

**THE DECRIMINALISATION OF PROSTITUTION IN SOUTH AFRICA: TOWARDS A
LEGAL FRAMEWORK**

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DECLARATION

I declare that *The Decriminalisation of Prostitution in South Africa: Towards a Legal Framework* is my own work, 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.

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November 2010

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ABSTRACT

THE DECRIMINALISATION OF PROSTITUTION IN SOUTH AFRICA

This mini-thesis seeks to provide a substantiation for the need for a new legal framework for South Africa in order to address prostitution. It will argue that the current legal framework has failed in its desired aims and in addressing prostitution effectively.

It will begin by explaining the connection between prostitution and human rights in order to establish the basis from which to proceed in an attempt to legislatively address prostitution. It maintains that whatever legislative framework is adopted, it needs to be entrenched in a human rights approach to prostitution.

The international and domestic legal framework that currently governs prostitution will be unpacked. In terms of the international legal framework, this mini-thesis establishes that the international legal framework proceeds from the presumption for the need for total criminalisation of prostitution to the presumption of choice of legislative answer to prostitution. The legislative framework is entrenched in the acceptance that all forms of forced prostitution should be eradicated. Moreover, it finds that the current domestic legal framework, which criminalises prostitution, is insufficient in meeting its desired aims.

This mini-thesis critically analyses the underlying reasons for prostitution in South Africa and discovers that it is influenced by a myriad of interrelated factors. The current level of poverty and the prevailing socio-economic paradigm in South Africa have contributed to its complex nature. The demand for prostitution acts as a catalyst for both the further exploitation of prostitutes and women, while making them vulnerable to sexually transmitted diseases. I establish that criminalisation alone is not sufficient to address prostitution, especially given the HIV/AIDS epidemic.

The current judicial discourse on prostitution is critically analysed and it is found that it entrenches stereotypical notions of gender and sexual roles in South Africa. Even in the Constitutional Court, these notions form part of judicial decision-making. As such, judicial

decisions have highlighted the need for a human rights approach to prostitution that is victim-centred.

A best practice method that is based in a human rights approach is then provided which sets out legislative methods for the criminalisation of the demand for prostitution while providing alternatives to the victims of prostitution and sexual exploitation. This mini-thesis then concludes by highlighting the failure of the current legislative framework in addressing prostitution and finds that it is necessary that a new legal framework that is entrenched in human rights.

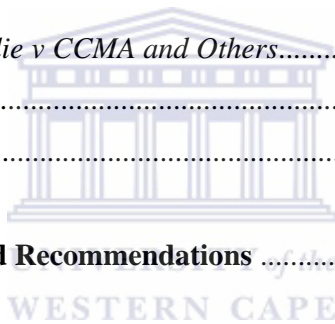


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CHAPTER 1 INTRODUCTION

1.1 Background to the Study

With the hosting of the FIFA Soccer World Cup in South Africa, issues of prostitution and trafficking in women and children have gained more press than ever before. Utterances by certain political figures have hinted at the temporary lifting of sanctions against sex workers. During the 2006 FIFA Soccer World Cup in Germany, the German government anticipated the increase in the demand for sexual services by accommodating prostitution by in a managed and controlled environment.¹ For the first time, the decriminalization of prostitution has been mooted in an attempt to regulate the selling and buying of sex within South Africa. This possible regulation aims not only to regulate the selling of sex, but also the trafficking of persons within South African borders as well as internationally. However, recent public discourses about the decriminalization of prostitution do not represent a contemporary occurrence. Rather, the debate about the possible decriminalization of prostitution dates back to before the first democratic elections due to the contemporary changes in the legal protections afforded to women.²

As a developing nation, South Africa faces substantial challenges in areas of crime, poverty, HIV/AIDS and health, education and service provision. State of the Nation Addresses and Government programmes have centered on dealing with the aforementioned issues. Targets and timelines set have proved to be unmet insofar as implementation and monitoring and evaluation is concerned. Moreover, the ability of the South African government to meet major international agreements (like the Millennium Development Goals) has not been encouraging. It is within this context that the decriminalization of prostitution has found its way onto the national political and legal agenda. It is true that the political and public discourse around the decriminalisation of adult prostitution in South Africa cannot be separated from issues of poverty, HIV/AIDS, health, education and crime.

In an attempt to move toward a legal framework that seeks to deal with the issue of prostitution, it is necessary to understand the factors that influence men and women to become involved in practices of prostitution. Several socio-economic factors exist that provide a perfect backdrop for the

¹ Ruth Bird & Ronnie Donaldson, "Sex, Sun, Soccer: Stakeholder-Opinions on the Sex Industry in Cape Town in Anticipation of the 2010 FIFA Soccer World Cup," *Urban Forum*, Vol. 20(1) (2010): 33.

² Ruth Bird & Ronnie Donaldson, "Sex, Sun, Soccer: Stakeholder-Opinions on the Sex Industry in Cape Town in Anticipation of the 2010 FIFA Soccer World Cup," *Urban Forum*, Vol. 20(1) (2010): 33.

compulsion of some women and men to become involved in prostitution.³ These considerations are critical to the debate on the decriminalization of prostitution as it would provide a framework that would crystallize a set of norms that could possibly provide measures that would seek to ‘coax’ men and women out of adult prostitution.

Dealing with crime has remained on the national agenda since the advent of democracy in South Africa and arguments for the decriminalization of prostitution have centered on the relationship between the levels of crime and prostitution. Central to this are notions of the decriminalization of prostitution and the increase in crime levels as well as law enforcement of a means of controlling prostitution. However, it is imperative to note that the abuse suffered by women and men in the commission of prostitution is an important factor that needs to be included in discussions on the link between prostitution and crime.

It would be a misnomer not to include a HIV/AIDS paradigm in the decriminalization of prostitution in South Africa. The ability of the South African Government to deal with the scourge of HIV/AIDS is critical in the discourse on the decriminalization of prostitution. However, it is not clear to what extent the practice of prostitution and the possible decriminalization would strengthen Governments hand in dealing with HIV/AIDS. It is critical to note that as in society in general, pervasive patriarchy still acts as a determinant in the selling and buying of sex and adds to the vulnerability of sex workers to insist on safe sexual practices.⁴

In suggesting possible legal frameworks for dealing with prostitution, it is important to take into account the socio-economic conditions that prevail in that jurisdiction and as well as the role of the government in the implementation of the legislation and the services that are spelled out in that legislation. Service delivery has remained a weakness of the South African government as is highlighted by the recent service delivery protests that have swept the country. Moreover, the failures in the implementation of the Domestic Violence Act have been repeatedly referred to at public hearings by the Portfolio and Select Committees on Women, Children and Persons with Disabilities⁵ and this serves to highlight problems with the implementation of legislation and the continued failure of the Government to cost legislation before it is enacted.

³ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 26.

⁴ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 26.

⁵ Parliament of the Republic of South Africa, (2009).

The South African Law Reform Commission in 2009 issued a Discussion Paper on Sexual Offences and Adult Prostitution that sought to elicit opinions on issue of the adult prostitution from South African society. However, instead of providing definitive recommendations, the Report by the South African Law Reform Commission in 2009 presented certain models that could be employed for dealing with prostitution.⁶ The Report by the Commission represented the first concrete step by Government to establish a legal framework. However, it is clear that any measures adopted needed to take into account the prevailing socio-economic conditions and levels of violence experienced by women and men who are involved in prostitution.

1.2 Conceptual Framework

This study will focus on the legal study of the decriminalisation of prostitution by reviewing on the social, health and economic aspects of prostitution. The analyses will therefore take into account a situational approach towards prostitution in an attempt to develop a set of guidelines for the development of a legal framework that would attempt to regulate prostitution with a view of abolishing the trade.

For the purposes of this study the definition employed in the South African Law Reform Commissions Report on Adult Prostitution will be used. The South African Law Reform Commission refers to Adult prostitution as “the exchange of any financial reward, favour or compensation for the purposes of engaging in a sexual act.”⁷

The decriminalisation refers to the abolishment of the criminalization of prostitution to the extent that mechanisms are put in place to eradicate the trade altogether and provide critical services to women and men involved in prostitution. Decriminalisation in the context of this paper does not only refer to the abolishment of the criminalisation of prostitution but also to the legislating of certain mechanisms in order to regulate certain aspects of prostitution.

⁶ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 5.

⁷ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 10.

1.3 Rationale for the Study

Whilst prostitution remains a very contentious issue, little is understood about it due to the lack in concrete empirical research.⁸ Similarly, the economics of prostitution reflects deeply entrenched societal norms and inequalities in society to the extent that women are predominantly sellers of sex while men are the buyers thereof.⁹ Moreover, the prevailing legal framework is aimed at the penalties for the women involved in prostitution rather than removing them from the trade altogether. It is important to note that those persons who purchase sex or who frequent prostitutes are not sanctioned in any manner.¹⁰

Female prostitutes are predominantly victims of sexual and physical violence due to existing inequalities in society and particularly in sexual roles. The 'working' conditions of prostitutes are such that many of these workers "face violence, abuse and exploitation within the sex industry. Sex workers are particularly vulnerable to rape, physical assault and verbal abuse."¹¹ These abuses are not only inflicted upon prostitutes by the 'clients' but also police officers, passersby and the larger social communities.

In relation to prostitutes, sexually transmitted diseases and HIV/AIDS, one of the critical understandings within the practice of prostitution was the use of condoms during sexual intercourse. There existed a general understanding that condoms prevented the spread of HIV/AIDS, but that the use of condoms depended on the request of the client, rather than the prostitute.¹² The use of condoms also related to the fear of physical abuse from the client. This is exacerbated by the fact that prevailing legal framework that criminalizes prostitution creates an environment where prostitutes are unable to openly seek sexual health care services and/or condom use. It is believed that the decriminalisation of prostitution would offer the opportunity to regulate the spread of STDs and HIV/AIDS.¹³ It might therefore be necessary to, in the consideration a legislative framework to regulate prostitution, include a set of regulations that would speak to the provision of medical and psycho-social support mechanisms to those who have been involved in prostitution.

⁸ Ellen Mattisson and Helen Ekebrand, "Behind the Prostitution Debate in South Africa," (Faculty of Health and Society: Malmo University), 15.

⁹ John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 25.

¹⁰ Natasha Distiller "Sex Work - A Labour Issue." *SA Labour Bulletin*, Vol. 24(6) (2000): 22.

¹¹ Natasha Distiller "Sex Work - A Labour Issue." *SA Labour Bulletin*, Vol. 24(6) (2000): 22.

¹² The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 191.

¹³ Scholtz, M. "Dikriminaliesering van prostitusie: 'n nuwe benadering vir n eue oue kwessie?" *Tydskrif vir Geesteswetenskappe*, Vol. 41(2) (2001).

The amount of women and men involved in prostitution in South Africa is unknown. This is attributed to the various forms of prostitution that exist in South Africa. It is believed that prostitution exists in a hierarchy where the type of remuneration received is directly related to the type or level of prostitution involved.¹⁴ This again speaks to the lack of empirical data on the type and amount of women and men involved in the industry.

Public discourse however does not reflect the feelings of South African society towards the criminalisation of prostitution. Racial differences pervade even societal opinions on prostitution. The greatest opposition to prostitution exists amongst the African portion of South African society who believes that African culture does not accept sex work and the sex industry.¹⁵ Certain writers posit that because of these beliefs, there exists a need for further academic debates around the legal frameworks in relation to prostitution.

1.4 Research Question

How can prostitution effectively be dealt with in South Africa through the adoption of a legal framework? To what extent can the adoption of a legal framework empower those who are involved in the activity and provide them with viable alternatives? What are the disadvantages and advantages of various legal frameworks in relation to prostitution?

1.5 Objectives

- (a) To provide an analysis of the South African Legal Framework as it pertains to prostitutes/sex workers.
- (b) To provide a background to the practice of prostitution within the South African context by examining the socio-economic, health and personal aspects of why women and men enter into prostitution.
- (c) Determining and including the views of civil society organisations that deals specifically with prostitutes/sex workers.
- (d) To provide an analysis of the impacts of prostitution on the lives of women and men.

¹⁴ Scholtz, M. "Dikriminaliesering van prostitusie: 'n nuwe benadering vir n eeu oue kwessie?" *Tydskrif vir Geesteswetenskappe*, Vol. 41(2) (2001).

¹⁵ Ruth Bird & Ronnie Donaldson, "Sex, Sun, Soccer: Stakeholder-Opinions on the Sex Industry in Cape Town in Anticipation of the 2010 FIFA Soccer World Cup," *Urban Forum*, Vol. 20(1) (2010): 34.

(e) To provide a critical assessment of the judgment in *S v Jordan and Others*¹⁶ and the implications thereof on sex work in South Africa.

(f) To provide recommendations for the development of legislation and policy that will attempt to deal with prostitution/sex work.

1.6 Methodology

The methodology employed in the research will be based on desktop research. It will be informed by feminist legal thought on the issue of prostitution and sex work whilst eliciting limited responses from women and men who are involved in sex work. These responses will be used in order to attempt to inform possible legal responses to the issue of prostitution. This study will be largely non-empirical in nature while at the same time utilising limited empirical research. To this extent, the primary sources used will be treaties, consensus documents, comparative legislation and case law. Secondary sources will be books, academic articles, journals and all related literature. In order to supplement these secondary sources, use will also be made of internet databases and library materials. This study will include a comparative analysis between an international best practice and the South African model of dealing with prostitution in order to establish whether it might be better to amend existing legislation or whether it might require the enacting of entirely new legislation.

1.7 Anticipated Conclusions

It is not coincidental that prostitution has been called the oldest occupation in the world and as such there exists a plethora of writing about prostitution. However, the responses to prostitution have been varied and have often been based on religious and cultural views that prevail in that jurisdiction.

Much of the literature departs from the premise that prostitution is based on patriarchal notions of sex and sexuality and that vulnerable women fall prey to these entrenched norms.¹⁷ Moreover, the literature posits that prostitutes are subjected to the same stereotypes which are exacerbated by violence against women and prostitutes. Violence against prostitutes is perpetuated because they are not afforded the protections afforded to them in the Constitution¹⁸ and are prevented from reporting instances of violence for fear of secondary victimisation from law enforcement officials

¹⁶ 2002 (2) SACR 499 (CC).

¹⁷ John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 25.

¹⁸ Act 108 of 1996.

and health care workers. It is anticipated that decriminalisation of prostitution would not speak to the effective protection of women from against violence at the hands of both the pimp and the client.

Sexual health care and service provision is one of the cornerstones of the South African health care system. The perceived notion that prostitutes spread HIV/AIDS has compounded the limitation of access to sexual and reproductive health care services.¹⁹ The lack of access to sexual and reproductive health care services is further compounded by the prevailing attitudes of health care workers to prostitutes who seek their services. Women are more vulnerable to the HIV/AIDS and their vulnerability to insist on safe sex and condom use are hallmarks of the criminalisation of prostitution. It is anticipated that the partial criminalisation of prostitution would enable vulnerable women access to sexual and reproductive health care services without fear of secondary victimisation or reprisal.

The Swedish Model governing prostitution, deals with prostitution on the one hand and those who solicit the services of prostitutes on the other. It effectively criminalises the solicitation of sex while it decriminalises sale of sex by prostitutes. The Swedish model provides for a coordinated batch of services that seek to remove vulnerable men and women involved in prostitutes from the industry by providing them with a comprehensive alternative to prostitution. It is anticipated that while these services are essential to providing a decent alternative to sex workers, service provision in South Africa has been particularly problematic while the implementation of legislation and parliamentary checks and balances have not been thorough enough to achieve the desired aims of policy and legislation. It is anticipated that the partial criminalisation of sex work in South Africa would require that any draft legislation be thoroughly costed before implementation and that monitoring and evaluation be conducted regularly by the relevant Parliamentary Committees.

Moreover, the Constitutional Court has confirmed the criminalisation of sex work in the case of *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*²⁰. The Court found that the criminalisation of sex work did not discriminate against women on the basis of sex because the Sexual Offenses Act²¹ and its provisions did not make a distinction between men and women and as such was gender neutral.²² It is important to highlight that in

¹⁹ Natasha Distiller "Sex Work - A Labour Issue." *SA Labour Bulletin*, Vol. 24(6) (2000): 22.

²⁰ 2002 (2) SACR 499 (CC).

²¹ Act 23 of 1957.

²² Roets Louw, "The Constitutional Court upholds the criminalisation of sex work," *Agenda*, 57 (2003): 106.

handing down the judgment, the Court noted that a flaw in the application of the provisions of the Sexual Offenses Act did not render it unconstitutional. This is problematic as the majority judgment does not take into account the fact that the Sexual Offenses Act does not reflect the reality of prostitutes in South Africa today.²³ Moreover, the majority judgment reflects a rather backward understanding of prostitutes in that it postulates that all women and men enter prostitution by choice, in light of difficult socio-economic circumstances. It is argued that in this instance, the Constitutional Court perpetuated entrenched societal notions on prostitution and prostitutes.²⁴ It is further, and rather provocatively, argued that a Court where the overwhelming majority of the Judges are men, more vigilance is needed in order to ensure that the Constitutional Court expresses the values entrenched in the Constitution and not their own. Based on the inferences drawn from both the majority and minority judgments in the aforementioned case, it can be provisionally concluded that a change in the prevailing legislative framework is needed in order to reflect the realities of men and women that are involved in prostitutes as well as to challenge the notion that men and women willingly enter prostitution.



CHAPTER TWO: PROSTITUTION AND HUMAN RIGHTS

²³ Roets Louw, "The Constitutional Court upholds the criminalisation of sex work," *Agenda*, 57 (2003): 106.

²⁴ Roets Louw, "The Constitutional Court upholds the criminalisation of sex work," *Agenda*, 57 (2003): 105.

2.1 Introduction

The very nature of prostitution has been a very contentious issue for human rights scholars throughout the world because of the way in which the practice of prostitution manifests itself, as well as research, ethical and methodological issues.²⁵ This dichotomy is based on the difference between *voluntary* and *forced* prostitution.²⁶ While there is no consensus between these two schools of thought, it cannot be argued that there does not exist a direct link between prostitution and human rights.²⁷ It is therefore essential to discuss prostitution from a human rights perspective in order to establish the basis for understanding the way in which different countries, indeed South Africa, deal with the issue of prostitution.

It is important that the arguments in relation to prostitution and human rights are shaped around a fundamental acceptance that women are mostly involved in prostitution and as such, these debates should be formulated from a feminist perspective.²⁸ While it is not entirely incorrect to assume that women are most involved in prostitution, it would be a misnomer to exclude men from the debate. However, given that women form the majority of the sex work industry, a distinct feminist bias will be utilized in assessing the prostitution human rights debate.²⁹ In this regard, it is easy to assume that women's rights are human rights; however, "the social subordination of women through tradition and prejudice in the world at large is also reflected in the marginalisation of women in the world of human rights."³⁰

Regardless of the school of thought, it is essential to protect vulnerable women and men who are sexually exploited and violently abused. This chapter will provide a discussion on the connection between prostitution and human rights in an attempt to provide a legislative answer to the practice of prostitution that is entrenched in the full realisation of human rights in South Africa.

²⁵ Julie Cwikel and Elizabeth, "Contentious Issues in Research on Trafficked Women Working in the Sex Industry: Study Design, Ethics, and Methodology," *The Journal of Sex Research*, Vol. 42 (4) (2005): 306.

²⁶ The distinction between forced and voluntary prostitution came about through prevailing discourses between prostitutes rights movement, feminists and human rights advocates and in response to the notion that all forms of prostitution is abusive. See further Jo Doezema, "Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy," in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

²⁷ Melissa Farley, "Research which addresses prostitution as a human rights violation," in *Prostitution Perspectives - A Collection of Pragmatic and Authoritative Essays*, ed. Jean du Plessis. (The House Group, 1996), 2.

²⁸ Donna M. Hughes, "Men Create the Demand; Women Are the Supply," *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/demand.htm>> (accessed on Nov. 10, 2010).

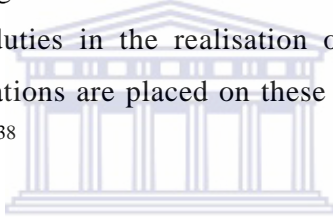
²⁹ Donna M. Hughes, "Men Create the Demand; Women Are the Supply," *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/demand.htm>> (accessed on Nov. 10, 2010).

³⁰ "Prostitution is a Violation of Human Rights." *Family Policy Institute*. <<http://www.familypolicyinstitute.com/article.php?id=33>> (accessed Sept. 1, 2010).

2.2 Human Rights in South Africa

The Constitution³¹ represents the supreme law of South Africa and any law or conduct that is consistent with the Constitution is automatically invalid.³² Moreover, the same section provides that obligations imposed under the Constitution must be fulfilled.³³ Of particular importance are the rights that are conferred on the citizenry of the country and the method of application and enforcement of these rights. These rights are contained in the Chapter 2 of the Constitution³⁴, known as the Bill of Rights.

The Bill of Rights constitutes the cornerstone of democracy in South Africa. It enshrines the rights of all South Africans and affirms the democratic values of human dignity, equality and freedom.³⁵ The State is tasked with respecting, promoting and protecting the rights enshrined in the Constitution.³⁶ The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of State.³⁷ In terms of the Bill of Rights, all three arms of government have particular duties in the realisation of social transformation of South Africa and as such, certain obligations are placed on these arms in order to reach those aims as enshrined in the Bill of Rights.³⁸



Social transformation in South Africa in the post-apartheid period has been founded on the rights enshrined in the Bill of Rights.³⁹ The Bill of Rights also ensures that everyone has the right to have access to health care services, including reproductive health care, to sufficient food and water and to social security, including social assistance if they are unable to support themselves and their dependants.⁴⁰ In this regard, the State is tasked with taking reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.⁴¹

³¹ Act 108 of 1996.

³² Section 2 of Act 108 of 1996.

³³ Section 2 of Act 108 of 1996.

³⁴ Act 108 of 1996.

³⁵ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Landsdowne: Juta, 2005), 23.

³⁶ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Landsdowne: Juta, 2005), 23.

³⁷ Parliament of the Republic of South Africa, *Draft Report – Rreview of the Role of the National Council of Provinces in Social Transformation: Health, Education and Social Development*, 2007, 13.

³⁸ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Landsdowne: Juta, 2005), 23.

³⁹ “Social Transformation,” *University of the Western Cape*,

http://www.uwc.ac.za/index.php?module=cms&action=showfulltext&id=gen11Srv7Nme54_8858_1210050501§ionid=gen11Srv7Nme54_5138_1210050501&menustate=dept_religion (accessed on Nov. 5, 2010).

⁴⁰ Section 2 of the Constitution Act 108 of 1996.

⁴¹ Parliament of the Republic of South Africa, *Draft Report – Rreview of the Role of the National Council of Provinces in Social Transformation: Health, Education and Social Development*, 2007, 14.

Moreover, the Bill of Rights facilitates social transformation by ensuring that everyone has the right to a basic education, including adult basic education and to further education which the State, through reasonable measures, must make progressively available and accessible.⁴²

The rights enshrined 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.⁴³ Potential limitation must take into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and consideration of less restrictive means to achieve the purpose.⁴⁴

Within the context of a progressive, human rights orientated Constitution, South Africa's position in terms of prostitution should take into account the rights enshrined in the Constitution. Moreover, the legislative framework dealing with prostitution should be supportive of facilitating positive social change in the lives of the women and men concerned.

By differentiating and listing sex and gender as a basis for discrimination, the Constitution outlines the importance of the human rights of women in South Africa and the world.⁴⁵ However, merely affording women rights is not enough. This needs to be complimented by a set of policies and legislation that are effectively implemented, monitored and evaluated in order to ensure that women and men are not subjected to sexual violence and violations of their human rights as a result of prostitution.⁴⁶

The current legislative framework in South Africa in relation to prostitution is one of total criminalisation and therefore does not afford men and women who are involved in prostitution any recourse to services provided by the State for fear of being exposed and victimised.⁴⁷ If one is to assume that prostitution is a form of human rights violation, the total criminalisation of prostitution is highly problematic as it reinforces the vulnerability of these men and

⁴² Parliament of the Republic of South Africa, Draft Report – Rreview of the Role of the National Council of Provinces in Social Transformation: Health, Education and Social Development, 2007, 14.

⁴³ Section 36 of the Constitution Act 108 of 1996.

⁴⁴ Section 36 of the Constitution Act 108 of 1996.

