

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**CRIMINALISATION OF SEX WORK AS A HUMAN RIGHTS
VIOLATION AGAINST WOMEN IN SOUTH AFRICA**

BY

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**A mini-thesis contributed in fulfilment of the LLM degree in the
faculty of law**

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29 November 2019

DECLARATION

I, Lumba Ndhlovu, declare that 'The *Criminalisation of prostitution as a human rights violation against women in South Africa*' is my work and that it has not been submitted before any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: Lumba Ndhlovu

29 November 2019

KEY WORDS

Sex work

Criminalisation

Decriminalisation

Legalisation

Abolition

Human Rights violation

Gender inequality

Sexual Offences Act 23 of 1957

S v Jordan

The Constitution of the Republic of South Africa.

Swedish model

DEDICATIONS

To my lord and saviour, I dedicate this dissertation to you. In times of exhaustion, confusion, and sluggishness, it is your love, grace, and patience that carried me through. To my grandmother Anna, while you are no longer with us, how you lived her life has been a blueprint for my own life. You taught me to always dream big and go after my dreams and aspirations.

To my parents and brother, thank you for being my source of strength and inspiration. Your unwavering spiritual, emotional and financial support provided a pillar upon which I could lean on in the process of writing this dissertation.

To my family and friends at large, thank you for your support.

ACKNOWLEDGEMENTS

Firstly, I would like to express my sincere gratitude to my supervisor Dr. AC Diala, for his continued guidance, patience, motivation and support. His guidance helped me in my research and writing of this dissertation. His great communication and fast return of feedback gave me the ability to conduct research and write my dissertation without unreasonable delays. I could not have imagined a better supervisor for my dissertation.

Secondly, I would like to thank Prof. Patricia Lenaghan for her support and encouragement. Her ‘open door policy’ and willingness to assist with both academic and non-academic queries made my academic journey pleasurable. In the same breath, my gratitude goes to the Graduate Lecturing Assistant Committee (GLA Committee) for creating a GLA programme that aims at providing support to working masters’ degree students. The many opportunities given to attend informative seminars and interactive programmes helped me learn about the required standard of dissertations and contributed to my writing experience.

Last but not least, I would like to show my gratitude to my colleague and mentor, Thando Qaqa, for his support and enthusiastic willingness to help.

SUMMARY

There is considerable and often emotive debate around the topic of sex work. Sex work is either criminalised, decriminalised, or legalised depending on the country. In South Africa, sex work is criminalised in section 20 (1) (Aa) of the Sexual Offences Act (previously Immorality Act) 23 of 1957. This dissertation asks whether the criminalisation of sex work is a human rights violation by investigating how it negatively affects the human rights of female sex workers. It focusses on the disadvantages of criminalising sex work and the effectiveness of South Africa's legislative framework on sex work. It analyses the criminalisation of sex work in South Africa in the context of gender inequality, constitutional texts, policy documents, and South Africa's commitment to international human rights instruments.

This dissertation uses a qualitative method involving literature review and content analyses of case law and legislation. It reveals a relationship between the criminalisation of sex work and the violation of sex workers' human rights. It further finds that criminalisation of sex work contributes to women's human rights violations. Due to fear of criminal prosecution, criminalisation hinders female sex workers from accessing justice and healthcare services.

The dissertation recommends reform of South Africa's legal framework to give effect to the objectives of the Bill of Rights and international human rights treaties. Specifically, section 20(1) (Aa) of the Sexual Offences Act 23 of 1957 should be repealed, and legislation should be adopted to enable sex workers enjoy the full protection of the law.

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CHAPTER 1

INTRODUCTION

1.1 Background to the study

The world expands in different spheres, and so does the commercial sex industry. Sex work has become an all-inviting ‘job’ for many women within the African continent.¹ While it is known that sex work plagues many cities and towns, it remains stigmatised and places shame upon women who are associated with it.² Sex workers, by virtue of their ‘profession’, are targets for discrimination.³

Sex workers are generally subject to constant disapproval in society. The most critical disapproval, apart from families, comes from the authorities.⁴ Arguably, the criminalisation from authorities negatively affects the safety of sex workers.⁵ Sex workers are vulnerable due to the lack of legal protection afforded to them within many countries. As a devastating consequence of criminalisation, sex workers are often placed in dangerous and alarming situations, which include, but are not limited to the risk of abuse, exploitation, health-related shortcomings, and human trafficking.⁶

In recent history, the world has become devoted to the protection of human rights. Thus, human rights have become the foundation upon which states enact, amend, or abolish pieces of legislation that are inconsistent with human rights. Human rights are the basic rights and freedoms that are afforded to everyone.⁷ These rights can never be taken away, although they can

¹ Proal A, Chacko S et al ‘Sexual behaviour, AIDS and poverty in Sub-Saharan Africa’ (1991) 2 *International Journal of STD & AIDS* 2.

² World health organisation ‘Violence against sex workers and HIV prevention’ (2005) 3 *The Global Coalition on Women and Aids* 1.

³ World health organisation ‘Violence against sex workers and HIV prevention’ (2005) 3 *The Global Coalition on Women and Aids* 1.

⁴ World health organisation ‘Violence against sex workers and HIV prevention’ (2005) 3 *The Global Coalition on Women and Aids* 1.

⁵ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 21.

⁶ Sex workers and sex work in South Africa: A Guide for Journalists and Writers, 2014, 12.

⁷ Constitution of the Republic of South Africa, 1996, section 7. – ‘(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.’

sometimes be restricted.⁸ They apply regardless of where one is from, what one believes, or how one chooses to live their life.⁹ These basic rights are based on shared values of dignity, fairness, equality, respect, and independence.¹⁰ Sex work is one of the most globally debated topics. While many human rights organizations have acknowledged that sex workers' rights are human rights and deserve such recognition, less than 10% of the world's states have legalised or decriminalised sex work.¹¹ Thus, sex workers' rights continue to be violated.

Decriminalisation, as used in this dissertation, does not translate to the removal of laws that criminalise exploitation, human trafficking, and violence against sex workers. These laws must remain intact and should be strengthened. Instead, decriminalisation translates to the removal of legislation and policies that criminalise or penalise sex work. This includes laws and regulations related to the selling and buying of sexual services.¹²

See also South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 87.

⁸ Constitution of the Republic of South Africa, 1996' section 36. – '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent

that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

⁹ Constitution of the Republic of South Africa, 1996' section 7. This clause is wide and covers 'everyone' in the Republic of South Africa notwithstanding what their nationalities are.

¹⁰ The Constitution of the Republic of South Africa, 1996' section 1. 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness.'

¹¹ Rosen D 'It's time to decriminalize sex work' available at:

<https://www.yorkdispatch.com/story/opinion/contributors/2018/08/16/oped-time-decriminalize-sex-work> (accessed 24 September 2018).

¹² Amnesty International's policy to protect the human rights of sex workers' available at:

<https://www.amnesty.org/en/qa-policy-to-protect-the-human-rights-of-sex-workers> (accessed 23 September 2018).

1.2 Problem statement and argument

This study assumes that sex work is a phenomenon that is extremely prevalent in Africa. In recent years, the decriminalisation of sex work in Africa has gained traction due to the voices of human rights activists. However, the continent has and remains stagnant in the enactment of progressive decriminalisation legislation.¹³ This position has negative effects and such effects have manifested themselves in the increase of HIV/AIDS,¹⁴ poverty, cruel treatment, abuse, negative stigmas and the perpetuation of human trafficking.¹⁵ Sex workers are a key population that bears a disproportionately high proportion of HIV, abuse and human trafficking burden compared to other groups.¹⁶

Thus, this study formulates four arguments. Firstly, as long as sex work is a criminal act, there will be a stigmatised community that is vulnerable. Secondly, the issues that plague sex workers stem from the lack of protection in terms of the law. Thus, one needs to ask why sex work has not yet been legalised or decriminalised in South Africa, in comparison to the response by other countries in the world. Human rights instruments afford inherent rights and protection to all human beings by virtue of being human.¹⁷ Consequently, sex workers have human rights. Such rights are not protected due to the hindrance created by the laws criminalising sex work. Therefore, there is a need to decriminalise sex work in South Africa to prevent human rights violations against adult sex workers and to bridge the gap between gender inequalities. Thirdly, there is a need to explore human rights protection accorded to sex workers by various human rights instruments and come to an understating that the criminalisation of adult sex work is a human rights violation against women.

Fourthly, enacted legislation combating sex work in South Africa is problematic. This problem is established by the disparity between the aimed purpose or objective of the legislation and the consequences that occur at a grassroots level. The relevant legislation is the Sexual Offences Act 23 of 1957 (The Sexual Offences Act). The preamble of The Sexual Offences Act conveys the objective of the Act¹⁸ as primarily focused on protecting women and children from abuse and

¹³ South African Law Report Commission (Project 107) adult prostitution (2018) 9.

¹⁴ World Aids campaign, sex work and the law: the case for decriminalization, 2010, 15.

¹⁵ Sex workers and sex work in South Africa: A Guide for Journalists and Writers, 2014, 11

¹⁶ Asijiki, sex work, migration and tourism, Factsheet 2015, 1.

¹⁷ Universal Declaration of Human Rights (1948) 7.

¹⁸ Criminal law (sexual offences and related matters) Amendment Act 32 of 2007, the Preamble states that:

violence as a means to maintain the commitment to the Constitution and various International legal instruments that South Africa is a signatory of.¹⁹ Section 20 (1A) (a) of the Sexual Offences Act makes it an offence for any person 18 years or older to have unlawful carnal intercourse or commit an act of indecency with any other person for reward.²⁰ Section 20 does not specify the reward that a person should obtain to be guilty of an offence. Reward is defined as a thing given in recognition of service, effort, or achievement. It has been established that healthy relationships between people are based on mutual benefit and in some instances on rewards. These benefits are in the form of support and encouragement.²¹ Thus, it can be argued that in some instances, rewards for sex are given in these private relationships.²² If section 20 had to be applied strictly, women in private relationships would consequently be guilty of having sex for reward. Acceptance of a reward for sex in private relationships is not criminalised, subsequently, acceptance of a reward for sex, by sex workers, should not be criminalised.

Furthermore, the Constitution of the Republic of South Africa is based on ensuring that the rights contained in the Bill of Rights and universal human rights are protected. The Constitution commits South Africa to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.²³ It also requires the state to promote the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.²⁴ The objective of the Constitution cannot be achieved if sex workers are ostracized by the law.

'WHEREAS women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children; WHEREAS several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children; AND WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance'.

¹⁹ Sexual Offences Act 23 of 1957.

²⁰ Section 20 (1A) of the Sexual Offences Act states that 'Any person who- (a) knowingly lives wholly or in part on the earnings of prostitution; or (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence'.

²¹ Wan W & Antonucci T 'Social Exchange Theory and Aging' (2016) 10 *Encyclopedia of Geropsychology* 3.

²² Wan W & Antonucci T 'Social Exchange Theory and Aging' (2016) 10 *Encyclopedia of Geropsychology* 3.

²³ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 54.

²⁴ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 54.

Since the sex work industry exists within a criminalised sphere, many of the abuses and exploitations that occur within it cannot be adequately dealt with because victims cannot report such abuses. Thus, the criminalisation of sex work perpetuates a cycle of abuse and exploitation within the sex work industry and society at large. It is with this conviction that this study considers whether South Africa's legal framework on commercial sex needs to be reformed to be aligned with the Constitution and to afford sex workers their human rights protection.

1.3 Significance of the study

While the law that criminalises sex work is enacted as a deterrence and preventative measure to combat violence, exploitation, and human trafficking, it can be argued that it is ineffective in achieving this mandate.²⁵ The violent and exploitative nature of sex work has not been suppressed by national legislation or by-laws within the South African context and in many states.²⁶ The criminalisation of sex work forces sex workers to internalise the abuses they suffer. They are afraid to report crimes to the police out of fear of being detained and charged with sex work.²⁷ Sex workers have no way of realising the rights enshrined in international human rights instruments due to criminalisation.²⁸ To this extent, sex workers continue to suffer human rights violations as a consequence of legislation that is not adequately obtaining its objectives. Accordingly, the recognition that criminalisation of sex work is a human rights violation against women is imperative.²⁹

1.4 Research questions

Flowing from the problems that prompted this dissertation, this study examines a central research question: In what ways does the criminalisation of sex work contribute to human rights violations in South Africa? To answer this question, the following sub-questions are explored:

²⁵ Mokoena N & Choma HJ 'Prostitution under the Sexual Offences Act in South Africa: A Constitutional Test' (2013) 3 *International Journal of Humanities and Social Science* 237.

²⁶ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 64

²⁷ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 64.

²⁸ Mokoena N & Choma HJ 'Prostitution under the Sexual Offences Act in South Africa: A Constitutional Test' (2013) 3 *International Journal of Humanities and Social Science* 235.

²⁹ Mokoena N & Choma HJ 'Prostitution under the Sexual Offences Act in South Africa: A Constitutional Test' (2013) 3 *International Journal of Humanities and Social Science* 237.

- a) What are the negative effects of criminalising sex work?
- b) Does the South African legal framework on sex work need reform?
- c) What have other countries done to successfully decriminalise and/or legalise sex work?

1.5 Objective of the study

The objective of this study seeks to demonstrate how the criminalisation of sex work in South Africa contributes to violations of women's rights. Additionally, the aim is to illustrate the reason why South Africa needs law reform of legislation dealing with adult sex work. In conducting this mandate South Africa's legislative response to sex work will be compared to that of other countries. Thus, this study has the following further objectives:

1. To provide a comprehensive interpretation of the protection offered by international human rights instruments to women in the sex industry.
2. To outline the underlying lacuna in the current legislative framework criminalising sex works in South Africa.
3. To identify a legal framework that can be utilised in South Africa to address the problem of sex work.

1.6 Literature review

Literature review shows that the focus placed on the decriminalisation of sex work in South Africa is founded by the concept of Constitutionalism. It has been argued that the criminalisation of sex work within the South African context contributes to the violation of sex workers' Constitutional rights such as the rights to dignity and bodily integrity.³⁰ Thus, Constitutionalism takes precedence and it is upon it that legal reform must take place. It was stipulated in the Commission for Gender Equality that the decriminalisation approach to sex work will validate sex workers' Constitutional rights. These rights include the right to be free from arbitrary arrest and detention, health services and free choice of work.³¹

³⁰ ASIJKI, Sex work and Human Rights, Factsheet 2015.

³¹ Commission for Gender Equality *Decriminalization of Prostitution in South Africa* Report 2013- *Official Position of the Commission on Gender Equality* (2013) 2-3.

Chi Mgbako, a clinical professor of law, and several other researchers express the view that the criminalization of sex work fails to achieve its mandate of eradicating sex work in south Africa.³² On the contrary, criminalizing sex work has negative effects to sex workers because they experience violence, police abuse, lack of access to health care and the justice system.³³ Furthermore, it is argued that the decriminalization of sex work is an effective solution that will fulfill South Africa's Constitutional and human rights commitments by promoting sex workers' rights.³⁴

Recent studies have shown that the decriminalisation of sex is rooted in recognising that sex work is work and it is the undercurrent that empowers women to be responsible upstanding citizens within our communities.³⁵ Research findings indicate that the main driving force towards commercial sex for some women is the need for financial stability. Participants stipulated that they practice commercial sex as a means to survive and take care of their families.³⁶

Most researchers in this field agree that the criminalisation of sex work is a violation of sex workers' rights.³⁷ Some International Organisations such as Amnesty International strongly advocate for the decriminalisation of sex work.³⁸ This is because the criminalisation of sex work prevents sex workers from having equal access to health and other services.³⁹ The comprehensive review of research literature is encompassed in this quote by the Special Rapporteur on violence against women, in which it was stated that:

³² Mgbako C, Bass K & Bundra E *et al* 'The Case for Decriminalization of Sex Work inSouth Africa' (2013) 44 *Georgetown Journal of International Law* 1425

³³ Mgbako C, Bass K & Bundra E *et al* 'The Case for Decriminalization of Sex Work inSouth Africa' (2013) 44 *Georgetown Journal of International Law* 1432

³⁴ Mgbako C, Bass K & Bundra E *et al* 'The Case for Decriminalization of Sex Work inSouth Africa' (2013) 44 *Georgetown Journal of International Law* 1424.

³⁵ Saady B *Decriminalized Prostitution: The Common Sense Solution* 1ed (2017) 6.

³⁶ Letlape O & Dube M 'Experiences of Female Commercial Sex Workers in Marabastad, Pretoria' (2019) 11 *Global Journal of Health Science* 132.

³⁷ These Researchers include but not limited to, Qayyum S, Muhammad M, Iqbal A *et al* 'causes and decision of women's involvement into Prostitution and its consequences in punjab, Pakistan' (2013) 4 *Academic Research International* 6. Bal P *A Review of Human Dignity* (2017) 5. Patosalmi M 'Bodily Integrity and Conceptions of Subjectivity' (2009) 24 *Hypatia* 136. Fick N 'Police abuse of sex workers when making arrests' (2006) 16 *SA Crime Quarterly* 27. Rangasami, J, Konstant, T & Manoek, S; Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015; Women's Legal Centre (2016) 18.

³⁸ Amnesty International explanatory note on amnesty international's policy on state obligations to respect, protect and fulfil the human rights of sex workers (Index 30/4063/2016) 29.

³⁹ Bernstein E, Cheng S, Grewal I & others 'Response to UN Women Call on 'Consultation seeking views on UN Women approach to sex work, the sex trade and prostitution' (2016) 4.

“Decriminalization with a human rights approach calls for the protection of the legal rights of sex workers. Thus, it calls for decriminalisation of sex work and related acts and the application of existing human rights and labour rights to sex workers and sex work.”⁴⁰

From literature review, it is evident that the decriminalisation of sex work has support based on Constitutionalism and human rights protection. However adequate and effective recognition needs to be given to the fact that the criminalisation of sex work is a human rights violation against women and consequently the lacuna within the South African legal framework on sex work does not justify the human rights violations that consequence to sex workers as a result to criminalisation.

1.7 Methodology

This work adopts literature review to assess the extent to which the criminalisation of sex work in South Africa contributes to the violation of women’s human rights. To this extent, qualitative data such as various writings about decriminalisation of sex work has been considered. There are numerous arguments made in favour and against the decriminalisation of sex work. The different arguments have been captured in various sources. Thus, a conceptual analysis of literary study in the form journal articles and books was conducted. Furthermore, conclusive data contained in reports by the South African government has been considered. International human rights instruments have been analysed to deduce the human rights protection offered to sex workers. These instruments include but are not limited to, the Universal Declaration of Human Rights, The United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and The Convention on the Elimination of All Forms of Discrimination against Women.⁴¹ Furthermore, primary data from various reports by several organisations, such as Amnesty International and United Nations Women, have been considered.

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⁴⁰ Amnesty International explanatory note on amnesty international’s policy on state obligations to respect, protect and fulfil the human rights of sex workers (Index 30/4063/2016) 24.

⁴¹ United Nations treaties are primary sources and they will be used to obtain vital information for this study.

⁴² Amnesty International Amnesty is a non-governmental organization which campaigns to end grave human rights abuses. The NGO fosters a global movement and it comprises more than 3 million activists and supporters. United Nations Entity for Gender Equality and the Empowerment of Women, also known as UN Women is a United Nations entity that is focused on the global empowerment of women.

The legal framework criminalising sex work in South Africa will be considered. To conduct this mandate, the Sexual Offences Act will be analysed. The legal frameworks of the Netherlands, Sweden and Zambia have been considered because these countries have successfully decriminalised sex work. The Netherlands is one of a few countries that have legalised sex work,⁴³ while, Sweden has developed its own response to sex work known as the ‘Swedish model’ to which only the buying of sex is criminalised.⁴⁴ On the other hand, Zambia’s response to sex work is that of decriminalisation.⁴⁵

This methodology approach was undertaken to put into context the reasons why sex workers join the sex work industry, the issues that sex workers experience and the causes and implications of criminalising sex work in South Africa.

1.8 Delimitation of study

This study does not relate to sex workers who are children (under the age of 18), sex workers who are forced or are involuntary adult sex workers and persons who are trafficked for sexual exploitation. Furthermore, this study will focus on female sex workers to the exclusion of male, transgender, and gay sex workers. The term ‘sex work’ in this study is used only for consensual exchanges between adults.

1.9 Outline of chapters

This study has a total of five chapters.

