish model up to today returns moral interests into the concept of harm, at the expense of expanding the protected good<sup>73</sup> (health, dignity and other rights) or by referring to the harm, that is not related to sex work itself, but to the prostitution regime.

Harm should not be seen where the action takes place with the consent of the participants, and therefore, there is no victim. The causes of prostitution - social, economic or cultural factors - can be changed by other alternative efforts, such as empowering women economically, socially and etc. The use of criminal law as the first, and not the last resort in the politics of defeating patriarchy, is counterproductive over and over again for the group, that the law intends to protect.

More or less, all prostitution regimes have problems, but empirical studies have shown, that in countries where legislation of prostitution is based on the health and safety of the sex workers themselves, there is no policing of behavior, because the act is fully decriminalized and regulations are minimal, and sex workers are autonomous agents, who control working hours and conditions themselves.<sup>74</sup>

#### **IV. GEORGIAN REGIME OF PROSTITUTION**

As for the Georgian legal environment, prostitution is prohibited in Georgia under Article 172<sup>3</sup> of the Code of Administrative Offenses, and Article 254 of the Criminal Code prohibits facilitation of prostitution. Thus, Georgian regime is not a model of legalization of prostitution, nor of its decriminalization, or partial criminalization like the Swedish model. According to the Georgian regime, a sex worker and the facilitator

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<sup>72</sup> Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (NYU Press 2011) 15; Nicola Mai Final Policy-Relevant Report, *Migrant Workers in the UK Sex Industry*, Institute for the Study of European Transformations (London Metropolitan University 2010) 43.

<sup>73</sup> Michal Buchhandler-Raphael, 'Drugs, Dignity and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization' (2013) 80 *Tennessee Law Review* 301.

<sup>74</sup> Abel, *supra* note 24, 590; Valverde, *supra* note 24, 644-645.

of prostitution, i.e. a third party, are punished for prostitution, while a client is not punished.<sup>75</sup> In addition, prostitution is not defined in the Georgian legislation, and at first glance, the subject of the administrative offense provided for in Article 1723 can be both, the seller and the buyer of sex work, although practically, only the seller or the sex worker is punished.<sup>76</sup> In conditions, where prostitution is not defined, it is impossible to foresee, what activities are prohibited under it, only sex-work that involves sexual penetration, or other types of sexual activities are also included in it. It is unclear whether the ban covers cases, where a third party buys sex services for another person, rather than for themselves.<sup>77</sup> In practice, the term is broadly defined, and not only sexual intercourse is considered prostitution, but also preparatory actions, such as trying to persuade a client and agreeing on terms. Against the background of such terminological vagueness, there is a huge danger of discriminatory police and judicial practice, which will lead to unjustified restriction of human freedom in even more cases.

What does the Georgian model protect by prohibiting prostitution? Clearly not the sex worker's sexual autonomy, dignity or health, because in such case not the sex worker, but the client would be punished for prostitution. The Georgian model is rather based on the ideology, that sex work is against "society's morals", and this is also evidenced by the systematic interpretation of Georgian legislation. According to the Code of Administrative Offenses, prostitution is an act that undermines public order, and facilitation of prostitution is punishable under Article 254 of the Criminal Code, although it protects not the sex worker's right not to be subject to exploitation, but public morals and health. Such approach is a reflection of the social disposition, that considers sex work to be "promiscuous", "undermining the family values" and spreading "diseases".

As for the elements of offence, provided for in Article 254 of the Criminal Code - facilitation of prostitution, as mentioned above, it is included in the chapter dedicated to crimes against public health and morals, which directly indicates the interest protected from this crime.

When prostitution is a form of coercion, there is no doubt that it should be prohibited, as it violates the sexual freedom and other rights of a person involved in prostitution. But when it comes to prohibiting of prostitution (administrative offense), voluntary activity is implied here<sup>78</sup>, and in such a case, protecting a person and even more so, punishing him/her, is a despotic paternalism, which infringes on the personal autonomy of a person to dispose of his/her own life and decide what is best for him/her.

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<sup>75</sup> Article 1433 of the Criminal Code of Georgia criminalizes using the services of a victim of trafficking, and not prostitution.

<sup>76</sup> Dekanosidze, *supra* note 13, 22-23.

<sup>77</sup> For more on ambiguity of terminology related to prostitution and the variety of acts that are likely to be covered under it, see Green, *supra* note 17, 299-303.

<sup>78</sup> Amnesty International Policy, *supra* note 19.

The purpose of Article 254 of the Criminal Law Code is to protect sex workers from exploitation by pimps and organized criminals<sup>79</sup>, although such norm performs totally opposite function in Georgian reality. Above, when analyzing different regimes, a number of studies were indicated, which have shown, that the right regime of prostitution protects sex workers from exploitation by pimps.