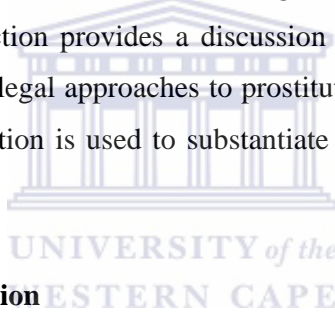
⁴⁵ “Securing Women’s Rights through the Constitution,” Realizing Rights, <http://www.realizingrights.org/pdf/Securing_Womens_Rights_in_the_Constitution-Zimbabwe.pdf> (accessed on Oct. 29, 2010).

⁴⁶ “Securing Women’s Rights through the Constitution,” Realizing Rights, <http://www.realizingrights.org/pdf/Securing_Womens_Rights_in_the_Constitution-Zimbabwe.pdf> (accessed on Oct. 29, 2010).

⁴⁷ The South African Law Reform Commission, Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution, 2009, pg. 12.

women.⁴⁸ It is therefore essential to locate prostitution within the framework of fundamental human rights in order to ascertain the extent to which women and men involved in prostitution should be afforded measures and services that would provide an alternative to prostitution.

In essence, the opposing discourses about prostitution and human rights utilise different set of rights in order to supplement their argument and prove their point. Moreover, either of these opposing arguments establishes the basis for the implementation of a legislative framework for dealing with prostitution, whether it is criminalisation, regulation or decriminalisation. Both sides of the debate accept that men and women who engage in prostitution face serious threats of violence by those who buy sex.⁴⁹ However, the distinguishing factor between these two groups is the reliance on a different set of internationally recognised human rights and the way in which either group attempts to address this.⁵⁰ These varying discourses have led to different methods in dealing with prostitution while supporting different legal approaches based on the rights that are granted to prostitutes (or the lack thereof).⁵¹ The following section provides a discussion on the relationship between human rights and prostitution, the various legal approaches to prostitution and finally, how the connection between human rights and prostitution is used to substantiate either the anti-prostitution and pro-prostitution debate.



2.3 Legal Approaches to Prostitution

There is no singular way of developing a legal approach to prostitution and these approaches are based on the policy framework and objectives of that particular country. Moreover, “different authors frequently described the legal status of prostitution in a specific country in quite different ways.”⁵² As has already been stated, different groups prefer different legal approaches to prostitution.⁵³ Essentially, there are three legal models available that seek to provide a holistic legal approach in addressing prostitution: criminalisation, decriminalisation and regulation.⁵⁴ In some

⁴⁸ Janet Wojcicki, “Race, class and sex: the politics of the decriminalisation of sex work,” *Agenda*, Vol. 42 (1999): 98.

⁴⁹ Melissa Farley, “‘Bad for the Body, Bad for the Heart’: Prostitution Harms Women Even if Legalized or Decriminalized,” *Violence Against Women*, Vol. 10(10) (2004): 1092.

⁵⁰ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁵¹ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁵² New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁵³ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁵⁴ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 7.

cases, the criminalisation can be sub-divided into total and partial criminalisation. The following section will provide a discussion of the various legal approaches to prostitution.

2.3.1 Criminalisation of Prostitution

The criminalisation of prostitution is an approach which entails the institution of criminal sanctions against the seller of sexual acts (prostitute) and the purchaser or facilitator.⁵⁵ To this extent, the criminalisation seeks to “reduce or eliminate the sex industry and is supported by those who are opposed to prostitution on moral, religious or feminist grounds.”⁵⁶ Moreover, those who support the criminalisation of prostitution consider all aspects of prostitution unacceptable and seek to eradicate the practice altogether.⁵⁷

As has already been stated, where countries have implemented the criminalisation legal approach, they employ two distinct variations of the criminalisation method.⁵⁸ These two sub-categories are total criminalisation (or prohibitionist approach) and partial criminalisation (abolitionist approach).⁵⁹

The total criminalisation, or prohibitionist, approach is employed in countries that find all forms of prostitution unacceptable and therefore all aspects of prostitution are totally criminalised.⁶⁰ As such, all parties involved in prostitution are criminalised as well as the prostitute, the client and the pimp.⁶¹ In comparison, the partial criminalisation (or abolitionist approach) of prostitution is “a modified form of prohibition which allows the sale of sex, but bans all related activities (e.g. soliciting, living off the earnings of prostitution, brothel keeping, and procurement).”⁶² The abolitionist approach criminalises all the parties except the prostitute as he or she is considered a victim of sexual exploitation.⁶³ Anti-prostitution advocates consider the abolitionist legal approach to prostitution as the most desirable approach as it is the only approach where the victim is not

⁵⁵ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 7.

⁵⁶ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁵⁷ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁵⁸ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 13.

⁵⁹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 13.

⁶⁰ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁶¹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 13.

⁶² New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁶³ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 13.

subject to criminalisation.⁶⁴ In essence, the prostitutes are considered a victim and therefore the abolitionist approach attempts to reduce the negative impacts that prostitution has on him or her.⁶⁵ Advocates of the abolitionist approach maintain that prostitution is a form of sexual and gender based violence and as such cannot be tolerated.⁶⁶

The Government of Sweden has employed the abolitionist approach with apparent success in reducing the numbers of women and men involved in prostitution.⁶⁷ It is reported that the number of persons involved in prostitution has decreased by half since the abolitionist legislation has been implemented.⁶⁸ It is estimated that the number of persons involved in prostitution stands at approximately 1 500 while no more than 400 persons are involved in street prostitution.⁶⁹ Given the apparent success of the abolitionist approach as applied in Sweden, and more importantly the founding notion that prostitution is a form of sexual and gender-based violence, a detailed analysis of the Swedish method of partial criminalisation will be provided in Chapter 5.

2.3.2 Legalisation of Prostitution

Legalisation is a legal approach to prostitution where prostitution is wholly controlled by government and may only be practiced under certain state-specified conditions.⁷⁰ In this regard, the legalisation legal approach to prostitution is also known as the non-criminalisation or regulation of prostitution.⁷¹ “The underlying premise in legalised regimes is that prostitution is necessary for stable social order.”⁷² The legalisation legal approach to prostitution is employed in an attempt to reduce the crimes associated with prostitution and as a means to protect the prostitute.⁷³

The salient features of the legalisation legal approach are the “existence of prostitution-specific controls and conditions specified by the state that can include licensing, registration, and mandatory

⁶⁴ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 1.

⁶⁵ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁶⁶ Melissa Farley, “‘Bad for the Body, Bad for the Heart’: Prostitution Harms Women Even if Legalized or Decriminalized,” *Violence Against Women*, Vol. 10(10) (2004): 1092.

⁶⁷ “Analysing the Swedish Model on Prostitution” *Ruhama* <<http://www.ruhama.ie/easvedit/files/analyzingtheswedishmodelonprostitution.doc>> (accessed Oct. 14, 2010).

⁶⁸ “Analysing the Swedish Model on Prostitution” *Ruhama* <<http://www.ruhama.ie/easvedit/files/analyzingtheswedishmodelonprostitution.doc>> (accessed Oct. 14, 2010).

⁶⁹ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 18.

⁷⁰ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁷¹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 13.

⁷² New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁷³ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

health checks.”⁷⁴ Moreover, in certain countries, the legalisation legal approach to prostitution requires the institution of mandatory health checks for prostitutes.⁷⁵

The legalisation legal approach to prostitution is criticised by anti-prostitution advocates because it seeks to normalise prostitution and as such it is accepted that prostitution is an inevitable part of human life and society.⁷⁶ Moreover, because the conditions under which prostitution has to occur is controlled by the state, prostitutes are robbed of their choice and control over their circumstances in choosing the way in which they work and the buyers she or he has to facilitate.⁷⁷ Because the conditions of prostitutes are tightly controlled, they are often not able to move freely outside of the place where he or she operates.⁷⁸

A further criticism of the legalisation legal approach is that it acts as a driver for the increase in instances of human trafficking and child prostitution.⁷⁹ In this regard, in the Netherlands where the legalisation legal approach is employed, it has been noted that there has been an increase in the numbers of children and foreign women and this seems to indicate that because of the implementation of the legalisation approach to prostitution, the Netherlands has become a more attractive destination for the trafficking in children and foreign women for the purposes of sexual exploitation.⁸⁰

While the implementation of the legalisation legal approach seeks to prevent the inherent harm associated with prostitution, it cannot be proven the extent to which the reduction of the harms associated with prostitution has occurred.⁸¹ This should be weighed against the presence of high levels of poverty and the vulnerability of women and men. It therefore needs to be considered whether these socially vulnerable groups benefit from the legalisation of prostitution in a substantial manner.

⁷⁴ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁷⁵ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 13.

⁷⁶ Janice G. Raymond, “Prostitution on Demand: Legalizing the Buyers as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1157.

⁷⁷ “Making the Harm Visible,” *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/mhvlegal.htm>> (accessed Oct. 12, 2010).

⁷⁸ “Making the Harm Visible,” *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/mhvlegal.htm>> (accessed Oct. 12, 2010).

⁷⁹ Janice G. Raymond, “Prostitution on Demand: Legalizing the Buyers as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1159.

⁸⁰ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 38.

⁸¹ Janice G. Raymond, “Prostitution on Demand: Legalizing the Buyers as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1157.

2.3.3 Decriminalisation of Prostitution

The decriminalisation legal approach to prostitution entails the repeal of all legislation that criminalises prostitution or the removal of provisions that criminalises all aspects of prostitution.⁸² It should be noted that a clear distinction is made between voluntary and forced or coerced prostitution.⁸³ In this regard, all forms of forced or coerced prostitution are criminalised.

The most important characteristic of the decriminalisation legal approach is that the state imposes no prostitution-specific legislation.⁸⁴ Instead, the practicing of prostitution is regulated through an existing legal framework.⁸⁵ The practice of prostitution is considered a legitimate form of work and is therefore approached through existing labour laws.⁸⁶ However, the application of existing labour laws is not automatic.⁸⁷ Rather, the application of existing labour legal frameworks to prostitution falls within the sole domain of the State.

Pro-prostitution advocates support the decriminalisation legal approach to prostitution because this method ostensibly aims at respecting the human rights of sex workers by improving their health, safety and working conditions.⁸⁸ “Proponents of decriminalisation argue that the cost of keeping prostitution illegal largely outweighs the gains, and that prostitution should essentially be seen as consenting behaviour between adults.”⁸⁹ Moreover, these advocates postulate that decriminalisation reduces the inherent harms associated with prostitution (like sexual and gender-based violence) as prostitutes will be able to dictate the terms of any sexual interaction.⁹⁰

Anti-prostitution advocates however claim that the decriminalisation legal approach is a gender neutral one that fails to take into account the inherent inequalities between men and women (particularly in sexual relations) and the vulnerability of women in prostitution transactions.⁹¹ Moreover, these advocates criticise the pro-prostitution notion that prostitution is an inalienable

⁸² New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁸³ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁸⁴ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 13.

⁸⁵ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁸⁶ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 13.

⁸⁷ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 13.

⁸⁸ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁸⁹ New Zealand Ministry of Justice, *Decriminalising or Legalising*, Wellington, 2007.

⁹⁰ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 14.

⁹¹ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 14.

aspect of society.⁹² To this extent, it amounts to the acceptance that prostitution is not a form of sexual and gender-based violence because it can be controlled (to a degree) through the enforcement of certain regulations, legal provisions and policy positions.⁹³

2.4 The Anti-Prostitution Human Rights Debate

The Anti-Prostitution human rights debate is premised on various principled arguments regarding prostitution, *inter alia*, consent and coercion.⁹⁴ Moreover, anti-prostitution advocates agree that prostitution can be stopped and that decriminalisation alone might not be enough to eliminate the harm that is inherent in the prostitution transaction.⁹⁵ These arguments therefore advocate for the full abolishment of the practice of prostitution on the basis of the fact that the act of prostitution is a violation of the person's human right to dignity, freedom of association and equality.⁹⁶

The inherent harm involved in prostitution cannot be ignored and this is the point of departure for either of the schools of thought.⁹⁷ To this extent, "much of the available empirical research on commercial sex indicates that at least some sex workers experience high levels of violence, including, but not limited to, physical assaults, sexual assaults, verbal threats or abuse, psychological abuse, robberies and kidnapping."⁹⁸ However, these inherent harms should not detract from the fact that the act of prostitution in itself is a form of sexualized male violence upon women.⁹⁹ Moreover, the harm and violence that women (and some men) experience in prostitution should be seen as an addition to the violence of the act of prostitution itself.¹⁰⁰ The understanding that prostitution is a form of sexual violence is based on the assertion that the act of prostitution lacks consent.¹⁰¹ Moreover, sexual violence needs to be distinguished from other forms of violence

⁹² "Making the Harm Visible," *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/mhvlegal.htm>> (accessed Oct. 12, 2010).

⁹³ "Making the Harm Visible," *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/mhvlegal.htm>> (accessed Oct. 12, 2010).

⁹⁴ "Redefining Prostitution as Sex Work on the International Agenda," *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

⁹⁵ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 23.

⁹⁶ Kimberly Klinger, "Prostitution, Humanism, and a Women's Choice," *The Humanist*, Jan.-Feb. (2003):1.

⁹⁷ Matthew Lemisio, "Should Prostitution be Decriminalised in the Pacific? The Pros and Cons," *Journal of South Pacific Law*, Vol. 12(1) (2008): 103.

⁹⁸ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 24.

⁹⁹ "Drawing the line: Is prostitution consensual sex for a price or men's violence against women?" *Prostitution Research and Education*, <<http://www.prostitutionresearch.com/Hampton-Drawing%20the%20line.pdf>> (accessed Aug. 12, 2010).

¹⁰⁰ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 23.

¹⁰¹ "Drawing the line: Is prostitution consensual sex for a price or men's violence against women?" *Prostitution Research and Education*, <<http://www.prostitutionresearch.com/Hampton-Drawing%20the%20line.pdf>> (accessed Aug. 12, 2010).

because it is context dependant: it is not the behavior that is violent but rather it is the context in which the act occurred that is violent.¹⁰² The prostitute involved in the sexual act is often not able to give consent because she is under threat of violence, drugs or coercion from either the buyer of sex, the pimp and, in some instances, the police officials.¹⁰³ The assertion is that women have control over their bodies and as such can make decisions about when, whether and with whom to have sex is a fundamental human right and is integral to the gender equality between men and women.¹⁰⁴ This inalienable right is the foundation of women's right to autonomy and dignity of person.¹⁰⁵

Anti-prostitution advocates reject the notion that prostitution is a consensual transaction and a personal choice by some to sell a sexual service in exchange for money.¹⁰⁶ These advocates maintain that such a view does not take into account the issue of women's equality and that the act of prostitution ignores the fundamental inequality between men and women during the sexual transaction.¹⁰⁷ The act of prostitution seeks to entrench women's sexual subordination to men because it removes the factor of consent.¹⁰⁸ As such, prostitution is a violation of the human rights of women. Moreover, it is contended that this intrinsic inequality between men and women in prostitution indirectly affects women and men who are not involved in prostitution because prostitution becomes a reference point for all sexual relationships.¹⁰⁹ The notion that prostitution is inevitable seeks to entrench sexual inequality between men and women.¹¹⁰ Furthermore, anti-prostitution advocates agree that prostitution is a transaction between two parties in which one party provides commodified sexual services and as such is a form of social and sexual subordination.¹¹¹

¹⁰² "Drawing the line: Is prostitution consensual sex for a price or men's violence against women?" *Prostitution Research and Education*, <<http://www.prostitutionresearch.com/Hampton-Drawing%20the%20line.pdf>> (accessed Aug. 12, 2010).

¹⁰³ Janice G. Raymond, "Prostitution on Demand: Legalizing the Buyers as Sexual Consumers," *Violence Against Women*, Vol. 10(10) (2004): 1174.

¹⁰⁴ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 24.

¹⁰⁵ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 50.

¹⁰⁶ "Drawing the line: Is prostitution consensual sex for a price or men's violence against women?" *Prostitution Research and Education*, <<http://www.prostitutionresearch.com/Hampton-Drawing%20the%20line.pdf>> (accessed Aug. 12, 2010).

¹⁰⁷ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 5.

¹⁰⁸ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 5.

¹⁰⁹ Jan Macleod, Melissa Farley, Lynn Anderson, Jacqueline Golding, Challenging Men's Demand for Prostitution in Scotland, (Glasgow: Women's Support Project, 2008), 15.

¹¹⁰ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 15.

¹¹¹ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 24.

Anti-prostitution advocates further argue that women start off on an unequal footing with men in that they experience a lack of access to adequate incomes, decent housing and other governmental services. In fact, the feminization of poverty cannot be argued.¹¹² As such, the notion that prostitution is a voluntary choice is not true. “The proposition that prostitution is a choice like any other for the many women who are in it simply does not stand up to scrutiny when so many coercive factors are present.”¹¹³

It is true that some women and men voluntarily enter into prostitution, however they are far outnumbered by those who are forced or coerced into entering into prostitution. The question that anti-prostitution advocates put forward is: to what extent should *voluntary* prostitutes determine or shape public policy for women and men who do not have the luxury of such a choice and who want to exit prostitution.¹¹⁴ Essentially, legislation should seek to provide assistance through government service delivery to the most vulnerable in society, especially women and young girls who are mostly disadvantaged by poverty.¹¹⁵ In terms of prostitution, any attempt to legally deal with prostitution should take into account the needs of these women.¹¹⁶

2.5 The Pro-Prostitution Human Rights Debate

One of the critical features of the pro-prostitution human rights debate is that of redefining prostitution as a form of labour.¹¹⁷ “The terms 'sex work' and 'sex worker' have been coined by sex workers themselves to redefine commercial sex, not as the social or psychological characteristic of a class of women, but as an income-generating activity or form of employment for women and men.”¹¹⁸ It is further believed that the lack of recognition of prostitution as a form of labour further makes these women and men vulnerable to exploitation by employers, law enforcement officials and governmental service providers. Moreover, “sex workers without rights in their place of work

¹¹² Johanna Kehler, “Women and Poverty: The South African Experience,” *Journal of International Women’s Studies*, Fall (2001):10, <<http://www.bridgew.edu/soas/jiws/fall01/kebler.pdf>> (accessed Aug. 12, 2010).

¹¹³ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 27.

¹¹⁴ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 27.

¹¹⁵ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 28.

¹¹⁶ “Factors affecting prostitution – Formal supports and services,” *Ruhama*, <<http://www.ruhama.ie/easyedit/files/Ruhama-NextStep-10.pdf>> (accessed Nov. 3, 2010).

¹¹⁷ Janice G. Raymond, “Prostitution on Demand: Legalizing the Buyers as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1157.

¹¹⁸ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

are uniquely vulnerable to infection with HIV and other sexually transmitted diseases, as they routinely lack the information, materials or authority to protect themselves and their clients.”¹¹⁹

In order to afford prostitutes rights within the normative legal framework, it is necessary to define prostitution as sex work, and then sex work as a form of labour.¹²⁰ To this extent, scholars of the pro-prostitution human rights debate have established a definition of sex-work that would enable the practice to be defined as a form of labour. To this extent, sex work is defined as:

“Negotiation and performance of sexual services for remuneration with or without intervention by a third party where those services are advertised or generally recognised as available from a specific location where the price of services reflects the pressures of supply and demand.”¹²¹

This definition is highly problematic as it fails to take into account the realities of prostitution around the world.¹²² Firstly, the definition provides that there is the possibility of negotiation of the form and nature of the sex work. This is highly problematic as women (and to a certain degree men) who are engaged in prostitution are highly vulnerable (given their illegal status) to various forms of violence and this severely impairs their ability to negotiate the terms of sexual services.¹²³ Secondly, the definition prescribes that any form of sexual services is rendered without the intervention of a third party. To this extent, the definition strikes at the role of the pimp. Again, this notion does not take into account the lived experience of prostitutes. Many prostitutes are subject to the sexual exploitation of pimps who exploit these women (because of their vulnerability) for reward and subject these women to duress, coercion and various forms of physical and psychological violence. The notion that prostitution is free of the involvement of the pimp is incorrect. Thirdly, the location to which the definition refers is somewhat problematic as these locations cannot be determined, and is not subject to the provisions of other labour legislation. The rights of prostitutes can therefore not be protected and this makes them even more vulnerable to exploitation.

¹¹⁹ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

¹²⁰ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

¹²¹ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

¹²² Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 9.

¹²³ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 9.

From the discussion above, it can thus be determined that the definition provided in order to classify sex work as a form of labour is highly problematic. Again, it does not take into account the realities of the practice of prostitution and therefore cannot be applied practically.¹²⁴

Pro-prostitution human rights advocates argue that it is because of the vulnerabilities of women engaged in prostitution that they are discriminated against. “Sex workers face systematic discrimination throughout the world and are therefore at risk of a variety of abuses.”¹²⁵ These include police extortion and arbitrary detention, violations of their human and labour rights, which in some cases even amount to slavery, especially resulting from debt bondage or child servitude.¹²⁶ It is argued that in order to protect against these possible violations, it is necessary to legalise prostitution and recognise it as a form of sex work that is subject to protections from labour legislation.

Pro-prostitution human rights advocates further argue that prostitutes are not committing an inherently harmful act. “While the spread of disease and other detriments are possible in the practice of prostitution, criminalization is a sure way of exacerbating rather than addressing such effects.”¹²⁷ To this extent, it is argued that by legalising or decriminalising prostitution, the practice can be made subject to normative legal provisions and governmental policies that would seek to provide health care services and help prevent the spread of sexually transmitted diseases.¹²⁸

Pro-prostitution human rights advocates argue that if prostitution is legalised or decriminalised, it would enable the regulation of the prostitution and that this would prevent the forced or coerced form of prostitution. They argue that prostitution would then be the voluntary sale of someones body, of which that person has total control. Moreover, it is argued that “as long as the prostitution transaction is voluntary, there is no justification for governmental interference. Indeed, such interference constitutes an infringement of the privacy and personal liberty of the individuals involved.”

¹²⁴ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights, 2009: 9.

¹²⁵ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

¹²⁶ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

¹²⁷ The Prostitution Debate, (no date).

¹²⁸ “Redefining Prostitution as Sex Work on the International Agenda,” *WALNET*, <<http://www.WALNET.org/csis/papers/redefining.html#1>> (accessed Aug. 14, 2010).

The basic tenet of the pro-prostitution human rights debate is that by legalising prostitution, the government would be able to regulate the activity and provide mechanisms that would protect women and men from further exploitation and harm and enable them to access essential services. However, the extent to which governments are able to regulate these activities is highly questionable, especially in a country where monitoring and evaluation is problematic and gender-based violence is extremely high.

2.6 Analytical Commentary

From the discussion above, it is clear that there exists various legal models in dealing with prostitution ranging from total criminalisation to the legalisation.¹²⁹ However, the most important consideration in the employment of either of these models should be the protection of the vulnerable men and women who are involved in prostitution.

The prevailing discourse around prostitution deals specifically with the question of whether someone can choose prostitution as a profession or whether prostitution is as a result of gender inequality.¹³⁰ To this extent, various schools of thought opine that prostitution needs to be dealt with in a manner that best addresses the needs of vulnerable women.

The anti-prostitution human rights debate is centred around the notion that prostitution is unacceptable and is a form of violence against women that it does not take into account the fundamental inequality between men and women.¹³¹ Moreover, these scholars also firmly reject the notion that prostitution is a form of work and should therefore be subjected to legislation that would seek to control and regulate the practice. This is based on the opinion that prostitution is inherently devoid of consent.¹³² The fundamental question in this regard is the extent to which those who enter into prostitution voluntarily should determine policy and legislation for the majority for whom prostitution is not a choice.¹³³

¹²⁹ Kakule Kalwahali, "The Criminalisation of Prostitution in South African Criminal Law," (LL.M. diss., University of South Africa, 2009), 7.

¹³⁰ Jo Doezema, "Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy," in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 17.

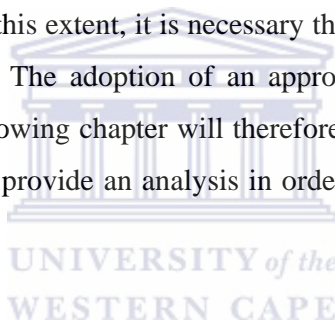
¹³¹ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 28.

¹³² Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 5.

¹³³ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes*, (2008): 28.

In contrast, pro-prostitution human rights scholars opine that prostitution is a form of labour and should therefore be subjected to a set of laws that seek to regulate it.¹³⁴ As discussed above, in attempting to bring prostitution into the domain of normative labour practices, these scholars have established a working definition for prostitution. However, this definition is highly problematic as it does not take into account the fact that the majority of women involved in prostitution do not do so out of their own volition, but rather as a result of dire socioeconomic conditions, coercion and blatant violence. Moreover, pro-prostitution advocates assert that women and men involved in prostitution are victims because of the discrimination they face. Again, this assertion is problematic as it does not take into the discrimination and lack of access to human rights before entering into prostitution.