Chapter 1 – Introduction

Chapter one deals with the foundation of this thesis. It presents the sex work industry as a prevalent industry within our society and the need to demonstrate human rights violations that occur as a result of criminalisation of sex work. Literature review establishes that some authors think that sex work should be decriminalised. The problem statement indicates that the criminalisation of sex work has substantial detrimental consequences for sex workers. The methodology used in this thesis will be based on a literature review and content analysis of case law and legislation.

⁴³ Daalder A.L ‘Prostitution in Netherlands in 2014’ (2015) 1a *Research and Documentation Centre* 14.

⁴⁴ Olsson AJ ‘Prostitution policy in Sweden – targeting demand’ (2019) 45 *The Swedish Institute* 15.

⁴⁵ The Penal code Act of Zambia Act 29 of 1976, offences against morality.

Chapter 2 – Legal responses to sex work

This chapter considers why sex work exists and examines the different legal responses to sex work. This chapter establishes the causes and effects of sex work as well as the social consequences of abuse, exploitation, and diseases. An analysis conducted establishes a relationship between Criminalisation of sex work and gender inequality to demonstrate the notion that, gender inequalities ensue as a result of criminalisation, thus the liberal and the radical's approach for the decriminalisation of sex work has been considered.

Chapter 3 – Human rights implications of sex work criminalisation

This chapter focuses on how the criminalization of sex work is a human rights violation. The term, human rights, is comprehensively defined and international human rights instruments are consulted to determine the protection that is afforded to sex workers. This includes international conventions and covenants.

Chapter 4 – Legal position of sex work in South Africa

This chapter considers the current legal framework in South Africa. The Sexual Offenses Act is analysed. Furthermore, the case of *S v Jordan* is discussed and analysed to indicate the errors in the Court's ratio. Thus, both the majority and the dissenting judgements are analysed.

Chapter 5 – Conclusion and recommendations

This chapter concludes the dissertation by summarising the preceding chapters. Furthermore, a recommendation on legal response for South Africa is offered. In doing this, the legal framework of the Netherlands, Sweden and Zambia is considered. Consequently, general recommendations on how South Africa should conduct law reform are suggested.

CHAPTER 2

MORALITY, LEGAL RESPONSES TO SEX WORK AND THE EFFECTS OF SEX WORK

2.1 Introduction

Fyodor Dostoyevsky, a 19th-century Russian author, once stated that a society can be judged by the conditions within its prisons.⁴⁶ In the same vein, one can determine the strength of a society by how it treats those living on the outskirts of society, the most vulnerable and stigmatised citizens.⁴⁷ A society's treatment of sex workers is illustrated by its legal response to sex work. The abolitionist approach to sex work is the most common approach used by many countries in the world, including South Africa. This approach calls for the total abolition of sex work and uses the criminalisation of sex work as a means to achieve this goal.⁴⁸ The alternatives to the abolitionist approach are decriminalisation and legalisation. Decriminalisation aims to ensure that sex work is not subject to criminal penalties, while legalisation focuses on regulating sex work.⁴⁹ Stigmatisation within a society plays a vital role, it informs the legal framework by which sex work will be regulated.

The stigmatisation of sex workers is heavily ingrained in South African culture.⁵⁰ Here, the media plays a vital role. When we hear about sex work, a woman in high heels waiting in the cold by the corner of the street comes to mind.⁵¹ Unsurprising, this picture is spread by mainstream media and supported by the state and religious groups. The foundation of this stigmatisation is deeply rooted in the theory of morality. According to the theory of morality, a woman's moral personality does not involve the selling of her body for the pleasure of a man with whom she has no romantic relationship.⁵² Thus, sex work is a moral evil because it goes

⁴⁶ Saady B *Decriminalized Prostitution: The Common Sense Solution* 1ed (2017) 3.

⁴⁷ Saady B *Decriminalized Prostitution: The Common Sense Solution* 1ed (2017) 3.

⁴⁸ Scoular J & Carline A 'A critical account of a 'creeping neo-abolitionism': Regulating prostitution in England and Wales' (2014) 14 *Criminology & Criminal Justice* 610.

⁴⁹ Scoular J & Carline A 'A critical account of a 'creeping neo-abolitionism': Regulating prostitution in England and Wales' (2014) 14 *Criminology & Criminal Justice* 609.

⁵⁰ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 19.

⁵¹ Benoit C, Jansson M & Smith M et al 'Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers' (2017) 10 *The Journal of Sex Research* 5.

⁵² Richards D 'Commercial sex and the rights of the person: a moral argument for the decriminalization of prostitution' (1979) 127 *university of Pennsylvania law review* 1219.

against the sanctity of marriage between one woman and one man.⁵³ Many societies, especially in Africa, view sex work as an abominable practice that brings shame to the family of the sex worker since a woman's objective is to 'keep' herself pure for the satisfaction of her future husband only.⁵⁴

However, it is important to note that morality is not stagnant, rather, it adapts to society's views. For instance, in many African traditions, women's nudity was not frowned upon as it was part of tradition. Women would walk bare-chested in their compounds without sexuality being attached to their nudity.⁵⁵ Today, public nudity in any form is shamed and those that choose to practice their traditions are often called primal and uncivilised. Another example is the moral evolution of South Africa's society concerning same-sex marriages. Before the enactment of the Civil Union Act 17 of 2006, which authorises same-sex civil unions,⁵⁶ South Africa's morality views were contained in the Immorality Act 23 of 1957. This law stipulated that a sexual act between same-sex people was immoral and subject to administrative or criminal penalties.⁵⁷ Therefore, using morality as a yardstick for the stigmatisation and criminalisation of sex work is not justifiable. Arguably, the continued stigmatisation of sex work results in devastating human rights abuses that offend society's morality.

2.2 Defining prostitution

The word 'prostitution' derives from the Latin word *prostituto*, which means 'to cause to stand', it can be argued that this phrase infers that a prostitute has to practice standing in public to solicit clients.⁵⁸ The Cambridge dictionary defines prostitution as the business of having sex for money.⁵⁹ Based on these definitions of prostitution, it can be established that prostitution is the

⁵³ Richards D 'Commercial sex and the rights of the person: a moral argument for the decriminalization of prostitution' (1979) 127 *university of Pennsylvania law review* 1219.

⁵⁴ Waliggo J 'Law and public morality in Africa: legal, philosophical and cultural issues' (2005) *The ALRAESA Annual Conference* 2.

⁵⁵ Ngugi T 'Prostitution is unAfrican? You must be joking' available at: <https://www.theeastafrican.co.ke/oped/comment/Prostitution-is-unAfrican-You-must-be-joking/434750-1324608-7awkq4/index.html> (accessed on 15 April 2019).

⁵⁶ Ru H 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Unisa Press* 245.

⁵⁷ Ru H 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Unisa Press* 226.

⁵⁸ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 9.

⁵⁹ Cambridge Dictionary University press 1995.

access to one's body, with a reciprocal obtainment of something of value, most frequently money or drugs.⁶⁰

Gemme, a sex researcher, says that there will always be sexual needs which can only be satisfied by a commercial exchange.⁶¹ Thus, sex should be viewed as labour conducted by sex workers and money should be viewed as their remuneration.⁶² Similarly, Flexner states that 'any person is a prostitute who habitually or intermittently has sexual relations more or less promiscuously for money or other mercenary considerations'.⁶³ However, it is important to note that promiscuity in isolation is not an element within the definition of prostitution. Many women are promiscuous. In Kenya, women have been reported to go out to clubs and seek sexual partners for the weekend. They do not accept money for sex but they have their clothes and other expenses paid for.⁶⁴ Conclusively the defining element of sex work is the exchange of money for sexual acts.⁶⁵ The United Nations provides an inclusive definition, to which prostitution is the sale of consensual sex for money.⁶⁶ The inclusion of the word 'consensual' indicates that the UN only recognises sex work as work if it is consensual.

In South Africa, the SALRC Report defines prostitution as an act involving the buying and selling of sexual acts and related activities.⁶⁷ Furthermore, a prostitute is defined as an adult person who voluntarily offers or provides sexual services for financial or other reward, irrespective of whether the sexual act occurred or not.⁶⁸ Section 1 of the Sexual Offences Act defines prostitution as the exchange of carnal intercourse, or acts of indecency for reward.⁶⁹ In *R v Kam Cham*, the court held that a woman or a girl, who finds herself in the presence of men for hire or has sexual intercourse for gain, is a prostitute.⁷⁰ This definition illustrates the fixation on

⁶⁰ Monto M 'Prostitution, Sex Work, and Violence: lessons from the Cambodian context' (2014) 15 *Studies in Gender and Sexuality* 76.

⁶¹ Martin M 'Female Prostitution, Customers, and Violence' (2004) 10 *Violence against women* 165.

⁶² Monto M 'Prostitution, Sex Work, and Violence: Lessons from the Cambodian Context' (2014) 15 *Studies in Gender and Sexuality* 79.

⁶³ Monto M 'Prostitution, Sex Work, and Violence: Lessons from the Cambodian Context' (2014) 15 *Studies in Gender and Sexuality* 79.

⁶⁴ Proal A, Chacko S *et al* 'Sexual behaviour, AIDS and poverty in Sub-Saharan Africa' (1991) 2 *International Journal of STD & AIDS* 2.

⁶⁵ Edlund L & Korn E 'A theory of Prostitution' (2002) 110 *Journal of Political Economy* 184.

⁶⁶ The United Nations Programme on HIV/AIDS (UNAIDS) defines sex workers as 'Female, male and transgender adults aged over 18 years who sell consensual sexual services in return for cash or payment in kind...'.⁶⁷

⁶⁷ SALRC Report (Project 107) Sexual Offences Adult Prostitution (2015) Para 61.

⁶⁸ SALRC Report (Project 107) Sexual Offences Adult Prostitution (2015) Para 61.

⁶⁹ Sexual Offences Act No 23 of 1957.

⁷⁰ South African Law Report Commission (Project 107) adult prostitution (2018) Para 2.

women within society when defining prostitution. However, due to a rise in social awareness, society now views prostitution as inclusive of both males and females.⁷¹

2.3 Legal Responses to Sex Work

The regulation of sex work has proved to be a complex issue for politicians and policymakers. From the mid-nineteenth century to the late twentieth century, only two responses to sex work were dominant, the abolitionist and the regulatory. In recent times, a recent response has emerged. The legalisation of sex work has become an option that a few countries have embraced in the twenty-first century.⁷²The government has the responsibility to decide between criminalisation, decriminalisation or legalisation as the basis upon which sex work legislation and policy will be enacted.⁷³

2.3.1 Criminalisation

The criminalisation of sex work is the most common legislative approach adopted by many countries.⁷⁴ In general terms, criminalisation refers to the action of rendering activities illegal and their commission a criminal offence.⁷⁵The criminalisation of sex work imposes criminal sanctions on both the seller and the buyer of sex work.⁷⁶ To this extent, a sex worker who has been trafficked or exploited does not have any recourse to report the crime based on being a participant in sex work.⁷⁷ Furthermore, if she is to report a crime flowing from sex work, such as rape, the police by law are bound to arrest the sex worker and charge her with violating the law on sex work.

There are two common facets to the criminalisation of sex work. They are the prohibitionist approach and partial criminalisation. The prohibitionist approach refers to total criminalisation,

⁷¹ South African Law Report Commission (Project 107) adult prostitution (2018) Para 2.

⁷² Lopes A & Macrae A 'Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden' (2013), Child and Woman Abuse Studies Unit, London Metropolitan University 2.

⁷³ Mathienson A 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' (2015) 14 *Seattle Journal for Social Justice* 368.

⁷⁴ House of Commons Home Affairs Committee 'Prostitution' (2016) Authority of the House of Commons 5.

⁷⁵ Oxford living dictionary.

⁷⁶ Smith R & Shekarkhar Z 'Why is prostitution criminalized? An alternative viewpoint on the construction of sex work' (2010) 13 *Contemporary Justice Review* 44.

⁷⁷ Deady M.G 'The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry' (2011) 17 *WASH. & LEE J.C.R. & SOC. JUST.* 536.

in which all aspects of sex work are prohibited. The selling and the buying of sex are prohibited and all parties involved are subject to prohibiting penal codes on sex work.⁷⁸ In contrast, partial criminalisation may elect to not criminalise the conduct of sex workers as they are considered to lack the agency to make a voluntary choice to become sex workers.⁷⁹ However, the buying of sex and the involvement of third parties such as pimps, traffickers and brothel owners is criminalised and such persons face criminal sanctions.⁸⁰

In South Africa, there is a total criminalisation of sex work. The Sexual Offences Act prohibits sex work and other related offences. The criminalisation of sex work is a subject of debate in South Africa. Various reasons have been given to justify the criminalisation of sex work.⁸¹ These include but not limited to the notion that sex work is immoral, it victimises vulnerable women and it is a threat to public health.⁸² Deterrence has also been cited as the fundamental reason for criminalising sex work. The first deterrence assumption is that criminalising sex work will negatively affect the demand for sex work and this, in turn, will ensure a decrease in human trafficking.⁸³ The second assumption supposes that the knowledge of the criminalised nature of sex work will deter citizens from buying sexual services.⁸⁴ South Africa has one of the highest levels of HIV/AIDS epidemic,⁸⁵ thus, sex workers have an increased risk of HIV exposure, making HIV, STDs and STIs rampant amongst them.⁸⁶ On this basis, the third assumption is that the prohibition of women from entering the sex industry will prevent the spread of HIV/AIDS and other sexual diseases.⁸⁷ Therefore criminalising sex work is imperative.⁸⁸

⁷⁸ Berer M 'The international women's health movement' (1997) 10 *Reproductive Health Matters* 45

⁷⁹ Gould A 'The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden' (2001) 3 *Cambridge University Press* 453.

⁸⁰ Mathienson A 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' (2015) 14 *Seattle Journal for Social Justice* 396.

⁸¹ Christian Lawyers Association 'Prostitution Should Remain Illegal in South Africa' available at: <https://www.christianlawyers.co.za/node/29> (accessed 18 February 2020).

⁸² Deady M.G 'The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry' (2011) 17 *WASH. & LEE J.C.R. & SOC. JUST.* 536.

⁸³ Mathienson A 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' (2015) 14 *Seattle Journal for Social Justice* 401.

⁸⁴ Smith R & Shekarkhar Z 'Why is prostitution criminalized? An alternative viewpoint on the construction of sex work' (2010) 13 *Contemporary Justice Review* 44.

⁸⁵ Statistics South Africa 2019.

⁸⁶ Sex workers and sex work in South Africa: A Guide for Journalists and Writers, 2014, 12.

⁸⁷ Smith R & Shekarkhar Z 'Why is prostitution criminalized? An alternative viewpoint on the construction of sex work' (2010) 13 *Contemporary Justice Review* 44.

⁸⁸ Raymond J G 'Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution' (2008) 17 *Journal of Trauma Practice* 2.

2.3.2 Decriminalisation

Decriminalisation refers to the action of not rendering an activity as illegal.⁸⁹ Thus, the decriminalisation of sex work refers to the elimination of all laws and criminal sanctions associated with sex work.⁹⁰ However, decriminalisation does not mean that sex work-specific regulations will be enacted, rather, sex work is regulated by ordinary statutes regulating other sectors such as employment or health.⁹¹

Decriminalisation is established from the notion that sex work is a choice that women can make.⁹² In turn, this creates a normalcy around the topic of sex work and acts as a catalyst for a paradigm shift of how sex work is viewed within society.⁹³ It is argued that sex work should be seen as labour and sex workers should be seen as workers within the market. Similarly, neoliberalism seeks to assert the best interest of an individual and the freedom to use their body as a commodity to secure such interest.⁹⁴ Those that are pro-decriminalisation rest their case on various notions. It is stipulated that sex workers working within a sphere of criminal suppression experience severe abuse as a result of their illegal status. Unsurprisingly, sex workers are forced to be subservient to pimps as a way to guarantee their protection from authorities.⁹⁵ This is illustrated by the fact that pimps often pay for bail and other legal services when sex workers are arrested. Furthermore, it has been argued that states can use decriminalisation as a means to increase revenue through the collection of tax from sex workers and regulating such tax collection.⁹⁶ In support, Scambler and Scambler have noted that decriminalisation removes ‘the anomaly of a gender-biased body of legislation exclusive to a particular area of work and prepares the ground for de-marginalising female sex workers and restoring basic citizenship and other rights to them’.⁹⁷

⁸⁹ Oxford living dictionary.

⁹⁰ Mathienson A ‘Prostitution policy: legalization, decriminalization and the Nordic model’ (2015) 14 *Seattle Journal for Social Justice* 379.

⁹¹ Mossman E ‘International Approaches to Decriminalising or Legalising Prostitution’ Ministry of Justice New Zealand, (2007) 6.

⁹² Mathienson A ‘Prostitution policy: legalization, decriminalization and the Nordic model’ (2015) 14 *Seattle Journal for Social Justice* 378.

⁹³ Berer M ‘The international women's health movement’ (1997) 10 *Reproductive Health Matters* 41.

⁹⁴ Mathienson A ‘Prostitution policy: legalization, decriminalization and the Nordic model’ (2015) 14 *Seattle Journal for Social Justice* 381.

⁹⁵ Vanwesenbeeck I ‘Sex Work Criminalization Is Barking Up the Wrong Tree’ (2017) 46 *Arch Sex Behav* 1633.

⁹⁶ Deady M.G ‘The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry’ (2011) 17 *WASH. & LEE J.C.R. & SOC. JUST.* 15.

⁹⁷ Abel G M ‘A decade of decriminalization: Sex work ‘down under’ but not underground’ (2014) 14 *Criminology & Criminal Justice* 581.

South Africa can be said to be one of the most liberal countries on the African continent.⁹⁸ Therefore, it is befitting that South Africa is considered to be on the brink of decriminalising sex work. The work of civil society organisations is a pushing force for the decriminalisation of sex work. The Sex worker Education and Task Force (SWEAT) argues that sex work should be decriminalised as it will ensure that the rights of sex workers are protected. Additionally, a respectable relationship between the police and sex workers will develop, resulting in the establishment of a platform for sex workers to report crimes conducted against them and have easy access to health services.⁹⁹

It is important to note that countries have an option between full and partial decriminalisation of sex work. Full decriminalisation requires all laws associated with sex work to be repealed and all criminal penalties of those laws to be repealed as well. New Zealand illustrates the operation of full decriminalisation. It requires brothels to be certified, open to inspection, and clients to abide by safe sex practices or be subject to a fine.¹⁰⁰ Partial decriminalisation of sex work requires some laws associated with sex work to be decriminalised, thus, keeping the criminal penalties of the unrepelled laws. Sweden is a primary example of a state that has adopted partial decriminalisation because it criminalises the buying of sex but does not criminalise the selling of sex.¹⁰¹

2.3.3 Legalisation

Legalisation refers to the action of making an activity that was against the law, permissible.¹⁰² The legalisation of sex work differs from decriminalisation in that it imposes responsibility on

⁹⁸ Godsell B 'A South African Liberalism for the 21st Century' available at: https://hsf.org.za/publications/focus/focus65/02.%20B_Godsell%20%20A%20South%20African%20Liberalism%20for%20the%2021st%20Century.pdf (accessed 30 March 2019).

⁹⁹ World Aids campaign, sex work and the law: the case for decriminalization, 2010. SWEAT is an organization that advocates for women that are in the sex work industry. SWEAT also argues that the decriminalisation of prostitution can have a positive economic effect in South Africa. They argue that, by decriminalisation, sex workers will be included in the tax base, by paying tax. However, this is only viable if the state treats sex workers as employees and buyers as clients.

¹⁰⁰ Raphael J 'Decriminalization of Prostitution: The Soros Effect' (2018) 3 *Dignity: A Journal on Sexual Exploitation and Violence* 7.

¹⁰¹ Mathienson A 'Prostitution Policy: Legalization, Decriminalization and the Nordic Model' (2015) 14 *Seattle Journal for Social Justice* 396.