The situation of sex workers in Georgia is difficult, as their work is not safe due to prohibitions, and they often become victims of deception and violence committed by clients, but they cannot turn to police for help, because their activities are illegal and they are afraid of exposure, and another reason is, that they do not trust the police.<sup>80</sup>

Studies have established that sex workers in Georgia often become victims of police terror and violence, tools of police control.<sup>81</sup> The Georgian regime of prostitution puts the sex worker in a helpless position, as she/he is completely vulnerable to threats coming from both, a client and violent policemen. It is noteworthy, that the Public Defender of Georgia in the *amicus curiae* assessment expresses suspicion, that administrative fines are applied selectively, and for confirmation refers to statistics, which shows small number of those, who were fined under this norm during 2016-2019.<sup>82</sup> It should be noted, that the most common method of punishing sex workers in Georgia is under the pretext of non-compliance with the police order<sup>83</sup>, and the sanction for this administrative offense is greater (Article 173 of the Code of Administrative Offenses provides for a fine from 2,000 to 3,000 GEL or up to 15 days of imprisonment) than for prostitution, and perhaps that is why this norm has become an effective mechanism of police terror. In the same document, the Ombudsman supports cancellation of provision, prohibiting prostitution due to its incompatibility with human rights. He assesses the unconstitutionality of the norm in reference to legal certainty (because prostitution is not defined) and the right to free development of an individual.

As for acts related to prostitution, which is an offence under Article 254 of the Criminal Code, the element of the objective party - facilitation, is so broad that it covers all actions that may be related to the promotion of prostitution. According to this norm, a sex worker cannot hire a personal bodyguard, a driver, or rent an apartment for safe

<sup>79</sup> For criticism of Article 254 of the Criminal Code of Georgia, see Group of Authors, edited by Bachana Jishkariani, *Sex Offenses* (World of Lawyers 2020) 135-136.

<sup>80</sup> Dekanosidze, *supra* note 13, 31.

<sup>81</sup> *ibid*, 30; Giorgi Chubinidze and Soso Chauchidze, *Sex-work in Tbilisi: Informalization, Agency and Different Experiences*, in the compendium *Voices of the Oppressed: Research, Art and Activism for Social Change* (EMC 2014) 51. ‘Research of Sex-Workers’ Needs and Factors Causing Discrimination’ (Social Research and Analysis Institute 2014) 18-19. Nino Tarkhishvili, *Prostitution - what are sex workers afraid of?* (Radio Liberty, May 10, 2019) <<https://www.radiotavisupleba.ge/a/29933421.html>> [last accessed on 11 May 2022].

<sup>82</sup> *Amicus Curiae* opinion, *supra* note 2.

<sup>83</sup> Dekanosidze, *supra* note 13, 28.

working conditions. Persons who are financially dependent on sex workers may be prosecuted.<sup>84</sup> Because of so many prohibitions and threats, sex workers fall under the supervision of pimps, who run the business according to a well-organized scheme, and a sex worker is often forced to work for them.<sup>85</sup> I.e. Prohibitive norms do not prevent involvement of prostitutes in the activities of sex workers, but on the contrary, they facilitate it. In Canada, where prostitution is legal, its facilitation was prohibited under criminal law until 2013, when the Supreme Court of Canada ruled it unconstitutional in its decision on the case *Bedford v. Canada*<sup>86</sup>. The court stated, that a rule prohibiting a sex worker to communicate with a client, rent an apartment, hire a bodyguard for personal security, or other similar actions, violated the sex worker's right to care for her/his own health and safety.<sup>87</sup>

Thus, it is safe to say that police terror and violence against sex workers are common features of those regimes, where prostitution is criminalized or strictly regulated. It is necessary to reform the prostitution regime in Georgia. By observing the experiences of other countries, it is possible to consider replication of New Zealand's legislation and practice, which were developed with the interest of sex workers in mind, their real needs, and not the biased and moralistic ideology of some populist group. This is why sex workers in New Zealand often talk about improved environment when evaluating the regime<sup>88</sup>. Prostitution should be fully decriminalized in Georgia, effective mechanisms should be created to protect the rights of sex workers, and the police should respond adequately to the harassment of sex workers.

## V. CONCLUSIONS

Thus, it can be said that Georgian regulation related to prostitution cannot protect the health and personal safety of sex workers. All it does with "success" is discredit the police and marginalize sex workers. Georgia, like other countries, should comprehensively understand current situation, challenges, and taking into account the real interests of sex workers, implement the right policy, which will be focused on protecting their health and safety. As for the elements of offence, provided for in Article 254 of the Criminal Code of Georgia (facilitation of adult prostitution), the form and scope of punishment of these actions needs to be revised, because it is a moral offence and this cannot serve as basis to justify such punishment, and the said norm does not protect anyone's interest,

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<sup>84</sup> For a similar critical analysis, see Authors Group, *supra* note 78, at 135-136.

<sup>85</sup> Criminal subculture is a concurrent result of prohibition of prostitution, for an analysis of the issue, see Lippman, *supra* note 57, 270.

<sup>86</sup> *Canada (Attorney General) v. Bedford*, SCC 72, 3 S.C.R. 1101. 2013 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do>> [last accessed on 16 May 2022].

<sup>87</sup> For analysis of decisions see Erdman, *supra* note 64, 252-259.

<sup>88</sup> Crichton, *supra* note 54.

except for protection of a very abstract notion - morality of the population. For the same reason, the norm prohibiting prostitution, which is a tool of police control and humiliation of sex workers, should be abolished too.