Regardless of the choice of discourse relating to prostitution, it is clear that such a discourse is framed within the framework of human rights. Prostitutes face significant challenges, discrimination and violence and to this extent, it is necessary that the adoption of a legal framework seek to address these challenges. The adoption of an appropriate legal framework is therefore critical to this realisation. The following chapter will therefore discuss the prevailing international and domestic legal framework and provide an analysis in order to provide a succinct description of the gaps and challenges.



¹³⁴ Janice G. Raymond, "Prostitution on Demand: Legalizing the Buyers as Sexual Consumers," *Violence Against Women*, Vol. 10 (10) (2004): 1157.

CHAPTER THREE: LEGAL AND POLICY FRAMEWORK

3.1 Introduction

A legal framework refers to a body of legislation and policy that governs a specific thematic area. In this regard, the legal and policy framework refers to the body of legislation and policy that governs the buying and selling of sex in South Africa. South Africa does not possess a specific set of laws and policy that deals specifically with prostitution. Rather, prostitution, or the buying and selling of sex, is criminalised by certain provisions of the Sexual Offences Amendment Act 32 of 2007, Sexual Offences Act 23 of 1957 and the Criminal Procedure Act 51 of 1977. While these statutes contain specific provisions that deal with the buying and selling of sex, at a municipal level, certain bylaws contain provisions that deal with nuisances related to prostitution. The following section will set out the international and domestic legal and policy framework that deals with the regulation of prostitution.



3.2 International Legal Framework

It is important to discuss the international legal framework as it pertains to prostitution in order to ascertain whether the South African Government has certain obligations in terms of those instruments in dealing with prostitution. Moreover, the international legal framework is an important consideration in the regulation of prostitution because “international law has dealt with prostitution as well as human rights and women’s rights”.¹³⁵ To this extent, the South African Constitution Act¹³⁶ requires South African courts take into account international law and may refer to foreign jurisprudence.¹³⁷ Section 233 of the Constitution states that:

“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.”

Courts should interpret domestic legislation in such a manner that is consistent with international law and the obligations that those instruments place on South Africa. It can thus be said that international instruments that are binding on South Africa have a direct impact on the way in which

¹³⁵ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 17.

¹³⁶ Act 108 of 1996.

¹³⁷ Section 231(5) of the Constitution Act 108 of 1996.

South African courts interpret domestic legislation. However, this Constitutional provision does not require that the South African government enact legislation that is consistent with obligations that are set by international law. This is dealt with in a related section of the Constitution. Section 231 (4) of the Constitution states that:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Moreover, Section 231 (5) of the Constitution states that:

“The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”

To this extent, international agreements that deal with prostitution specifically or in its provisions become law in South Africa once legislation to that effect has been passed. This however does not sufficiently address situations where legislation has not been passed in order to give full effect to international law and international obligations. In this regard, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 has been ratified by South Africa. However, specific legislation has not been enacted in order to give effect to the Protocol. Instead, specific provisions in the Sexual Offences Act¹³⁸, regulate the practice of trafficking in persons for sexual exploitative purposes alone and does not regulate the trafficking in persons for the purposes of debt bondage, labour exploitation, etc. It is therefore critical that if upon examination of the international legal framework certain obligations do exist and require the South African Government to legislate, necessary legislation be enacted in order to give effect to those obligations. The following section therefore provides a discussion on the international legal framework and how these instruments set certain obligations on the South African Government, if any.

3.2.1 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)

¹³⁸ 32 of 2007

The most important legal international instrument concerning prostitution is the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹³⁹ The Convention resulted from a resolution by the United Nations General Assembly on 2 December 1949 and “recognized that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human persons and endanger the welfare of the individual, the family and the community.”¹⁴⁰ South Africa is currently a State Party to the Convention.

The Convention specifically calls upon State Parties to punish any person who is found guilty of exploitation of prostitution (including both the buyers and sellers of sex)¹⁴¹ and those who own or finances brothels.¹⁴² Article 6 of the Convention goes further to state that State Parties agree to:

“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 to any exceptional requirements for supervision or notification.”

Article 6 of the Convention seems to extend the prohibition against prostitution by calling upon State Parties to the Convention to take all measures possible to repeal all legislation that seeks to regulate prostitution and the antecedent provision of special services to prostitutes. The Convention clearly posits its position on prostitution by calling for the suppression of all forms of prostitution, regardless of whether it is forced or voluntary. This distinction is critically important to the discussion on the legislative framework that governs prostitution because of the development in international human rights law and the interpretation of the human rights of women the right of choice over their bodies. Moreover, this Convention is critical to the debate on prostitution because it provides a backdrop to the development of future instruments on women’s rights and the true emancipation of women. Internationally at the time of the adoption of the Convention, the discourse around prostitution centered around the total abolition of the practice in relation to the human rights of women and the violence against women.¹⁴³ In this regard, the Convention is criticised because its provisions call for the total abolition of prostitution regardless of whether such

¹³⁹ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 36.

¹⁴⁰ Preamble to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

¹⁴¹ Article 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

¹⁴² Article 2 Article 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

¹⁴³ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 17.

a person has been trafficked and is subject to debt bondage, coercion or duress.¹⁴⁴ However, it could be said that the Convention views all forms of prostitution as violations of human rights in that it amounts to the sexual exploitation of others, regardless of whether the person had entered into the practice voluntarily or by force. This distinction is a critical one and will be discussed in the paragraphs below.

3.2.2 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

The United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is a statement of minimum standards that governments need to meet in order to ensure that there is an end to discrimination and to promote gender equality.¹⁴⁵ By signing and ratifying CEDAW the South African Government has agreed to adopt and develop mechanisms to help protect the basic rights of women and improve their status by eliminating gender-based discrimination. Specific areas of discrimination against women are identified in CEDAW. These include discrimination with regard to political rights, employment, marriage and the family. CEDAW highlights the need for equality between men and women as a basis for sustainable growth and development.¹⁴⁶ The Convention advocates the recognition of the economic and social contribution of women to the family and to society as a whole. It stresses the negative effects that discrimination against women will have on social, political and economic development. It further strengthens the need for behavioural and attitudinal change, through the education of both men and women to overcome prejudices and eliminate practices based on stereotyped roles. The Convention effectively constitutes an international Bill of Rights for women.

While CEDAW does not specifically pronounce on prostitution, it does however refer to issues of trafficking and exploitation of women. In this regard, Article 1 of CEDAW states that:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean 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

¹⁴⁴ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 20.

¹⁴⁵ “The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): A Fact Sheet,” Physicians for Human Rights <<http://physiciansforhumanrights.org/library/documents/general-pdfs/cedaw-fact-sheet.pdf>> (accessed on Oct.13, 2010).

¹⁴⁶ “The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): A Fact Sheet,” Physicians for Human Rights <<http://physiciansforhumanrights.org/library/documents/general-pdfs/cedaw-fact-sheet.pdf>> (accessed on Oct.13, 2010).

equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Whilst Article 1 does not specifically list prostitution as a category of discrimination against women, it could be argued that in terms of the distinction, exclusion or restrictions that are placed on women on the basis of their sex, they cannot enjoy the fundamental freedoms and rights enshrined in the South African Constitution. These include the inequalities that women continue to experience in relation to sexual and intimate relationships, the feminisation of poverty, lack of access to social, economic and political development. It is argued that in reading Article 1, the practice of prostitution is closely related to exploitation and discrimination of women as it serves to perpetuate issues of childhood violence, poverty and pervasive patriarchy that continue to impede on the ability of women to fully enjoy economic, social and political freedom.¹⁴⁷ However, this notion does not take into account women and men who freely enter into prostitution. In this regard, it is argued that prostitution should not be seen as discrimination against women because it does not violate any human rights, specifically in relation to the freedom of women over their own bodies and the right to enter into prostitution freely.¹⁴⁸ It is therefore argued that prostitution is a form of work that women can enter into freely.¹⁴⁹

Article 5 of CEDAW states that:

“States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and custom and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

Article 5 therefore obliges States to take specific measures (whether legal or otherwise) that seek to eliminate all forms of prejudices that entrench the inferiority of women and the superiority of men. This refers specifically to entrenched gender roles. Essentially, gender refers to social constructs that determine the different roles of men and women in society and as such impact on the way in which men and women interact with each other.¹⁵⁰ This includes relationships between men and

¹⁴⁷ The South African Law Reform Commission, Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution, 2009, pg. 98.

¹⁴⁸ “Prostitution is a violation of Human Rights,” Family Policy Institute <<http://www.familypolicyinstitute.com/article.php?id=33>> (accessed on Aug. 12, 2010).

¹⁴⁹ “Prostitution is a violation of Human Rights,” Family Policy Institute <<http://www.familypolicyinstitute.com/article.php?id=33>> (accessed on Aug. 12, 2010).

¹⁵⁰ Rhoda, Deborah L. “The Ideology and Biology of Gender Difference.” *Speaking from Sex: The Denial of Gender Inequality*, (1997): 32.

women that are of a sexual nature and these relationships are also subjected to societal norms, tradition and patriarchy.¹⁵¹

Article 6 however expressly requires States to take measures that seek to suppress the practice of prostitution. 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.”

While this article deals specifically with the practice of prostitution, it is not clear the extent to which the provision requires States to prohibit the practice of prostitution itself or whether States should implement measures that seek to protect women involved in prostitution from exploitation. This is particularly problematic as it leads to a certain degree of ambiguity insofar as prostitution is concerned. On the one hand, it is argued that Article 6 deals only with the exploitation of prostitutes and not prostitution itself as exploitation refers to the related mischief and not the activity of prostitution.¹⁵² It is further argued that CEDAW does not call for the total criminalisation of prostitution, but rather for the criminalisation of prostitution resulting from sexual exploitation.¹⁵³ However, it is conversely argued that there rests an obligation on States to criminalise prostitution because it is too closely related to the sexual exploitation of women based on their unequal status in sexual, and other relations.¹⁵⁴ This is based on the notion that because of unequal status between men and women, and the inability of women to fully participate on an equal footing with men, that prostitution will always be an option and thus can be considered to be a form of exploitation.¹⁵⁵

Given the ambiguity regarding the Article 6 of CEDAW, it seems that the CEDAW Committee has intimated a possible interpretation of the Article on various occasions. In February 1999, the CEDAW Committee noted with concern that prostitution was illegal in several South East Asian countries and recommended accordingly that prostitution be decriminalised in order to ensure that

¹⁵¹ The South African Law Reform Commission, Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution, 2009, pg. 98.

¹⁵² The South African Law Reform Commission, Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution, 2009, pg. 98.

¹⁵³ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 34.

¹⁵⁴ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 34.

¹⁵⁵ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 28.

these women receive access to medical and other services.¹⁵⁶ Similar recommendations in relation to the decriminalisation of prostitution were made to Liechtenstein. Moreover, the CEDAW Committee also noted with concern that in instances where countries had decriminalised prostitution and provided a regulatory framework that sought to provide essential sexual health and other services to prostitutes, that these services were not being provided in a manner that was set out in those regulatory frameworks. These countries include Germany, Greece and Hong Kong.

This trend could serve to highlight that the current thinking of the CEDAW Committee in the interpretation of Article 6 leans toward to the decriminalisation of prostitution. However, it is not clear what the reasoning behind these pronouncements are, but it has been argued that the CEDAW Committee acknowledges the links between the decriminalisation of prostitution and the issues of poverty, violence and the continued exploitation of women.¹⁵⁷

An essential feature of CEDAW is the requirement of State Parties to submit reports on the progress made in terms of the provisions of the Convention. Article 18 of CEDAW states that:

“(1) States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

- (a) Within one year after the entry into force for the State concerned;
- (b) Thereafter, at least every four years and further whenever the Committee so requests.

(2) Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.”

Article 18 of CEDAW therefore allows interested parties to examine country reports in order to establish the measures that have been taken in relation to a specific provision. In this case, it allows one to establish (to a degree) the South African position on prostitution. South Africa ratified CEDAW in 1995 and the provisions of the Convention came into force in 1996. As such, the South African Government is required to have submitted three country reports to date. However, the South African Government has only submitted two country reports, the initial report and a combined second and third report. To this extent, the provisions relating to prostitution allow interested parties to examine the position of the South African Government in relation to prostitution. In its initial Report to the CEDAW Committee in 1996, the South African Government noted that while the Sexual Offences Act

¹⁵⁶ The South African Law Reform Commission, Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution, 2009, pg. 98.

¹⁵⁷ Feminist Legal Approaches to Prostitution, 2010

23 of 1957 criminalised the practice of prostitution, certain initiatives had been undertaken at provincial levels (particularly in the provinces of Gauteng and KwaZulu-Natal) which recommended the decriminalisation of prostitution in the light of further evidence and statistical analysis. Moreover, the report also noted that reports of adults selling children for the purposes of sexual exploitation and child prostitution confused the public discourse around adult prostitution. It can therefore be argued that upon examination of the initial country report, that the South African Government had a progressive view on prostitution and supplemented this with a call for further information in order to make an informed decision in terms of policy and legislation. However, the subsequent combined country report illustrate that little has happened in terms of the suppressing of the exploitation of prostitution of women and children. The Country Report entitled “Progress made on the Implementation of the Convention for the Period 1998 to 2008” deals largely with the prostitution of children, specifically in terms of the enactment of legislation.¹⁵⁸ The Report does not speak to Government initiatives in terms of addressing Article 6 of CEDAW, but rather to civil society initiatives in this regard.¹⁵⁹ This serves to highlight the regression that has occurred in terms of governmental debate on the issue of prostitution. It does not offer any insight into the current executive thinking on the issue of prostitution and this is problematic in terms of the high rate of HIV and AIDS infections and incidences of domestic and gender based violence.

In general, CEDAW remains relatively neutral in terms of the decriminalisation of prostitution. Rather, in dealing with prostitution, the CEDAW Committee addresses antecedent ills that exacerbate the sexual exploitation of women who sell sex as well as services that seek to improve the lives of those women, as has been illustrated above. In so doing, it allows State Parties to employ mechanisms that are domestically appropriate given their specific needs. However, in certain circumstances, the CEDAW Committee has come out in support of the decriminalisation of prostitution, but only relating to situations where women are being negatively affected by the continued exploitation.¹⁶⁰

Furthermore, whilst CEDAW contains provisions that speak to the monitoring and evaluation of the implementation of the Convention, it contains no provisions that allow the Committee to take action against those State Parties who have not implemented policies in order to meet

¹⁵⁸ The Presidency of the Republic of South Africa, *South African CEDAW Country Report*, 2008.

¹⁵⁹ The Presidency of the Republic of South Africa, *South African CEDAW Country Report*, 2008.

¹⁶⁰ Lin Lean Lim, ed. “*The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*,” (Geneva: International Labour Organisation, 1998).

the requirements of CEDAW. This means that whilst State Parties are required to report on achievements, gaps and challenges, those State Parties will not be subjected to specific sanctions should they fail to abide by their obligations. This is clear from the combined second and third report of the South African Government.

3.2.3 Declaration on the Elimination of Violence Against Women (DEVAW) (1993)

The DEVAW is a declaration resulting from a resolution taken by the United Nations General Assembly on the 20 December 1993. The DEVAW was envisaged to supplement the CEDAW and act as reiteration of the commitment to the eradication of all forms of violence and discrimination against women. Moreover, the DEVAW identifies specific instances of “violence in the family, public violence and violence condoned by the state (regardless of where it occurs) as forms of violence that violate women’s human rights.”¹⁶¹

The DEVAW defines violence as against women in Article 2 and states that:

“Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; and
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

The DEVAW refers to *forced* prostitution as a category of gender-based violence. To this extent, it does not refer to voluntary adult prostitution. This is a particularly contentious issue as it is not certain the extent to which women and men enter into prostitution voluntarily or under a form of duress. It is clear that DEVAW allows for State Parties to determine their own domestic legal and policy framework in terms of voluntary adult prostitution, but that in instances where women are forced into prostitution that certain measures need to be taken in order to eradicate that practice.

¹⁶¹ Feminist Legal Approaches to Prostitution, 2010

Moreover, the Declaration requires that State Parties amend their justice systems in order to ensure that injured women are able to access those criminal justice systems.¹⁶²

As has already been mentioned, the Declaration does not specifically deal with voluntary prostitution. However, it deals with the dangers and nuisances that surround or involve prostitution. In this regard, “specific measures should be accessible to injured women and stipulates that States should exercise due diligence in preventing, investigating and punishing acts of violence against women whether those acts are committed by the State or a private person.”¹⁶³ This stipulation deals with situations where women who sell sex voluntarily are subjected to acts of violence. In this regard, “State Parties are obliged to prevent any act that is likely to result in physical, sexual or psychological harm or suffering to women. This would cover the symptoms of post-traumatic stress disorder and the generally poor health of sex workers.”¹⁶⁴ If it is assumed that prostitution of women results in “physical, sexual or psychological harm” then one can assume that a duty is inferred upon State Parties to criminalise the practice of prostitution, including both the seller and the buyer. However, if one assumes that the Declaration deals with the decriminalization of prostitution, then it can be construed that women who sell sex are to be afforded specific protections in terms of access to public services, including sexual and reproductive health and access to courts.

The Declaration therefore does not provide certainty as to whether the practice of prostitution should be decriminalized. Regardless of this uncertainty, the Declaration provides for no enforcement mechanisms in situations where State Parties do not meet the provisions of the instrument. As such, the authority of the Declaration is rather limited.

3.2.4 Beijing Declaration and Platform for Action (1995)

The Beijing Platform for Action defines violence against women as “any of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” This critically important instrument provides various categories of violence against women. In this regard, it is important to note that various categories of violence

¹⁶² Feminist Legal Approaches to Prostitution, 2010

¹⁶³ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 100.

¹⁶⁴ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 98.

against women are not a closed list. Accordingly, violence against women encompasses but is not limited to the following:

- “(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

In viewing the definition of violence against women, the Beijing Platform for Action includes in its categories “forced prostitution”. It is important to note the Beijing Platform for Action distinguished between *forced* prostitution and *voluntary* prostitution. In this regard, one can assume that the above-mentioned instrument does not consider voluntary prostitution as a form of violence against women but rather as a form of employment that women enter into voluntarily.

The Beijing Platform for Action does not end by merely categorising violence against women, but rather provides a description of violence against women from a gender relations perspective. To this extent, the Beijing Platform for Action purports that violence against women stems from a historically unequal balance of power between men and women which has led to discrimination against women.¹⁶⁵ Violence against women is further perpetuated by a host of factors that include:

“the shame of denouncing certain acts that have been perpetrated against women; women’s lack of access to legal information, aid or protection; the lack of laws that effectively prohibit violence against women; failure to reform existing laws; inadequate efforts on the part of public authorities to promote awareness of and to enforce existing laws; and the absence of educational and other means to address the causes and consequences of violence.”¹⁶⁶

In light of the above-mentioned, it is important to ascertain to what extent women enter prostitution voluntarily and to what extent they are forced or coerced into it and to what extent either are subjected to violence. In relation to the Beijing Platform for Action, forced prostitution including violence perpetrated against women who enter prostitution voluntarily is considered unacceptable. In this regard, the instrument places certain obligations on State Parties in an effort to stem the tide of gender-based violence. In an attempt to ensure that protections against gender-based violence are afforded to either category of prostitute, the Beijing Platform for Action requires State Parties to review and adopt legislative measures that seek to end violence against women. The aforementioned instrument states that:

¹⁶⁵ Beijing Platform for Action, (1995).

¹⁶⁶ Beijing Platform for Action, (1995).

“Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders; take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators.”¹⁶⁷

To this extent, women who are involved in prostitution are subjected to various forms of violence and as such should be afforded protections that would seek to protect them from the scourge. It is can thus be construed that the Beijing Platform for Action provides a measure that would allow State Parties to enact, review or implement legislation that would seek to end violence against women.

However, the review of actions taken by governments is limited in terms of the Beijing Platform. There exist no mechanisms through which sanctions can be placed on State Parties in order to ensure that programmes, legislation and policies are put in place in order to ensure gender equality and women’s empowerment. To this end, Article 293 of the Beijing Platform for Action places the primary responsibility for actions to be taken on governments. Article 293 states that:

“Governments have the primary responsibility for implementing the Platform for Action. Commitment at the highest political level is essential to its implementation, and Governments should take a leading role in coordinating, monitoring and assessing progress in the advancement of women.”

It is therefore critical that governments enact, implement and monitor legislation, policies and programmes that seek to end violence against women. However, in relation to forced and voluntary prostitution, the Beijing Platform for Action does not require governments to implement measures that regulate prostitution. Rather, it allows governments to decide and legislate according to the needs and requirements of that constituency. In this regard, it is incumbent on the Government of South Africa to decide which, if any, measures to put into place in order to ensure that prostitution is regulated to the benefit of all women.

3.2.5 International Labour Organisation (ILO) 1998

The International Labour Organisation (hereinafter the ILO) was established in 1919 as party of the Treaty of Versailles in recognition that international peace could only be achieved if it is based on true equality and freedom. The ILO is concerned with advancing the labour rights of men and

¹⁶⁷ Beijing Platform for Action (1995).

women and ensuring labour conditions that are fair, equal and entrenched in human dignity. As such, the ILO is at the forefront in terms of the promotion of working conditions and social justice.

In terms of prostitution, the ILO has not included the practice in any binding instruments that would require the official recognition of prostitution as a form of work. However, in a 1999 report entitled “The Sex Sector: the Economic and Social Bases of Prostitution in Southeast Asia” the ILO recommended the recognition of the sex industry based on its potential contributions to the gross domestic product (GDP) of four Southeast Asian countries. To this extent, the report sets out the extent of prostitution in these four Southeast Asian countries and therefore the report has limited application to South Africa.

Regardless of the applicability of the report to South Africa, the report still states that measures introduced to regulate or prohibit the practice have been based on moral, social and human rights on grounds while prostitution is mainly economic in nature “with foundations in deeply ingrained patriarchal views.” Moreover, it is believed that macro-economic policies tend to be prioritized over policies that deal with prostitution. In this regard, the report presupposes that if policy makers and legislators do not take into account the economic and social aspects of prostitution, that legislation, policies and programmes instituted to deal with prostitution will not be effective as these measures are drafted with a moral bias.

The report also dealt with prostitution from a distinct economic perspective and failed to fully take into account issues of exploitation, patriarchy and violence. Instead, the report attends to the effects that the development of macro-economic policy have had, directly or indirectly, on the growth of prostitution. Furthermore, the report aims to highlight that when measures are put in place to deal with prostitution, that these measures are outweighed by the economic implications (when they are considered) of prostitution. The theoretical basis of the report is therefore limited to the economic dimensions of prostitution and as such postulates that on the basis of economic factors, prostitution should be recognised. Critically important is that the report does not suggest that prostitution should be decriminalised, but rather recognised in terms of its economic viability. The report suggests that affording prostitution economic recognition, it would be incumbent on the government to put in place mechanisms that would provide data as to the extent of the prostitution in that country. Such data would provide policy makers and legislators would be able to formulate a more effective legislative and policy response to prostitution.

While this report is important to the continuing debate around prostitution and the decriminalisation thereof, it is critical to note that the report does not form part of the formal recognition by the International Labour Organisation. Rather, the report presents as nothing more than a formal and written contribution to the discourse on prostitution and the way in which governments choose to deal with the issue. However, the report does however highlight a very important issue in this regard. “Unless Governments take into account the economic and social bases for prostitution, policy or legislative measures will never be effective.” It is therefore critical that any discussion around prostitution should take into account the economic bases for prostitution as a means of establishing any legislative or policy recognition to the practice.

3.2.6 Analytical Commentary

As has already been stated, one of the discernable trends that emerge from the international legal debate on prostitution is the differentiation between voluntary and forced prostitution and the discourses that surround this distinction. As has already been illustrated in the above discussion of international legal instruments, there seems to be a distinct trend in the informal recognition by international legal instruments of the ‘right to self determination’ of prostitution. However, it cannot be assumed that the inclusion of forced prostitution in human rights protections implicitly allows for the formal recognition of voluntary prostitution or the way in which prostitution should be defined or regulated.¹⁶⁸

Moreover, the distinction between forced and voluntary prostitution in international legal instruments could be because of the need for the more urgent recognition and abolition of forced prostitution.¹⁶⁹ In this regard, the distinction would allow for easier consensus on the way in which to deal with trafficking in persons and exploitation of prostitution.