¹⁰² Oxford living dictionary.

the state to enact legislation to regulate the sex work industry. Furthermore, legalisation imposes certain requirements that have to be fulfilled for legal sex work to take place.¹⁰³

The legalisation of sex work approach empowers women to be upstanding citizens because it ensures that the sex work industry is embedded in the commercial market of the state. This makes sex work a part of tourism and source of revenue for the state through the collection of tax.¹⁰⁴ In the Netherlands, sex work is regulated and immersed within the heart of the tourism industry. The city of Amsterdam provides websites providing more information about tours to the red light district, a street where sex work is concentrated. This has resulted in high levels of sex tourism in the city.¹⁰⁵ Anti-legalisation advocates criticise the legalisation of sex work based on hidden sex work. It is articulated that legalising sex work increases hidden sex work because in some cases legislation requires registration, however, some sex workers do not want to register and undergo the regular check-up out of fear that they will lose their autonomy and experience the stigma attached to sex work.¹⁰⁶ However, the pro-legalisation movement establishes its ideology on the premise that the legalisation of sex work positively contributes to the fight against human trafficking. This is because legalisation establishes a culture in which sex workers are free to report human trafficking and abuse cases¹⁰⁷ For instance, in the Netherlands, trafficked sex workers cannot obtain a working licence. A sex worker without a licence will be arrested and her income is forfeited. Human traffickers lose money if ‘their’ girls get arrested, this results in a decrease of trafficked sex workers because they present a risk of money loss to traffickers.¹⁰⁸ Likewise, it has been articulated by those in support of pro-legalisation that sex work should be viewed as a legitimate form of labour and the participants should be protected by law.¹⁰⁹ To this extent, legalisation endorses the protection of women within the sex work industry because mandatory health checks for sex workers should be established to prevent the spread of HIV and other infections. The legalisation of sex work within the South African context would

¹⁰³ Lee S & Persson P ‘Human Trafficking and Regulating Prostitution’ (2015) 11 *New York University Law School* 19.

¹⁰⁴ Mathienson A ‘Prostitution policy: legalization, decriminalization and the Nordic model’ (2015) 14 *Seattle Journal for Social Justice* 379.

¹⁰⁵ Mathienson A ‘Prostitution policy: legalization, decriminalization and the Nordic model’ (2015) 14 *Seattle Journal for Social Justice* 379.

¹⁰⁶ Trifiolis K ‘Legalizing Prostitution: An Introduction’ (2014). *Law School Student Scholarship* 18.

¹⁰⁷ Daalder A *Prostitution in the Netherlands since the lifting of the brothel ban* ed1 (2007) 54.

¹⁰⁸ Deady M.G ‘The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry’ (2011) 17 *WASH. & LEE J.C.R. & SOC. JUST.* 15.

¹⁰⁹ Mgbako C ‘The Case for Decriminalization of Sex Work in South Africa’ (2013) 44 *Georgetown Journal of International Law* 1435.

mean that all activities within the sex work industry are regulated and sex work which occurs outside the ambit of state control remains illegal.¹¹⁰

2.4 Different categories of sex workers

Understanding the different types of sex work is important to place context on the hierarchy that exists in the sex work industry. There are two categories of sex work; indoor and outdoor sex work. Indoor sex work refers to sex work that operates in private, such as brothels, massage parlour, clubs, private homes, and hotels.¹¹¹ Outdoor sex work refers to sex work that operates in public, such as street corners.¹¹² Expectedly, street sex workers are regarded as being in the most degrading position as they have to stand in the streets to sell their bodies. In contrast, call girls are regarded as being in the best position because they independently choose the terms on which to meet and have sex with clients.

2.5 The causes of sex work

The sex work industry is rapidly growing worldwide,¹¹³ and so are its human rights violations. As a result, it is imperative to analyse the social-economic issues that push women to become sex workers. Like many countries, gender inequality is a prevalent problem in South Africa. This is embedded in patriarchy because women are treated as inferior to their male counterparts. As a result, women experience socioeconomic problems more severely.¹¹⁴ It has to be noted that while the experience of inequality is one shared among white and black women, nonetheless, black women are at the bottom of the totem pole due to racial inequalities that still exist post-apartheid.¹¹⁵ The decision to become a sex worker is not easy, therefore, understanding the forces

¹¹⁰ Mgbako C 'The Case for Decriminalization of Sex Work in South Africa' (2013) 44 *Georgetown Journal of International Law* 1435.

¹¹¹ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 95.

¹¹² SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 96.

¹¹³ Qayyum S, Muhammad M, Iqbal A *et al* 'Causes and decision of women's involvement into Prostitution and its consequences in punjab, pakistan' (2013) 4 *Academic Research International* 2223.

¹¹⁴ Bentley K 'Women's Human Rights & the Feminisation of Poverty in South Africa' (2004) 100 *Review of African Political Economy* 247.

¹¹⁵ Commission for Gender Equality 'Challenges that remain a hindrance in attaining gender equality in South Africa' available at: <http://www.cge.org.za/challenges-that-remain-a-hindrance-in-attaining-gender-equality-in-south-africa/> (accessed 30 March 2019).

that lead women to become sex workers is of vital importance as it informs the optimal legal response to sex work that a state should adopt.¹¹⁶

2.5.1 Factors that push women to become sex workers

Poverty, debts, rape, and family pressure are some of the social factors that lead women to become sex workers.¹¹⁷ It has been established that poverty creates a breeding ground for sex work to thrive.¹¹⁸ In the context of South Africa, the harsh reality of social-economic marginalisation of women has quickly resulted in the ‘feminisation of poverty’.¹¹⁹ The feminisation of poverty means that women are disproportionately affected by poverty in comparison to men.¹²⁰ Notably, South Africa’s discriminatory culture establishes a challenge for women, especially black women to access economic and educational resources.¹²¹ Many children in South Africa are raised in all-women homes, in which the mother is expected to be the financial provider. Women, as sole breadwinners for their families, experience immense pressure.¹²² With this in mind, it is important to remember that the high levels of unemployment in South Africa establish a challenge for women to obtain a regular paying job to support their families.¹²³ For many women, sex work is an option for escaping the holds of poverty because it does not require a high level of skills.¹²⁴

Modernisation is a factor that makes women migrate from their small towns to the big city in search of a better life. Rural areas do not offer many opportunities for women, therefore, women choose to migrate to urban areas such as Gauteng and the Western Cape in search of employment opportunities.¹²⁵ For this reason, the implication of this migration is the overpopulation of urban

¹¹⁶ Qayyum S, Muhammad M, Iqbal A *et al* ‘Causes and decision of women’s involvement into Prostitution and its consequences in Punjab, Pakistan’ (2013) 4 *Academic Research International* 399.

¹¹⁷ Qayyum S, Muhammad M, Iqbal A *et al* ‘Causes and decision of women’s involvement into Prostitution and its consequences in Punjab, Pakistan’ (2013) 4 *Academic Research International* 403.

¹¹⁸ Monroe J ‘Women in Street Prostitution: The Result of Poverty and the Brunt of Inequity’ (2005) 9 *Journal of Poverty* 6.

¹¹⁹ Cause for Justice, Submissions on the SALRC report on project 107 on adult prostitution, 2018, 19.

¹²⁰ Pheko L, Position paper on gender and poverty in South Africa for submission to the national planning commission, 2011, 7.

¹²¹ Cause for Justice, submissions on the SALRC report on project 107 on adult prostitution, 2018, 78.

¹²² Pudifin S & Bosch S ‘Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa’ (2012) 15 *PER / PELJ* 11.

¹²³ Pudifin S & Bosch S ‘Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa’ (2012) 15 *PER / PELJ* 11.

¹²⁴ Cause for Justice, Submissions on the SALRC report on project 107 on adult prostitution, 2018, 29.

¹²⁵ Mlambo V ‘An overview of rural-urban migration in South Africa: its causes and implications’ (2018) 6 *Archives of Business Research* 66.

areas and the increased burden on state resources. Overpopulation in urban areas contributes to unemployment, and without jobs, migrant women are unable to pay for rent, buy food or pay for transport to go back home. The desperation experienced in cities by emigrants from rural areas catapults their decision to make sex work their source of income.¹²⁶

It is no secret that the rate of sexual violence against women and children in South Africa is among the highest in the world, making sexual violence a probable prior experience for some sex workers before entering the sex work industry.¹²⁷ Studies show that the physiological impact of sexual violence against children and some women can result in sex work.¹²⁸ This is based on the psychological effect that sexual abuse has on the victim. In many instances, the victim will view the molester as dominant, leading to an unhealthy connection between men and sexuality. As a result, sex work becomes a source of power and a means to obtain a dominant sexual position.¹²⁹

A study revealed that family pressure is also a factor that can lead to sex work. In a society with very limited job opportunities for women,¹³⁰ and limited capital for women to start their own business,¹³¹ members of a family can actively facilitate the initiation of a family member's entry into the sex work industry.¹³² Nevertheless, it is important to note that sex work is also associated with drug and alcohol abuse since some women become sex workers to fund their drug or alcohol addiction.¹³³

2.6 Effects of criminalising Sex work

For centuries, sex work has been one of the most hazardous professions that women can engage in. Sex work is highly dangerous, sex workers experience the devastating effects of having to

¹²⁶ Asijiki, sex work, migration and tourism, Factsheet 2015, 1.

¹²⁷ Sigsworth R 'Anyone can be a rapist' (2009) *Centre for the Study of Violence and Reconciliation* 8.

¹²⁸ Campbell R & Ahrens C *et al* 'The relationship between adult sexual assault and prostitution: an exploratory analysis' available at: <https://www.ncbi.nlm.nih.gov/pubmed/12968660> (accessed 10 April 2019).

¹²⁹ Nkala P 'Factors That Influence the Increase of Prostitution in Bulawayo's Business Centre' (2014) 19 *Journal of Humanities and Social Science* 67.

¹³⁰ Prakash H 'Prostitution and Its Impact on Society-A Criminological Perspective' (2013) 2 *International Research Journal of Social Sciences* 35. It is articulated that poverty is a harsh factor that pushes women into sex work. 'A woman who is unable to get any gainful employment and who has no supporter must either starve to death or earn her livelihood through prostitution.'

¹³¹ Nkala P 'Factors That Influence the Increase of Prostitution in Bulawayo's Business Centre' (2014) 19 *Journal of Humanities and Social Science* 68.

¹³² Qayyum S, Muhammad M, Iqbal A *et al* 'Causes and decision of women's involvement into Prostitution and its consequences in punjab, Pakistan' (2013) 4 *Academic Research International* 403.

¹³³ Bhunu C & Mhlanga A *et al* 'Exploring the Impact of Prostitution on HIV/AIDS Transmission' (2014) *International Scholarly Research Notices* 2.

conduct sex work without the state's protection. Subsequently, considering the disturbing effects of sex work is imperative to support the notion that illegal sex work is the breeding ground for human rights abuses.¹³⁴ While it can be said that sex work leads to women empowerment through sexual control and independence of women, criminalised sex work has many counter consequences that engulf these positive traits.

2.6.1 Abuse

The most common form of abuse experienced by sex workers in South Africa is physical and sexual abuse. A study shows that a third to half of all sex workers in South Africa have experienced physical or sexual violence or both in their lives.¹³⁵ Pimps and clients often assert their power by using force to place the sex worker in a compromised position where she can be coerced to do anything requested by the pimp or the client.¹³⁶ For example, some pimps request that sex workers should not talk back to them or look the pimp in the eye and sex workers are often required to give the money they make to the pimp.¹³⁷ Sex workers often do not have the power to negotiate the terms upon which sex should occur.¹³⁸ Consequently, Client abuse and exploitation is an expected factor within the sex work industry. A study conducted showed that seventy percent of women within the sex industry were subjected to rape by clients.¹³⁹

The police are expected to protect and serve the community. However, the criminalised status of sex work is used by the police to abuse, harass, and exploit sex workers.¹⁴⁰ Police often enforce such abuse by arresting sex workers and subjecting them to harassment. Some authorities request bribes in the form of sex or money from sex workers.¹⁴¹ Due to the criminalised nature of sex work, the abuse and sexual violence experienced by sex workers remain unreported.¹⁴²

¹³⁴ Sanders T & Cambell R 'Criminalization, protection and rights: Global tensions in the governance of commercial sex' (2014) 14 *Criminology & Criminal Justice* 539.

¹³⁵ Sex workers and sex work in South Africa: A Guide for Journalists and Writers, 2014, 11.

¹³⁶ Erbe N 'Prostitutes: Victims of Men's Exploitation and Abuse' (1984) 2 *Law & Inequality: A Journal of Theory and Practice* 3.

¹³⁷ Grough M & Goldbach T 'Relationship between Pimps and Prostitutes' available at: https://courses2.cit.cornell.edu/sociallaw/student_projects/PimpsandProstitutes.htm (accessed 15 April 2019).

¹³⁸ NSW, *Sex Work and Gender Equality*, Policy Brief 2016, 15. (1-14).

¹³⁹ Erbe N 'Prostitutes: Victims of Men's Exploitation and Abuse' (1984) 2 *Law & Inequality: A Journal of Theory and Practice* 12.

¹⁴⁰ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 21.

¹⁴¹ Rangasami, J, Konstant, T & Manoek, S; Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015; Women's Legal Centre (2016) 12.

¹⁴² Pudifin S & Bosch S 'Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa' (2012) 15 *PER / PELJ* 12.

2.6.2 Discrimination

Women in the sex work industry face rejection from friends, family, and society at large.¹⁴³ Society views sex workers as damaged ‘goods’ and impure because they suffer from moral collapse.¹⁴⁴ As a result, sex workers face discrimination from society and are not given the respect given to other members of the community. Under these circumstances, sex workers are hesitant to access health services as they often experience prejudiced behaviour from hospital or clinic staff. Furthermore, sex workers are afraid to access health services due to fear of being found out and arrested.¹⁴⁵ For this reason, it is not surprising that sex workers do not obtain the medical attention they need or deserve, making them susceptible to sexual and other diseases. Because Sex work is not regarded as work, sex workers are unable to claim employment rights. Thus, they are expected to work in unfavourable and dangerous conditions that place their life at risk.¹⁴⁶ Furthermore, sex workers are discriminated against from accessing housing, this is illustrated by the fact that some landlords do not accept applications or offers placed by sex workers based on their occupation.¹⁴⁷

2.6.3 HIV and STDs

In many countries where Sex work is illegal, there are high levels of HIV exposure.¹⁴⁸ South Africa has the highest rates of HIV/AIDS.¹⁴⁹ As a consequence, sex workers are the most vulnerable to HIV exposure, as they often have unprotected sex. The criminalisation of sex work establishes their inability to negotiate safe sex or resist forced requests by clients to have unprotected sex. While it is believed that sex workers are the reason for the spread of HIV, it should be noted that sex workers are far more at risk of contracting the virus from male clients due to the composition of the vagina. Women are four times more likely to contract HIV and

¹⁴³ Prakash H ‘Prostitution and Its Impact on Society-A Criminological Perspective’ (2013) 2 *International Research Journal of Social Sciences* 7.

¹⁴⁴ Prakash H ‘Prostitution and Its Impact on Society-A Criminological Perspective’ (2013) 2 *International Research Journal of Social Sciences* 7.

¹⁴⁵ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 20.

¹⁴⁶ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 20.

¹⁴⁷ NSWP, *Stigma and Discrimination Experienced by Sex Workers Living with HIV*, Policy Brief 2013, 3.

¹⁴⁸ World Aids campaign, sex work and the law: the case for decriminalization, 2010, 15.

¹⁴⁹ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 74.

STDs than men.¹⁵⁰ Notably, the unawareness of free condoms available at health institutions and the engagement in violent sex provides further catalysts for HIV and STDs contraction.¹⁵¹ Moreover, many sex workers do not go to health care institutions due to several reasons, namely, the discriminatory attitude of staff. Sex workers are reluctant to inform medical staff about their occupation because they are afraid that staff would not respect their confidentiality.¹⁵² A study at a Cape Town clinic showed that clinic staff were rude to sex workers and sex workers were not treated equally to other patients.¹⁵³ When sex workers do not have access to health-care, it becomes very hard to monitor the levels of HIV and STD infections.¹⁵⁴

2.7 Gender inequality

Patriarchal societal norms prescribe the gender roles that society must play. To this extent, women are expected to provide emotional and sexual labour to men for free, but because sex workers obtain payment for sex and emotional labour, they are subjected to treatment that undermines gender equality.¹⁵⁵ The effects of this treatment, as illustrated in this chapter disproportionately affect the lives of women. The criminalisation of sex work oppresses women, this oppression is deeply rooted in patriarchy's sex/gender system that demonises women and causes their subordination.¹⁵⁶ Throughout recent history, men have controlled women's bodies to serve them and their needs while women are denied control over their bodies and their sexual desires.¹⁵⁷ It is from this struggle that two schools of thought emerged, radical feminists and liberal feminists.

¹⁵⁰ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 80.

¹⁵¹ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 74.

¹⁵² SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 80.

¹⁵³ *SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) 80.*

¹⁵⁴ Luiz J & Roets R 'On Prostitution, STDs and the Law in South Africa: The State as Pimp' (2000) 18 *Journal of Contemporary African Studies* 8.

¹⁵⁵ NSW, *Sex Work and Gender Equality*, Policy Brief 2016, 7.

¹⁵⁶ Barry k 'A Radical Feminist Approach to Confronting the Global Sexual Exploitation of Women' (1995) 32 *The Journal of Sex Research* 172.

¹⁵⁷ Barry k 'A Radical Feminist Approach to Confronting the Global Sexual Exploitation of Women' (1995) 32 *The Journal of Sex Research* 172.

2.7.1 Radical feminism

Traditional radical feminists view sex work as a mechanism for women's oppression. The commodification of women's bodies lays the groundwork for the exploitation of women to take place. Sexual exploitation is the use of a woman's body to satisfy a man.¹⁵⁸ It is from this exploitation that the oppression of women and inequality is established. It is believed that sex places men in a position of control and dominance in sexual relations while women are expected to be sexual subordinate.¹⁵⁹

It is important to note that some radical feminists have made some acknowledgements and adjustments to their view on sex work.¹⁶⁰ Some radical feminists argue that sex work is treated differently from other jobs because of society's historical view of sex work as against social norms. Instead, sex work should be seen as an avenue where people can explore non-normative sexual activities.¹⁶¹ The criminalisation of sex work is seen as another way society justifies the subordination of women. Under sex work, women are dominated by men as a result of institutionalised male sexual dominance.¹⁶² Thus, allowing women to use their bodies as they please, addresses the cause of sex inequalities.¹⁶³ Sex workers are a part of a marginalised sexual group of people that practice sex as not prescribed by society's standards.¹⁶⁴ In consequence, radical feminists argue that any regulations that restrict sex workers hinder their self-determination.¹⁶⁵ The eradication of all laws criminalising sex work is imperative to level the playing field so that both men and women can compete equally and decide how to use their bodies.¹⁶⁶ Conclusively, the criminalisation of sex work is not an illustration of society's commitment to addressing the subordination of women. Rather, it shows that women's sexuality is not only controlled by men, but it is also controlled by the state through legislation to ensure that women are vulnerable and powerless in comparison to men.¹⁶⁷

¹⁵⁸ E Oppenheimer *Prostitution as the Exploitation of Women and a Violation of Women's Human Rights* (unpublished MPHIL thesis: University of Cape Town, 2014) 28.

¹⁵⁹ E Oppenheimer *Prostitution as the Exploitation of Women and a Violation of Women's Human Rights* (unpublished MPHIL thesis: University of Cape Town, 2014) 28.

¹⁶⁰ Freeman J 'The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (IM) possibility of Consent' (1989) 5 *Berkeley Women's Law Journal* 92.

¹⁶¹ Weatherall A & Priestley A 'a feminist discourse analysis of sex work' (2001) 11 *Feminism & Psychology* 325.

¹⁶² Thompson S 'Prostitution-A Choice Ignored' (2000) 21 *women's rights law reporter* 232.

¹⁶³ NSW, *Sex Work and Gender Equality*, Policy Brief 2016, 7.

¹⁶⁴ Weatherall A & Priestley A 'a feminist discourse analysis of sex work' (2001) 11 *Feminism & Psychology* 325.

¹⁶⁵ Weatherall A & Priestley A 'a feminist discourse analysis of sex work' (2001) 11 *Feminism & Psychology* 325.

¹⁶⁶ Thompson S 'Prostitution-A Choice Ignored' (2000) 21 *women's rights law reporter* 236.

¹⁶⁷ Freeman J 'The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (IM) possibility of Consent' (1989) 5 *Berkeley Women's Law Journal* 92.

2.7.2 Liberal feminism

Liberal feminists argue that sex work should be viewed as a job equivalent to other jobs. Sex work should be distinguished from other sex minorities, such as lesbians, gays or bisexual individuals because sex minorities are viewed as sexual deviations or preferences, while sex work should be viewed as work.¹⁶⁸ The recognition of sex work as work means that sex workers will not be denied the rights that come with employment under the law.