In reviewing the international legal framework on prostitution, it is clear that prostitution is not compatible with the concept of equality because the men and women are not equal politically, economically, and socially and it is important that these factors are taken into account.¹⁷⁰ The provisions of the international legal framework require governments to take specific action to

¹⁶⁸ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in Global Sex Workers, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 17.

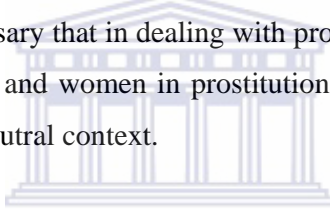
¹⁶⁹ Jo Doezema, “Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,” in Global Sex Workers, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 17.

¹⁷⁰ Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes*, (2008): 28.

prevent against sexual exploitation, but stops short of prescribing the measures to ensure such prevention.

The existence of the international human rights framework in relation to women's rights is testament to the advances made in the recognition of women's equality, not just as a paper right, but as an enforceable human right. It is my opinion however, that granting prostitution legal status, it would renege on the gains made as prostitution subjects women as commodities necessary for the gratification of men's sexual desires and as conduits for procreation. This is highly problematic.

It is also evident that prostitution is dealt with primarily via human rights instruments that speak to the protection of women's rights. A gap does exist in the international legal framework insofar as male prostitutes are concerned. This omission recognises that women and young girls are mostly involved in prostitution, but it does not recognise the role of men in prostitution. It can however be argued that the framework requires sovereign states to enact legislation that seeks to protect women from sexual exploitation, it is necessary that in dealing with prostitution such legislation should take into account the roles of both men and women in prostitution. It is therefore necessary that such provisions be framed in a gender-neutral context.



As is stated above, the international legal framework requires signatory states to take measures in order to deal with prostitution. It is therefore the prerogative of the states to enact legislation that gives effect to these international obligations. The following section therefore examines the South African approach in giving effect to its international obligations.

3.3 South African Legal Framework and Prostitution

The South African legal framework on Prostitution is one of total criminalisation. In this regard, prostitution is criminalised by various pieces of legislation and municipal by laws and as such, meets the requirements of various international legal instruments that South Africa is party to. However, this position has not precluded various portions of South African society from continuing the discourse around prostitution and the way in which the Government should deal with it. An important factor to consider in the way in which South Africa deals with prostitution is the implication that the current domestic legal framework has on prostitution.

The following section will provide a discussion on the South African legal framework and the way in which prostitution is dealt with. This is comprised of discussions on specific pieces of legislation, bills and policy statements.

3.3.1 Sexual Offences Act 23 of 1957

The Sexual Offences Act¹⁷¹ commenced on the 12 April 1957 and aims to consolidate and amend the laws relating to brothels and unlawful carnal intercourse and other acts in relation thereto.¹⁷²

The act of prostitution is primarily criminalised by section 20 (1A) of the Sexual Offences Act 23 of 1957. It states that:

“(1) (A) Any person 18 years or older who—
(a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or
(b) in public commits any act of indecency with another person, shall be guilty of an offence.”

Section 20(1)(aA) clearly criminalises the act of having sex for reward. However, in this definition, the Act uses the term “carnal intercourse”. It is therefore clear that the crime created by section 20 has three distinct elements: carnal intercourse, an act of indecency and for reward. It is essential to include a discussion on the elements of the crime created by section 20(1)(aA) because primary criminalisation of prostitution.

In terms of the Act, “carnal intercourse” is defined in the Act as “carnal intercourse otherwise than between husband and wife.”¹⁷³ This definition is very limited in scope as it entails that intercourse between persons other than husband and wife is unlawful carnal intercourse. It can therefore be interpreted that intercourse between an unmarried couple could also be construed as unlawful carnal intercourse. The definition provided by the Act is therefore ambiguous and could lead to certain inconsistencies in the interpretation of the definitions section. This contention is echoed by the South African Law Reform Commission in their Discussion Paper on the Decriminalisation of Prostitution. The Discussion Paper contends that “although the Act does not define the terms ‘carnal intercourse’, Milton and Cowling¹⁷⁴ explain that the term is generally understood to connote penetration of the female vagina by a

¹⁷¹ 23 of 1957.

¹⁷² Sexual Offences Act, No. 23 of 1957.

¹⁷³ Section 1 of the Sexual Offences Act, No. 23 of 1957.

¹⁷⁴ J. R. L. Milton and M.G. Cowling, “*South African Criminal Law and Procedure Volume III Statutory Offences ed.*” (Cape Town: Juta & Co., 2005).

male penis and not intercourse per annum.”¹⁷⁵ According to this assertion, ‘carnal intercourse’ refers to intercourse between a man and a woman. However, the definition of ‘carnal intercourse’ has also been extended in terms Constitutional Court case law.¹⁷⁶ The South African Law Reform Commission goes further to illustrate that the definition of ‘carnal intercourse’ has been extended through the recognition of the rights of homosexual men to consensual anal intercourse.¹⁷⁷ As such, ‘carnal intercourse’ can be understood to mean both consensual vaginal and anal intercourse.¹⁷⁸

However, it is important to note that section 20(1)(aA) does not prohibit being a prostitute per se, but rather criminalises the actions of a prostitute.¹⁷⁹ In this regard, the South African legal approach is one of partial criminalisation.¹⁸⁰ It is therefore true to say that merely being known as a prostitute is insufficient grounds for being arrested, as it has to be coupled with the reasonable suspicion that one has or is about to commit an act of sexual intercourse or indecent act for reward. Moreover, the provisions contained in section 20(1)(aA) does not criminalise the actions of the buyer who pays the reward in exchange for sexual intercourse or an indecent act. While section 20(1)(aA) does not specifically refer to prostitution or prostitutes, it is clear that the actions criminalised under that provision only refer those who sell sexual intercourse and indecent acts for reward.¹⁸¹ To this extent, the client in the sexual act does not commit an offence under section 20(1)(aA).¹⁸² However, in legislative amendments made to the Sexual Offences Act¹⁸³ in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, the buyer of sexual intercourse and indecent act is guilty of an offence.¹⁸⁴ This will be discussed below.

The Act also does not define ‘an act of indecency’ in the definition section, however such a definition has been developed through statutory interpretation by South African courts.¹⁸⁵ In

¹⁷⁵ South African Law Reform Commission. (2009). *Discussion Paper 0001/2009 Project 107 Sexual Offences Adult Prostitution*. Pretoria.

¹⁷⁶ See further National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC).

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Kakule Kalwahali. “The Criminalization of Prostitution in South African Law.” (LLM diss., South Africa: University of South Africa, 2004) 1.

¹⁸⁰ Kakule Kalwahali. “The Criminalization of Prostitution in South African Law.” (LLM diss., South Africa: University of South Africa, 2004) 1.

¹⁸¹ J.R.L Milton & M.G. Cowling, *South African Criminal Law and Procedure Volume III Statutory Offences* ed. (Juta & Co: Cape Town, 2010), 36.

¹⁸² South African Law Reform Commission. (2009). *Discussion Paper 0001/2009 Project 107 Sexual Offences Adult Prostitution*. Pretoria.

¹⁸³ Act 23 of 1957.

¹⁸⁴ Kakule Kalwahali. “The Criminalization of Prostitution in South African Law.” (LLM diss., South Africa: University of South Africa, 2004) 1.

¹⁸⁵ South African Law Reform Commission. (2009). *Discussion Paper 0001/2009 Project 107 Sexual Offences Adult Prostitution*. Pretoria.

the case of *S v C*¹⁸⁶, the court interpreted ‘an act of indecency’ to mean “something is indecent if it offends against recognised standards of decency. The applicable standards are those of the ordinary reasonable member of contemporary society.” Moreover, in reviewing the courts interpretation of and ‘an act of indecency’, it is construed to mean any sexual act that does not amount to carnal intercourse.¹⁸⁷

Finally, the Act does not define the term ‘for reward’ but it can be interpreted to mean all forms of monetary reward and “any forms of compensation with a pecuniary value, for example, clothing, food or accommodation.”¹⁸⁸

The Act also created a range of crimes that are related to the practice of prostitution. It includes the following crimes: keeping a brothel¹⁸⁹, procuring of someone for sex work¹⁹⁰, assisting someone to have unlawful carnal intercourse¹⁹¹, permitting the use of premises for prostitution¹⁹², soliciting to commission of immoral acts¹⁹³, living off the earnings of prostitution¹⁹⁴, public indecency (the commission of unlawful carnal intercourse in public)¹⁹⁵ and receiving remuneration for the commission of an act of indecency¹⁹⁶.

In terms of the Criminal Law (Sexual Offences) Amendment Act¹⁹⁷, it is now considered a crime for a person to engage the services of a person 18 years or older for financial or other reward, favour or compensation to an individual or to a third person for the purpose of engaging in a sexual act with that individual. The aim of the aforementioned legislative provisions is expected to deter the client from creating an annoyance in the solicitation of sexual services however such legislation is more often invoked only against the female prostitute.¹⁹⁸ However, as has already been discussed, under the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁹⁹, the buyer of sexual intercourse is also penalized.

¹⁸⁶ 1993 (1) SACR 174 (W)

¹⁸⁷ Ibid at 33.

¹⁸⁸ Ibid.

¹⁸⁹ Section 2 of the Sexual Offences Act 23 of 1957.

¹⁹⁰ Section 9 and 10 of the Sexual Offences Act 23 of 1957.

¹⁹¹ Section 12A of the Sexual Offences Act 23 of 1957.

¹⁹² Section 17 of the Sexual Offences Act 23 of 1957.

¹⁹³ Section 19 of the Sexual Offences Act 23 of 1957.

¹⁹⁴ Section 20 of the Sexual Offences Act 23 of 1957.

¹⁹⁵ Section 20 (1) (b) of the Sexual Offences Act 23 of 1957.

¹⁹⁶ Section 20 (1) (c) of the Sexual Offences Act 23 of 1957.

¹⁹⁷ Act 32 of 2007.

¹⁹⁸ Kakule Kalwahali, “The Criminalization of Prostitution in South African Law.” (LLM diss., South Africa: University of South Africa, 2004) 1.

¹⁹⁹ 32 of 2007.

Section 20(1)(aA) has been the subject of various judgments, most importantly in the case of *S v Jordan*²⁰⁰. In this regard, this will be elaborated upon in later Chapter 5 of this dissertation. Moreover, this section has specific implications for prostitutes in that they are unable to access specific essential services like sexual and reproductive health care for fear that they will be subjected to secondary victimization.²⁰¹ Monitoring and evaluation of the impacts of certain sexually transmitted diseases (STDs²⁰²) is therefore hindered because it is difficult to ascertain the amount of women and men involved in prostitution and to what extent they have been infected or affected by these STDs. The implementation of a legislative framework therefore needs to speak to both the way in which the Government aims to deal with prostitution and inter-related legislation, such as legislation that attempts to deal with trafficking. In this regard, the Act contained certain provisions that were at odds with the Constitution²⁰³. For example, the Constitution protects the interests of children and in certain situations, the protection of children is the paramount concern of the South African judicial system.²⁰⁴ However, the Act contained a provision that maintained that sexual abuse of a minor for the purposes of the Act will not be considered sexual abuse if it is found that the minor was involved in prostitution.²⁰⁵ That the Act and its provisions were in conflict with the purport of the Constitution was obvious. In 2001, the South African Law Reform Commission²⁰⁶ was tasked with the review of the Act under discussion and certain recommendations were made in order to bring the then current legislation in line with the provisions of the Constitution and to reflect the contemporary international legal obligations of South Africa. The result was the Criminal Law (Sexual Offences and Related Matters) Amendment Act.²⁰⁷

3.3.2 Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act 32 of 2007)

As has already been stated, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act) was passed in an attempt to replace certain sections of the Sexual Offences Act.²⁰⁸ To this extent, the Act also creates new sexual crimes. To this extent, the Preamble to the Sexual Offences Act²⁰⁹ sets out the purpose of the Act: “To comprehensively and extensively review and

²⁰⁰ 2002 (2) SACR 499 (CC).

²⁰¹ South African Law Reform Commission. (2009). *Discussion Paper 0001/2009 Project 107 Sexual Offences Adult Prostitution. Pretoria*

²⁰² These are diseases that are transmitted through sexual contact.

²⁰³ Act, 108 of 1996.

²⁰⁴ Section 28 of Act, 108 of 1996.

²⁰⁵ Natasha Distiller, “Sex Work - A Labour Issue,” *SA Labour Bulletin*, Vol. 24(6) (2000): 23.

²⁰⁶ The South African Law Reform Commission is tasked with the research of all branches of the law in order to make recommendations to the Executive for the development, improvement, modernisation or reform of any law in South Africa.

²⁰⁷ 32 of 2007.

²⁰⁸ Centre for Applied Legal Studies and Tshwaranang Legal Advocacy Centre (2007).

²⁰⁹ 32 of 2007

amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute.” The Act therefore creates various new crimes through the extension of the definition of rape and including transitional sections that attempt to deal with the trafficking in persons for sexual purposes. Moreover, section 2 (b) of the Act highlights the intention of the new Act to deal with all forms of sexual exploitation. Important to this discussion is the fact that the Act also re-establishes the criminalisation of prostitution.

In terms of prostitution, section 11 of the Act states that:

- “A person (‘A’) who unlawfully and intentionally engages the services of a person 18 years or older (‘B’), for financial or other reward, favour or compensation to B or to a third person (‘C’)—
- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
 - (b) by committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older.”

Section 11 therefore expressly criminalises the buying of sex for reward, favour or compensation. The inclusion of section 11 of the Act is therefore seen as an extension of the Sexual Offences Act²¹⁰. While the Sexual Offences Act²¹¹ only criminalised the selling of ‘carnal intercourse’, the Sexual Offences Amendment Act²¹² extends the prohibition to include the buyer of carnal intercourse. The rationale for this inclusion was expressed in the public hearings on the Sexual Offences Amendment Act hosted by the Portfolio Committee on Justice and Constitutional Development (the Committee) of the Parliament of the Republic of South Africa. The Committee was of the opinion that in practice, the seller of sex was usually a woman and the buyer was predominantly a man.²¹³ In this regard, the Committee felt that the “selective application of the law is not acceptable in a constitutional democracy such as ours.”²¹⁴ For this reason, section 11 was introduced to criminalise the clients of prostitutes.²¹⁵

In a further critical departure from its predecessor, the Sexual Offences Amendment Act²¹⁶ provides for a distinction between the adult prostitution and child prostitution. Section 17 of the Sexual

²¹⁰ Act 23 of 1957.

²¹¹ Act 23 of 1957.

²¹² Act 32 of 2007.

²¹³ South African Law Reform Commission. (2009). *Discussion Paper 0001/2009 Project 107 Sexual Offences Adult Prostitution*. Pretoria

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Act 32 of 2007.

Offences Amendment Act²¹⁷ provides for a range of offences related to the prostitution of children. In this regard, the Sexual Offences Amendment Act²¹⁸ specifically criminalises the role players who are involved in the commission of child prostitution.²¹⁹ While an examination on the criminalisation of child prostitution will not be provided for the purposes of this discussion, it is important to note that the Act does provide specific protection to children who are involved in prostitution while these protections are not afforded to adults who are involved in prostitution.

The amendments contained in the Amendment Act seem to further entrench the South African paradigm of total criminalisation of prostitution. It extends the criminality for prostitution to both the buyer and seller of unlawful carnal intercourse while providing for specific protections and access to sexual health services to victims of child prostitution. The issue of services is critical to the discussion on adult prostitution because it is not clear to what extent these services are available to prostitutes who are victims of sexual offences. “Given the violence sex workers experience at the hands of police, and their fear of being arrested, it is not surprising that very few sex workers actually approach the police for help if they have been victims of violence.”²²⁰ To this extent, the Amendment Act provides for services for victims of sexual offences and compulsory HIV testing of alleged sex offenders. Section 28 of the Amendment Act provides that:

“If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may

- (a) subject to subsection (2),
 - (i) receive Post Exposure Prophylaxis (PEP) for HIV infection, as a public health establishment designated from time to time by the cabinet member responsible for health by notice in the *Gazette* for that purpose under section 29, at State expense and in accordance with the State’s prevailing treatment norms and protocols;
 - (ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and
 - (iii) be supplied with a prescribed list, containing the names, addresses and contact particulars of accessible public health establishments contemplated in section 29(1)(a); and
- (b) subject to section 30 apply to a magistrate for an order that the alleged offender be tested for HIV at State expense.”

These services are critical to victims of sexual violence in that they provide a measure of a safety net in terms of contracting STDs and HIV. The purpose of this provision is to provide certain services to certain victims of sexual offences, *inter alia*, to minimise or, as far as possible, eliminate

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ South African Law Reform Commission. (2009). *Discussion Paper 0001/2009 Project 107 Sexual Offences Adult Prostitution*. Pretoria

²²⁰ Nicole Fick, “Sex Workers Speak Out - Policing the Sex Industry.” *SA Crime Quarterly*, No. 15 (2006): 15.

secondary traumatisation.²²¹ However, in stating that these services are critical, the Amendment Act also contains a *caveat* to the provision of these services. Section 28 (2) requires that:

“Only a victim who-
(a) lays a charge with the South African Police Service in respect of an alleged sexual offence; or
(b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in subsection (1)(a)(i),
within 72 hours after the alleged sexual offence took place, may receive the services contemplated in subsection (1)(a).”

This means that victims of sexual violence are required to report these crimes to the South African Police Service and in a manner that is prescribed by the Amendment Act before such victims are eligible to receive these services.

This discussion is critical to the examination of prostitution because it illustrates the way in which the current legislative frameworks acts as a deterrence to prostitutes in accessing sexual health services. In this regard, prostitutes are afraid to access these services and disclose their occupation as they fear that they will be arrested, be discriminated against or be subjected to secondary victimisation.²²² This exposes the dichotomy between the provisions of the Amendment Act in that it expressly criminalises both the buyer and the seller of sex (and in so doing acts as a deterrence to the accessing of essential sexual health services) while providing sexual health services to victims of sexual violence. Moreover, this further exposes the weaknesses in the aims of the current legal framework (to eradicate the practice of prostitution) and the method employed by the framework to achieve those aims.

3.3.3 Criminal Procedure Act 51 of 1977

The Criminal Procedure Act 51 of 1977 (hereinafter, the Criminal Procedure Act) was passed in order to make provision for procedures and related matters in criminal proceedings. For the purposes of prostitution, this objective is important because it highlights the South African paradigm of total criminalisation of prostitution.

The Criminal Procedure Act deals with prostitution in a very limited way in that it only speaks to the competent verdicts²²³ of prostitution. Section 268 of the Criminal Procedure Act states that:

²²¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

²²² Nicole Fick, “Sex Workers Speak Out - Policing the Sex Industry,” *SA Crime Quarterly*, No. 15 (2006): 14.

²²³ The Criminal Procedure Act, 51 of 1977 allows for a court to find the accused guilty on a competent verdict where the state has failed to prove that the accused has committed the charged offence, but the evidence is sufficient to prove the accused's guilt on a

“If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but -;

(a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, respectively;

(b) the offence of common assault; or

(c) the statutory offence of -

(i) committing an immoral or indecent act with such other person;

(ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;

(iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or

(iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.”

Section 268 therefore provides for competent verdicts in situations where the offence of prostitution (unlawful carnal intercourse) cannot expressly be proved. In this regard, the Criminal Procedure Act allows for accused (both the buyer and/or seller of sex or an indecent act) to be guilty of an offence regardless of whether unlawful carnal intercourse took place or not. Mere solicitation, or enticement for the aims of unlawful carnal intercourse is sufficient to be found guilty of a crime. That section 268 further entrenches the South African paradigm of total criminalisation of prostitution is obvious as it is applicable to both the buyer and seller of unlawful carnal intercourse. In this regard, the Criminal Procedure Act makes no distinction between man and women, or buyer or seller.



3.3.4 The Prevention and Combating of Trafficking in Persons Bill

The Prevention and Combating of Trafficking in Persons Bill (the Bill) is currently being considered by the Portfolio Committees on Justice and Constitutional Development and Women, Children and Persons with Disabilities. Essentially, the Bill represents a response by South Africa in terms of the country’s obligations in terms of the Palermo Protocol on Human Trafficking. South Africa has both signed and ratified the United Nations Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (or the Palermo Protocol). The Palermo Protocol came into force on the 25 December 2003 and obliges signatory states to criminalise trafficking in persons and investigate and prosecute traffickers, as well as undertake border control measures.

These requirements places obligations on South Africa to enact measures that provide measures to protect and assist victims; criminalise trafficking; investigate, prosecute and convict traffickers;

competent verdict to the offence with which he was charged.

train law enforcement and border officials; and inform and educate victims, potential victims and the general public.

To this extent, the current legislative framework in South Africa that relates to human trafficking is governed by the both the Criminal Law (Sexual Offences and Related Matters) Amendment Act²²⁴ and the Children’s Act²²⁵. These Acts each contain sections that deal the trafficking of women and children. However, it is important to note that these measures are transitional in nature, given that the South African Parliament is currently considering the Prevention and Combating of Trafficking in Persons Bill. At this juncture, it is important to note that the Bill contains certain provisions that are applicable to persons who are trafficked for the purposes of sexual exploitation and prostitution. The following section will provide an analysis of the Bill and its provision in relation to trafficking.

In terms of health care services, the Bill provides victims who have been trafficked for the purposes of sexual exploitation access to health care services equivalent to other South Africans. Section 15 of the Bill states that:

“A foreigner who is a victim of trafficking is entitled to the same public health care services as those to which the citizens of the Republic have access.”

To this extent, women and men who are trafficked for the purposes of sexual exploitation and prostitution are able to access health care services in South Africa. However, prostitutes who have not been victims of trafficking are not afforded those rights. This dichotomy serves to highlight the disjuncture between the current legislative framework in relation to prostitution and the intention of the South African Government in dealing with the consequences of trafficking. The mere presumption that a person has been trafficked guarantees access to essential health care. This is problematic as it raises issues of equality between those who have been forced in prostitution (but who have not been trafficked) and those who have been trafficked.

Prostitutes who have been trafficked are also immune from prosecution. Section 16 of the Bill states that:

“(1) No criminal prosecution may be instituted against a child who is found to be a victim of trafficking after an investigation in terms of section 110(5)(c) of the Children’s Act, or against an adult person who has been certified to be a victim of trafficking in terms of section 13(7)(a), for—
(a) entering or remaining in the Republic in contravention of the Immigration Act;

²²⁴ 32 of 2007

²²⁵ 38 of 2005.

- (b) assisting another person to enter or remain in the Republic in contravention of the Immigration Act;
- (c) possessing any fabricated or falsified passport, identity document or other document used for the facilitation of movement across borders; or
- (d) being involved in an illegal activity to the extent that he or she has been compelled to do so, as a direct result of his or her situation as a victim of trafficking.”

Again, Section 16 of the Bill highlights the dichotomy between the existing legal framework in relation to prostitution and the Bill currently being considered by the South African Parliament. While women and men who are forced into prostitution are not granted immunity from prosecution, immunity from prosecution is granted to women and men who have been trafficked. In this regard, it is not clear whether the Department of Justice and Constitutional Development had taken into account the conflicting legislative frameworks.

In terms of the compensation to victims of trafficking, section 27 of the Bill provides that:

“(1)(a) The court may, subject to paragraph (c), on its own accord or at the request of the complainant or the prosecutor, in addition to any sentence which it may impose in respect of any offence under this Act, order a person convicted of that offence to pay appropriate compensation to any victim of the offence for -

- (i) damage to or the loss or destruction of property, including money;
- (ii) physical, psychological or other injury;
- (iii) being infected with a life-threatening disease; or
- (iv) loss of income or support,

suffered by the victim as a result of the commission of that offence.”

The Bill expressly provides for compensation of prostitutes who have been trafficked. To this extent, a clear criteria in the order of compensation is that the order is made against the person who is convicted of the offence of trafficking. This means that the order to compensate the trafficked prostitute is made against the person who is convicted of trafficking that prostitute. However, in instances where women and men are forced into prostitution, similar rights are not afforded to these persons. Again, this highlights the difference in the way that the South African Government intends dealing with prostitutes and prostitutes who have been trafficked.

The Prevention and Combating of Trafficking in Persons Bill therefore highlights an important gap in terms of the way in which the South African Government deals with prostitution. The total criminalisation of prostitution robs men and women who have been coerced or forced into prostitution of essential governmental services and constitutionally protected rights as the proposed Bill introduces.

3.4 Current Gaps and Challenges: Critical Commentary

A review of the South African legislative framework exposes the total criminalisation of prostitution. This criminalisation is based on the need to prevent crime, the prevention of public disturbances, the prevention of the spread of STDs and because it is immoral.²²⁶ However, in examining the current legal approach to trafficking for the purposes of sexual exploitation of women and young girls, one exposes the dichotomy between the way in which the existing South African legal framework deals with prostitution and the intention of the South African Government in dealing with trafficking in persons.

The South African legal approach to prostitution is one of total criminalisation. In this way, the Sexual Offences Act criminalises both the seller and buyer of sexual intercourse for reward. To this extent, the South African approach does not take into account the fact that the majority of women and men involved in prostitution have been coerced or forced into prostitution and have not engaged in acts of prostitution as a matter of choice. In this way, the South African Government penalises women who have been victims of gender-based violence and perpetuates secondary victimisation against these women and men. While the Parliament of the Republic of South Africa has identified that previous legislation has selectively criminalised only women (and subsequently extended the criminalisation to those who purchase unlawful carnal intercourse.

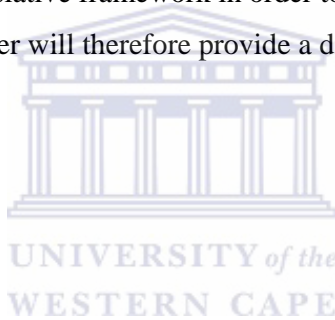
While the Sexual Offences Act draws a distinction between child and adult prostitution, this distinction relates to the provision of services as well. Victims of child prostitution are granted access to health and sexual health services, while this right is not granted to women and men who are forced into prostitution by those who exploit their gender vulnerabilities. Again, the South African Government does not take into account the particular vulnerabilities of women and men who are forced into prostitution and incorrectly assume that all men and women who engage in prostitution do so voluntarily.

As has already been stated, the legislative framework in dealing with prostitution conflicts with the intention of the South African Government in dealing with the trafficking of persons for the purposes of sexual exploitation. This dichotomy highlights glaring inequalities in the way in which the South African Government intends dealing with prostitutes and prostitutes who have been trafficked. These inequalities relate specifically to the right of access to health care and sexual health care services, the right to immunity from prosecution in instances where women and men

²²⁶ Irma De Bruyn, “‘n Bespreking van die vraagstuk of prostitusie in Suid Afrika gedekriminaliseer behoort te word,” *Acta Criminologica*, Vol. 9(2) (1996): 39.

have been forced or coerced into prostitution and compensation to women and men who have been forced or coerced into prostitution. It is problematic that while the prevailing legislative framework deals with prostitution in a total criminalisation manner, the same cannot be said for the way in which the South African Government intends dealing with prostitutes who are victims of trafficking. In instances where men and women are forced or coerced into prostitution, the South African Government does not recognise their status as a victim of a human rights violation. It can thus be said that the current legislative framework in relation to prostitution does not distinguish between those who voluntarily enter into prostitution and those who are forced or coerced into prostitution.

Understanding the prevailing legislative framework in terms of prostitution is essential to the discussion around the nature and extent of prostitution in South Africa. The latter discussion would provide the backdrop to the requirements for the amendment to the current legislative framework and the establishment of a new legislative framework in order to effectively deal with prostitution in South Africa. The following Chapter will therefore provide a discussion on the nature and extent of prostitution in South Africa.



5. BACKGROUND TO PROSTITUTION IN SOUTH AFRICA

4.1 Introduction

As has already been stated, the current legal regime in South Africa regarding prostitution is one of total criminalisation.²²⁷ However, the criminalisation of adult prostitution has a long history in the South African legal system, dating back to 1902 and the prohibition on intercourse between white women and black men.²²⁸ Despite the criminalisation of prostitution in South Africa, it is clear that the current legislative framework has not succeeded in eliminating the occurrence of prostitution. In contrast, it can be argued that it has led to its increase. Therefore, it is clear that there are factors that have led to women and men undertaking prostitution as an alternative to conventional forms of labour.

While much of the discourse in South Africa deals with the legal responses to prostitution, it does not begin to address the relationship between HIV/AIDS and prostitution. Very little research exists in relation to the size and nature of prostitution in South Africa, particularly of the relationship between HIV/AIDS and prostitution.²²⁹ In this regard, given the prevalence of HIV/AIDS in South Africa, HIV/AIDS has been used as a rationale for the criminalisation of prostitution. Moreover, studies have begun to show the complex nature of prostitution and the use of condoms and the critical role socio-cultural and economic factors play in determining their sexual behavior.²³⁰

However, prostitution should also be understood in the context of the high levels of gender-based violence in South Africa. These levels of violence are further perpetuated by entrenched cultural

²²⁷ Chesa Boudin and Marlise Richter, "Adult, Consensual Sex Work in South Africa – The Cautionary Message of Criminal Law and Sexual Morality," *South African Journal on Human Rights*, Vol. 25(2009): 179.

²²⁸ Ibid.

²²⁹ Ellen Mattisson and Helen Ekebrand, "Behing the Prostitution Debate in South Africa," (Faculty of Health and Society: Malmo University), 15.

²³⁰ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 74.

patriarchy that continue depict the sexual roles of women in a specific way. These notions of gender also dictate the way in which women should behave sexually and reject any other expression of gender as contrary to societal norms.

It is therefore important to understand the factors that drive women and men to become prostitutes. The high levels of poverty in South Africa might have a contributive role to the existence of prostitution in the country.²³¹ These realities therefore play an important role in the examination of the underlying causes of prostitution in South Africa.

It is critical that in order to understand the nature and extent of prostitution in South Africa, that one understands the various types of prostitution. In South Africa, there exists four main types of prostitution.²³² These are brothel prostitutes (where the prostitute resides in a brothel that is frequented by patrons and that is owned by a madame who takes a percentage of the prostitutes earnings), escort agency prostitutes (where an escort agency provides the escort services to a client and where sex is a private negotiation between the patron and the escort), call girls (where the prostitute operates independently and makes contact directly with the client or through advertisements in the newspaper) and street prostitutes (where the revenue is shared between the pimp and the prostitute in exchange for protection).²³³ These different types of prostitution is also arranged according to a hierarchy whereby street prostitutes are at the bottom, while call girls are at the top as they dictate their own terms and are able to better negotiate the rules of engagement.²³⁴

The following sections will provide a discussion on the nature of prostitution in South Africa by looking at the factors that are at play. Specific focus will be paid to the role of patriarchy, the impact of HIV/AIDS and the demand for prostitution in South Africa. It is important to note that these are not a closed list of reasons. Instead, these reasons are limited to the scope and extent of literature available and the purpose of this study and the limited research available.²³⁵

4.2 Why women and men become prostitutes in South Africa

²³¹ "Prostitution in South Africa: Developing a Research Agenda," *Sexual Violence Research Initiative*, <<http://www.svri.org/worker.htm>> (accessed Sept. 22, 2010).

²³² Ellen Mattisson and Helen Ekebrand, "Behing the Prostitution Debate in South Africa," (Faculty of Health and Society: Malmo University), 15.

²³³ John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 25.

²³⁴ John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 25.

²³⁵ Ellen Mattisson and Helen Ekebrand, "Behing the Prostitution Debate in South Africa," (Faculty of Health and Society: Malmo University), 15.

The reasons detailing why women (and men) become prostitutes are vast. The various types of prostitution, specific needs and social and economic issues will often dictate why that person resorted to prostitution.²³⁶ These underlying reasons for becoming a prostitute in South Africa will determine the type of legal model and policy framework that would need to be employed in order to effectively deal with prostitution.²³⁷

One of the most prominent reasons forwarded for entry into prostitution relates to socio-economic reasons.²³⁸ Social and economic forces within South African society are complex, with women disproportionately affected by poverty.²³⁹ Even in situations where prostitution is a choice, there also exists a willingness to reduce the risks associated with prostitution and to find sustainable alternatives to prostitution.²⁴⁰ The challenge is to identify such sustainable alternatives, in a socioeconomic context penalized by conditions of under-development.²⁴¹

In South Africa, “prostitutes are disproportionately recruited from families disorganized by death or desertion, or by abusive or alcohol and drug-dependant parents, or parents themselves in grey world commerce.”²⁴² It can thus be said that because women and young girls come from poverty stricken backgrounds, they have no choice but to enter into prostitution.²⁴³ Prostitution should also be understood in the context that it is not a profession most women would willingly enter into, like doing or would do if they had other options.²⁴⁴

The socio-economic reasons for entering into prostitution should be understood in terms of the feminisation of poverty in South Africa.²⁴⁵ With more than half of the South African population being women, rural women are the most vulnerable in South Africa because of a lack of socio-

²³⁶ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 26.

²³⁷ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 26.

²³⁸ Chandre Gould and Nicolé Fick, “Report to the South African Law Reform Commission: Preliminary Research Findings of relevance to the draft legislation to combat trafficking in persons and legislation pertaining to adult prostitution,” Institute for Security Studies and Sex Worker Education and Advocacy Taskforce, (2007), 11.

²³⁹ Johanna Kehler, “Women and Poverty: The South African Experience,” *Journal of International Women’s Studies*, Fall (2001):1, <<http://www.bridgew.edu/soas/jiws/fall01/kebler.pdf>> (accessed Aug. 12, 2010).

²⁴⁰ O. Tandia, A. Seck, M.H. Mottin-Sylla, and K. Samb, “Prostitution, poverty, AIDS and economic alternatives,” *Presentation at the International Conference on AIDS held in Dakar, Senegal*, Jul. 19-24 (1992).

²⁴¹ Johanna Kehler, “Women and Poverty: The South African Experience,” *Journal of International Women’s Studies*, Fall (2001):3, <<http://www.bridgew.edu/soas/jiws/fall01/kebler.pdf>> (accessed Aug. 12, 2010).

²⁴² Arthur Stinchcombe, “Prostitution, Kinship, and Illegitimate Work,” *Contemporary Sociology - A Journal of Reviews*, Vol. 23(6) (1994):856.

²⁴³ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 25.

²⁴⁴ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 27.

²⁴⁵ Johanna Kehler, “Women and Poverty: The South African Experience,” *Journal of International Women’s Studies*, Fall (2001):10, <<http://www.bridgew.edu/soas/jiws/fall01/kebler.pdf>> (accessed Aug. 12, 2010).

economic development and infrastructure and a lack of opportunities for employment and income generation.²⁴⁶ “Additionally, rural women are faced with limited access to education and skills training, which further contributes to a life below the poverty line.”²⁴⁷ Even in urban settings, women have less access to and control over economic resources. These women are more vulnerable to considering prostitution as a viable economic option. However, the link between the socio-economic basis for prostitution and individual choice is however contested by certain feminist groups.²⁴⁸ It is argued that just because women are vulnerable does not mean that they are forced or coerced into prostitution and that prostitution should rather be seen as a choice over ones body.²⁴⁹ Prostitution is therefore more appealing as it requires no particular skills set.²⁵⁰

The migration of populations from rural settings is also an important consideration when considering the reasons for entry into prostitution. Rural populations are migrating to urban settings in search of better services, opportunities and employment.²⁵¹ HIV/AIDS treatment and labour considerations certainly have had a bearing on the migration of persons, particularly women, to urban centres.²⁵² These migration patterns result in economic burden that lead to the particular vulnerability of women. The situation is further compounded by the migration of foreign nationals into South Africa.²⁵³ As has been highlighted by the recent outbreaks of xenophobic violence, the lack of access to basic services, economic opportunities and employment has resulted in the vulnerability of these foreign nationals in South Africa.²⁵⁴ Because of the lack of opportunities, vulnerable women are inclined to make decisions, in favour of possible children, that are dangerous and unsafe.²⁵⁵

²⁴⁶ Johanna Kehler, “Women and Poverty: The South African Experience,” *Journal of International Women’s Studies*, Fall (2001):10, <<http://www.bridgew.edu/soas/jiws/fall01/keehler.pdf>> (accessed Aug. 12, 2010).

²⁴⁷ Johanna Kehler, “Women and Poverty: The South African Experience,” *Journal of International Women’s Studies*, Fall (2001):3, <<http://www.bridgew.edu/soas/jiws/fall01/keehler.pdf>> (accessed Aug. 12, 2010).

²⁴⁸ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 28.

²⁴⁹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 28.

²⁵⁰ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 29.

²⁵¹ Dorrit Posel, “Have Migration Patterns in post-Apartheid South Africa Changed?,” *Paper prepared for Conference on African Migration in Comparative Perspective, Johannesburg, South Africa*, Jun. 4-7, (2003): 2.

²⁵² Dorrit Posel, “Have Migration Patterns in post-Apartheid South Africa Changed?,” *Paper prepared for Conference on African Migration in Comparative Perspective, Johannesburg, South Africa*, Jun. 4-7, (2003): 2.

²⁵³ Romi Sigsworth, “Double Jeopardy: Foreign and Female,” *Heinrich Böll Stiftung Southern Africa*, <<http://www.boell.org.za/web/110-560.html>> (accessed on Oct. 28, 2010).

²⁵⁴ Romi Sigsworth, “Double Jeopardy: Foreign and Female,” *Heinrich Böll Stiftung Southern Africa*, <<http://www.boell.org.za/web/110-560.html>> (accessed on Oct. 28, 2010).

²⁵⁵ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 30.

4.3 Prostitution and Health in South Africa: The Impact of HIV/AIDS

As has already been stated, the case for the criminalisation of prostitution is rationalised on the basis of the prevalence of HIV/AIDS and other sexually transmitted diseases.²⁵⁶ The extent to which it is true that prostitution acts as a cause of the increase in HIV/AIDS and other STDs is not certain, but it is true that left uncontrolled, prostitution could exacerbate the situation in South Africa. By the very nature of this assertion, it is clear that sexual and social stereotypes are at play that dictate the vulnerabilities of South African women. Moreover, the link between STDs and prostitution is highlighted by the belief that HIV/AIDS and other STDs is spread through promiscuous behavior.²⁵⁷ While such opinions and beliefs prevail in South African society, it is true that those involved in prostitution are often more at risk of contracting HIV/AIDS and other STDs as they are unable to insist on safer sex.²⁵⁸ Furthermore, given that most prostitutes are women, their vulnerability to STDs are more pronounced because of the biology of women.²⁵⁹ Other factors that increase the risk of STD infection of prostitutes includes the increase in the amount of sexual partners, inability to negotiate safe sex or condom usage and sexual violence.²⁶⁰ Women who are prostitutes are more vulnerable to contracting STDs and as opposed to spreading them.²⁶¹ This speaks directly to the vulnerability of women in prostitution.²⁶² Prostitutes vulnerability to sex is thus related to: the limited access to sexual health services, sexual and gender-based violence, unsafe working conditions, difficulties with negotiating safer sex and stigma.²⁶³ In South Africa, the total criminalisation of prostitution has compounded the problem of STDs and HIV/AIDS. To this extent, the relationship between STDs and prostitution in South Africa is highlighted by a “lack of specialized services targeting sex workers, scanty and ineffective public and donor funding for HIV prevention in sex work settings, condom availability in general

²⁵⁶ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 24.

²⁵⁷ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 20.

²⁵⁸ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 28.

²⁵⁹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 20.

²⁶⁰ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi “Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers,” *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁶¹ Christine A. Vagra, “The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa,” *African Journal of Reproductive Health*, Vol. 1(1) (1997): 75.

²⁶² The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 32.

²⁶³ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 32.

primary health clinics, limited promotion of condoms in sex work settings, syndromic treatment of symptoms within general STD services, limited access to health information and family planning counselling and high rates of unintended pregnancy and increasing number of dependents.”²⁶⁴

In South Africa, the practice of prostitution is complex as it cuts across various types of prostitution, gender, racial, religious, economic, social and cultural barriers.²⁶⁵ And these factors contribute to the proper evaluation of the relationship between HIV/AIDS. The fear of being prosecuted under the Sexual Offences Act²⁶⁶ also acts a deterrent for prostitutes to seek medical advice regarding their physical and sexual health.²⁶⁷

These prostitutes therefore do not have access to health-care programmes that seek to address sexually transmitted diseases.²⁶⁸ This in turn makes it difficult for service providers and governmental officials to track and monitor STD and HIV/AIDS prevalence rates. Essential services required by prostitutes include: STD screening and treatment, HIV testing and tailored counselling, post-exposure prophylaxis after rape, access to male and female condoms, antiretroviral treatment, as well as mental health support and substance abuse treatment.²⁶⁹ Where programmes that target prostitutes exist, these programmes are not able to reach most prostitutes because of the informal and unstructured way in which they work.²⁷⁰ Moreover, most health care facilities operate during the day while prostitutes operate mostly at night and are not available during the day. A further problem related to the provision of sexual health care services relates to the attitudes of these service providers to prostitutes.²⁷¹ These negatives attitudes towards prostitution and prostitutes serves to further reinforce the reluctance of prostitutes to seek medical help.

Moreover, the type of prostitute also speaks to the level of knowledge of STDs and the ability of these prostitutes to negotiate safe sexual intercourse. In a study conducted by John M. Luiz and

²⁶⁴ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

²⁶⁵ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 26.

²⁶⁶ 32 of 2007.

²⁶⁷ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 28.

²⁶⁸ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 28.

²⁶⁹ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

²⁷⁰ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 31.

²⁷¹ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

Leon Roets it was reported that street prostitutes had a very scant knowledge of STDs as well as the underlying causes and transmission thereof.²⁷² Even more worrying was that the use of condoms depended largely upon the decision of the clients and not on the prostitute.²⁷³ In fact, prostitutes fear insisting on condoms use because it could result in physical and sexual violence.²⁷⁴ Furthermore, where clients paid more for unprotected sex and because of their dire financial positions, prostitutes found it difficult to decline this offer.²⁷⁵ Research suggests that outdoor prostitutes (street prostitutes) are particularly vulnerable to STD infection because of the social and economic power relations in prostitution and the ability of the prostitute to negotiate safe sex.²⁷⁶ However, even in circumstances where there existed an increased knowledge about the dangers of HIV/AIDS and STDs, this knowledge had a limited impact on prostitutes in the negotiation of safer sex.²⁷⁷ It is worrying that prostitutes view HIV/AIDS and STD infection rather fatalistically: it is considered an occupation hazard.²⁷⁸

Street prostitutes also displayed a lack of knowledge about medical treatment for STDs.²⁷⁹ To this extent, it is suggested that some prostitutes used generic household cleaners in an attempt to protect against infections and contraction of STDs.²⁸⁰ However, the continued use of cleaning fluid as a means of protection against STDs and HIV/AIDS puts prostitutes at risk of genital tract infection and could possibly lead to increased vulnerability to STD and HIV/AIDS infection.²⁸¹

In cases where STD infection was suspected, prostitutes felt more at ease visiting a traditional healer as they were more accessible and there was a minimal chance of secondary victimisation. This view is supported by Karim, Abdool Karim, Soldan and Zondi who state that efforts to educate prostitutes as to HIV/AIDS protective strategies have been impeded by frequent police

²⁷² John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 31.

²⁷³ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁷⁴ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁷⁵ Marlise Richter, et. al. "Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail," *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

²⁷⁶ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 33.

²⁷⁷ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 77.

²⁷⁸ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 83.

²⁷⁹ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁸⁰ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1524.

²⁸¹ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1522.

harassment, which has made them a "hard-to-reach" group.²⁸² It is therefore important that STD and HIV/AIDS education with prostitutes needs to go beyond information sessions and focus on the social context within which prostitutes operate.²⁸³ However, in the latter study, it was reported that prostitutes had a high knowledge of STD and HIV/AIDS infection.²⁸⁴ But as has already been stated, these did not alter their sexual behaviour.

One of the most critical aspects of the relationships between STDs and prostitutes is the ability to negotiate safer sex practices. The ability to negotiate such practices is reliant on a myriad of factors, including the type of prostitute, the type of client and knowledge of STDs and HIV/AIDS.²⁸⁵ While there is no cure for HIV/AIDS emphasis has shifted to a change in the sexual behaviour and the use of condoms during sexual intercourse.²⁸⁶ In relation to the ability of prostitutes to negotiate safer sex, many studies have been undertaken that highlight threat of physical violence from clients, clean and trustworthy appearance of prospective clients, and financial incentives for unprotected sex as motivating factors in considering whether to use a condom or not.²⁸⁷ These studies have revealed that while prostitutes insist on the use of condoms with their personal partners, the same cannot be said for when it came to clients.²⁸⁸ One of the most prevalent reasons for not using a condom related specifically to finances.²⁸⁹ A prostitute would be more willing to not use a condom if he or she had not made enough money in an evening or if a client was willing to pay more money.²⁹⁰ "Several women also described steady clients with whom they did not insist upon condom use in fear of losing the regular income."²⁹¹ The second reason denoted for the failure to request safer sex related to the increased use of alcohol and drugs. The use of drugs and alcohol is considered necessary in order to muster courage to solicit clients and face other unpleasant working conditions.²⁹² Moreover, "with intense competition for clients

²⁸² Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁸³ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁸⁴ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi "Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers," *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁸⁵ Marlise Richter, et. al. "Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail," *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

²⁸⁶ Charles D. H. Parry, et. al., "Rapid Assessment of HIV Risk Behavior in Drug Using Sex Workers in Three Cities in South Africa," *AIDS and Behavior*, Vol. 13(5) (2009): 854.

²⁸⁷ John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 26.

²⁸⁸ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 80.

²⁸⁹ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 80.

²⁹⁰ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 80.

²⁹¹ Christine A. Vagra, "The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa," *African Journal of Reproductive Health*, Vol. 1(1) (1997): 80.

²⁹² Charles D. H. Parry, et. al., "Rapid Assessment of HIV Risk Behavior in Drug Using Sex Workers in Three Cities in South Africa," *AIDS and Behavior*, Vol. 13(5) (2009): 854.

weakening the bargaining power of individual workers, these factors all too often culminate in unsafe sex.”²⁹³

Certain service providers do offer services to prostitutes and in this regard, they report that because of these interventions, the prevalence of HIV/AIDS and STD infections has dropped.²⁹⁴ However, it is not sure to what extent this assertion is true given the problems experienced in reaching street prostitutes.²⁹⁵ The ability of sexual health service providers might also be limited in terms of the conditions attached to the grants that they receive. An example of this is the US Presidential Emergency Plan for AIDS Relief (PEPFAR), which makes funding conditional in exchange for a pledge by recipient organisations that they will not advocate for the legalisation of sex work.²⁹⁶

In order to address the plight of prostitutes in relation to their increased risk of HIV/AIDS infection, various programmes need to be implemented in the short and long term. In the long term, it is suggested that programmes need to be implemented that seek to address the lack of social and legal rights of prostitutes.²⁹⁷ This would speak to the availability of sexual health care services, prevention of secondary victimisation and access to legal redress.²⁹⁸ In the short term, it is necessary to educate prostitutes on the dangers of unprotected sex and the increased risk of women to HIV/AIDS and STD infections.²⁹⁹ The total criminalisation of prostitution has proved unsuccessful in curbing the prevalence of HIV/AIDS amongst prostitutes in South Africa³⁰⁰. In this regard, it is necessary to use legal mechanisms in order to control public health hazards emanating from prostitution.³⁰¹ A successful example of this is the use of legislation to regulate the use of tobacco in South Africa. “This is surely a missed opportunity: history tells us that sensibly applied,

²⁹³ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

²⁹⁴ John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 32.

²⁹⁵ Because of the criminalisation of prostitution, prostitutes are unable to be monitored in terms of HIV/AIDS infection and intervention monitoring. See further John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 26.

²⁹⁶ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

²⁹⁷ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi “Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers,” *American Journal of Public Health*, Vol. 85(11) (1995):1524.

²⁹⁸ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi “Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers,” *American Journal of Public Health*, Vol. 85(11) (1995):1523.

²⁹⁹ Quarraisha Abdool Karim, Salim Abdool Karim, Kate Soldan and Martin Zondi “Reducing the Risk of HIV Infection among South African Sex Workers: Socioeconomic and Gender Barriers,” *American Journal of Public Health*, Vol. 85(11) (1995):1523.

³⁰⁰ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³⁰¹ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

legislative processes can be a most powerful public health ally.”³⁰² In light of the HIV/AIDS pandemic in South Africa in relation to prostitution, it is clear that a new legislative model for prostitution needs to be considered.