Sex work should be seen as a means to which women establish their self-autonomy. Thus, the freedom and autonomy that results from women's decision to become sex workers is seen as a justification for promoting a positive view of sex work.¹⁶⁹ In support of this view, Anne McClintock¹⁷⁰ thinks that it is important to acknowledge the excitement and narcissistic enjoyment that occurs in some women as a result of the control they obtain when a man's desire is dependent upon them and they still get paid for it.¹⁷¹ Sex workers should not be seen as victims, but rather empowered women claiming their rights. To this extent, the decision to enter sex work is the exercise of the right to self-autonomy.¹⁷² Sex work acknowledges that women are independent beings capable of deciding what is in their best interest.¹⁷³ Consequently, the criminalisation of sex work upholds the patriarchal notion that women are vulnerable and need to be protected from sexuality, causing gender inequality because women are not allowed to use their body for pleasure or money, but are expected to give sex to men for free.

Society holds the concept of 'no means no' when it comes to women's sexuality, therefore, it is only logical that 'yes must mean yes'.¹⁷⁴ If a woman wants to sell her body for financial gain or other reasons, then society should not interfere with her decision. Consequently, liberal feminism dispels the idea that sex work is merely about money. Sexual freedom is a way in which human

¹⁶⁸ Sutherland K 'Work, sex, and sex-work: competing feminist discourses on the international sex trade' (2004) 42 *Osgoode Hall Law Journal* 155.

¹⁶⁹ Weatherall A & Priestley A 'A feminist discourse analysis of sex work' (2001) 11 *Feminism & Psychology* 325.

¹⁷⁰ McClintock A is the writer of *Workers and sex work: Introduction*. Text 1 (winter 1993).

¹⁷¹ Bernstein E 'What's Wrong with Prostitution? What's Right With Sex Work? Comparing Markets in Female Sexual Labour' (1999) 10 *Hastings Women's Law Journal* 97.

¹⁷² E Oppenheimer *Prostitution as the Exploitation of Women and a Violation of Women's Human Rights* (unpublished M.Phil thesis: University of Cape Town, 2014) 24.

¹⁷³ Thompson S 'Prostitution-A Choice Ignored' (2000) 21 *women's rights law reporter* 237.

¹⁷⁴ Baldwin M 'Split at the Root: Prostitution and Feminist Discourses of Law Reform' (1992) 5 *Yale Journal of Law and Feminism* 96.

rights can be enjoyed, this argument is supported by many human rights groups and organisations.¹⁷⁵

2.8 Chapter conclusion

Public perception and opinion is a fundamental contributor to the stigmatisation of sex work. While public opinion is of importance, the legal responses of a Constitutional democracy such as South Africa are guided by the Constitution.¹⁷⁶ It was held in *S v Makwanyane and Another 1995 (6) BCLR 665* that public opinion may have relevance, however, public opinion is irrelevant when the Court has to protect the rights of minorities and others who cannot protect their rights adequately.¹⁷⁷ The legal responses to sex work are criminalisation, decriminalisation or legalisation. The criminalisation of sex work imposes criminal sanctions on the buying and selling of sex work. As a result, women within the sex work industry are unable to report human rights abuses that they experience. The decriminalisation of sex work ensures that activities related to sex work are not subject to criminal sanctions, while the legalisation of sex work ensures that sex work is regulated by a specific law(s).

The decision to become a sex worker can be attributed to several issues. The most common issues experienced by many women are social-economic in nature. Poverty is prevalent in South Africa, making it a common issue that leads many women to sex work. It can be concluded that sex work requires little to no skills, thus, many women choose to become sex workers. On the other hand, it is important to note that the safety and health of sex workers depend on the state's chosen legal response to sex work. The criminalisation of sex work means that sex workers are not protected by the law. As a result, sex workers experience discrimination from society, which results in an increased rate of HIV/AIDS within the sex work industry and an increase in human rights violations.

The criminalisation of sex work establishes gender inequality between women and men. Some radical feminists acknowledge and support the notion that sex work should be regarded as work and women should be allowed to exercise their self-autonomy. Liberal feminists hold the view

¹⁷⁵ Weatherall A & Priestley A 'A feminist discourse analysis of sex work' (2001) 11 *Feminism & Psychology* 325.

¹⁷⁶ *S v Makwanyane and Another 1995 (6) BCLR 665* para 89.

¹⁷⁷ *S v Makwanyane and Another 1995 (6) BCLR 665* para 88.

that the criminalisation of sex work is upholding the patriarchal notion that women are vulnerable. In light of this, women should have the right to exercise their self-autonomy. To this extent, the criminalisation of sex work does not achieve the objective of protecting women.

CHAPTER 3

HUMAN RIGHTS IMPLICATIONS OF SEX WORK CRIMINALISATION

3.1 Introduction

The Republic of South Africa has been described as a miracle for its ability to move from an oppressive regime to a democracy without undergoing a full-blown civil war.¹⁷⁸ The consequence of such a history has informed South Africa's strong and admired Constitution, which respects the rights of all humans.¹⁷⁹ It is important to note that under the Constitutional order, all rights are legally enforceable. Some rights like human dignity are so special that they enjoy the status of Constitutional values. Accordingly, if any law infringes on these special rights, such laws will be invalid.¹⁸⁰ South Africa is a signatory to several conventions that aim to protect human rights.¹⁸¹ Therefore, South Africa is obligated to respect all the rights contained in the various international human rights instruments to which it is a signatory. This chapter seeks to contextualise the criminalisation of sex work within a human rights framework. It also seeks to determine the position of sex work in various international human rights instruments. This is done as a background to concretise the argument that the criminalisation of sex work prevents the enjoyment of sex workers' human rights.¹⁸²

3.2 Defining human rights

The atrocities that occurred throughout the world's history inform the definition of human rights.¹⁸³ Human rights are considered to be those rights that are inherent in all human beings by

¹⁷⁸ This was the rationale for the phrase 'miracle rising'. See Eeden E 'The Miracle Rising as source for teaching History: Theoretical and practical considerations' (2014) 12 *yesterday & Today* 28.

¹⁷⁹ Chapter 2 of The Constitution of the Republic of South Africa, 1996'

¹⁸⁰ Richards D 'commercial sex and the rights of the person: a moral argument for the decriminalization of prostitution' (1979) 127 *University of Pennsylvania Law Review* 1222.

¹⁸¹ Liebenberg S, Human Development and Human Rights South African Country Study, (200) Para 5.3. South Africa signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights.

¹⁸² The human rights affected include the right to work, not to be discriminated against, liberty, bodily integrity, and dignity.

¹⁸³ The Advocates for Human Rights 'A practitioner's guide to human rights monitoring, documentation and advocacy, available at: https://www.theadvocatesforhumanrights.org/uploads/practitioners_guide_final_report.pdf (accessed 01 August 2019). The world's atrocities such as slavery, genocide, and discrimination prompted the League of Nations to encourage individual governments to recognise and protect the rights of their people.

virtue of being human. Human rights are afforded to everyone and transcend race, religion, sex, colour, property, birth, and political opinion.¹⁸⁴ The preamble of the Universal Declaration of Human Rights recognises the inherent dignity of all members of the human family. Thus, the purpose of the Universal Declaration of Human Rights is to recognise, enshrine and protect human rights.¹⁸⁵ Unsurprisingly, the South African courts interpret human rights to mean those rights that one inherently possesses by the mere fact that they are human beings.¹⁸⁶

Human rights are guaranteed by human rights law and are expressed in treaties, customary international law and bodies of principles.¹⁸⁷ The establishment of the human rights framework is informed by a moral background. Human rights refer to the morally justifiable claims that every human should be able to make upon society.¹⁸⁸ Therefore, human rights are universal and inalienable, meaning that they should be applied to all humans without discrimination, and may only be restricted in exceptional circumstances subsequent to due process.¹⁸⁹ For example, the right to liberty of a person may be restricted if a person is found guilty of a crime by the court of law and has to serve time in jail. In addition to this, human rights are indivisible, interrelated, and interdependent. This means that one right affects other rights, and no one right can exist without other rights, or be treated in isolation, or as more important than other rights.¹⁹⁰ Consequently, the violation of one right affects the enjoyment of various rights. However, the enjoyment of human rights imposes certain obligations on humans, for example one can only enjoy the right to liberty and freedom if he does not violate the rights of others.¹⁹¹

The importance of human rights is captured not only by the establishment of dedicated international institutions, organisations, and bodies but also by the global acknowledgement that human rights set the basic standards by which humans should be treated. The United Nations expresses the importance of human rights by articulating that human rights protect the ability of humans to develop their intelligence, talent, conscience and satisfy their spiritual and other

However, after WWII it was clear that the efforts of the League of Nations were not sufficient and a new international system of human rights protection had to be established. From this was born the universal declaration of Human rights.

¹⁸⁴ Office of the High Commissioner for Human Rights, Human Rights: A basic handbook for UN staff. 13.

¹⁸⁵ Universal Declaration of Human Rights.

¹⁸⁶ *S v Makwanyane and Another 1995 (6) BCLR 665* Para 308.

¹⁸⁷ Office of the High Commissioner for Human Rights, Human Rights: A basic handbook for UN staff. 14.

¹⁸⁸ McFarland W 'Human Rights 101: a brief college-level overview' (2015) *Science and Human Rights Coalition 2*.

¹⁸⁹ Office of the High Commissioner for Human Rights, Human Rights: A basic handbook for UN staff. 14.

¹⁹⁰ Whelan D *Indivisible Human Rights* 1ed (2010) Chapter 3.

¹⁹¹ Parliament of The republic of South Africa 'Human Rights' available at: https://www.parliament.gov.za/storage/app/media/EducationPubs/human_rights_email_eng.pdf (accessed 01 August 2019).

needs.¹⁹² To this extent, human rights are established to afford people dignity, equality, liberty and the choice of how they want to live their lives.¹⁹³

Throughout history, sex workers have been placed in a special category which does not afford them sufficient human rights protection,¹⁹⁴ and as a result, have been excluded from enjoying the same protection that is afforded to other women. However, in recent times, it is argued that only trafficked and exploited sex workers are adequately protected, while voluntary sex workers do not fall under such protection.¹⁹⁵

3.3 Debate on ‘forced’ and ‘voluntary’ sex work

Since the 1980s, the abolitionist ideology against sex work has been replaced by a new discourse that distinguishes between ‘voluntary’ and ‘forced’ sex work.¹⁹⁶ The neo-abolitionists argue that sex work is inherently forced and can never be voluntary because sexual commerce is a form of violence against women. Sex work gives men access to a woman’s body and makes women dependant on men.¹⁹⁷

Contrary, neo-abolitionists have been criticised for their lack of recognition of women’s right to choose sex work as a profession.¹⁹⁸ It is argued that the rationale for sex work is based on poverty, as it forces women to enter the sex work industry. In other words, this rationale expresses that no normal woman would choose to enter the sex work industry unless forced by poverty.¹⁹⁹ While poverty is a fundamental issue,²⁰⁰ it does not negate the fact that a

¹⁹² United Nation ‘Understanding Human Rights’ available at:

<http://www.un.org/cyberschoolbus/humanrights/about/understanding.asp> (accessed 30 July 2019).

¹⁹³ The Advocates for Human Rights ‘A practitioner’s guide to human rights monitoring, documentation and advocacy, available at: https://www.theadvocatesforhumanrights.org/uploads/practitioners_guide_final_report.pdf (accessed 01 August 2019).

¹⁹⁴ South African Law Report Commission (Project 107) adult prostitution (2018) Para 79.

¹⁹⁵ European Parliament, Directorate general for internal policies. Sexual exploitation and prostitution and its impact on gender equality. 70.

¹⁹⁶ Peng Y [“Of course they claim they were coerced”: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma] (2005) 7 *Journal of International Women’s Studies* 20.

¹⁹⁷ Gerassi L ‘A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work’ (2015) 42 *Journal of sociology and social welfare* 3.

¹⁹⁸ Gerassi L ‘A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work’ (2015) 42 *Journal of sociology and social welfare* 3.

¹⁹⁹ Peng Y [“Of course they claim they were coerced”: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma] (2005) 7 *Journal of International Women’s Studies* 20.

²⁰⁰ Phoko L, position paper on gender and poverty in South Africa for submission to the national planning commission, 2011, 7.

decision to become a sex worker made without force or coercion, is made voluntarily.²⁰¹ Women that enter the sex work industry are there to make money, therefore their objective is no different from that of migrant domestic workers, street sellers, garbage collectors or people doing other unpleasant jobs.²⁰² However, only sex workers are pressured to use the ‘poverty as force’ explanation,²⁰³ voluntary sex work done purely for economic gain does exist, and sex work is not inherently coercive or forced.²⁰⁴

The Beijing Declaration supports a position that expresses a distinction between forced and voluntary sex work. The Declaration provides for different categories of violence against women, this encompasses but is not limited to ‘forced prostitution’.²⁰⁵ The Declaration’s inclusion of forced sex work as a form of violence against women makes the distinction between forced and voluntary sex work. From the definition, forced sex work is considered to be violence against women. Conversely, the Declaration views voluntary sex work as a legitimate way to empower women to make a living, thus it can be argued that the Declaration supports the decriminalisation of sex work.

3.4 International human rights framework

The international human rights framework is an important source in determining what is considered to be human rights. Sex workers have inherent human rights that should not be taken away as a result of their choice to be sex workers, they deserve to be treated with dignity and respect.²⁰⁶ Therefore, it is imperative to consider the international legal framework as a means to establish whether South Africa has an obligation to protect sex workers’ human rights through the repealing or enactment of legislation.

²⁰¹ Peng Y [“Of course they claim they were coerced”: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma] (2005) 7 *Journal of International Women’s Studies* 20.

²⁰² Peng Y [“Of course they claim they were coerced”: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma] (2005) 7 *Journal of International Women’s Studies* 20.

²⁰³ Peng Y [“Of course they claim they were coerced”: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma] (2005) 7 *Journal of International Women’s Studies* 20.

²⁰⁴ Cause for Justice, submissions on the SALRC report on project 107 on adult prostitution, 2018, para 19.

²⁰⁵ Beijing Declaration, Platform for Action 1995 and Reaffirming Resolution of 2005.

²⁰⁶ South African Law Report Commission (Project 107) adult prostitution (2009) Para 5.1.

International law has both a direct and indirect impact on policy-making in South Africa.²⁰⁷ The starting point of establishing this impact is by considering the Constitution. Section 39 (1) of the Constitution stipulates that:

‘When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.’²⁰⁸

South Africa is obligated to consider international law when interpreting the Bill of Rights. To this extent, international law has a significant importance and effect on the way South African law is enacted and interpreted.²⁰⁹ Furthermore, the Constitution authorises the consideration of foreign law, at the discretion of the court, when interpreting the Bill of Rights. Not only should South African courts consider international law, but it is well established that courts must prefer an interpretation in line with international law when adjudicating cases.²¹⁰ According to section 233 of the Constitution:

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

Section 233 of the Constitution validates the importance of international law. However, the courts will consider international law that is binding upon South Africa and that is consistent with the Bill of Rights.²¹¹ As a result, the interpretation of domestic law must be in accordance with obligations placed by applicable international law in South Africa.

While it has been established that laws may in certain circumstances be inconsistent with international law, section 231 (4) reiterates the fundamental effect of international law. International agreements have a direct effect on South African law once domestic law has been enacted to give effect to such agreement.²¹² South Africa is a signatory to a number of

²⁰⁷ Slye R ‘International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law’ (2001) 2 *Chicago journal of International* 66.

²⁰⁸ The Constitution of the Republic of South Africa, 1996’

²⁰⁹ Meyersfeld B ‘Domesticating International Standards: The Direction of International Human Rights Law in South Africa’ (2015) 3 *Constitutional Court Review* 401.

²¹⁰ The Constitution of the Republic of South Africa, 1996’

²¹¹ Slye R ‘International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law’ (2001) 2 *Chicago journal of International* 67.

²¹² Tuovinen J ‘What to Do with International Law? Three Flaws in Glenister’ (2015) 5 *Constitutional Court Review* 438.

international instruments that aim to protect human rights, especially that of women and children. South Africa is a signatory to UN Conventions that deal with sex work, however, it has not enacted legislation specifically dealing with sex work.²¹³ South Africa is a signatory to the Universal Declaration of Human Rights, which is a predecessor to the Bill of Rights.²¹⁴ As a result, South Africa has an obligation to ensure human rights protection of women because the commitment to international human rights law has been domesticated in South African's constitution, specifically the Bill of Rights. The subsequent section examines some prominent human rights treaties.

3.5 International human rights instruments

There are various international human rights instruments, however, the instruments used in this thesis will consist of UN Conventions and Covenants respectively. Conventions and Covenants adopted by the UN General Assembly create legally binding international standards for states that are signatories. Upon the adoption of the Convention and Covenant by the UN General Assembly, member states can ratify the Convention or covenant by establishing legislation that will uphold the objectives of such a binding agreement.²¹⁵

3.5.1 The Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others came into effect on 25 July 1951.²¹⁶ This Convention is ground-breaking because it was the only UN treaty that dealt with the exploitation of the prostitution of others until the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children. This protocol supplemented the United Nations Convention against Transnational Organized Crime of 2000 (trafficking protocol).²¹⁷ The 1949 Convention is

²¹³ Cause for Justice, submissions on the SALRC report on project 107 on adult prostitution, 2018. Para 38 & 39.

²¹⁴ Parliament of The Republic of South Africa 'Human Rights' available at: https://www.parliament.gov.za/storage/app/media/EducationPubs/human_rights_email_eng.pdf (accessed 01 August 2019).

²¹⁵ Grosek K & Sabbati G, Ratification of international agreements by EU Member States, Briefing 2016, 1.

²¹⁶ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949

²¹⁷ Doezeema J 'Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol' (2002) 10 *Gender and Development* 24.

thus regarded as a monumental international instrument relating to sex work.²¹⁸ South Africa as a signatory shows an expression of intent to ratify the Convention and thus should abide by the obligations imposed by this Convention.

The preamble declares that an individual, the family, and the community are of great importance, thus they should be protected.²¹⁹ The Convention requires states to punish those who are found guilty of exploitation of sex work. This includes a person who is guilty of procuring and enticing another person into sex work.²²⁰ Similarly, the managing of a space or brothel for sex work is prohibited by the Convention.²²¹ Article 6 of the Trafficking Convention states that:

‘Each Party to the present Convention agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or any exceptional requirements for supervision or notification.’

Article 6 establishes its position on sex work by calling for the non-regulation of sex work.²²² It is clear that the Convention views sex work as a consequence of traffic or coercion, thus women in sex work are victims that need to be protected or saved. Based on this it can be concluded that the Convention is positioned within the criminalisation model and has an abolitionist approach.²²³ Moreover, the Convention is criticised for using the repression of sex work against sex workers themselves without the protection of their rights. On the other hand, the Trafficking protocol establishes a leeway for the emancipation of sex workers. The protocol defines trafficking as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion.²²⁴ Consequently, force or coercion are essential elements for trafficking, making the recognition of voluntary sex work possible. As a result, states are free to recognise sex work as labour and regulate it according to labour standards and are prevented

²¹⁸ Doezeema J *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy* 1 ed (1998) 36.

²¹⁹ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949.

²²⁰ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949.

²²¹ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949.

²²² SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.15

²²³ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.16.

²²⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.

from criminalising sex work and denying sex workers protection of the law in the name of fighting trafficking.²²⁵ In essence, while the 1949 Convention has an abolitionist stance on sex work, the 2000 trafficking Protocol offers an updated stance on sex work and moves away from the abolitionist approach to offer recognition to sex work and the need to protect sex workers.

3.5.2 Convention on the Elimination of Violence against Women of 1993 (CEDAW)

The United Nations General Assembly adopted the Convention on the Elimination of Violence against Women (CEDAW) in 1979.²²⁶ The Convention is one of the most fundamental conventions of the UN and it has been ratified by the majority of the member states.²²⁷ The adoption of the CEDAW was based on the need to adopt an instrument that would be effective in setting a comprehensive international standard for the protection of women against sexual and gender-based violence.²²⁸ As a signatory, South Africa is bound by various obligations set by the CEDAW. South Africa ratified the CEDAW in 1995 without reservations. The CEDAW aims to ensure that discrimination against women is eradicated and it covers other areas concerning women, such as physical, sexual and psychological violence at home and elsewhere in society.²²⁹

The preamble of CEDAW not only recognises the systematic discrimination of women, but it also emphasises that discrimination is a threat to the achievement of equality among all. Article 1 of the CEDAW defines discrimination against women as:

‘Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

Sex work is not listed as a ground for non-discrimination, moreover, it can be argued that the discrimination of sex workers is based on sex and it hinders sex workers from enjoying

²²⁵ Doezeema J ‘Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol’ (2002) 10 *Gender and Development* 24.

²²⁶ Convention on the Elimination of Violence against Women of 1993.