4.4 The Demand for Prostitution

In plain economic terms, there will not be a supply for a product without a demand.³⁰³ In this regard, the link between the demand for prostitutes is in direct correspondence to the supply thereof. Simply put, prostitution begins when men go in search of sex than can be purchased.³⁰⁴ It can therefore be said that the demand for prostitution comes predominantly from men.³⁰⁵ And it is the demand by men that dictates the supply of prostitution and prostitutes. The demand for prostitution would therefore speak directly to the establishment and implementation of an appropriate legal framework. However, the vey nature of the demand for prostitution is not that simple. In fact, it is rather complex and depends on various factors, including social, cultural and economic contexts.³⁰⁶

The demand for sex has also led to the growth of the trafficking in humans for the purposes of sexual exploitation as the end result is the prostitution of the person that is trafficked.³⁰⁷ It is believed that one of the factors that leads to trafficking in persons for sexual exploitation and prostitution is the nature of the demand for sex.³⁰⁸ “It is the demand for prostitution and other commercial sexual services that makes vulnerable women and girls such enticing and profitable cargo for traffickers.”³⁰⁹ It is therefore critical to understand that sex trafficking, and indeed prostitution, is a system of gender-based domination where exploiters prey on women and girls made vulnerable by poverty, discrimination, and violence and leaves them traumatized, sick, and impoverished.³¹⁰

³⁰² Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³⁰³ Lin Lean Lim, ed., *The Sex Sector: The economic and social bases of prostitution in Southeast Asia*, (Geneva: International Labour Organisation, 1998), 1.

³⁰⁴ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 1.

³⁰⁵ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 1

³⁰⁶ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 40.

³⁰⁷ “The Link Between Prostitution and Sex Trafficking,” *United States of America Department of State*, <<http://www.servingourworld.org/PDF/trafficking/dos-prostitution-sex%20-trafficking.pdf>> (accessed Oct. 28, 2010).

³⁰⁸ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 2.

³⁰⁹ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Dehli: Apne Aap Women Worldwide, 2007),

³¹⁰ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Dehli: Apne Aap Women Worldwide, 2007), 29.

Research suggests that social beliefs regarding why men purchase sex are incorrect. Men who purchase sex have a higher tendency to have more than one sexual partner and it is reported that they are not dissatisfied with their wives or partners.³¹¹ The same research suggests that “a significant number of men say that the sex and interaction with the prostitute were unrewarding and they did not get what they were seeking; yet they compulsively repeat the act of buying sex.”³¹² It can therefore be deduced that men who purchase sex do so to fulfill an emotional need, rather than a physical one. Possibly the most startling assertion is that men buy sexual intercourse because they do not respect those that they purchase sex from as it is a contract where they dictate the circumstances under which the sexual intercourse should occur.³¹³ In this way, the demand for sex has diminished the ability of women and men who sell sex to insist on safer sex practices. Those who purchase sex also view prostitutes in a particular light. In prostitution, women (and indeed girls) are seen as objects over which the buyer can control temporary possession.³¹⁴

Furthermore, it is argued that in legalising sex, states become complicit in the demand for sex and therefore the exploitation of those who sell sex.³¹⁵ While many organisations argue for the legalisation of prostitution on the basis that it results in tax revenue for the state and greater regulation of the practice, these expected benefits have not materialised.³¹⁶ This fact is highlighted by the problems experienced in the Netherlands and Germany with the increased trafficking in foreign women in order to meet the demand.³¹⁷

In determining the demand for sex, an understanding of the effects of this demand is also necessary. As has already been stated, men who purchase sex often have more than one sexual partner, and this is most often women who are not involved in prostitution. Research suggests that men who purchase sex have a higher tendency to violent or aggressive behaviour towards sexual partners

³¹¹ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 3.

³¹² Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 3.

³¹³ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 4.

³¹⁴ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Delhi: Apne Aap Women Worldwide, 2007), 89.

³¹⁵ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 70.

³¹⁶ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 2.

³¹⁷ Donna Hughes, “Prostitution: Causes and Solutions,” *Presentation at Female Prostitution: Prostitution and Interventions held in Santiago de Compostela, Galicia, Spain*, (2004): 2.

who are not involved in prostitution.³¹⁸ This is particularly problematic as it leads to a circular problem where the increased demand leads to increased violent behavior which leads to increased demand for violent sex.³¹⁹

The demand for prostitution inevitably drives the supply thereof. And it is believed that in addressing the demand for prostitution through legislative measures, prostitution would also diminish. “Prostituted women who have examined the potential effects of criminalizing demand agree that penalization of clients would reduce the demand for sexual exploitation.”³²⁰ The way in which the South African Government chooses to deal with the demand for prostitution will determine the levels of prostitution in the country. It is my opinion that an appropriate legislative response to the demand side of prostitution would therefore be essential.

4.5 Crime and Prostitution

In South Africa, sex work is highly stigmatised and this stigma results in direct discrimination, violence and abuse against sex workers, which is more often than not, publicly condoned.³²¹ Moreover, it is suggested that the criminalisation of prostitution actually leads to the increase antecedent crime rather than reduce it.³²² Regardless of which side of the discourse one associates with, there exists, even if superficially, a connection between crime and prostitution. Crimes associated with prostitution include public nuisance, drug-related activities, robbery, assault and organised crime.³²³ Prostitutes have also been the target of law enforcement officials who randomly arrest prostitutes, without the expectation of a successful prosecution.³²⁴ In this regard, the Cape High Court has taken a firm stance against these law enforcement officials.³²⁵ The following section will discuss the aforementioned criminal aspects related to prostitution.

³¹⁸ Jan Macleod, Melissa Farley, Lynn Anderson, Jacqueline Golding, Challenging Men’s Demand for Prostitution in Scotland, (Glasgow: Women’s Support Project, 2008), 15.

³¹⁹ Jan Macleod, Melissa Farley, Lynn Anderson, Jacqueline Golding, Challenging Men’s Demand for Prostitution in Scotland, (Glasgow: Women’s Support Project, 2008), 15.

³²⁰ Ruchira Gupta and Ruchi Sinha, Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement (New Delhi: Apne Aap Women Worldwide, 2007), 91.

³²¹ Marlise Richter, et. al. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail,” *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³²² The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 197.

³²³ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 182.

³²⁴ Nicole Fick, “Sex Workers Speak Out - Policing the Sex Industry,” *SA Crime Quarterly*, No. 15 (2006): 17.

³²⁵ In this regard, 10 prostitutes obtained an interim court order from the Cape High Court ordering police officials from Claremont Police Station in Cape Town from harassing them. See further The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 182.

One of the biggest problems associated with prostitution is that of drugs.³²⁶ While research suggests that the prevalence of substance abuse amongst prostitutes is relatively high, this cannot be determined as a certainty.³²⁷ A study undertaken by the Institute for Security Studies and the Sex Worker Education and Advocacy Taskforce indicated that the prevalence of drug dependency amongst prostitutes was not very high.³²⁸ It should however be noted that the prevalence of drug dependency amongst prostitutes did not form part of the scope of the study. In this way, the results of the study in relation to drug dependency are questionable. However, the use of drugs in the context of prostitution remains problematic for prostitutes themselves as well as brothel owners and pimps.³²⁹ Prostitutes who are addicted to drugs are at an increased risk of contracting HIV/AIDS and related STDs as the use of drugs inhibits their ability to insist on safer sex.³³⁰ Brothel owners report that the use of drugs in prostitution renders the buyer of sex uncontrollable and therefore is a danger to the prostitute.³³¹ The drug of choice amongst prostitutes also varies across different areas of South Africa, with most admitting the use of cannabis. The increased prevalence for crack cocaine is of serious concern to both prostitutes and brothel owners.

The general tendency of law enforcement officials is to penalize the prostitute while tolerating the drug use of the purchaser.³³² Moreover, prostitutes who are addicted to drugs are more vulnerable to violence and more likely to commit crime.³³³ In summary, where drugs and street prostitution are linked, street prostitution becomes less predictable and more dangerous.³³⁴ It is not uncommon for pimps and traffickers to coercively addict prostitutes to drugs in order to exercise strict control over them.³³⁵

The criminalisation of prostitution in South Africa prevents prostitutes from reporting abuse to the police or from seeking legal recourse after rape or sexual assault, which in turn serves to strengthen

³²⁶ Amy Young, Carol Boyd and Amy Hubbell, "Prostitution, Drug Use, and Coping with Psychological Distress," *Journal of Drug Issues*, Vol. 30(4) (2000): 794.

³²⁷ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 66.

³²⁸ Gould, Chandre and Fick, Nicole, *Selling Sex in Cape Town: Sex work and Human Trafficking in a South African City* (Pretoria: Institute for Security Studies 2008), 35.

³²⁹ Gould, Chandre and Fick, Nicole, *Selling Sex in Cape Town: Sex work and Human Trafficking in a South African City* (Pretoria: Institute for Security Studies 2008), 35.

³³⁰ Amy Young, Carol Boyd and Amy Hubbell, "Prostitution, Drug Use, and Coping with Psychological Distress," *Journal of Drug Issues*, Vol. 30(4) (2000): 794.

³³¹ Gould, Chandre and Fick, Nicole, *Selling Sex in Cape Town: Sex work and Human Trafficking in a South African City* (Pretoria: Institute for Security Studies 2008), 36.

³³² Gould, Chandre and Fick, Nicole, *Selling Sex in Cape Town: Sex work and Human Trafficking in a South African City* (Pretoria: Institute for Security Studies 2008), 37.

³³³ Michael S. Scott Kelly Dedel, *Street Prostitution, United States of America Department of State*, (2006): 15.

³³⁴ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 67.

³³⁵ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 67.

clients' power and dominance over them.³³⁶ In this regard, police harassment of sex workers also acts as a barrier to women reporting related crimes and violence and harassment can take the form of assault, unlawful arrests, rape, extortion, and demands for sex or money as bribes.³³⁷ Because of police harassment, prostitutes rarely report these crimes to law enforcement officials even where the crime that was committed is particularly severe.³³⁸ This is further compounded by the fact that police officers do not take reports of violence by sex workers seriously as it is believed that prostitutes have brought this violence upon themselves and have therefore given up their right to consent to sexual intercourse and reporting the crime.³³⁹ The threat of arrest is also used by police officers in order to compel prostitutes in exchange for sex.³⁴⁰ In this regard, the Cape High Court has found in favour of prostitutes who have complained of constant harassment by police through arrests – knowing that these arrests would not result in a successful prosecution.³⁴¹ This case has been seen as a major victory in the protection of the rights of prostitution in that it prevents police officials from harassing prostitutes with the threat of arrest.

4.6 Critical Commentary

By its very nature, prostitution in South Africa is a very complex issue with various factors contributing the size and demand of the practice.³⁴² It cannot be analysed without taking cognisance of the fact that mostly women are involved in prostitution.³⁴³ However, in considering which legislative framework to adopt, various factors would need to be considered. The prevailing socio-economic circumstances in South Africa acts as a driver in the consideration of prostitution as option in breaking the chains of poverty.³⁴⁴ However, addressing poverty alone will not address the state of prostitution in South Africa.³⁴⁵ These can only be achieved through the introduction of a legislative framework that recognises the socio-economic factors that lead to prostitution, and seeks

³³⁶ Marlise Richter, et. al. "Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail," *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³³⁷ Marlise Richter, et. al. "Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail," *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³³⁸ Nicole Fick, "Sex Workers Speak Out - Policing the Sex Industry," *SA Crime Quarterly*, No. 15 (2006): 16.

³³⁹ Nicole Fick, "Sex Workers Speak Out - Policing the Sex Industry," *SA Crime Quarterly*, No. 15 (2006): 16.

³⁴⁰ Gould, C. and Fick, N., (2008).

³⁴¹ Sex Worker Education and Advocacy Taskforce v The Minister of Safety and Security and 7 Others, Cape High Court. Case Number: 3378/074.

³⁴² John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 26.

³⁴³ Jennifer Simpson, "Stereotyping Sex Workers: S v. Jordan and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 8.

³⁴⁴ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 41.

³⁴⁵ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 41.

to provide alternatives to those who are involved in the practice. This will seek to address both voluntary and forced prostitution.

On the demand side, it is clear that those who purchase sexual intercourse do so because of stereotypical views of sexual roles and sexuality.³⁴⁶ It forces upon women the role of conduit for sexual gratification and this in turn leads to exploitation of prostitutes.³⁴⁷ It is therefore critical that the adoption of a legal framework should seek to address the specific demand for prostitution in a manner that seeks to suppress the demand rather than encouraging it. Through the legalisation of prostitution, the demand for prostitution is not addressed. Rather, it forces regulations upon a practice that does not seek to be controlled while driving the demand for more dangerous and exploitative prostitution underground and further away from the very legislation that seeks to regulate it.³⁴⁸

The connection between HIV/AIDS cannot be denied.³⁴⁹ The biological vulnerability of women to sexually transmitted diseases are further compounded by their socio-economic conditions and the increase in sexual partners (particularly in the case of prostitutes).³⁵⁰ Moreover, the ability of prostitutes (particularly street prostitutes) to negotiate safe sex and safer sexual practices is severely impaired given the criminalisation of prostitution.³⁵¹ The legalisation and regulation of prostitution does provide opportunities for prostitutes to access sexual health care services, but vulnerable prostitutes are still at odds over whether to access these services.³⁵² However, given the dire state of service provision in South Africa, it is not clear to what extent these services will be made available or could be made available.³⁵³

Crime and violence associated with prostitution is also of particular concern. The legalisation of prostitution does not begin to address the trafficking in persons, as there exists an inextricable link

³⁴⁶ Sarah Bromberg, "Feminist Issues In Prostitution," *Feminist Issues*, <<http://www.feministissues.com/>> (accessed on Nov. 10, 2010).

³⁴⁷ Donna M. Hughes, "Men Create the Demand; Women Are the Supply," *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/demand.htm>> (accessed on Nov. 10, 2010).

³⁴⁸ Janet Wojcicki, "Race, class and sex: the politics of the decriminalisation of sex work," *Agenda*, Vol. 42 (1999): 96.

³⁴⁹ John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 26.

³⁵⁰ "Women, HIV and AIDS," *Avert*, <<http://www.avert.org/women-hiv-aids.htm>> (accessed Nov. 10, 2010).

³⁵¹ Marlise Richter, et. al. "Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail," *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³⁵² Marlise Richter, et. al. "Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail," *Globalization and Health*, <<http://www.globalizationandhealth.com/content/6/1/1>> (accessed Aug. 17, 2010).

³⁵³ South Africa has recently been plagued by service delivery protests which have occurred due to the lack of basic services provision in the country. See Courtney Brooks, "SA hit by service-delivery protests," *Mail and Guardian Online*, Jul. 22, 2009. <<http://www.mg.co.za/article/2009-07-22-sa-hit-service-delivery-protests>> (accessed on Nov. 10, 2010).

between the two issues.³⁵⁴ Providing services to one category at the expense of another would amount to discrimination and this is the dichotomy that exists between prostitution and trafficking for sexual exploitation.³⁵⁵ Indeed, the trafficking in persons for sexual exploitation is a crime that is associated with prostitution.³⁵⁶ Dealing with prostitution would need to be complemented by a legislation framework that deals with trafficking. It is my opinion that the criminalisation of the demand for prostitution would begin to address the harmful effects of prostitution, and therefore the demand for trafficked persons. To this extent, it would provide an outlet for those involved in prostitution with viable alternatives that would seek to better their lives.

The application of an appropriate legislative framework is therefore critical to the eradication of the harms associated with prostitution and indeed prostitution itself. This is inextricably linked to the promotion of gender equality, most importantly in the sexual roles of men and women. The following chapter will seek to provide a best practice method that seeks to address prostitution while addressing gender inequalities between men and women.



³⁵⁴ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Delhi: Apne Aap Women Worldwide, 2007), 87.

³⁵⁵ As has already been discussed in Chapter 3, the Prevention and Combatting of Trafficking in Persons Bill intends on providing various services to victims of trafficking for sexual exploitation. However, these services are not available for those who are involved in prostitution.

³⁵⁶ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Delhi: Apne Aap Women Worldwide, 2007), 87.

5. INTERNATIONAL BEST PRACTICE: SWEDISH MODEL

5.1. Introduction

An appropriate legislative response to prostitution is essential in ensuring that women and men who are involved in prostitution are afforded an opportunity to access services that seek to improve their lives. If one is to assume that prostitution is a human rights issue, the necessary legislative response to prostitution would therefore be based on human rights. In this regard, various countries have employed different legislative responses to prostitution. These legislative responses range from total criminalisation to legislation and regulation. The most contemporary and unique of these responses is that of Sweden where prostitution is approached from a human rights perspective, recognizing the inherent exploitation involved in prostitution.³⁵⁷ However, the Swedish approach also represents the strongest statement of condemnation of prostitution.³⁵⁸ To this extent, the Swedish approach will be used as a best practice model in dealing with prostitution.

The Swedish legislative response is based on a human rights approach to prostitution in that the legislative framework seeks to eliminate prostitution and the trafficking of persons for sexual purposes as they represent a serious obstacle to social equality, gender equality and the enjoyment of human rights.³⁵⁹ Moreover, this response to prostitution is based upon the notion that prostitution is a form gender-based violence and as such presents a serious threat to the way in which women and men interact. The Swedish Parliament recognises that if prostitution stems from as well as causes gender inequality, it would be contrary to equality imperatives in Sweden to endorse prostitution by decriminalization as it would be to criminalize the ones already subordinated by prostitution itself.³⁶⁰ Furthermore, the fight against prostitution in Sweden is aimed at eradicating prostitution, assisting individuals out of prostitution and to stop the purchasing sex.³⁶¹

One of the critical aspects of the Swedish approach to prostitution is that it seeks to intensify outreach activities and give greater priority to sheltered housing, treatment centres and other forms

³⁵⁷ Julie Bindel and Liz Kelly, "A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden." <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept. 14, 2010).

³⁵⁸ Karen Leander, "Reflections on Sweden's Measures against Men's Violence against Women," *Social Policy & Society* 5:1 (2005): 118.

³⁵⁹ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, 2008 <<http://www.prostitutionresearch.com/pdfs/Against%20Prostitution%20Sweden10-09.pdf>> (accessed Sept. 16, 2010).

³⁶⁰ Max Waltman, "Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape," Speech delivered at "Prostitution in South Africa: Developing a Research Agenda," held 14-15th April, 2010, at Leriba Lodge, Pretoria.

³⁶¹ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, Inquiry on the evaluation of the prohibition of the purchase of sexual services, 2010, 32.

of support and protection to women and men involved in prostitution.³⁶² As such, Sweden became the first country in the world to outlaw the purchase of sex as part of a comprehensive approach to violence against women.³⁶³

The following chapter will set out the historical background to the Swedish Legislative Model in dealing with prostitution. Moreover, it will provide an examination of the specific legislative provisions that govern the practice of prostitution and the way in which both the seller and buyer of sex is dealt with.

5.2. Historical Background to Prostitution in Sweden

The historical background to the law governing prostitution in Sweden is based largely on religious grounds in that it sought to prohibit any sexual interaction between persons other than husband and wife.³⁶⁴ However, this position gradually changed in order to adequately deal with the practice in a manner that best suited the social position of Sweden.

In the early 19th century, prostitution was decriminalised and brothels fell under the strict control of the government.³⁶⁵ The rationale for the legalisation of prostitution in Sweden was to control the negative consequences and the nuisances associated with prostitution. In this regard, the legal approach to prostitution did not take into account the particular vulnerabilities experienced by women who were involved in prostitution. Rather, it sought to protect the Swedish public from possible harms associated with prostitution. During this time, prostitution in Sweden was governed by 2 distinct pieces of legislation: the Vagrancy Law of 1885 and the Lex Veneris (The Law on Venereal Diseases) of 1918. The Lex Veneris, passed in 1918 sought to control the spread of venereal diseases, of which prostitution was a major cause. The Lex Veneris attempted to cure those infected with venereal diseases and reducing the risk of further infection.³⁶⁶ Moreover, it provided for the mandatory and free treatment of all citizens through the provision of fast and easy access to medical assistance.³⁶⁷ To this extent, testing positive for a venereal disease resulted in the

³⁶² Regeringskansliet: Ministry of Integration and Gender Equality Sweden, 2008

<<http://www.prostitutionresearch.com/pdfs/Against%20Prostitution%20Sweden10-09.pdf>> (accessed Sept. 16, 2010).

³⁶³ Julie Bindel and Liz Kelly, "A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden." <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

³⁶⁴ "Prostitution in Sweden," *Prostitution in Germany and Sweden: What is right and what is wrong?*, <<http://sites.google.com/site/prostitutiongermany/prostitution-in-sweden>> (accessed Sept. 1, 2010).

³⁶⁵ "Prostitution in Sweden," *Prostitution in Germany and Sweden: What is right and what is wrong?*, <<http://sites.google.com/site/prostitutiongermany/prostitution-in-sweden>> (accessed Sept. 1, 2010).

³⁶⁶ Ida Blom, "Fighting Venereal Diseases: Scandinavian Legislation c.1800 to c.1950," *Medical History*, no. 50 (2006): 215.

³⁶⁷ Ida Blom, "Fighting Venereal Diseases: Scandinavian Legislation c.1800 to c.1950," *Medical History*, no. 50 (2006): 215.

obligatory notification to the Swedish authorities, contact tracing, medical inspection of suspected victims, and, if necessary, isolation of the infected person through hospitalization.³⁶⁸ The Swedish Vagrancy Law of 1885 sought to eradicate prostitution by criminalising the living off of the proceeds of prostitution and the antecedent vagrancy. To this extent, activities associated with prostitution were criminalised. In this way, it was not the act of prostitution that was criminalised but rather the activities associated with the act. Moreover, between 1847 and 1918, prostitutes in Sweden were required to carry permits that stipulated that they were in good enough health to continue selling sex.³⁶⁹ The language of both the legislative measures were gender neutral and were considered particularly restrictive towards women as they were specifically targeted by law enforcement officials.

The demand for more information regarding prostitution in Sweden increased and numerous studies were undertaken in the 1970's to understand the nature of the practice. To this extent, it was understood that one in eight males were purchasing sexual services in Sweden.³⁷⁰ It was also believed that the increase in the drug trade in Sweden also compounded the problem of prostitution.³⁷¹ To this extent, the Swedish Government undertook to legalise certain aspects of prostitution in order to bring both these problems under control.

Following on from the aforementioned measures, various legislative commissions were undertaken in order to assess the impact that continued prostitution had on Swedish society as well as the gendered implications of the practice.³⁷² These commissions were critical to the development of a discourse around prostitution in Sweden. To this extent, the dominant discourse on prostitution in Sweden was based on the notion that “any society that claims to defend principles of legal, political, economic, and social equality for women and girls must reject the idea that women and children, mostly girls, are commodities that can be bought, sold, sexually exploited by men. To do otherwise is to allow that a separate class of female human beings, especially women and girls who are economically and racially marginalized, is excluded from these measures, as well as from the

³⁶⁸ Ida Blom, “Fighting Venereal Diseases: Scandinavian Legislation c.1800 to c.1950,” *Medical History*, no. 50 (2006): 215.

³⁶⁹ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

³⁷⁰ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

³⁷¹ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

³⁷² “Controlling Loose Women: International trends in the regulation of the exchange of sexual services,” *Michael Goodyear*, <<http://cybersolidaires.tyepad.com/Controlling-Loose-Women.pdf>> (accessed Oct. 5, 2010).

universal protection of human dignity enshrined in the body of international human rights instruments developed during the past 50 years.”³⁷³ There was a distinct move in discourse from one based on medical theory (and the eradication of venereal diseases) to a feminist one, that believed that the reason for the existence of prostitution was based on the male demand for prostitution. To this extent, it was believed that prostitution was a form of gender based violence against women and young girls.³⁷⁴

On this basis, the existing legislation was challenged and subsequently abolished and replaced with the Prohibition of Purchase of Sexual Services Act^{375, 376}. Moreover, considerable lobbying from Swedish civil society contributed to the establishment of parliamentary commissions, namely the Commission on Prostitution (1995) and the Commission on Violence against Women (1995) that contributed extensively to the development of the legislation.³⁷⁷ This needs to be viewed in light of the fact that the Women’s Movement in Sweden is relatively homogenous and enjoys considerable support at a political level.³⁷⁸

One of the critical aspects of the Swedish legislative framework, specifically provisions that criminalise the purchasing of sexual services, was brought about through the intense lobbying from the National Organization for Women’s Shelters and Young Women’s Shelters in Sweden.³⁷⁹ These two organisations had made regular submissions to a multi-party women’s group in the Swedish Parliament on issues that related to the abolition of prostitution. Because of this direct access to women parliamentarians, civil society was not only able to bring about the adoption of legislation, but also legislation that sought to eradicate prostitution and place the needs of these vulnerable women at the centre of government programmes and policies.³⁸⁰ In so doing, the Swedish Legislative Model acts as a best practice model, not only for prostitution but for public participation.

³⁷³ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1192.

³⁷⁴ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1192.

³⁷⁵ Act 147 of 1999 (amended 2005).

³⁷⁶ Controlling Loose Women: International trends in the regulation of the exchange of sexual services,” *Michael Goodyear*, <<http://cybersolidaires.typepad.com/Controlling-Loose-Women.pdf>> (accessed Oct. 5, 2010).

³⁷⁷ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1192.

³⁷⁸ Scoular, J. “Criminalising ‘Punters’: evaluating the Swedish position on prostitution, ed. Iain McDonald, *Journal of Social Welfare and Family Law* 26:2 (2004): 196.

³⁷⁹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 119.

³⁸⁰ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

5.3. Prohibition of Purchase of Sexual Services Act 147 of 1999 (amended 2005)

As has already been stated, the legislative responses to prostitution in Sweden is based on the assumption that all forms of trafficking and prostitution of women and girls is a form of gender-based violence.³⁸¹ For the Government of Sweden, this is problematic as violence against women is viewed as a gender equality issue.³⁸² Moreover, policy and legislative responses focus on the root causes of prostitution by recognising that “without men’s demand for and use of women and girls for sexual exploitation, the global prostitution industry would not be able flourish and expand.”³⁸³ It is understood that prostituted women and children are victims of gender-based violence who are subjected to secondary violence through the invocation of penal measures.³⁸⁴ As victims of gender-based violence, these women and children should not be subjected to secondary violence, but should rather be afforded the right to assistive measures that seek to emancipate them from the oppressive circumstances of prostitution.³⁸⁵

The Prohibition of Purchase of Sexual Services Act was passed in 1999 and encompassed a range of pieces of legislation that not only deals with prostitution, but also sexual offences such as rape. The most critical aspect of the legislation deals with the criminalisation of the purchasing of sex. Moreover, those men and women who are involved in prostitution are in turn provided with governmental services that seek to provide alternatives to prostitution.³⁸⁶

The Prohibition of Purchase of Sexual Services Act (the Act) states that:

“A person who obtains casual sexual relations in exchange for payment shall be sentenced - unless the act is punishable under the Swedish Penal Code - for the purchase of sexual services to a fine or imprisonment for at most six months. Attempt to purchase sexual services is punishable under Chapter 23 of the Swedish Penal Code.”

The Prohibition of Purchase of Sexual Services Act was eventually repealed and replaced by Chapter 6 of the Swedish Penal Code that deals with sexual offences, including prostitution. The

³⁸¹ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1189.

³⁸² Karen Leander, “Reflections on Sweden’s Measures against Men’s Violence against Women,” *Social Policy & Society*, Vol. 5:1 (2005): 116.

³⁸³ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1189.

³⁸⁴ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1189.

³⁸⁵ “Swedish Policies on Prostitution and trafficking in human beings,” *The European Network Against Trafficking in Women for sexual Exploitation*, <<http://www.aretusa.net/download/centro%20documentazione/03contributi/c-14GunillaBestPractices%20.doc>> (accessed Sept. 22, 2010).

³⁸⁶ “Analysing the Swedish Model on Prostitution” *Ruhama* <<http://www.ruhama.ie/easyedit/files/analyzingtheswedishmodelonprostitution.doc>> (accessed Oct. 14, 2010).

rationale for this decision was to contain all penal provisions under one act in order to ensure a uniform manner of dealing with sexual offences, including prostitution. Moreover, there existed a broad consensus on the need for legislative amendments to the existing legislation and that the criminalisation of the selling of sex (and indeed prostitutes) placed an unfair burden on the less powerful party.³⁸⁷ In effect, the criminalisation of buying prostitution in Sweden highlights the high degree of co-operation between women in the Swedish Parliament and the Government.³⁸⁸ The legislation covers the purchasing of all forms of sexual services, regardless of whether they were purchased on the street, in a brothel or in a massage parlour.³⁸⁹ This legislation therefore seeks to strike at the root causes of prostitution while attempting to provide alternatives to women who are involved in prostitution.³⁹⁰

The Swedish Model on prostitution diverges from other contemporary approaches to prostitution in that it not only criminalises the purchasing of sex, but also provides for the implementation of strategies for the empowerment of victims of prostitution and provide alternative opportunities for prostitutes to exit prostitution.³⁹¹ The fundamental aspect of this approach is that the Swedish Government has increased spending to educate women and men on the harmful aspects of prostitution.³⁹² Essentially, the belief is that it is necessary for prostituted women to exit prostitution without fear of punishment or stigmatisation.³⁹³

The following section will discuss the specific critical legislative provisions of the Prohibition of the Purchasing of Sexual Services Act in order to understand the way in which Sweden deals with the practice of prostitution. It is important to note that while much of the literature on the prohibition of purchase of sexual services in Sweden relates specifically to the criminalisation of purchasing sexual services, very little information provides critical analysis on the provisions of Chapter 6 of the Swedish Penal Code. In this regard, the following sections will provide a critical

³⁸⁷ Jane Scoular, "Criminalising 'Punters': evaluating the Swedish position on prostitution, ed. Iain McDonald, *Journal of Social Welfare and Family Law*, Vol. 26:2 (2004): 197.

³⁸⁸ Scoular, J. "Criminalising 'Punters': evaluating the Swedish position on prostitution, ed. Iain McDonald, *Journal of Social Welfare and Family Law*, Vol. 26:2 (2004): 197.

³⁸⁹ "Information from the Swedish Government on measures to eliminate men's violence against women including Sweden's efforts to combat prostitution and trafficking in human beings", *United Nations Office of the High Commissioner for Human Rights*, <<http://www2.ohchr.org/english/issues/women/rapporteur/Sweden.doc>> (accessed Oct. 14, 2010).

³⁹⁰ "Analysing the Swedish Model on Prostitution" *Ruhama* <<http://www.ruhama.ie/easyedit/files/analyzingtheswedishmodelonprostitution.doc>> (accessed Oct. 14 2010).

³⁹¹ "Analysing the Swedish Model on Prostitution" *Ruhama* <<http://www.ruhama.ie/easyedit/files/analyzingtheswedishmodelonprostitution.doc>> (accessed Oct. 14, 2010).

³⁹² This has essentially led to the increase in support for the law as well as the underlying principles for this approach amongst the Swedish population. For further information on the Swedish public support for the Law on the Prohibition on the Purchase of Sexual Services see Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004).

³⁹³ "Analysing the Swedish Model on Prostitution" *Ruhama* <<http://www.ruhama.ie/easyedit/files/analyzingtheswedishmodelonprostitution.doc>> (accessed Oct. 14, 2010).

analysis of the provisions of the Swedish Penal Code that relate specifically to the purchasing of sexual services.

5.3.1 The Criminalisation of the Purchase of Sexual Services: “The John”

As has already been stated, Chapter 6 of the Swedish Penal Code, entitled “On Sexual Crimes” replaced the Prohibition of Purchase of Sexual Services Act in 2005, and deals with all forms of sexual crimes within Sweden. Moreover, in Sweden prostitution is regarded as a form of male violence against women and therefore constitutes a form of exploitation.³⁹⁴ In relation to prostitution, it is believed that the causes of prostitution relate to the demand for sexual services.³⁹⁵ Therefore, abolishing prostitution would entail abolishing the demand for sexual services.

Section 11 of Chapter 6 of the Swedish Penal Code states that:

“A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months.”

In this regard, it is clear that from reading the above-mentioned section that the purchaser of sexual services is criminalised and subject to a fine or imprisonment for a maximum period of 6 months.³⁹⁶ This section highlights the shift in perspective from criminalising the seller of sexual services to criminalise those who purchase sexual services. Again, this is based on the need to firstly, eradicate the demand for prostitution and secondly, to eradicate prostitution altogether. Moreover, the criminalisation of the purchasing of sexual services is not only limited to street prostitution, but also brothel prostitution, massage parlour prostitution and escort services.³⁹⁷ However, during the initial phases of the implementation of the legislation focussed mainly on the prosecution of street prostitution.³⁹⁸

³⁹⁴ Regeringskansliet: Ministry of Industry, Employment and Communications, 2004
<www.legislationline.org/download/.../ee4eb3cbfa0adeec87ad87067a6f.pdf> (accessed Oct. 14 2010).

³⁹⁵ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1189.

³⁹⁶ “Analyzing the Swedish Model on prostitution” *Ruhama* <<http://www.ruhama.ie/page.php?intPageID=207>> (accessed Oct. 14, 2010).

³⁹⁷ “Against prostitution and human trafficking for sexual purposes,” Regeringskansliet: Ministry of Industry, Employment and Communications <http://www.prostitutionresearch.com/pdfs/Against%20Prostitution%20Sweden10-09.pdf> (accessed Oct. 14 2010).

³⁹⁸ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1190.

In 2003, in an evaluation of the prohibition of the purchase of sexual services, the Swedish Government pronounced on its official position regarding prostitution.³⁹⁹ In the “Factsheet on Prostitution” issued by the Swedish Department of Ministry of Industry, Employment and Communications”, the Governmental position on prostitution was explained as:

“In Sweden prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem, which is harmful not only to the individual prostituted person, but also to society at large. This objective is central to Sweden’s goal of achieving equality between women and men at the national level as well as the international level. However, gender equality will remain unattainable so long as men buy, sell and exploit women and children by prostituting them...By adopting the legislation as a serious form of oppression of women and children and that efforts must be made to combat it.”⁴⁰⁰

This statement succinctly captures the official position in relation to prostitution in Sweden. The criminalisation of the purchaser, also known as the “John” is a way on eradicating gender inequality both in Sweden and internationally. As has already been stated, the Swedish Government believes that prostitution is a form of gender-based violence and therefore manifests as an obstacle to the full achievement of gender equality.⁴⁰¹ In Sweden, gender equality is a means of achieving a society where men and women have equal access and enjoyment of the resources, services and rights in the country.⁴⁰² The Swedish Model can therefore be seen as a holistic approach to prostitution as emphasis is not only placed on the criminalisation of those who purchase sex, but also raising awareness on the realities and consequences of prostitution.⁴⁰³

One of the critical gaps in section 11 is that it criminalises only those persons who purchases sexual services on a casual basis. In this regard, those who purchase sexual services on a regular basis, that is to say one who engages the services of the same prostitute on a regular basis, is exempt of the criminal prohibition contained in section 11. While the demand is still present, it does not meet the requirements of section 11.

³⁹⁹ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

⁴⁰⁰ Regeringskansliet: Ministry of Industry, Employment and Communications, Prostitution and trafficking in human beings, 2005.

⁴⁰¹ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

⁴⁰² Karen Leander, “Reflections on Sweden’s Measures against Men’s Violence against Women,” *Social Policy & Society*, Vol. 5:1 (2005): 116.

⁴⁰³ “Analyzing the Swedish Model on prostitution” *Ruhama* <<http://www.ruhama.ie/page.php?intPageID=207>> (accessed Oct. 14, 2010).

Moreover, section 11 does not address situations where one person purchases sexual services on behalf of someone else.⁴⁰⁴ To this extent, the use of an intermediary in the purchasing of sexual services therefore nullifies the applicability of section 11 of Chapter 6 of the Penal Code. However, section 11 has been extended to include the culpability of persons who promises or gives payment for the purchase of sexual services on behalf of another.⁴⁰⁵ In this regard, the culpability is extended to persons who act as an intermediary between the seller and the buyer of sexual services. It can therefore be said that the culpability for prostitution is extended to people who act as pimps and brothels owners.⁴⁰⁶ The entire spectrum of buyer and facilitator is criminalised under section 11 of the Swedish Penal Code. This criminalisation creates a clear distinction between the victim and perpetrator of prostitution and this again serves to highlight the emphasis that the Swedish Government places on gender equality and gender-based violence.

5.3.2 Further Crimes under the Swedish Penal Code

The Swedish Penal Code further criminalises certain acts related to the purchase of casual sexual services.⁴⁰⁷ In this regard, section 12 of the Swedish Penal Code provides for a broad range of crimes associated with the purchasing of casual sexual services. Section 12 of the Penal Code creates two distinct crimes related to the procurement of casual sexual services. Section 12 states that:

“A person who promotes or improperly financially exploits a person’s engagement in casual sexual relations in return for payment shall be sentenced for procuring to imprisonment for at most four years.”

The act of promotion or improper financial exploitation of prostitutes is specifically criminalised and such persons are guilty of procuring the sexual services of prostitutes for the buyers. This relates specifically to the actions of persons known as pimps.⁴⁰⁸ These persons benefit directly from the promotion of casual sexual services for reward. In this regard, the acts of such pimps is seen as an extension of the sexual exploitation of women and a form of gender-based violence.

⁴⁰⁴ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

⁴⁰⁵ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 32.

⁴⁰⁶ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 32.

⁴⁰⁷ The purchasing of casual sexual services speaks to the purchasing sexual services on a once off basis as opposed to the purchasing of sexual services on a regular basis with the same prostitute(s).

⁴⁰⁸ A pimp is an informal term for a man (or woman) who runs a brothel or otherwise oversees prostitution. Typically, a pimp will solicit clients for, protect, and in other ways manage a prostitute in exchange for a commission on her earnings. See “A Comparison of Pimps and Batterers,” *Prostitution Research and Education*, <http://www.prostitutionresearch.com/prostitution_research/000018.html> (accessed on Nov. 10, 2010).

These pimps are usually buyers who take a more active role in the purchasing of sexual services by marketing the victims and acting as a middleman to the ‘operations’.⁴⁰⁹ To this extent Section 12 therefore addresses the full spectrum of the demand side of prostitution.⁴¹⁰ It is reported that the demand side of prostitution includes taxi drivers, hotel owners, security personnel and spa personnel.⁴¹¹

Moreover, section 12 also criminalises the actions of persons who promote prostitution.⁴¹² These persons are seen as benefitting directly from the exploitation of women and men involved in prostitution. As such, their activities are seen as contributive factors to the perpetuation of gender-based violence and the exploitation of women specifically. Whilst the language of these provisions are gender neutral, it is understood that those who financially exploit or promote prostitution are mostly men while the victims of such exploitations are mostly women. Departing from this assumption it is easy to see the nature of gender-based violence and exploitation within the context of prostitution in Sweden. Moreover, both these categories of persons act in direct relation to the demand for prostitution in that they act as a facilitator between the buyer and seller of sexual services and therefore have a direct interest in the perpetuation of the exploitation of prostitutes and the continued demand for them. The Swedish legislative approach to prostitution therefore takes into account that in order to abolish the demand for prostitution, it is necessary to criminalise the entire spectrum of those who benefit from continued prostitution. However, it is believed that the criminalisation of the purchasing of prostitution could force prostitution underground and therefore create circumstances under which women (and men) could be further exploited.⁴¹³ This would create a situation where prostitutes and buyers would rely more on those who promote or facilitate prostitution.⁴¹⁴ The extension of the criminalisation on the purchase of sexual services to include the promotion and facilitation of prostitution serves to ensure that attempts to drive prostitution underground would be punishable under the Swedish Penal Code.

The sanction imposed by section 12 of Chapter 6 of the Swedish Penal Code is considerable and therefore reflects the severity of the crime of procuring the services of a prostitute. The impossible

⁴⁰⁹ Kasja Claude, Targeting the Sex Buyer. The Swedish Example: Stopping Prostitution and Trafficking Where it all Begins (Sweden: Intellecta Infolog, 2010) 7.

⁴¹⁰ “Analyzing the Swedish Model on prostitution” *Ruhama* <<http://www.ruhama.ie/page.php?intPageID=207>> (accessed Oct. 14, 2010).

⁴¹¹ “Prostitution in Sweden 2003: Knowledge, Beliefs & Attitudes,” *Socialstyrelsen*, <<http://www.childcentre.info/projects/exploitation/sweden/dbaFile11751.pdf>> (accessed Aug. 2, 2010).

⁴¹² A person commits the crime of promoting prostitution if he/she knowingly advances or profits from prostitution of a person.

⁴¹³ Arthur Gould, “The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden,” *Social Politics Journal*, no. 30:3(2001): 445.

⁴¹⁴ Arthur Gould, “The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden,” *Social Politics Journal*, no. 30:3 (2001): 445.

sentence needs to be viewed in relation to the maximum sentence that may be imposed by a Swedish Court for any individual criminal offence, which is ten years.⁴¹⁵ Two important considerations in this regard are: that the sanction imposed for procurement does not include the option of a fine and that the sanction stipulates a maximum term of imprisonment.⁴¹⁶ Again, these critical aspects illustrate the severity of the crime in question. It is clear that the intention of the Swedish legislature was ensure that this section would act as a deterrent to the facilitation and procurement of the services of prostitutes to buyers.

A further crime created by the section 12 relates to owners of brothels or houses that are used by prostitutes in order to facilitate the purchasing of sexual services for buyers. To this extent, the Government of Sweden also views the owning of brothels as a form of promoting or encouraging prostitution.⁴¹⁷ Section 12 states that:

“If a person who, holding the right to the use of premises, has granted the right to use them to another, subsequently learns that the premises are wholly or to a substantial extent used for casual sexual relations in return for payment and omits to do what can reasonably be requested to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be held criminally responsible in accordance with the first paragraph.”

This clause speaks directly to the provision of premises in order to facilitate the purchasing of sexual services in return for payment. In relation to prostitution, these premises are known as brothels and are used as a contact point between prostitutes and the purchaser of sexual services. The effect of this clause is that it extends culpability to the owner of such premises on condition that he or she was aware, or later became aware, that the premises were used for the commission of the act of purchasing sexual services in return for payment. Where the owner of such a property subsequently becomes aware that the premises has, or is currently being used for such a purpose, the onus is on the owner to terminate the right of the lessee to use that property.

An important consideration here is that section 12 does not place a duty on the owner of the property to report the activities in relation to the purchasing of sexual services in return for payment to the relevant authorities. The only duties that are placed on the owner of the property is to terminate the right to use the property in order to ensure that the purchasing of sexual services does not continue on the property concerned. The fact that section 12 does not place a duty on the owner

⁴¹⁵ Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004):1192.

⁴¹⁶ For more on Criminal Sanctions in Sweden see Per Ole Traskman, “Sweden” Hyper Articles and Ligne, <http://hal.archives-ouvertes.fr/docs/00/41/91/59/PDF/p185_198.PDF> (accessed Oct. 22, 2010); *The South African Law Reform Commission, Discussion Paper 0001/2009 Project 97 Sentencing*, 2001.

⁴¹⁷ Regeringskansliet: Ministry of Industry, Employment and Communications, *Prostitution and trafficking in Women*, 2004.

of the property to report such activities is problematic and manifests as a gap in the current legislation. Moreover, prostitutes experience discrimination and ill-treatment from landlords as they are forced to lie in order to rent property in which to live.⁴¹⁸

Moreover, this clause departs from the presumption that the owner is not party to the facilitation of the purchasing of sexual services in return for payment. Rather, it provides that such an owner needs to ensure that the continued facilitation of purchasing of sexual services is no longer carried out on said premises.⁴¹⁹ The onus is therefore on the State to prove that the owner of the property was involved in the facilitation of the purchase of sexual services or that the owner knowingly allowed such practices to be carried out on the premises concerned. The extent to which it can be proved that the owner of the premises knowingly allowed such activities to be carried out on his or her premises is not clear that therefore is problematic as it places an excessive burden upon the State.⁴²⁰ If found guilty in terms of the aforementioned clause, the owner of such property is liable to imprisonment of a term no longer than four years. As has already been discussed, this is particularly lengthy term of imprisonment and illustrates the intention of the Swedish Legislature to punish those who facilitate the purchasing of sexual services and continue to benefit from it.⁴²¹

Section 12 also takes into consideration the severity of the situation and accordingly provides for appropriate sanctions. Section 12 states that:

“If a crime provided for in the first or second paragraph is considered gross, imprisonment for at least two and at most eight years shall be imposed for gross procuring. In assessing whether the crime is gross, special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person.”

This clause contains two aspects: the sentence imposed in relation to the relation to the severity of the crimes described above and the criteria that the courts should use in determining an appropriate sentence for those crimes. Firstly, the clause sets out the court needs to take into account the scale of the activity, whether the activity brought about considerable financial gain or whether the actions involved the ruthless exploitation of another person. These factors therefore take into account aspect of gender-based violence against women and young girls in deciding the extent of the sanction imposed on those found guilty of purchasing of sexual services. Under normal conditions,

⁴¹⁸ “Swedish Critique of Swedish Prostitution Policy,” *Petra Ostergren*, <http://www.petraostergren.com/pages.aspx?r_id=40716> (accessed Oct. 17, 2010).

⁴¹⁹ Joshua Bailey, “Freedom or Slavery? The Harm in Legalizing Prostitution,” *Critique*, Fall 2009/Spring 2010: 196.

⁴²⁰ Some sex workers have also reported that some sex workers experience difficulties living with their partners in leased homes as it is assumed that such a partner is the pimp or in some other way benefits from prostitution. See “Swedish Critique of Swedish Prostitution Policy,” *Petra Ostergren*, <http://www.petraostergren.com/pages.aspx?r_id=40716> (accessed Oct. 17, 2010).

⁴²¹ Justis og Politidepartementei, *Purchasing Services in Sweden and the Netherlands: Legal Regulation and Experiences*, Report 2004, 18.

the Swedish Courts consider fines an appropriate sentence for most crimes.⁴²² This position is also applicable to crimes relating to the purchasing of prostitution.⁴²³

Secondly, the extent of the sanction that is imposed on those found guilty of contributing to the purchasing of sexual services is particularly severe. The parameters of the sanction are wide enough to provide the presiding officer a certain degree of discretion in handing down sentence given that certain criteria have been met.⁴²⁴ If one is to inspect the upper level of the sanction (which is eight years), it can be seen that if one is to be found guilty of the facilitation of prostitution and having consideration for the factors discussed above, that the possible sentence imposed is relatively severe.

5.4 The Swedish Legal Framework and the Seller

It is necessary to reiterate that the basis for the ban on selling of sexual services is to eliminate the demand for sexual services and in so doing end the sexual exploitation of certain vulnerable groups and attempt to eliminate sexual and gender-based violence.⁴²⁵ An important consideration in reading the legislation pertaining to the ban on the purchase of sexual service is that the language of the legislation is gender-neutral. In this regard both the buyer and seller can be either male or female.⁴²⁶

However, an important aspect of the Swedish model is that it is not a crime to sell sexual services. In this regard, the seller is not covered by the rules on complicity in a crime on the purchasing of sexual services.⁴²⁷ As such, the seller of sexual services is able to remove him or herself from being subjected to sexual and gender-based violence. The Swedish model also reflects (and continues) an interventionist social welfare approach to social problems as the Swedish Government dedicated

⁴²² Justis og Politidepartementei, *Purchasing Services in Sweden and the Netherlands: Legal Regulation and Experiences*, Report 2004, 17.

⁴²³ Justis og Politidepartementei, *Purchasing Services in Sweden and the Netherlands: Legal Regulation and Experiences*, Report 2004, 17.

⁴²⁴ Justis og Politidepartementei, *Purchasing Services in Sweden and the Netherlands: Legal Regulation and Experiences*, Report 2004, 18.

⁴²⁵ Ramya Subrahmanian, "Sexual Politics And Social Policy: Swedish Policy Reviewed," in *Global Perspectives on Gender Equality: Reversing the Gaze*, Edda Magnus, Naila Kabeer and Agneta Stark. (Oxford: Routledge, 2007), 204.

⁴²⁶ Regeringskansliet: Ministry of Industry, Employment and Communications, *Prostitution and trafficking in Women*, 2004.

⁴²⁷ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009, pg. 120.

funds for exit strategies, including drug and alcohol treatment, further education and training and counseling.⁴²⁸

The Swedish Model relies on social services within the framework of the provision of social security to deal with the prostitutes or the seller of sexual services. To this extent, the Government of Sweden addresses the needs of prostitutes through the Social Services Act.⁴²⁹ While there is no specific provision that deals with the needs of prostitutes, the Act does contain important provisions that cater to the needs of prostitutes. The overarching framework in this regard can be found section 2 of the Act which states that:

“The municipality has the ultimate responsibility for ensuring that all those present in the municipality receive the support and assistance which they require.”