²²⁷ Convention on the Elimination of Violence against Women of 1993.

²²⁸ Declaration on the Elimination of Violence against Women of 1993.

²²⁹ Declaration on the Elimination of Violence against Women of 1993.

fundamental rights.²³⁰ Women have the right to participate in the economic, consequently, women that voluntarily enter the sex work industry for economic reasons should not be discriminated from participating in the economy. It is argued that sex work itself does not violate any rights, in state sex work is a manifestation of sex workers' exercise of their rights over their bodies and freedom to dictate how to express their sexual freedom.²³¹

Article 3 expresses fundamental rights that must be enjoyed by women and places an obligation for state parties to ensure that such rights are enjoyed. This includes the right to life, equality, and freedom from all forms of discrimination.²³² Article 6 further obliges states to act positively, it states that:

‘States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’

The wording of Article 6 indicates that sex work is given focus. The wording is important because it provides two arguments that can be made as to the intention of the CEDAW. On one hand, it is argued that article 6 instructs states to suppress exploitation of sex work,²³³ and does not propose the elimination of sex work itself.²³⁴ On the other hand, it is argued that article 6 targets the suppression of all forms of sex work. Moreover, it is commonly expressed that article 6 does not endorse the criminalisation of sex work but rather the consequences of exploitation of sex work.²³⁵ To this extent, the interpretation of Article 6 indicates the importance of suppressing the trafficking and exploitation of women in the sex work industry, so states must ensure that the exploitation of sex workers is suppressed. The article does not direct states to suppress sex work itself.

Article 21 authorises the CEDAW committee to make recommendations upon the examination of reports submitted by states.²³⁶ The interpretation of article 6 captured in various recommendations of the CEDAW committee establishes a trend that indicates that the CEDAW lens towards the decriminalisation of sex work.

²³⁰ Convention on the Elimination of Violence against Women of 1993.

²³¹ Human Rights Watch, *Why Sex Work Should Be Decriminalized*, 2019.

²³² Convention on the Elimination of Violence against Women of 1993.

²³³ Erbe N ‘Prostitutes: Victims of Men's Exploitation and Abuse’ (1984) 2 *Law & Inequality: A Journal of Theory and Practice* 3.

²³⁴ SALRC Discussion Paper 0001 (project 107) *Sexual Offences* (2009) para 5.29.

²³⁵ SALRC Discussion Paper 0001 (project 107) *Sexual Offences* (2009) para 5.29.

²³⁶ Convention on the Elimination of Violence against Women of 1993.

In General Recommendation No.19: violence against women, paragraph 14, the CEDAW Committee noted that|:

‘Sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.’²³⁷

Sex work is not included in the list of exploitative practices but, this illustrates the fact that the Convention does not oblige states to criminalise it. Therefore states are encouraged to criminalise the mischiefs that result from sex work and not sex work itself.

In General Recommendation No. 19: Paragraph 15, the CEDAW Committee noted that:

‘Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need equal protection of laws against rape and other forms of violence.’²³⁸

This recommendation does not differentiate between sex workers and non-sex workers for purposes of protection from exploitation. All women must be protected from rape and other forms of violence thus, the committee directly expresses the optimal need to protect sex workers irrespective of their status.

In General Recommendation No. 19: Paragraph 24, the CEDAW committee held that:

‘States parties should ensure that laws against family violence and abuse, rape, sexual assault, and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.’²³⁹

²³⁷ General Recommendation No. 19 (11th session, 1992)

²³⁸ General Recommendation No. 19 (11th session, 1992)

²³⁹ General Recommendation No. 19 (11th session, 1992) furthermore the committee noted that ‘States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia: Effective legal measures, including penal sanctions, civil remedies and compensatory

This recommendation places a burden on states to ensure that law enacted achieves its purpose of protecting women against violence. In South Africa, the Sexual Offences Act criminalises sex work and articulates that a person found to be guilty will be subject to criminal sanctions.²⁴⁰ Sex workers are unable to report violations against them due to the fear of being prosecuted.²⁴¹ Consequently, there is a disconnection between the purpose of the legislation, which is to protect women from violence and exploitation, and the results achieved.

In General Recommendation No 24-women and health, Paragraph 6, the CEDAW Committee stated that:

‘Special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee, and internally displaced women, the girl child, and older women, women in prostitution, indigenous women and women with physical or mental disabilities.’²⁴²

Furthermore, paragraph 18 of the General Recommendation of 24 states that HIV and other sexually transmitted diseases are central to the rights of women. There are unequal power relations between men and women. Women and adolescent girls are likely to be unable to refuse sex, insist on safe sex or practice responsible sex. Thus, women who are in the sex work industry are particularly vulnerable to sexually transmitted diseases. As a result, states should ensure, without prejudice or discrimination, that the right to sexual health information, education, and services of all women and girls is realised.²⁴³ Moreover, in South Africa, the criminalisation of sex work hinders the realisation of the right to access health care due to the discriminatory manner in which sex workers are treated by health care staff. Accordingly, sex workers refrain from demanding adequate health care due to the fear of being reported to the authorities.²⁴⁴

CEDAW makes the distinction between forced and voluntary sex work as a means to illustrate that sex work is not inherently exploitative.²⁴⁵ The CEDAW recognises the need to enjoy the

provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace.’

²⁴⁰ The sexual offences act, section 20 (1) (aA).

²⁴¹ Pudifin S & Bosch S ‘Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa’ (2012) 15 *PER/PELJ* 12.

²⁴² General Recommendation No. 24 (20th session, 1999).

²⁴³ General Recommendation No. 24 (20th session, 1999).

²⁴⁴ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 4.21.

²⁴⁵ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.38.

equal protection of the law by voluntary sex workers and non-sex workers.²⁴⁶ The CEDAW indirectly endorses the decriminalisation model.²⁴⁷ Decriminalisation of sex work means that all legislation criminalising adult voluntary sex work is abolished and as a consequence sex workers can have access to health services without judgement, can report crimes conducted against them and have better working conditions. In essence, the CEDAW allows states to enact legislation that will ensure that all women are protected from exploitation and abuse, thus the negative effects caused by criminalising sex work establishes the need to decriminalise sex work at the exclusion of forced or coerced sex work.

As a signatory to the CEDAW, South Africa undertakes to fulfill all the obligations established in terms of the convention. South Africa ratified the CEDAW in 1995. To this extent, South Africa must submit periodic reports in terms of article 18 to the secretary-General of the United Nations indicating what the problems are with adhering to the protection of all women, including sex workers, against violence and exploitation.²⁴⁸ Additionally, South Africa's HIV/ ADIS rate is one of the highest in the world, making women's health at great risk and in need of protection.²⁴⁹ The criminalisation of sex work is a large contributor to violence and exploitation experienced by sex workers and the high levels of HIV/AIDS. Conversely, South Africa should consider decriminalising sex work to achieve the objectives of the CEDAW, which is to ensure equal protection for all women against discrimination, violence, and exploitation.

3.5.3 International Covenant on Civil and Political Rights of 1966 (the ICCPR)

The ICCPR is an international human rights treaty adopted in 1966. The ICCPR was adopted to give effect to the Universal Declaration of Human Rights. The other treaty that gives effect to the UDHR is the International Covenant on Economic, Social and Cultural Rights.²⁵⁰

The preamble of the ICCPR stipulates that the enjoyment of human rights as contained in the Universal Declaration of Human Rights, depend on establishing conditions that make it possible for everyone to enjoy his or her civil and political rights, as well as his or her economic, social

²⁴⁶ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.38.

²⁴⁷ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.38.

²⁴⁸ Convention on the Elimination of Violence against Women of 1993.

²⁴⁹ Statistics South Africa 2019.

²⁵⁰ The International Covenant on Civil and Political Rights.

and cultural rights.²⁵¹ States that have signed and ratified the ICCPR have the obligation to respect, promote and fulfil or realise human rights and freedoms contained in the covenant for the people of that state's territory. South Africa ratified the ICCPR in 1998,²⁵² consequently, South Africa has the obligation to implement measures that will give immediate effect to the rights contained in the ICCPR. According to the covenant, all peoples must enjoy the rights in the covenant to enable them to enjoy a broad range of human rights. Sex workers are a part of the category of 'all peoples'.²⁵³

Article 17 stipulates that everyone has the right not to be subjected to arbitrary or unlawful interference with their privacy, nor to unlawful attacks on their honour or reputation, as well as the right to be protected by law against such interference or attacks.

Article 26 expresses that all persons are equal before the law and are entitled without discrimination to equal protection of the law. All persons have the right to equal and effective protection against discrimination on any grounds such as sex, social origin, birth or other status.

Article 2(3) holds that the state who is a party to this covenant must ensure that there is an effective remedy for those people whose rights or freedoms in the covenant have been violated, notwithstanding that the violation has been committed by persons acting in an official capacity.

The rights contained in the ICCPR are non-derogable, meaning that one does not lose them irrespective of whether one is a sex worker or not.²⁵⁴ The ICCPR protects Sex workers' rights by expressly directing that states have to take positive action and omissions to ensure the realisation and enjoyment of the rights contained in the ICCPR. The criminalisation of sex work leads to unequal protection of the law because sex workers are hindered from accessing the justice system. Furthermore, the criminalisation model causes arbitrary arrests, discrimination, loss of life and hindrance in accessing health care.²⁵⁵ Hence, the realisation of these rights is better achieved if sex work is decriminalised.²⁵⁶ Conclusively, the objective of the ICCPR supports a non-criminalising response to sex work.

²⁵¹ The International Covenant on Civil and Political Rights.

²⁵² The International Covenant on Civil and Political Rights.

²⁵³ Canadian HIV/AIDS Legal Network 'vectors, Vessels and Victims' (2005) 48.

²⁵⁴ Decker M, Crago AL & Chu S *et al* 'Human rights violations against sex workers: burden and effect on HIV' (2014) 4 *Series* 11.

²⁵⁵ Decker M, Crago AL & Chu S *et al* 'Human rights violations against sex workers: burden and effect on HIV' (2014) 4 *Series* 11.

²⁵⁶ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.21.

3.5.4 International Convention on Economic, Social and Cultural Rights of 1966 (the ICESCR)

The ICESCR was adopted by the General Assembly in 1966 but came into force in 1976. The ICESCR is one of the two treaties that give effect to the Universal Declaration of Human Rights, the other being the ICCPR.²⁵⁷ Together, the Universal Declaration of human rights, the ICCPR and the ICESCR make up the International Bill of Human Rights.²⁵⁸

The ICESCR is a treaty that focuses on the realisation and enjoyment of economic, social and cultural rights for everyone. The preamble of the ICESCR expresses that the enjoyment of the rights contained in the Universal Declaration of Human Rights relies on the establishment of conditions that will enable everyone to enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights.²⁵⁹ The ICESCR obligates member states that have ratified the covenant to promote, observe and establish measures to realise the rights contained in the covenant. However, the enjoyment of these rights will depend on the resources of the state concerned and thus, the realisation of the rights should be progressive. South Africa is a signatory to the covenant, the covenant was signed in 1994 and ratified in 2015.

it.²⁶⁰ As a signatory, South Africa shows its intention to realise the rights contained in the covenant, thus to show good faith, South Africa should tackle the obligations set by the covenant.²⁶¹

The ICESCR stipulates that ‘all peoples’ must enjoy the economic, social and cultural rights contained in the covenant.²⁶² As such sex workers are human and they fall within the category of ‘all peoples’.

Article 6(1) affirms that everyone has the right to work, which includes the right to gain a living by work which anyone freely chooses or accepts. The state must take reasonable steps to safeguard this right.

²⁵⁷ International Covenant on Economic, Social and Cultural Rights.

²⁵⁸ International Covenant on Economic, Social and Cultural Rights.

²⁵⁹ International Covenant on Economic, Social and Cultural Rights.

²⁶⁰ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.22.

²⁶¹ Canadian HIV/AIDS Legal Network ‘vectors, Vessels and Victims’ (2005) 48.

²⁶² SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) para 5.32.

Article 7 expresses that everyone has the right to the enjoyment of just and favourable conditions of work, this includes but not limited to remuneration, fair wages, a decent living, equal opportunity for everyone, safe and healthy working conditions, as well as rest, leisure and reasonable limitation of working hours.

Article 9 guarantees that everyone has the right to social security, including social insurance.

Article 11 (1) stipulates that everyone has the right an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.

Article 12 (1) guarantees that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.

The ICESCR does not expressly mention sex workers' rights specifically, however it guarantees the rights of sex workers by the indication that all peoples, including sex workers, are recipients of the rights contained in the covenant. The ICESCR recognises and guarantees the right to work. Thus, voluntary sex workers who 'choose' to enter the sex work industry without force or coercion should be viewed as exercising their right to work. The exercise of the right to work positively affects the attainment of other rights such as the right to just and favourable working conditions, social security, adequate standard of living, and the highest attainable standard of physical and mental health. The covenant's objective is focused on the attainment of economic and social rights. Consequently, the covenant supports a framework that recognises sex work as work and entitling sex workers to work in safe and healthy working conditions.²⁶³ As a result, it can be concluded that the ICESR supports the decriminalisation of sex work.²⁶⁴

3.6 Significance of sex work criminalisation on human rights

The international human rights framework indicates that everybody has human rights. Moreover, the criminalisation of sex work contributes to the violation of sex workers' rights. As indicated in the Conventions discussed in this dissertation, sex workers' rights to work, non-discrimination and liberty are violated.²⁶⁵ As a consequence to the violation of these rights, other rights such as

²⁶³ Mossman E 'International Approaches to Decriminalising or Legalising Prostitution' (2007) 12.

²⁶⁴ Mossman E 'International Approaches to Decriminalising or Legalising Prostitution' (2007) 12.

²⁶⁵ Peters D 'Sex work and Human Rights' available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 25 April 2019).

the right to bodily integrity and dignity are violated as well. Thus, it is imperative to also discuss the rights to bodily integrity and dignity of sex workers. The focus on the violation of these specific rights is imperative because these rights are commonly violated when sex work is criminalised.²⁶⁶

As established in this chapter, South Africa has an obligation to consider international law when interpreting the Bill of Rights. To this extent, discussing the rights to work, non-discrimination, liberty, bodily integrity and dignity is important because the international interpretation of these rights has an important effect on the interpretation of Constitutional rights in South Africa.²⁶⁷

3.6.1 The right to choose one's trade, occupation or profession freely

The argument that sex work is work can be traced centuries back to when Karl Marx made an analogy of sex work to labour. He states that 'prostitution is only a specific expression of the general prostitution of the labourer'.²⁶⁸ The ILO Convention (1964) contains an employment policy. The employment policy stipulates that everyone is entitled to 'full, productive and freely chosen employment'. Additionally the Universal Declaration of human rights, article 23 affirms that:

'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'

This provision is made legally binding in the ICESCR. In General Comment No. 18: Right to work, it is stipulated that a person's dignity is expressed when they exercise their freedom to choose the work they want to do, and this work must be performed free from violence and harassment, including sexual harassment.²⁶⁹ The right to work requires states to formulate and implement an employment policy,²⁷⁰ take appropriate measures to develop an enabling environment for productive employment opportunities with non-discrimination²⁷¹ and respect,

²⁶⁶ Office of the High Commissioner for Human Rights, Ruhama's submission to the CEDAW Committee. 2.

²⁶⁷ Meyersfeld B 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' (2015) 3 *Constitutional Court Review* 401.

²⁶⁸ Van der Meulen E 'When Sex is Work: Organizing for Labour Rights and Protections' (2012) 69 *Athabasca University Press* 7.

²⁶⁹ General Comment No.19-right to work, ICESCR para 4.

²⁷⁰ General Comment No.18 ICESCR para 26.

²⁷¹ The International Covenant on Economic, Social and Cultural Rights. Art. 7.

protect and fulfil the right to work.²⁷² Therefore, the state must refrain from denying access to decent work for people,²⁷³ it has to adopt legislation that does not hinder people from equal access to work and has to fulfill the right to work for individuals or groups that cannot do so by recognising the right to work in national legal systems.²⁷⁴

In General comment No. 23: Right to just and favorable conditions of work. The right to just and favorable working conditions was interpreted to mean that everyone is entitled to work under safe and healthy conditions.²⁷⁵ The state must take the appropriate measures to reduce workers outside the formal economy, who as a result of the situation, have no protection.²⁷⁶

General comment No.19: violence against women states that socioeconomic hardships force many women into sex work.²⁷⁷ Thus, the majority of the sex workers rely on sex work for financial gain and sex work is seen as a way in which they can support themselves and their families.²⁷⁸ The right to employment means that sex workers have the right to a profession of their choice, fair labour practices and the freedom to use their body as a commodity to secure an interest.²⁷⁹

Sex workers as a result of their status are unable to work openly and freely, making them vulnerable.²⁸⁰ Sex workers working under pimps or brothel employers are often subjected to unfair labour practices such as being overworked, underpaid and forced to have unprotected sex with clients.²⁸¹ The understanding that sex work is work is fundamental in achieving improved and safe working environments for women in the sex work industry.²⁸² The German government recognises sex work as a profession and legislation enacted allows sex workers to entre

²⁷² General Comment No.18 ICESCR para 24.

²⁷³ General Comment No.18 ICESCR para 25.

²⁷⁴ General Comment No. 18 ICESCR para 26.

²⁷⁵ General comment No. 23 ICESCR para 6.

²⁷⁶ General comment No. 18 ICESCR para 10.

²⁷⁷ General Recommendation No. 24 (20th session, 1999).

²⁷⁸ Qayyum S, Muhammad M, Iqbal A *et al* 'causes and decision of women's involvement into Prostitution and its consequences in punjab, Pakistan' (2013) 4 *Academic Research International* 6.

²⁷⁹ Mathienson A 'prostitution policy: legalization, decriminalization and the Nordic model' (2015) 14 *Seattle Journal for Social Justice* 381.

²⁸⁰ Peters D 'Sex work and Human Rights' available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 25 April 2019).

²⁸¹ Peters D 'Sex work and Human Rights' available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 25 April 2019).

²⁸² Van der Meulen E 'When Sex is Work: Organizing for Labour Rights and Protections' (2012) 69 *Athabasca University Press* 7.

contracts of employment.²⁸³ The Primary purpose of decriminalisation is to improve the social, economic and working conditions of sex workers.²⁸⁴ While the state has the obligation to implement an employment policy, it can be argued that the decriminalisation model does not oblige the state to assume an employment contract between the sex worker and a third party.

3.6.2 The right to dignity

Human dignity refers to the value or worth that is placed on a person, it implies that every person is worthy of honor and respect.²⁸⁵ Thus, human dignity protects the intrinsic human worth of all people. In General Comment No. 14: The Right to the Highest Attainable Standard of Health, the committee held that the enjoyment of human rights means that everyone has to live a life of dignity.²⁸⁶ To this extent, human dignity is a fundamental right upon which other rights rest.

It is reported that sexual violence and HIV is the highest among female sex workers.²⁸⁷ This is attributed to the lack of medical services rendered to sex workers.²⁸⁸ In South Africa, the department of health is mandated with distributing free condoms to sex workers to prevent HIV, pregnancy and STIs, this mandate is rarely carried out a grassroots level.²⁸⁹ In practice, sex workers are merely treated as instruments that have no emotion and without consideration of their characteristics, this is the point upon which their dignity is stripped away.²⁹⁰ All humans possess equal and inherent worth, regardless of their socioeconomic status, age and occupation.²⁹¹ To this extent, it can be expressed that criminalising sex work perpetuates the occurrence of exploitation against sex workers, resulting in their dignity being violated.²⁹²

²⁸³ The Prostitution Act (Prostituiertenschutzgesetz) of 2002, Section 1.

²⁸⁴ Benoit C, Jansson S M & Others 'prostitution stigma and its effect on the working conditions, personal lives, and health of sex' (2017) *Prostitution Stigma* 4.

²⁸⁵ Shultziner D 'Human Dignity - Functions and Meanings' (2003) 3 *Global Jurist Topics* 6.

²⁸⁶ General Comment No. 14. The Right to the Highest Attainable Standard of Health.

²⁸⁷ Sex workers and sex work in South Africa: A Guide for Journalists and Writers, 2014, 12.

²⁸⁸ Mutangoma M, Samuel M & Others 'High HIV prevalence and associated risk factors among female sex workers in Rwanda' (2017) 28 *International Journal of STD & AIDS* 1.

²⁸⁹ IOL News 'Sex workers have right to dignity' available at: <https://www.iol.co.za/news/south-africa/gauteng/sex-workers-have-right-to-dignity-1996919> (accessed 26 April 2019).

²⁹⁰ Bal P *A Review of Human Dignity* (2017) 5.

²⁹¹ Andorno R *Human Dignity and Human Rights* (2014) 45.

²⁹² IOL News 'Sex workers have right to dignity' available at: <https://www.iol.co.za/news/south-africa/gauteng/sex-workers-have-right-to-dignity-1996919> (accessed 26 April 2019).

3.6.3 The right to bodily integrity

The right to bodily integrity refers to the ‘ability to have freedom of movement, security against violence, sexual satisfaction, and reproductive choice’.²⁹³ This is a conceptualised notion that each person should have control of their body.²⁹⁴ Society has to respect women as active agents of their own lives. Women have the right to have sexual relations with whomever they so choose outside the confines of marriage or civil unions.²⁹⁵ Therefore, an adult woman who chooses to be a sex worker has the freedom to do so, and this does not establish the basis upon which her rights can be violated. In General Comment No. 22: the Right to sexual and reproductive health, the committee articulated that a woman has the right to make choices concerning her body and sexuality, free from discrimination, violence, and coercion. To this extent, women need to have access to health facilities, materials, information and services that will ensure the full enjoyment of the right to sexual and reproductive health under article 12 of the ICESCR.²⁹⁶

Criminalising sex work does not recognise the autonomy of women and their freedom to use their bodies to obtain money.²⁹⁷ The realisation of the right to bodily integrity for female sex workers is a step in recognising equality.

3.6.4 The right to non-discrimination

The right to equality and non-discrimination is contained in Article 2 of the Universal Declaration of Human Rights. The right is also contained in various UN human rights instruments, including article 2 of the ICESCR and articles 2 and 26 of the ICCPR.

In General Comment No.18: non-discrimination, the human rights committee stipulated that the term ‘discrimination’ as used in the ICCPR should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. The

²⁹³ Patosalmi M ‘Bodily Integrity and Conceptions of Subjectivity’ (2009) 24 *Hypatia* 127.

²⁹⁴ Patosalmi M ‘Bodily Integrity and Conceptions of Subjectivity’ (2009) 24 *Hypatia* 128.

²⁹⁵ Manamela T ‘towards a sexually free south Africa: a feminist and Constitutional defence in favour of legalising prostitution through the right to bodily integrity’ (2018) 12 *Pretoria Student Law Review* 102.

²⁹⁶ General Comment No. 22.

²⁹⁷ Patosalmi M ‘Bodily Integrity and Conceptions of Subjectivity’ (2009) 24 *Hypatia* 136.

committee further stipulated that the enjoyment of rights on equal footing does not mean identical treatment, for example, the death penalty cannot be imposed on a person below the age of 18 years.²⁹⁸ States have an obligation to ensure non-discrimination of any individual or group, and even when a state derogates from its obligations in terms of the ICCPR, such derogation should not be discriminative to an individual or a group of people.²⁹⁹

In General Comment No. 22: the Right to sexual and reproductive health, the committee held that the right to sexual and reproductive health is interdependent with other rights. Therefore, if the freedom of a woman to make choices with her body is taken away, this leads to discrimination based on gender.³⁰⁰

Sex workers often experience discrimination from various institutions including healthcare institutions.³⁰¹ The discrimination of sex workers is manifested in their trouble to access certain services. For example, Police do not treat sex workers as victims of crimes because of their unlawful status,³⁰² discouraging sex workers from reporting crimes. The discrimination experienced by sex workers from society and public authorities has detrimental consequences on their health, safety and the enjoyment of other human rights.

3.6.5 The right against deprivation of liberty

The Universal Declaration of Human Rights 1948 states that no person may be arbitrarily deprived of their liberty.³⁰³ Furthermore, article 9 of the ICCPR provides for the right to liberty. The deprivation of liberty has to be justified and the procedure carried out must be in accordance with domestic law.

According to General Comment No. 35: Article 9(Liberty and security of person), states have the obligation to take reasonable steps to protect the right to liberty of person against deprivation by third parties. The right to liberty is not absolute and deprivation can be justified by the enforcement of criminal laws.³⁰⁴ Nonetheless, the deprivation of liberty must not be arbitrary nor

²⁹⁸ General comment No. 18 Non-Discrimination Para 8.

²⁹⁹ General Comment No. 18 Non Discrimination para 2.

³⁰⁰ General Committee No 22.

³⁰¹ Qayyum S, Muhammad M, Iqbal A *et al* 'causes and decision of women's involvement into Prostitution and its consequences in punjab, Pakistan' (2013) 4 *Academic Research International* 10.

³⁰² Fick N 'Police abuse of sex workers when making arrests' (2006) 16 *SA Crime Quarterly* 29.

³⁰³ The Universal Declaration of Human Rights, Article 9.

³⁰⁴ General Comment No. 35, Right to liberty, para 10.

unlawful. An arrest and detention will be arbitrary or unlawful if the arrest and detention are not imposed on such grounds and in accordance with the procedure established by law. In essence, arrests or detentions may be in violation of applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful.³⁰⁵

In General Comment No. 3: Liberty and security of person, the committees confirm that arbitrary arrest and detention is unlawful. Domestic law may authorise an arrest or detention, but the notion of ‘arbitrariness’ refers to the elements of inappropriateness, lack of due process and injustice being present in the arrest or detention, and this must not be equated to the notion of ‘against the law’³⁰⁶ In General Comment No. 18: The right to work, the committee articulates that the state should not discriminate anyone from accessing means to obtain employment, thus arbitrary arrest and detention can be viewed as a hindrance in obtaining employment.

Sex workers are vulnerable to violence not only from clients and pimps but from the authorities as well. A gross abuse of power is often exercised by the police.³⁰⁷ It is common for police not to follow the correct procedures when affecting arrests because they are often guilty of harassing, assaulting or raping sex workers as well.³⁰⁸ In an interview done by the Sex Worker Education and Advocacy Taskforce (SWEAT), three sex workers revealed that a police officer not only promised to grant them freedom if they slept with him, he also took part in profiling sex workers when they get arrested.³⁰⁹ In South Africa, it has been reported that some police officers take pictures of the sex workers upon their arrest to show other police officers, even though this is illegal.³¹⁰ Additionally, some police officers unlawfully drive around with sex workers in the van for long periods of time and once detained sex workers are often kept in poor conditions.³¹¹

The arrest of sex workers is often not for the achievement of justice but rather for their abuse and extortion by the police. Unsurprisingly, police can avoid accountability due to the illegal status of sex work. The constant harassment, arbitrary arrest, and abuse experienced by sex workers

³⁰⁵ General Comment No. 35, liberty, para 11.

³⁰⁶ General Comment No. 35.

³⁰⁷ Fick N ‘Police abuse of sex workers when making arrests’ (2006) 16 *SA Crime Quarterly* 27.

³⁰⁸ Peters D ‘Sex work and Human Rights’ available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 25 April 2019).

³⁰⁹ Fick N ‘Police abuse of sex workers when making arrests’ (2006) 16 *SA Crime Quarterly* 27.

³¹⁰ Rangasami, J, Konstant, T & Manoek, S; Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015; Women’s Legal Centre (2016) 16.

³¹¹ Rangasami, J, Konstant, T & Manoek, S; Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015; Women’s Legal Centre (2016) 18.

experience at the hands of the police is a violation of their right to liberty. It can be suggested that this culture of malpractice by the police can only be suppressed when sex work is decriminalised.

3.7 Chapter conclusion

Human Rights are inherent to human beings. Human rights are universal and inalienable, therefore they should be applied to all humans without discrimination, and may only be restricted in exceptional circumstances subsequent to due process. Sex workers are human beings who are beneficiaries of inherent human rights and have the right not be discriminated against in the enjoyment of human rights. A debate as to whether sex work is inherently 'forced' or whether it can be 'voluntary' emerged after the 1980s. According to abolitionist ideology, sex work is inherently forced and can never be voluntary. However, the abolitionist ideology has been criticised for its lack of recognition of women's right to choose sex work as a profession. It is argued that while poverty is a fundamental issue, it does not negate the fact that women that decide to enter the sex work industry are there to make money, therefore, their objective is no different from that of migrant domestic workers, street sellers, garbage collectors or people doing other unpleasant jobs. To this extent, it has been established that 'voluntary' sex work exists in instances where sex workers enter the sex work industry without force, force excludes poverty.

While Sex work is not extensively addressed by international human rights instruments, the interpretation of these instruments establishes the need to protect all women from violence and traffic. It has been argued that the interpretation of international human rights law aims to eradicate the effects of exploitation for sex work and not sex work itself. The consequences of criminalised sex work are devastating and are perpetuated by the illegal status of sex work. Violence, exploitation and sexual abuse experienced by sex workers as a result of criminalisation violates, among other rights, their right to work, dignity, bodily integrity, non-discrimination and liberty. To this extent, it may be concluded that sex workers are protected under international human rights law and the criminalisation of sex work contributes to sex workers' human rights violations. As a signatory to the conventions and covenants discussed in this chapter, South Africa should uphold the objectives of the various instruments and

ensure the protection of all women from exploitation and their enjoyment of all human rights. Consequently, the remedy to these gross violations is to decriminalise sex work to grant sex workers the power to effectively enjoy their human rights.

CHAPTER 4

LEGAL POSITION OF SEX WORK IN SOUTH AFRICA

4.1 Introduction

It has been established that South Africa's legal approach to sex work is total criminalisation.³¹² The application of legislation to a set of facts provides the courts the opportunity to interpret legislation and determine the effectiveness of that legislation.³¹³ To this extent, the effectiveness and interpretation of the Sexual Offences Act will be considered through analysing *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)*. In addition, the case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* will be considered to determine whether the Labour Relations Act No 66 of 1995 (LRA) applies to sex work.

The legal status of sex work in South Africa has been a point of debate, as some support the criminalisation of sex work while others advocate for its decriminalisation. The judicial decision in *S v Jordan* further contributes to this debate.³¹⁴ *S v Jordan* is a landmark case that illustrates the manner in which sex work was viewed by the Constitutional Court judges at that time. As the highest court in South Africa, the Constitutional Court is trusted with protecting, interpreting and enforcing the Constitution.³¹⁵ Thus, it is upon the judges' critical analysis of the Sexual Offences Act, in light of the Constitution, that the legal jurisprudence on the question of sex work in South Africa has been established.³¹⁶ In comparison, the case of *Kylie v CCMA* will be analysed to establish its contribution to the movement of viewing sex work as a profession in South Africa.

The South African Law Reform Commission is mandated with researching all branches of law. This research is done to enable it to make recommendations to the government as to whether development, improvement, modernisation or reform of the law is required within the

³¹² Section 20 (1) (aA) of the Sexual Offences Act. Further explanation is given in Louw R 'The Constitutional Court Upholds the Criminalisation of Sex Work' (2003) 57 *Agenda: Empowering Women for Gender Equity* 105.

³¹³ Singh A & Bhero MZ 'Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of Section 39(2) of the Constitution' (2016) 19 *PER / PELJ* 3.

³¹⁴ Pudifin S & Bosch S 'Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa' (2012) 15 *PER / PELJ* 4.

³¹⁵ *S v Makwanyane and Another 1995 (6) BCLR 665* Para 266.

³¹⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 1-33.

Republic.³¹⁷ As a result, the Law Reform Commission's reports will be consulted throughout this chapter.

4.2 History of criminalisation of sex work in the Criminal Law Amendment Act

Sex work was first criminalised by the 1988 amendment to the Immorality Act 23 of 1957.³¹⁸ Prior to 1988, the Immorality Act did not criminalise sex work itself but rather activities related to sex work, such as brothel-keeping.³¹⁹ In the case of *S v H 1988 (3) SA 545 AD*, the court held that sex workers could not be convicted for prostituting themselves and living off their earnings. However, the court criminalised the conduct of third parties such as pimps and madams.³²⁰ Subsequent to this judgement, section 20(1) (aA) of the Immorality Act was amended to criminalise sexual intercourse for reward.³²¹ Sex work is criminalised in section 20(1) (aA) of the Sexual Offences Act. It provides:

‘Any person 18 years or older who- (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward,³²² shall be guilty of an offence.’³²³

4.3 Context of *S v Jordan*

The Constitutional Court was confronted with whether the criminalisation of adult commercial sex work constitutes an infringement of, among other rights, the right to equality and privacy.³²⁴ In deciding this case judges were not unanimous in their decision, thus a dissenting judgement was held.³²⁵ Both the majority and the dissenting judgement will be critically analysed to establish their effect on South Africa's legislative framework in response to sex work. The

³¹⁷ South African Law Reform Commission Act No. 19 of 1973, section 4.

³¹⁸ Cause for Justice, Submissions on the SALRC report on project 107 on adult prostitution, 2018, 6.

³¹⁹ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 17.

³²⁰ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 17

³²¹ Immorality Amendment Act No 2 of 1988.

³²² To be guilty of sex work, three essential elements must be present. The one must have committed carnal intercourse or an act of indecency with the mens rea of obtaining a reward.

³²³ The criminal sanction for a guilty conviction of sex work is imprisonment for a period not exceeding three years with or without a fine not exceeding R6000.

³²⁴ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 1.

³²⁵ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* from para 16-129.

discussion of this case will focus on the right to equality and the right to privacy regarding sex work. The right to equality is considered because it is an interlinking right that is violated due to the fact that sex workers are not treated equally under the law, this leads to the violation of other rights. Likewise, the right to privacy is of important consideration as the effective implementation of criminalising sex work may require the privacy of sex workers to be violated.

4.3.1 Majority judgement

4.3.1.1 The majority judgement on the right to equality

The judgement was written by Ngcobo J, with whom Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurred. The Court considered the case by interpreting section 20 (1) (Aa) of the Sexual Offences Act to determine if the contents of the section amounted to unfair discrimination on the basis of gender. The Court held that section 20(1) (aA) penalises anyone who engages in sex for reward. Therefore, the section is gender-neutral as it does not unfairly discriminate on the basis of gender but rather penalises the recipients of the reward for sex.³²⁶ Consequently, section 20(1) (aA) is not inconsistent with section 9 of the Constitution.³²⁷ The Court further held that the purpose of the prohibition is to outlaw commercial sex and that ‘one of the ways of curbing commercial sex is to strike at the merchant using criminal sanctions.’³²⁸

The Court in this instance supported the criminalisation of sex work. However, the focus on striking the merchant presents a problem as the issue surrounding ‘who’ the merchant is, has not been adequately dealt with. The sex work industry has gender disproportionality as there are more female sex workers than men.³²⁹ It is a common composition that women are a majority of sex workers and men are traditionally the clients receiving sexual services. The normality and expectation of female sex workers are illustrated by the fact that when a man is a sex worker there is usually specificity to his occupation as a male sex worker rather than just a sex worker.³³⁰

³²⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 9.

³²⁷ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 20.

³²⁸ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 10.

³²⁹ The South African National Sex Worker HIV Plan 2016 -2019, 19.

³³⁰ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 19.

Even in instances of male sex workers, their clients are commonly other males as it has been rare to find cases in which male sex workers have female clients.³³¹ In instances of male sex workers the point remains that the law will strike the sex worker and not the male client. Due to this observation, it can be argued that the ‘merchant’ is commonly a female sex worker while the client is commonly a man, even in cases of male sex workers the client is commonly a man. In essence, the criminalisation of sex work presents a practical and common situation in which a female sex worker is frequently criminally implicated while a male client is not.

To this extent, the Court’s attribution that section 20(1) (Aa) is gender-neutral and that the existence of more female sex workers does not justify an argument of discrimination,³³² presents some weaknesses. The Court is unsuccessful in taking into account the reasons why female sex workers are in the majority. The Court has to consider that many women in South Africa are experiencing the ‘feminisation of poverty’, this means that women disproportionately experience more poverty in comparison to men.³³³ Additionally, the lack of education and the general discrimination experienced by women presents few options to earn a living, thus sex work becomes an option for some women.³³⁴ Accordingly, it can be argued that enacting legislation that criminally strikes the sex work industry which is dominated by the female gender, as a result of societal discrimination, makes that legislation discriminatory against females.

It is important to note that the court must consider certain factors to determine whether legislation unfairly discriminates against a certain person or a group of people. The case of *Harksen v Lane* establishes these factors.³³⁵ The Harksen test for unfair discrimination comprises of two enquiries. The first enquiry asks whether there is discrimination and the second enquiry asks whether the discrimination is unfair. While the majority judgement found that sex workers are not discriminated against, it can be argued that the Courts should have considered the second

³³¹ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 19.

³³² *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 19.

³³³ Bentley K ‘Women’s Human Rights & the Feminisation of Poverty in South Africa’ (2004) 100 *Review of African Political Economy* 247.

³³⁴ Pudifin S & Bosch S ‘Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa’ (2012) 15 *PER / PELJ* 11.

³³⁵ *Harksen v Lane NO and Others 1997 (11) BCLR 1489* para 50, the Court held that courts must consider three factors to determine unfair discrimination. The courts must consider the positions of the complainants and whether they have suffered in the past, the nature and the purpose sought to be achieved by the legislation and after taking into consideration the factors above, as well as any other relevant factors, the court must consider whether the discrimination has affected the rights and interests of the complainants.

enquiry of the Harksen test before making its decision. The factors present in the second enquiry of the Harksen test illustrate the fact that sex workers are not only discriminated against, the discrimination is unfair. To this extent, the Court should have used the second enquiry of the Harksen test before ruling on whether sex workers are not discriminated against. In the case of *Harksen v Lane No and Others 1997(11) BCLR 1489*, the Court highlighted the three factors to be considered when determining if discrimination is unfair:

(A) The courts must consider the positions of the complainants and whether they have suffered in the past.³³⁶ It has been established that women have a history of being economically marginalised in South Africa partly because of sexism present within the patriarchal society.³³⁷ As a result, many women become sex workers to survive. Being a woman and a sex worker further result in the experience of more marginalisation and stigmatisation. Moreover, the Court stipulates that sex workers' involvement in sex work establishes the stigma attached to them and not their gender.³³⁸ It has been established that stigmatisation is deeply rooted in the theory of morality.³³⁹ According to the principles of morality, a woman's moral personality involves giving her body to a man with whom she has a romantic relationship.³⁴⁰ However, this is not required of men. Therefore, it can be expressed that stigmatisation is based on gender and is directed towards female sex workers. Additionally, the criminalisation of sex work itself contributes to the stigmatisation of sex work.

(B) The courts have to consider the nature and the purpose sought to be achieved by the legislation.³⁴¹ In this instance, the Court held that the purpose of section 20(1) (aA) is to outlaw commercial sex. Section 20(1) (aA) is aimed at striking the 'merchant' and not the client. As established, the 'merchant' is frequently a female sex worker while the client is a male. The goal of section 20(1) (aA) can be considered important for societal morality. However, the protection of women against abuse also constitutes a worthy and important societal goal that must be achieved. It should be noted that the eradication of commercial sex should take cognisance of the

³³⁶ *Harksen v Lane NO and Others 1997 (11) BCLR 1489* para 50.

³³⁷ Bentley K 'Women's Human Rights & the Feminisation of Poverty in South Africa' (2004) 100 *Review of African Political Economy* 247.

³³⁸ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 16.

³³⁹ Richards D 'commercial sex and the rights of the person: a moral argument for the decriminalization of prostitution' (1979) 127 *university of Pennsylvania law review* 1219.

³⁴⁰ Richards D 'commercial sex and the rights of the person: a moral argument for the decriminalization of prostitution' (1979) 127 *university of Pennsylvania law review* 1219.

³⁴¹ *Harksen v Lane NO and Others 1997 (11) BCLR 1489* Para 50.

fact that both the seller and buyer of sex must be criminally implicated for the general fair application of the legislation. To this extent, it can be suggested that section 20(1) (aA)'s goal to achieve the eradication of commercial sex simultaneously violates the rights of those it is intended to protect.

(C) The courts, after taking into consideration the factors above, as well as any other relevant factors, must consider whether the discrimination has affected the rights and interests of the complainants.³⁴² Sex workers experience a hindrance in accessing health care, the justice system and claiming labour rights. In addition, their rights to work, dignity, bodily integrity, non-discrimination, and liberty are adversely affected.³⁴³ From the above analysis, it is evident that the Court should have adequately considered the above factors. As a result, it can be argued that the Court erred in its judgement that section 20(1) (aA) is gender-neutral and non-discriminatory. The analysis conducted supports the notion that section 20(1) (aA) is not gender-neutral but rather discriminates against female sex workers. In its judgement, the Court can be said to have indirectly confirmed that section 20(1) (aA) aims to strike vulnerable female sex workers and not male clients.

Additionally, the Court's decision to use a legislative model that places criminal sanctions on the 'merchant' alone is not warranted as other models are available. The Court should have considered the Swedish model as it was in existence at the time that the case was considered. The Swedish model mandates the criminalisation of the buyer of sex and not the seller.³⁴⁴ Sweden has been successful in curbing the commercialisation of sex by focusing on the conduct of the buyer and not the seller.³⁴⁵ To this extent, the Court should have considered the great results that would be obtained from striking the buyers of sex and not sex workers. The Court's decision is problematic as it focused on the criminalisation model without the consideration of other models that effectively aim to protect sex workers.

The Court went on to establish that the differentiation made between a sex worker and a customer in section 20(1) (aA) is a common differentiation that is made in some statutes and:

³⁴² *Harksen v Lane NO and Others 1997 (11) BCLR 1489* Para 50.

³⁴³ Peters D 'Sex work and Human Rights' available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 25 April 2019).

³⁴⁴ ASIJKI Fact Sheet, Sex work: The Swedish Model, 2015, 1.

³⁴⁵ Selected extracts of the Swedish government report SOU, 'The Ban against the Purchase of Sexual Services. An evaluation 1999-2008', 2010, 7.

‘The differentiation made by the section must be viewed against the fact that a man or woman who pays for sex is guilty of criminal conduct and liable to the same punishment as the prostitute. At common law, the customer is a *socius criminis* and also commits an offence under section 18 of the Riotous Assemblies Act. In terms of the Riotous Assemblies Act, the customer is liable to the same punishment to which the prostitute is liable.’³⁴⁶

The Court’s reference to section 18 of the Riotous Assemblies Act in the implication of a buyer of sex is based on the assumption that the section intended to implicate a buyer of sex. The Riotous Assemblies Act was enacted as a result of tension between the European and the non-European inhabitants in South Africa and was aimed at protecting South Africa from perceived harm.³⁴⁷ Consequently, the Act did not expressly stipulate that it criminalised the conduct of buying sex, indicating that it is uncertain if the legislature had the intention to criminalise the buying of sex under the Riotous Assemblies Act. With this in mind, it is conclusive to argue that the court was improper in ascertaining that the Riotous Assemblies Act could be used to criminalise the buyer of sex. Additionally, the reliance on *Socius criminis* to implicate the buyer of sex is not convincing because in the present case the buyer of sex was not criminally implicated in terms of *socius criminis* during the trial.³⁴⁸

While it is important to note that section 11 of the Sexual Offences Amendment Act criminalises the buying of sexual services,³⁴⁹ the National Prosecuting Authority or the South African Police Service is unable to obtain the figures of arrests made of buyers of sex. Therefore, it appears that no record exists of the number of buyers arrested and prosecuted in terms of section 11.³⁵⁰ To this extent, it is permissible to argue that the criminalisation of the buyers of sex is ineffective.

The above analysis makes it clear that the majority judgement has shortcomings in considering certain factors, such as the status of women and men in society and how such status informs the decision to enter the sex work industry. The judgement holds that section 20(1) (aA) is gender-

³⁴⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* Para 11

³⁴⁷ The Riotous Assemblies Act No. 17 of 1956.

³⁴⁸ Kalwahali k The criminalization of prostitution in South African criminal law (published Thesis, UNISA, 2009) 20.

³⁴⁹ Criminal law (sexual offences and related matters) Amendment Act 32 of 2007. The section provides that a person who engages the services of a person 18 years or older for the purpose of engaging in a sexual act for reward is guilty of an offence.

³⁵⁰ SALRC Report (Project 107) Sexual Offences Adult Prostitution (2015) Para 3.55.

neutral without considering the fact that there is a higher percentage of women in the sex work industry. Furthermore, the judgement does not emphasise the fact that the crime of sex work is about supply and demand. Thus, the Court also failed to consider the positive effect of criminalising the conduct of the buyer through clear and intentional legislation. To this extent, the focus placed on striking the ‘merchant’ creates a gap in legislation that leads to discrimination that cannot be justified in terms of the test contained in *Harksen v Lane NO and Others 1997 (11) BCLR 1489*. In light of this, it could be argued that the protection of human rights for sex workers depends on the repealing of section 20(1) (aA).

4.3.1.2 The majority judgement on the right to Privacy

In considering the right to privacy, the Court referred to *the National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* and compared the elements in the case to that of the present case.³⁵¹ The Court held that in the referenced case, the offence that was subject to Constitutional challenge infringed the right of gay people not to be unfairly discriminated against and their right to dignity because it intruded into:

‘The sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community and in doing so affected the sexuality of gay people at the core of the area of private intimacy.’³⁵² The Court held that none of these considerations exist in the present case.

The right to privacy indicates that everyone has the right to keep certain information private and away from the public arena. In considering sex work, the Court held that the commercial exploitation of sex in private does not justify a claim of the privacy clause.³⁵³ Sex work is a special crime in comparison to other crimes. For example, when dealing with the selling and buying of drugs, the fact that the sell or buying of drugs occurs in someone’s home does not permit a claim of the privacy clause. Moreover, it can be argued that sex involves intimacy and intimacy is considered as non-peripheral but rather the core of privacy. Payment for sex is a

³⁵¹ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) para 27.*

³⁵² *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) para 27.*

³⁵³ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) para 28.*

crime but it does not take away the fact that commercial sex occurs in private and the actual conduct of sex is intimate. Therefore, the state's need to ascertain whether a reward was given and obtained involves an intrusion of privacy and intimacy between the seller and the buyer.³⁵⁴ In addition, the court admitted that sex workers are entitled to engage in sex and do with their bodies what they wish as long as it does not result in the selling of sex and breaking the law. This presents an ambiguous view from the Court and it can be argued that one needs to sell sex to obtain a commercial interest of financial stability. Consequently, it is justifiable to view sex workers' right to self-autonomy and the ability to pursue commercial interest as being recognised by the court. It has been established that many sex workers enter the sex industry due to social-economic issues, thus, their main objective is financial stability. As a result, the obtainment of a reward for sex can be argued to be a commercial interest³⁵⁵ for which the court condones.

4.3.2 Dissenting judgement

4.3.2.1 Dissenting judgement on the right to equality

The dissenting judgement was written by O'Regan J and Sachs J, with whom Langa DCJ, Ackermann J, and Goldstone J concurred. The dissenting judgement was based on a critical analysis of section 20(1) (aA). The Court concluded that section 20(1) (aA) is not gender-neutral and is discriminatory on the ground of sex. The Court held that:

‘It is worth noting, although not relevant to the proper interpretation of the section, that not only academic commentators have given it this meaning but law enforcement officers appear generally to have done so as well. Not a single case of a prosecution of a customer since 1988 (when section 20(1) (aA) was introduced into the statute) was brought to our attention’.³⁵⁶

The dissenting judgement confirms the position that section 20(1) (Aa) is discriminatory on the basis of gender. This discrimination can be said to be unfair because the wording contained in

³⁵⁴ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 21.

³⁵⁵ Pudifin S & Bosch S ‘Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa’ (2012) 15 *PER / PELJ* 11.

³⁵⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) para 42.

section 20(1) (aA) only criminalises the conduct of sex workers. In support of this position, the dissenting judges further held that the natural reading of the section strikes the sex worker (commonly female) for obtaining a reward while a male client engages in commercial sex for sexual gratification.³⁵⁷ To this extent, the lack of criminal implication afforded to the client is not justified because the client essentially contributes to the commission of the crime. It is important to note that prior to 1988, South Africa's response to sex work simulated that of many commonwealth countries, in which sex work was not penalised.³⁵⁸ Clearly, in 1988 the legislature's intention was to criminalise the conduct of sex workers and not the buyers.³⁵⁹ In light of the above discussion, the dissenting judgement highlighted the practical problems associated with the application of section 20(1) (aA). The dissenting judges indicated that an amendment to section 20(1) (aA) is imperative to eradicate the unfair discrimination, however, the Court noted that:

‘ Extending the definition of a crime, even to avoid what may otherwise constitute unfair discrimination, is something that a Court should only do, if ever, in exceptional circumstances.’³⁶⁰

While it would be unconstitutional for the Court to extend the definition of crime in section 20(1) (aA),³⁶¹ the legislature has the authority and should do so.³⁶²

In interpreting section 20(1) (2), the judges considered a holistic approach. The Court consulted the judgement of *President of the Republic of South Africa v Hugo*, in which it was concluded that the heading of legislation must be considered by the court interpreting any legislation.³⁶³ In this present case, the heading of section 20 of the Sexual Offences Act focuses on ‘people living

³⁵⁷ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 43.

³⁵⁸ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 44. While sex work was not penalised, other activities associated with it, such as pimping and brothel-keeping, were.

³⁵⁹ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 44.

³⁶⁰ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 45.

³⁶¹ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 46. Extending the definition of section 20 (1) (aA) would be unconstitutional because the Court would be intruding into the mandate of the legislature.

³⁶² *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 66.

³⁶³ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 49.

on earnings from sex work.’³⁶⁴ Thus, the heading makes it clear that the legislation criminalises those selling sex and not those buying sex. Therefore, the legislation amounts to discrimination because a majority of female sex workers are the ones receiving and living on earnings of sex work. The dissenting judges then considered section 18 of the Riotous Assemblies Act which stipulates that any person who conspires, procures the commission of or aids to commit a crime, will be guilty of an offence and will be liable to the punishment that the principle person is liable to.³⁶⁵

The dissenting judges concluded that the consideration of section 18 does not remedy section 20(1) (aA)’s discrimination because section 18 confirms the fact that sex workers are the principal offenders and the clients are the co-conspirators.³⁶⁶ As a result, the differentiation between principal offenders and co-conspirators contributes to the stigma attached to sex workers and leads to gender inequality.³⁶⁷

4.3.2.2 Dissenting judgement on the right to privacy

The dissenting judges considered the right to privacy and held that sex workers’ right to privacy is limited by section 20(1) (Aa). The Court first considered the case of *Bernstein*. The Court in *Bernstein* held that the starting point of understanding the right to privacy in the interim Constitution is by considering the inviolable inner self, then we move to the realm of home and personal life and end with the public realm where privacy is remotely implicated.³⁶⁸ Based on this judgement, the dissenting judges stipulated that:

‘Commercial sex involves the most intimate of activity taking place in the most impersonal and public of realms, the market place; it is simultaneously all about sex and all about money’.³⁶⁹ By making her sexual services available for hire to strangers in the

³⁶⁴ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 49. See further The Sexual Offences Act No 23 of 1957, section 20.

³⁶⁵ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 62.

³⁶⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 63.

³⁶⁷ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 64 & 65.

³⁶⁸ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 76.

³⁶⁹ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)* para 81.

marketplace, the sex worker empties the sex act of much of its private and intimate character.³⁷⁰

The Court's position indicates that sex conducted by sex workers in public loses its privacy and intimacy should be considered as inaccurate. Commercial sex does not happen in the 'public of realms', it is merely the advertising of commercial sexual services which takes place publicly. Furthermore, the Court's indication that sexuality is limited to nurturing relationships indicates that section 20(1) (aA) was enacted based on a political concern to protect neighbourhoods and 'reputable women' from harassment which requires sex work to be hidden.³⁷¹ Women's sexuality should not be confined to nurturing relationships. Essentially, the law does not prohibit sexual intercourse, except when money is involved. However, it cannot be forgotten that for many women, sex work is work from which they can obtain financial stability to support themselves and their families. The dissenting judgement stipulates that sex workers do not surrender all their rights to privacy just because they use their bodies to render sexual services for a reward,³⁷² and while an intrusion of privacy exists, the intrusion is justifiable.³⁷³ Moreover, it can be argued that the intrusion into the intimate sexuality of a person is not justifiable because the conduct of sex remains intimate and cannot be intruded on with the aim of upholding legislation. Additionally, to suggest that a sex worker loses her right to privacy by seeking payment is akin to prohibiting consensual adults from imposing sexual conditions,³⁷⁴ whether those conditions are that a person must be of a certain height, be of a certain ethnicity or pay a sum of money. Sexual conditions between consensual adults should not be a concern of the law, the law's interference with the right to privacy should focus on the prevention of harm and other legitimate public interest concerns.³⁷⁵ Furthermore, it can be argued that considering sex work as a job does not negate the right to privacy of sex workers. Just like other jobs, sex work should be afforded the same

³⁷⁰ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) Para 83*

³⁷¹ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 24.

³⁷² *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) para 84.*

³⁷³ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) para 84-86.*

³⁷⁴ Sexual conditions are conditions that are required to be satisfied for people to have consensual sex with other people. For Example, some adults will only have sex with other adults who have certain physical features to the exclusion of those who do not.

³⁷⁵ Sweetman B 'Is the criminalisation of the purchase of sex (the Swedish model) consistent with the European Convention on Human Rights?' (2015) Research paper 30.

privacy and such privacy may only be limited according to the justification of section 36 of the Constitution.³⁷⁶ The acknowledgement by the dissenting judgement that section 20(1) (aA) is discriminatory on the basis of gender and the intrusive nature of section 20(1) (Aa) towards sex workers' privacy, is persuasive towards decriminalising sex work.

4.4 The Interpretation of Section 20(1) (aA)

From the discussion thus far, it is clear that the debate on the ambit of section 20(1) (aA) has not been settled. As seen above, it is warranted to argue that section 20(1) (aA) only implicates the seller of sex. It is contested in *S v Jordan* that section 20(1) (aA) implicates both the seller and the client. Conversely, *S v Jordan* does not expressly criminalise the conduct of the buyer of sex and the interpretation contained in the South African Law Commission expresses the notion of society's hypocrisy of only prosecuting sex workers and not their customers.³⁷⁷ In light of this, it has been established that the accurate course of action would be to repeal section 20(1) (aA).

The phrase 'for reward' contained in section (20)(1) (aA) establishes another debate. It can be debated that the only difference between sex workers and other women in society is that for other women, carnal intercourse for reward is not their only source of income. Other women have day jobs and conduct sex for reward at night.³⁷⁸ Therefore, adults involved in voluntarily commercial intercourse should not be shamed by society. In the context of South Africa, it is important to discuss the difference between sex workers and other women in the context of the 'blesser-blessee' phenomenon. A 'blesser' is often an older man who lavishes young women with expensive gifts, such as bags or clothes or holidays, in exchange for sex or companionship.³⁷⁹ A 'blessee' is a young woman that receives rewards from the 'blesser' in exchange for sex or companionship.³⁸⁰ While it should be noted that this type of arrangement exists throughout the world, it's existence in South Africa is more alarming due to the high levels of HIV/AIDS. The women that take part in this arrangement may experience criticism from society but in some

³⁷⁶ The Constitution of the Republic of South Africa, 1996'

³⁷⁷ South African Law Report Commission (Project 107) Sexual Offences (1999) para 3.7.5.6 &3.7.5.7.

³⁷⁸ Kalwahali k *The criminalization of prostitution in South African criminal law* (published Thesis, UNISA, 2009) 24.

³⁷⁹ Mudzusi A 'Are "Blessers" a Refuge for Refugee girls in Tshwane, the capital city of South Africa? A phenomenographic study' (2019) 20 *Journal of International Women's Studies* 257.

³⁸⁰ Mudzusi A 'Are "Blessers" a Refuge for Refugee girls in Tshwane, the capital city of South Africa? A Phenomenographic Study' (2019) 20 *Journal of International Women's Studies* 259.

instances, they are admired for exhibiting women empowerment and freedom.³⁸¹ What is certain is that ‘blessees’ are not criminally implicated for their involvement in an arrangement that can be argued to be similar to sex work. Conclusively, it may be justifiable to equate the culture of ‘blesser blessee’ as part of the sex work industry. Moreover, it is prejudicial for sex work to be criminalised while the ‘blesser blessee’ arrangement is not.

4.5 The Status of sex work as a profession: an analysis of *Kylie v CCMA*

The judgement in *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)*. offers an important insight into our courts’ view of sex work as a profession post *S v Jordan*. In this case, sex work is recognised as a form of labour in terms of the Labour Relations Act No 66 of 1995 (LRA) and sex workers are afforded protection under the LRA.³⁸² Essentially, this case illustrates the potential shift of South Africa’s sex work legislation in the future.

In *Kylie v CCMA*, the appellant was a sex worker employed in a massage parlour to perform various sexual services for reward. On 27 April 2006, the appellant was informed that her contract was terminated. Subsequently, the matter was referred for arbitration to the Commission for Conciliation, Mediation, and Arbitration (CCMA). Upon consideration of the facts at hand, the second respondent held that the CCMA did not have the jurisdiction to deal with the matter because the appellant was employed as a sex worker, making her employment unlawful and outside the ambit of the CCMA.³⁸³ As a result, the appellant then approached the Labour Court (court *a quo*) to review the decision of the CCMA. The Court concurred with the decision of the CCMA and held that a sex worker was not entitled to protection against unfair dismissal as provided in terms of 185 (a) of the LRA because the sex worker’s employment was unlawful.³⁸⁴

The appellant then approached the Labour Appeal Court. The Court had to determine whether the appellant was protected by section 23 of the Constitution³⁸⁵ and the right to fair labour

³⁸¹ Basson A ‘Exploration of theblesser-blesseephenomenon among young people in Gauteng’ (2018) BMR Youth Research Unit, Unisa 10.

³⁸² *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* Para 44.

³⁸³ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* Para 2. The Court has to abide by the common law principle which stipulates that courts ought not to encourage illegal activity.

³⁸⁴ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* Para 3. The common law principle has been entrenched in the Constitution, 1996’ sections 108 and 109.

³⁸⁵ Section 23 of the Constitution stipulates that everyone has the right to fair labour practices.

practices contained in the LRA. It should be noted that an affirmative ruling to the above would entitle the appellant to claim a remedy for unfair dismissal.

In considering section 23 of the Constitution, the Court held that:

‘Sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationship namely with their employers, the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but by their employers, section 23 of the Constitution, which, at its core, protects the dignity of those in an employment relationship, should also be of application.’³⁸⁶

The relationship between the worker and the employer is of focus. In addition, section 23 does not exclude a worker or employer subject to an unlawful contract from claiming benefits and protection from the LRA. The Court indicated that termination from work is a labour practice irrespective of whether it is legal or illegal work.³⁸⁷ The Court’s stipulation indicates that the principle of freedom of contract is respected and an individual has the choice to enter into any contract and on any terms, he or she deems fit. Consequently, it can be argued that the Court indirectly acknowledges sex workers’ right to choose what they want to do with their bodies by exercising their freedom of contract. However, the Court held that the Constitution has encapsulated within it the principle that courts cannot assist a person who has entered into an illegal contract to enforce such a contract. Thus, obtaining a possible remedy for unfair dismissal is challenging.³⁸⁸

The purpose of the LRA is to advance economic development, social justice, labour, peace and the democratisation of the workplace’.³⁸⁹ To this extent, courts have to be vigilant to protect those employees who are vulnerable to exploitation.³⁹⁰ In this instance, the Court expressed the fundamental need to protect sex workers from exploitation and assault to their dignity as they are vulnerable.³⁹¹ Based on this notion, it can be established that the Court’s stipulation not only

³⁸⁶ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* Para 26.

³⁸⁷ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* Para 27.

³⁸⁸ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* para 34 & para 37.

³⁸⁹ Labour Relations Act No 66 of 1995, section 1.

³⁹⁰ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* para 41. The court further held that employees need protection because they may be economically and socially weaker than their employers.

³⁹¹ *Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)* para 41.

recognises sex work as work but also endorses a legal framework that would result in the protection of sex workers from exploitation.

4.6 Chapter conclusion

Sex work in South Africa remained unregulated prior to *S v H* and until the subsequent amendment to section 20(1) (aA) of the Immorality Act. Section 20(1) (aA) stipulates that a person that has sex for reward is guilty of an offence. The interpretation and impact of this section are addressed in the landmark case of *S v Jordan*. In this case, the majority judgement concluded that section 20(1) (aA) does not unfairly discriminate on the basis of gender as both the sex worker and the client are criminally implicated. Furthermore, sex workers' claim to the right to privacy is not justified as sex work occurs outside private intimacy. However, the majority judgement in *S v Jordan* is challenged. The judgement was held without adequate consideration of important factors, such as women's position in society and gender.

On the other hand, the dissenting judgement acknowledges the loopholes within section 20(1) (aA). The interpretation by the dissenting judgement emphasises the correlation between gender and sex work and establishes that section 20(1) (Aa) strictly applies to sex workers, who are commonly women. Likewise, the dissenting judgement acknowledges the intrusion of privacy that occurs as a result of the criminalisation of sex work. In *Kylie v CCMA*, the Court confirmed that sex work is a profession and the protection of sex workers' ability to work and inherent dignity is fundamental to enable them to obtain financial stability, this being the objective of the LRA and the Constitution.

In conclusion, it is evident that the dissenting judgement in *S v Jordan* and the judgement in *Kylie v CCMA* provide persuasive factors that indicate the error of criminalising sex work. Criminalisation does not achieve the aim of eradicating the sex work industry. Rather, it makes the working environment more dangerous for sex workers. Consequently, the legislature's action of repealing section 20(1) (aA) and decriminalising sex work would remove the impediment hindering sex workers from the ability to claim and enjoy the protection of the law, full employee benefits under the LRA and other human rights which are violated as a result of their status as sex workers.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This dissertation aimed to determine whether the criminalisation of sex work in South Africa is a human rights violation, particularly towards female sex workers. To this extent, this chapter focuses on articulating the established conclusions of the preceding chapters and subsequently recommending steps to be taken by the South African government to reform its legal framework on sex work. In establishing recommendations for South Africa, the legal approaches used in the Netherlands, Sweden, and Zambia will be considered.

The Netherlands is one of the few countries that have legalised sex work. While the impact of legalising sex work can be argued, it should be noted that the Netherlands has been able to successfully enact laws supported by practical procedures to respond to sex work. To this extent the Netherlands becomes an important reference when discussing the legalisation of sex work.³⁹² The criminalisation of sex work is usually exemplified by criminalising both the selling and the buying of sex. However, Sweden developed its own response to sex work known as the ‘Swedish model’ to which only the buying of sex is criminalised.³⁹³ Zambia is located in Southern Africa and is known as a “Christian nation”.³⁹⁴ Zambia’s response to sex work is that of decriminalisation, this contradiction makes Zambia a country of interest. In this context, it should be noted that the recommendations offered here take South Africa’s specific legal system and social-economic conditions into consideration.

5.2 Conclusive Findings

It is established that sex work is the access to one’s body, with a reciprocal obtainment of something of value, most frequently money.³⁹⁵ It has also been established that there are three

³⁹² Daalder A.L ‘Prostitution in Netherlands in 2014’ (2015) 1a *Research and Documentation Centre* 14.

³⁹³ Olsson AJ ‘Prostitution policy in Sweden – targeting demand’ (2019) 45 *The Swedish Institute* 15.

³⁹⁴ The Constitution of Zambia, 1996. The preamble of the Constitution states that the Republic is a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience or religion.

³⁹⁵ Monto M ‘Prostitution, Sex Work, and Violence: lessons from the Cambodian context’ (2014) 15 *Studies in Gender and Sexuality* 76.

main legal responses to sex work that have emerged, namely, the criminalisation, decriminalisation, and legalisation of sex work. Many states adopt a legal response to sex work without considering certain factors. Given that established sex work is more rampant among women, as women often experience the ‘feminisation of poverty’³⁹⁶ and are expected to provide emotional and sexual labour to men for free,³⁹⁷ this results in gender inequality.³⁹⁸ Moreover, liberals and some radical feminists acknowledge and support the notion that sex work should be regarded as work and women should be allowed to exercise their self-autonomy. Consequently, the criminalisation of sex work encourages the patriarchal notion that women are vulnerable and are not capable of making informed decisions.³⁹⁹

It has been established that human rights are those rights that are inherent to all human beings by virtue of being human.⁴⁰⁰ Human rights are important because they afford people their dignity, equality, liberty, and choice of how to live their lives.⁴⁰¹ To this extent, sex workers are not excluded from exercising and enjoying their human rights. When discussing sex workers, it is important to acknowledge the debate on ‘forced and ‘voluntary’ sex work. While some view sex work as inherently forced, it has been concluded that voluntary sex work exists within society. Voluntary sex work is based on the notion that a person’s social and economic issues do not negate the choice they make to become a sex worker.⁴⁰² The international human rights framework does not extensively address sex work. However, it has been concluded that international human rights instruments aim to eradicate the exploitation of sex workers and not sex work itself.⁴⁰³ To this extent, some international human rights instruments indirectly disapprove of the criminalisation of sex work. The rights violated by criminalising sex work include, but are not limited to the right to work, dignity, bodily integrity, non-discrimination, and liberty.⁴⁰⁴

³⁹⁶ Bentley K ‘Women’s Human Rights & the Feminisation of Poverty in South Africa’ (2004) 100 *Review of African Political Economy* 247.

³⁹⁷ Cause for Justice, Submissions on the SALRC report on project 107 on adult prostitution, 2018, 19.

³⁹⁸ NSW, *Sex Work and Gender Equality*, Policy Brief 2016, 7.

³⁹⁹ NSW, *Sex Work and Gender Equality*, Policy Brief 2016, 7.

⁴⁰⁰ Office of the High Commissioner for Human Rights, Human Rights: A basic handbook for UN staff. 13.

⁴⁰¹ The Advocates for Human Rights ‘A practitioner’s guide to human rights monitoring, documentation and advocacy, available at: https://www.theadvocatesforhumanrights.org/uploads/practitioners_guide_final_report.pdf (accessed 01 August 2019).

⁴⁰² Peng Y [‘Of course they claim they were coerced’]: On Voluntary Prostitution, Contingent Consent, and the Modified Whore Stigma] (2005) 7 *Journal of International Women’s Studies* 20.

⁴⁰³ SALRC Discussion Paper 0001 (project 107) Sexual Offences (2009) Para 5.29.

⁴⁰⁴ Peters D ‘Sex work and Human Rights’ available at: <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf> (accessed 25 April 2019).

South Africa's legal response to sex work is total criminalisation. Section (20)(1) (aA) of the Sexual Offences Act stipulates that any person that renders sexual services for reward is guilty of an offence.⁴⁰⁵ In the landmark case of *S v Jordan*, the majority judgement held that section (20) (1) (aA) is consistent with the Constitution.⁴⁰⁶ However, the majority did not adequately consider relevant factors as contained in *Harksen v Lane* and focused on striking the 'merchant'.⁴⁰⁷ Striking the 'merchant' results in a majority of female sex workers being criminally affected by section (20)(1) (aA) and not their male clients. The dissenting judgement held that section 20(1) (aA) unfairly discriminates based on gender. Indeed, in the case of *Kylie v CCMA*, the court held that sex workers do not lose their inherent dignity by their status as sex workers. The dissenting judgment in *S v Jordan* and the judgement in *Kylie v CCMA* provide essential arguments that support the notion that the criminalisation of sex work in South Africa does not achieve the aim of protecting human rights.

In the Netherlands, sex work is legalised. However, certain activities related to sex work such as the use of coercion, are criminalised.⁴⁰⁸ In Sweden, the Swedish government established the 'Swedish Model' to which the selling of sex is not criminalised, but the buying of sex is.⁴⁰⁹ In Zambia, sex work is decriminalised. However, activities related to sex work are criminalised.⁴¹⁰

5.3 Recommendations for Law Reform

The legal response to sex work differs in different jurisdictions in accordance with their unique political economies.⁴¹¹ Accordingly, only the best practices of these legal responses can be considered. In this context, the Netherlands, Sweden and Zambia are relevant in establishing adequate recommendations to reform law on criminalised sex work.

⁴⁰⁵ Section 20(1) (aA) of the Sexual Offences Act No 23 of 1957.

⁴⁰⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) para 20.

⁴⁰⁷ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) Para 10.

⁴⁰⁸ Mathienson A 'Prostitution policy: legalization, decriminalization and the Nordic model' (2015) 14 *Seattle Journal for Social Justice* 379.

⁴⁰⁹ Olsson AJ 'Prostitution policy in Sweden – targeting demand' (2019) 45 *The Swedish Institute* 15.

⁴¹⁰ Meerkotter A 'Crackdown on sex workers in Zambia' (2012) 21 *African Security Review* 52.

⁴¹¹ The main legal Responses to sex work are criminalisation, decriminalisation, and legalisation.

5.3.1 The Netherlands

The Netherlands is one of the few countries that have legalised sex work in Europe. In October 2000, the general ban on brothels, contained in the 1911 Dutch Penal Code, was removed.⁴¹² The Local Governance Act provides guidelines for the implementation of commercial sex. Article 151a stipulates that municipalities are mandated with implementing criteria enabling sex workers to perform sexual services for a reward.⁴¹³ These guidelines stipulate that:⁴¹⁴

- Local governments can establish a licencing system to regulate the sex work industry.
- Officials who are responsible for the issuing of licences should have access to criminal records to enable them to check the background of brothel managers or owners.
- A special guideline should be written to deal with victims of trafficking in the legal procedures and sex workers should identify themselves to the police to be protected by the law.

It is estimated that 75% of local governments have developed sex work regulations,⁴¹⁵ which prescribe conditions for licencing and the level of commercial sex to be accepted by the municipality.⁴¹⁶ However, there has been a debate about the effects of legalising sex work in the Netherlands. The second evaluation conducted by the Researchers of the Centre for Scientific Research and Documentation in 2005-2006 indicates that exploitation of sex workers working in brothels without a licence has decreased and only happens in limited instances.⁴¹⁷ The enforcement of adherence to local rules and regulations has increased.⁴¹⁸ Both the demand and the supply of sex work have decreased and data from the police show an increase in victims' reports of human trafficking and an increase in people reporting possible cases of involuntary sex work to the established free toll line 'Report Crime Anonymously'.⁴¹⁹ Additionally, the working

⁴¹²Wijers M 'Prostitution Policies in the Netherlands' available at: https://www.sexworkeurope.org/sites/default/files/resource-pdfs/wijers_m_pros_policies_nl_2008.pdf (accessed 29 August 2019).

⁴¹³ Daalder A.L 'Prostitution in Netherlands in 2014' (2015) 1a *Research and Documentation Centre* 11.

⁴¹⁴ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 127.

⁴¹⁵ Daalder A.L 'Prostitution in Netherlands in 2014' (2015) 1a *Research and Documentation Centre* 14.

⁴¹⁶ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 127.

⁴¹⁷ Outshoorn J 'Policy Change in Prostitution in the Netherlands: From Legalization to Strict Control' (2012) *Sex Res Soc Policy* 239.

⁴¹⁸ Daalder *A Prostitution in the Netherlands since the lifting of the brothel ban* ed1 (2007) 54

⁴¹⁹ Wijers M 'Prostitution Policies in the Netherlands' available at: https://www.sexworkeurope.org/sites/default/files/resource-pdfs/wijers_m_pros_policies_nl_2008.pdf (accessed 29

conditions of sex workers have improved.⁴²⁰ The lift on the ban on brothels gives recognition to sex work as work and labour law can be applied. A sex worker can either be self-employed or employed by someone else.

5.3.2 Sweden

On the first of January 1999, the Swedish government partially criminalised sex work.⁴²¹ The Act Prohibiting the Purchase of Sexual Services amended the Swedish Penal Code.⁴²² The Act stipulates that the purchase or an attempt to purchase sexual services is a criminal offence.⁴²³

- A person, who obtains sexual relations in return for payment, shall be sentenced for purchase of sexual services to a fine or imprisonment not exceeding one year.⁴²⁴
- A person who promotes or improperly financially exploits a person's engagement in casual sexual relations in turn for payment shall be sentenced for procuring to imprisonment for at most four years.⁴²⁵ If the crime is considered to be gross procuring other relevant factors shall be considered, such as the scale of the activity.

According to Chapter 23 of the Swedish Penal Code, purchasing sex is an offence punishable by fines or a maximum prison sentence of six months.⁴²⁶

The use of the Swedish Model is debated due to its uniqueness.⁴²⁷ However, data available indicates that street sex work in Sweden has decreased by half since the introduction of the ban on the purchase of sex.⁴²⁸ Although the ban discourages many clients from seeking sexual services, it should be noted that the internet has become a new arena that many sex

August 2019).

⁴²⁰ Daalder A.L 'Prostitution in Netherlands in 2014' (2015) 1a *Research and Documentation Centre* 32.

⁴²¹ Selected extracts of the Swedish government report SOU, "The Ban against the Purchase of Sexual Services. An evaluation 1999-2008", 2010, 4.

⁴²² South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 120.

⁴²³ Selected extracts of the Swedish government report SOU, "The Ban against the Purchase of Sexual Services. An evaluation 1999-2008", 2010, 4.

⁴²⁴ Ministry of Justice Sweden, Chapter 6 of the Swedish Penal Code (unofficial translation), Section 11.

⁴²⁵ Ministry of Justice Sweden, Chapter 6 of the Swedish Penal Code (unofficial translation), section 12.

⁴²⁶ South African Law Reform Commission Discussion Paper 0001 (project 107) Sexual Offences (2009) 29.

⁴²⁷ Ekberg Gunilla 'The Swedish Law That Prohibits the Purchase of Sexual Services' (2004) 10 *Violence Against Women* 1191.

⁴²⁸ Selected extracts of the Swedish government report SOU, "The Ban against the Purchase of Sexual Services. An evaluation 1999-2008", 2010, 7.

workers use instead of standing on the street.⁴²⁹ However, it was reported that as a result of the ban, sex workers feel safer because they can approach the authorities in instances of abuse.⁴³⁰

5.3.3 Zambia

Zambia is a Southern Africa country known as a ‘Christian nation’.⁴³¹ In spite of the need to regulate sex work, the government did not enact specific legislation dealing with sex work. To this effect, Penal Code of Zambia Act 29 of 1976 only prohibits activities related to sex work.⁴³²

According to the Penal Code:

- Any person who procures or attempts to procure any woman or girl to leave their usual place of residence for purposes of prostitution, or with the intention to make them become an inmate or frequent a brothel in Zambia or elsewhere will be guilty of a misdemeanour.⁴³³
- Any male person who knowingly lives in whole or in part on the earnings of a prostitute, or who persistently solicits or importunes for immoral purposes in public, is guilty of a misdemeanour.⁴³⁴
- Any person who keeps a house, room, set of rooms or any kind of place for purposes of prostitution is guilty of a misdemeanour.⁴³⁵

From the above provisions, it can be concluded that voluntary adult sex work is decriminalised in Zambia. In reality, sex workers sometimes get targeted under nuisance laws, for instance, a sex worker that behaves in a disorderly and indecent manner will be guilty of an offence.⁴³⁶

It can be argued that the decriminalisation of sex work has had a positive effect on Zambian society. For example, the decriminalisation of sex work has contributed to the decrease

⁴²⁹ Selected extracts of the Swedish government report SOU, “The Ban against the Purchase of Sexual Services. An evaluation 1999-2008”, 2010, 8.

⁴³⁰ Mansson SA ‘The History and Rationale of Swedish Prostitution Policies’ (2017) 2 *Dignity: A Journal on Sexual Exploitation and Violence* 10.

⁴³¹ The Constitution of Zambia, 1996. The preamble of the Constitution states that the Republic is a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience or religion.

⁴³² The Penal code of Zambia Act 29 of 1976, offences against morality.

⁴³³ The Penal code of Zambia Act 29 of 1976, Section 140.

⁴³⁴ The Penal code of Zambia Act 29 of 1976, Section 146.

⁴³⁵ The Penal code Act of Zambia, Section 149.

⁴³⁶ Meerkotter A ‘Crackdown on sex workers in Zambia’ (2012) 21 *African Security Review* 52.

in the rate of HIV and STIs within Zambia. An early survey conducted by The Zambian Demographic Health Survey indicates that a decriminalised approach to sex work has increased the use of condoms among commercial sex workers and their access to health care facilities has improved.⁴³⁷ In addition, it is reported that the working conditions of sex workers are better as they are able to freely rent hotel rooms to conduct their services with clients, under the protection of hotel guards.⁴³⁸

5.4 Recommendations for the South African Government

Society's view of sex work is largely based on morality. However, morality is not stagnant but rather a shifting concept. To this extent, it is recommended for the South African government to conduct awareness campaigns focused on educating people about the shifting nature of morality and the need for law to reflect this shift in instances when the rights of a group of people are being violated.

Furthermore, the public needs to be educated about the difference between law and morality. While morality can inform law, it is not the deciding factor for law to be enacted. As a result, law must reflect the Constitution of the Republic and not people's personal moral standards. An important example of the difference between law and morality is the acknowledgement and enactment of laws that protect gay people's right to conduct a civil union. Throughout South Africa's history, gay marriage was viewed as morally wrong. However, the court's decision in *Minister of Home Affairs and Another v Fourie and Another*⁴³⁹ exemplifies the need to separate law and morality. For example, Zambia is considered to be very conservative; however, morality and law have been separated and sex work is decriminalised. On the other hand, it can be argued that South Africa's Constitution makes it a liberal country. To this extent, its criminalisation of sex work based on morality is not justified. By conducting awareness on the relationship between morality and law, the public will view sex work as non-threatening to morality and people will detach the stigma attached to sex work.

⁴³⁷ Ibid at 54.

⁴³⁸ Lusaka Voice 'Lusaka Sex industry thrives, with flexible K10 discounts' available at: <http://www.lusakavoice.com/2015/05/17/lusaka-sex-industry-thrives-with-flexible-k10-discounts/> (accessed 02 September 2019).

⁴³⁹ *Minister of Home Affairs and Another v Fourie and Another (3) BCLR 355 (CC)* para 114, the Court held that same-sex marriage should be permissible.

The Netherlands illustrates the possibility of effectively establishing and enacting laws that successfully legalise sex work. The Swedish model is of imperative consideration because it criminalises the conduct of the buyers of sex only, ensuring that sex workers are protected. In Zambia, sex work is not illegal, but activities associated with sex work are criminalised. While, the legal responses of the Netherlands, Sweden, and Zambia are different, it is clear that the exercise and enjoyment of sex worker's human rights are protected through non-criminalisation of sex work. As a result, it is recommended for South Africa to consider the approaches used by the three countries in response to sex work. Indeed, it can be argued that the adoption of a non-criminalising approach to sex work will ensure positive results. The exploitation of sex workers will decrease. Also, their working conditions will improve because sex work will be regulated by labour law and the demand and supply of sex will decrease. Additionally, victims' reports of human trafficking and the public's report of involuntary sex will increase. Furthermore, sex workers will have easy access to healthcare facilities, and as a result, there will be an increase in the use of condoms and a decrease in the spread of HIV, STDs and STIs.

The South African government should develop a new legal response to sex work based on decriminalisation. Decriminalisation is recommended because sex workers are legally protected and are encouraged to exercise and enjoy their human rights without putting a strain on government resources to maintain the legal framework. While it has been said that Zambia's economy is fast-growing, it is not nearly as active and successful as South Africa's economy. Yet, Zambia shoulders the responsibilities of decriminalised sex work. To this extent, South Africa's social-economic position can handle the responsibilities of decriminalising sex work. The work of the South African Law Reform Commission should be of imperative consideration by the South African government for drafting legislation dealing with sex work. The work of the Commission is important because it highlights the meaning of decriminalisation, the characteristics of decriminalisation, and what decriminalisation of sex work entails. It is recommended for legislation to expressly decriminalise sex work and criminalise underage and forced sex work. Likewise, activities associated with sex work such as pimping and brothel-keeping should be illegal. Brothel keeping should only be legal when certain requirements have been satisfied, such as the non-existence of exploitation within the brothel.

Additionally, the South African government should acknowledge that the criminalisation of sex work is supported by patriarchy. Patriarchy breeds gender inequality, as women are perceived as

less equal to men in society. As a result, the criminalisation of sex work is largely based on a system that confers certain roles on women.⁴⁴⁰ To this extent, it is recommended for the South African government to promote legislation that addresses gender inequality. Decriminalisation of sex work is important as sex workers will be perceived as women who are equal to men and who are capable of choosing how to live their lives. Thus, it is fundamental for legislation on sex work to be informed by the Bill of Rights and the international framework on human rights. This is fundamental to ensure that sex workers can exercise and enjoy the rights guaranteed in the Universal Declaration of human rights and the Constitution.

5.4 Closing remarks

The debate as to whether sex work is exploitative or not is on-going. However, it has been adequately established that criminalising sex work largely contributes to its exploitative nature. Criminalisation creates an environment where sex work is done in the dark, women are constantly harassed by the authorities and are often abused by pimps and clients. Sex work is a human reality due to mainly socioeconomic reasons such as poverty and unemployment. Instead of using a legal response that is based on morality, it should be considered that the abuse experienced by sex workers is unjustifiable.

Ultimately, the law is aimed at protecting people and ensuring their enjoyment of rights. To this extent, it is strongly recommended for the South African government to align itself with a legal response to sex work that adequately protects sex workers instead of contributing to their human rights violations.

⁴⁴⁰ Women are expected to serve men, emotionally and sexually, for free without expectation of a reward.

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