It is therefore the responsibility of the municipality in which the prostitute resides to provide social services that meets the need of that person. The specific services provided is described in section 3 of the Act which states that:

“the municipality assume responsibility for care and service, information, counsel, general support, financial aid and other forms of assistance to families and individuals in need.”

While it remains the overall responsibility of the Swedish Government to provide these social services to those wishing to exit prostitution, social workers, counsellors and police officials also bear certain responsibilities in the provision of social services to prostitutes. In this regard, these service providers are required to provide assistance in terms of the Social Services Act, mentioned above, that speak to, amongst others, sexual health services (specifically related to pregnancy), empowerment of women, preventative measures for young people, services for women with impaired mental or physical function and support for women with substance abuse problems.

These services are critical in order to ensure that the women and men exit prostitution in a manner that speaks to the specific needs. This is rather difficult as it places a further burden on governmental service providers. However, the success of the programme needs to be weighed against the aforementioned interests of prostitutes. The following section therefore investigates these gains in light of the ban on the purchase of sexual services.

⁴²⁸ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden.” <<http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

⁴²⁹ Social Services Act of 2001.

5.5 Evaluation of the Swedish Model on Prostitution

One of the critical features of the Swedish model on prostitution is that it requires the State to report on the successes of the prohibition against the purchasing of sexual services. This feature is similar to the establishment of a Parliamentary Committee on Prostitution to evaluate the impact of prostitution legislation in Sweden.⁴³⁰ To this extent, the Inquiry's Remit was established to evaluate the application of the prohibition of the purchase of sexual services and the effects the prohibition has had since entering into force in 1999.⁴³¹ In order to fulfill these functions, the Inquiry has looked into how the legislation has been practically applied and what effects the prohibition has had on the prevalence of prostitution and human trafficking for sexual purposes in Sweden.⁴³² This would inevitably lead to the increased use of pimps therefore lead to an increase in women's vulnerability.⁴³³

Currently, such a report is undergoing consideration by the Executive of Sweden with the closing date for commentary being 24 October 2010. To this extent, only a summary is available in English and will be analysed below.

As has already been stated, the Report evaluates the ban on the purchase of sexual services and proceeds from the assertion that the evaluation of the ban on the purchase of sexual services has proven to be a difficult task because it is complex and a multifaceted social phenomena which partly occurs in secret.⁴³⁴ While civil society organisations working in the field of prostitution have noted a decline in prostitution but stress that this should be viewed in terms of ban on the purchase of sexual services and the development of the types of communication in the facilitation of prostitution.⁴³⁵ While empirical studies have been undertaken to establish the extent to which the ban on the purchase of sexual services has been undertaken, it is necessary to interpret the results with caution. However, it is agreed that certain conclusions can still be drawn.

⁴³⁰ "New Zealand and Sweden: two models of reform," Canadian HIV/AIDS Legal Network, <http://www.bayswan.org/swed/Canada_law_reform_models.pdf> (accessed Aug. 9, 2010)

⁴³¹ "Legislation on the purchase of sexual service," Regeringskansliet: Government Offices of Sweden, <<http://www.sweden.gov.se/sb/d/4096/a/119861>> (accessed Oct. 5, 2010).

⁴³² "Legislation on the purchase of sexual service," Regeringskansliet: Government Offices of Sweden, <<http://www.sweden.gov.se/sb/d/4096/a/119861>> (accessed Oct. 5, 2010).

⁴³³ Arthur Gould, "The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden," *Social Politics Journal*, no. 30:3(2001): 445

⁴³⁴ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 32.

⁴³⁵ Nordic Council of Ministers, "Prostitution in the Nordic Countries," *research project conducted by the Nordic Gender Institute*, 2009: 15.

The report notes that street prostitution in Sweden has halved since the introduction of the legislation.⁴³⁶ Moreover, this reduction may be directly as a result of the ban on the purchase of prostitution. In analysing the success of the legislation, the report draws heavily on comparative analyses with other Nordic countries, including Norway and Denmark. However, some criticism has been levelled at the Swedish Government in this regard. It is argued that the voices of prostitutes have been silenced in the evaluation of the ban on the purchase of sexual services.⁴³⁷ Moreover, it is because of the ban on the purchase of sexual services that some prostitutes have become more vulnerable and have been forced into other illegal activities.⁴³⁸ Those who oppose the legislation however, assert that the ban on the purchasing of prostitution would result in prostitution becoming less visible and be driven underground.⁴³⁹

Another area that is covered by the report is the escalation of the use of the internet in order to facilitate prostitution. It is agreed that the scale of internet prostitution is more difficult to ascertain (in comparison to street prostitution) and that the decrease in street prostitution could be as a result of the increase in internet prostitution.⁴⁴⁰

In relation to indoor prostitution, the report notes that there are no indications that indoor prostitution has increased in any material way, or that the decrease in street prostitution has led to an increase in indoor prostitution.⁴⁴¹ In this regard, the report relies on the information provided by service providers who deal directly with prostitutes. However, the report states that because there has been a marked increase in prostitution in neighbouring Nordic countries (as opposed to Sweden), these results could be attributed to the implementation of the criminalisation of prostitution in Sweden.⁴⁴² A degree of criticism has also been leveled against this assumption. It is argued that because there is a decrease in the demand for prostitution, this has forced prostitutes to resort more dangerous methods of attracting clientele that might put them at further risk.⁴⁴³

⁴³⁶ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 32.

⁴³⁷ Ramya Subrahmanian, "Sexual Politics And Social Policy: Swedish Policy Reviewed," in *Global Perspectives on Gender Equality: Reversing the Gaze*, Edda Magnus, Naila Kabear and Agneta Stark. (Oxford: Routledge, 2007), 212.

⁴³⁸ Ramya Subrahmanian, "Sexual Politics And Social Policy: Swedish Policy Reviewed," in *Global Perspectives on Gender Equality: Reversing the Gaze*, Edda Magnus, Naila Kabear and Agneta Stark. (Oxford: Routledge, 2007), 212.

⁴³⁹ Arthur Gould, "The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden," *Social Politics Journal*, no. 30:3(2001): 448

⁴⁴⁰ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 35.

⁴⁴¹ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 36.

⁴⁴² Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 36.

⁴⁴³ Ramya Subrahmanian, "Sexual Politics And Social Policy: Swedish Policy Reviewed," in *Global Perspectives on Gender Equality: Reversing the Gaze*, Edda Magnus, Naila Kabear and Agneta Stark. (Oxford: Routledge, 2007), 224.

Since the introduction of the ban on the purchasing of prostitution, public support for the ban has also increased.⁴⁴⁴ Various surveys were undertaken in order to establish public opinion on the ban on the purchase of sexual services, and it was established that more than 70 per cent of the population supported the ban and believed that it has yielded positive effects for Swedish society.⁴⁴⁵ However, it is important for the Swedish Government to ascertain what effects the ban on the purchasing of sexual services has had on prostitutes. In this regard, the report reveals that while some prostitutes feared that the ban on the purchase of sexual services would drive street prostitution underground, such fears had not materialised.⁴⁴⁶ It would therefore appear that public opinion in Sweden has moved from the opinion that prostitution in Sweden is inevitable to one that prostitution can be addressed in the long term through the criminalisation of the purchase of prostitution.⁴⁴⁷

An important consideration in this regard is that all Swedish legislation has extraterritorial jurisdiction which means that someone who commits an offence in another country with a similar legal code, can be found guilty of the same offence in Sweden. This is an important addition to the ban on the purchase of sexual services as it places a duty upon Swedish citizens to honour legislation that is in place in foreign jurisdictions.⁴⁴⁸

The most important aspect of the ban the purchasing of sexual services would be to evaluate whether the ban has indeed led to the decrease in the demand for prostitution and sexual services. In this regard, prostitutes, social workers and police officials had indicated that the demand for prostitution had indeed decreased.⁴⁴⁹ Reasons for the decrease in demand have been denoted to fear of being exposed to family members and fear of being arrested for purchasing sexual services. Moreover, in surveys conducted with men in Sweden, it was found that because of the ban, men had chosen not to purchase sexual services. Another important aspect in evaluating the effect of the legislation is to examine the police statistics on the amount of men who have been arrested for

⁴⁴⁴ "Swedish Critique of Swedish Prostitution Policy," *Petra Ostergren*, <http://www.petraostergren.com/pages.aspx?r_id=40716> (accessed Oct. 17, 2010).

⁴⁴⁵ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 37.

⁴⁴⁶ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 37.

⁴⁴⁷ Julie Bindel and Liz Kelly, "A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden." <<http://www.glasgow.gov.uk/NR/rdoonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

⁴⁴⁸ Julie Bindel and Liz Kelly, "A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden." <<http://www.glasgow.gov.uk/NR/rdoonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>> (accessed Sept.14, 2010).

⁴⁴⁹ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 38.

purchasing sexual services. According to the most recent statistics, in 2003 little more than 300 men were arrested for attempting to purchase sexual services, and that close to 200 were arrested in the capital Stockholm.⁴⁵⁰ These statistics are considerably lower than previous years and prove that the demand for sexual services has considerably dropped since the introduction of the legislation and is testament to the efficacy of the legislation.⁴⁵¹

Government service providers in Sweden also report on the success of the ban on sexual services. These services providers work directly with women (and to a lesser degree men) who are involved in prostitution. One such service provider reports that between 2000 and 2003, they had dealt with more than 130 women who were involved in prostitution. Of these women, more than 60 per cent had indicated their intention to leave prostitution permanently.⁴⁵² These service providers believe that the ban on purchase of sexual services acts as an incentive for women involved in prostitution to permanently exit prostitution and help address the effects of gender-based violence.⁴⁵³

The extent to which the Swedish model is successful is therefore the subject of much debate. From the report submitted to the Swedish Ministry on Legislation and Justice, it would appear that there has been a marked decrease in the presence of street prostitutes, but also in the prevalence of those who purchase sexual services. This is an important consideration in determining the way in which the South African Government chooses to deal with prostitution. Regardless of such findings, the Swedish Model does present an opportunity for the South African Government to deal with prostitution from a human rights approach, and essentially give effect to the Constitution while doing so.

5.6 Critical Analysis

The only way in which to consider the success of Chapter 6 of the Swedish Penal is to evaluate whether the aims of the legislation, that is to eliminate the demand for prostitution, has been achieved⁴⁵⁴. This will enable one to evaluate the extent to which the demand for prostitution has decreased.

⁴⁵⁰ Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1192.

⁴⁵¹ Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1192.

⁴⁵² Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1192.

⁴⁵³ Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1192.

⁴⁵⁴ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 30.

While these critical gaps exist, the Swedish Government has identified these loopholes and is currently considering amendments to the legislation in order to address them. As has already been stated, one of the current gaps in the Swedish Legal Framework is that the Swedish Penal Code only criminalises the purchasing of sexual intercourse on a casual basis while police and social workers experience difficulties with the exploitation of a person with a psychiatric disability, contact being made through a third party or an ordering service, exploitation of one person for several hours by several sex purchasers or exploitation of a young person or a person under the influence of drugs.⁴⁵⁵ The current provision does not take into account the purchasing of sexual intercourse on a regular basis, where the purchaser of sexual intercourse does so, on a regular basis and with the same prostitute.⁴⁵⁶ The presumption here is that the contractual sexual relationship between the two parties exists on a regular basis and there also exists an understanding that the purchaser only purchases sexual intercourse from one party.⁴⁵⁷ This is a critical gap as it could relate to a situation where there exists a situation of continued sexual exploitation of a prostitute.

The way in which the Swedish Legal Framework deals with the issue of prostitution is particularly fragmented in that different pieces of legislation is applied in dealing with either the buyer or seller of sexual intercourse.⁴⁵⁸ In contrast, the legislation in South Africa is rather thematic, dealing with a specific issue and attempting to address all the aspects of that specific issue.⁴⁵⁹ However, the fragmented approach used in Sweden might serve to highlight the ideological basis in dealing with prostitution: that of criminalising the buyer (and dealing with the buyer in terms of the Swedish Penal Code) and dealing with the seller of sex through social justice legislation.⁴⁶⁰ In this regard, there is no explicit explanation as to the services that are made available to the seller of sexual services. It can therefore be assumed that he or she is left to their own devices and expected to access those services on their own. This is problematic as the sellers (most often women) are often the victims of sexual and gender-based violence or have been the victim of sexual exploitation and as such might not be able to approach governmental sexual and sexual health service providers.⁴⁶¹

⁴⁵⁵ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 38.

⁴⁵⁶ Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1203.

⁴⁵⁷ Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1203.

⁴⁵⁸ In the Swedish model, the buyer of sexual services is dealt with in terms of the Swedish Penal Code which contains all the criminal provisions and sentencing guidelines. In contrast, the seller of sexual services is (indirectly) dealt with in terms of the Social Services Act.

⁴⁵⁹ See the Sexual Offences Act 32 of 2007.

⁴⁶⁰ Regeringskansliet: Ministry of Integration and Gender Equality Sweden, *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, 2010, 30.

⁴⁶¹ Regeringskansliet: Ministry of Industry, Employment and Communications, *Prostitution and trafficking in Women*, 2004.

In order to protect against the risk of secondary victimisation, Swedish legislation and policy should act as a conduit between the seller of sexual services and governmental service providers. This is a problematic gap in the fragmented approach applied in Sweden.

Moreover, if one is to assume that the latter is the reason for the Swedish approach, it serves to supplement the ideal that prostitution is a form of gender-based violence and that it can only be ended by eliminating the demand for it.

However, in considering which model to employ in South Africa, it is essential to take into account the conditions of both South Africa and Sweden. South Africa and Sweden are vastly different in terms of socio-economic conditions. South Africa is hampered by rampant poverty and problematic service delivery. The life expectancy in Sweden is relatively high for both men and women with both averaging above 75 years of age.⁴⁶² In South Africa, the life expectancy is considerably lower, at 52 years of age.⁴⁶³ This is a particularly important consideration given the impact of HIV and AIDS on the life expectancy in South Africa as well the dependency on social welfare services.

Given the impact of poverty as a driving factor for entering into prostitution, it is important to consider the economic and employment. Since 1994, Sweden has experienced relatively high economic growth spurred on by an expansion in the IT and financial sectors.⁴⁶⁴ This has led to low levels of income poverty across the country. In contrast, South Africa is still plagued by high levels of poverty, which currently stands at close to 25 % of the economically active population. This is particularly prevalent amongst the youth and rural women across South Africa. This is considerably important given the way in which the South African Government attempts to deal with prostitution. The Swedish model in dealing with prostitution relies heavily on alternative employment opportunities, particularly in relation to employment.

In terms of gender equality, Sweden is a very equal society. “This is based on the belief that a more just and democratic society results from women and men sharing power and influence equally as well as well developed welfare system makes it easier for both sexes to balance their work and family life.”⁴⁶⁵ However, in South Africa, gender equality has not been achieved. While the South

⁴⁶² “National Report Sweden: Socio-economic trends and welfare policies,” *Project Equality*, <http://www.projectquality.org/files/pdfD3.1_National_Reports_-_Sweden.pdf> (accessed Feb. 12, 2011).

⁴⁶³ “South Africa: Statistics,” *United Nations Children Fund*, <http://www.unicef.org/infobycountry/southafrica_statistics.html> (accessed Feb. 12, 2011).

⁴⁶⁴ “National Report Sweden: Socio-economic trends and welfare policies,” *Project Equality*, <http://www.projectquality.org/files/pdfD3.1_National_Reports_-_Sweden.pdf> (accessed Feb. 12, 2011).

⁴⁶⁵ “Gender Equality in Sweden,” *Sweden.se*, <<http://www.sweden.se/eng/Home/Society/Equality/Facts/Gender-equality-in-Sweden/>> (accessed Feb. 9, 2011).

African Government has initiated various pieces of legislation in order to achieve gender equality, this has been focussed mainly in the political and public service arena. The feminisation of poverty highlights the gender inequality in South Africa, particularly in the rural areas. This is a particularly important factor in considering the legislative model that needs to be employed in South Africa in dealing with prostitution. However, while there exists vast differences between South Africa and Sweden, this should not be the only factor that needs to be considered when looking at an appropriate legislative framework in terms of prostitution. It is critical to consider the importance of the legislation and the purpose thereof, given the protections that it can afford to vulnerable women and women who choose to exit prostitution.

The legislative frameworks of both South Africa and Sweden have been discussed in order to highlight the extent to which either jurisdiction attempts to deal with prostitution. However, a critical consideration in evaluating the success of such a framework is to investigate and analyse the way in which the specific judiciary interprets specific provisions of those legislative frameworks. The following chapter will seek to provide a discussion and analysis of current jurisprudence in relation to prostitution.



CHAPTER 6: A CRITICAL ASSESSMENT OF SOUTH AFRICAN JURISPRUDENCE ON PROSTITUTION

6.1 Introduction

One of the important ways one can measure the impact and operation of legislation is the way in which the courts interpret and apply specific provisions of various pieces of legislation. This is referred to as case law or jurisprudence.⁴⁶⁶ While legislation refers to the specific statutes, very little reference is made to factual situations or the way in which the law should be applied. To this extent, jurisprudence provides legal scholars and practitioners with the means to use the decisions of South African courts in order to substantiate their legal arguments.

One of the most important judicial decisions made in terms of prostitution is that of *S v Jordan*⁴⁶⁷ in which both the majority and minority decisions have been the subject of much debate. The case provides critical insights into the way in which the Constitutional Court views prostitution and serves to extend the South African discourse on the topic. The Constitutional Court is a critical source of jurisprudence as it provides legal scholars with an understanding of the way in which the Constitution⁴⁶⁸ is applied to contemporary questions around legislative and factual scenarios. In this regard, “the Constitutional Court is the highest court in the country when it comes to the interpretation, protection and enforcement of the Constitution. It deals exclusively with constitutional matters - those cases that raise questions about the application or interpretation of the Constitution.”⁴⁶⁹

Since the judgment in the case of *S v Jordan*, the South African jurisprudential landscape has change considerably, particularly since the judgment in the case of *Kylie v CCMA and Others*⁴⁷⁰. This case has provided a considerable amount of the development in relation to the criminalisation of prostitution and, more importantly in relation to labour.

The following section attempts to provide a critical assessment of both the majority and minority judgments contained in the case of *S v Jordan*⁴⁷¹ as this will provide an understanding of the way in which the courts have interpreted prostitution legislation. Moreover, this Chapter will also provide a comparative analysis of the case of *Kylie v CCMA and Others* and the implications of this case on prostitution in South Africa.

⁴⁶⁶ Jurisprudence refers to the actual application of these statutes to facts is left to judges who consider not only the statute but also other legal rules which might be relevant to arrive at a judicial decision. Thus, jurisprudence” has come to refer to case law, or the legal decisions which have developed and which accompany statutes in applying the law against situations of fact.

⁴⁶⁷ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC).

⁴⁶⁸ Act 108 of 1996.

⁴⁶⁹ “The Role of the Constitutional Court of South Africa,” *Constitutional Court of South Africa*, <<http://www.constitutionalcourt.org.za/site/thecourt/role.htm>> (accessed on Aug. 17, 2010).

⁴⁷⁰ (CA 10/08) 2010 (4) SA 383.

⁴⁷¹ 2002 (2) SACR 499 (CC).

6.2 *S v Jordan*: The Facts

The facts in the case of *S v Jordan*⁴⁷² are essential in the discussion of prostitution. In this regard, the following section will provide a discussion on the facts that were present.

On 20 August 1996 an unnamed police officer entered a brothel owned by the Ellen Jordan (the first appellant), in Pretoria and paid R250 to the second appellant (Louisa Johanna Francina Broodryk), a salaried employee, and received a pelvic massage from the third appellant (Christine Louise Jacobs), a prostitute. The three appellants were then arrested and charged in terms of the Sexual Offences Act⁴⁷³, in that they had provided the unnamed police officer sex for reward (in terms of the third appellant) and kept a brothel (in terms of the first and second appellant). Subsequently, in the court *a quo*, the three appellants admitted that they had contravened the Sexual Offences Act⁴⁷⁴, but claimed that the relevant provisions of the Act were unconstitutional and should be declared invalid. Given the limited jurisdictional powers of the Magistrate's Court in entertaining matters relating Constitutional validity, the three appellants admitted their guilt, and were sentenced by the Court. The appellants then appealed to the Pretoria High Court to have the provisions under which they were found guilty to be set aside as unconstitutional.

On appeal to the Pretoria High Court, the third appellant challenged the constitutional validity of section 20(1)(aA) of the Sexual Offences Act⁴⁷⁵ - which related to the having unlawful carnal intercourse for reward, on the basis that the section amounted to discrimination on the grounds of gender⁴⁷⁶, privacy and equality before the law⁴⁷⁷, while the first two appellants challenged the validity of sections 2 and 3 (b) and (c) of the Sexual Offences Act - which related to the keeping of a brothel. On appeal, the Pretoria High Court found that section 20(1)(aA) of the Sexual Offences Act was indeed unconstitutional on the basis that the section only criminalised the seller of sexual intercourse and not the buyer and that this amounted to unfair discrimination. The Pretoria High Court consequently referred the issue to the Constitutional Court for confirmation of invalidity. However, the Court found that sections 2 and 3 of the Sexual Offences Act⁴⁷⁸ were not unconstitutional as these sections sought to protect prostitutes from commercial sexual exploitation

⁴⁷² 2002 (2) SACR 499 (CC).

⁴⁷³ Act 23 of 1957.

⁴⁷⁴ Act 23 of 1957.

⁴⁷⁵ Act 23 of 1957.

⁴⁷⁶ Section 9 (3) of the Constitution, Act 108 of 1996.

⁴⁷⁷ Section 9 (1) of the Constitution, Act 108 of 1996.

⁴⁷⁸ Act 23 of 1957.

and that these sections amounted to the trafficking of persons for sexual exploitation. In the latter case, the Court granted the first and second appellant leave to appeal to the Constitutional Court.

In the Constitutional Court, the first and second appellant appealed against the order of validity of the sections 2 and 3 of the Sexual Offences Act while the third appellant sought an order of invalidity in terms of section 20(1)(aA) of the same Act. However, the Transvaal Director of Public Prosecutions and the National Director of Public Prosecutions contended that the order of invalidity of section 20(1)(aA) should not be confirmed by the Constitutional Court while the appeal of the first and second appellant should be dismissed. Simply put, the legal issue that the Constitutional Court had to consider was whether section 20(1)(aA), section 2 and section 3 (b) and (c) were indeed unconstitutional.

The Constitutional Court accepted requests for *amicus curiae*⁴⁷⁹ from various parties including the Sex Worker Education and Advocacy Taskforce (SWEAT), the Centre for Applied Legal Studies (CALS), the Reproductive Health Research Unit (RHRU), the Commission for Gender Equality (the GCE) and brothel-owners Pieter Crous, Menelaos Gemeliaris and Andrew Lionel Phillips.

In handing down judgment in the matter before the Court, it was found that the Pretoria High Court had erred in its decision to declare that section 20 (1) (aA) was unconstitutional on the grounds that it amounted to discrimination in terms of sections 9 (1) and (3) of the Constitution⁴⁸⁰. Moreover, it upheld the decision by the Pretoria High Court that section 2 and 3 (b) and (c) of the Sexual Offences Act⁴⁸¹ were indeed constitutional. However, in handing down its decision, a dissenting judgment emerged that disagreed with the majority judgment in this case. It is these two opposing decisions that have led to considerable public discourse on this case as it pertains to the very nature of the practice of prostitution and the circumstances of prostitutes. The following section will provide a critical analysis of these differing judgments and the effect that they have had on the development of the South African legislative framework in relation to the practice of prostitution. It is important to note that for the purposes of this discussion, only issues relating to equality will be discussed.

6.3 The Majority Judgment

⁴⁷⁹ An *amicus curiae*, directly translated means, a friend of the court. In this regard, an *amicus curiae*, refers to a person, or group of persons, who are not party to the litigation, but acts in a manner which provides the court with specialist or expert information in order to assist the Court in deciding a matter.

⁴⁸⁰ Act 108 of 1996.

⁴⁸¹ Act 23 of 1957.

One of the first questions that the Court needed to answer was whether section 20(1)(aA) discriminated against women on the basis of gender. In answering this question, the Court made various decisions. The majority judgment was handed down by Judges Chaskalson, Kriegler, Madala, Du Plessis and Skweyiya, concurring in the judgment of Judge Ngcobo.

Firstly, the Court analysed section 20(1)(aA) to find whether it indeed amounted to unfair discrimination on the basis of gender. In making the finding, the Court stated that:

“The prostitute is engaged in the business of commercial sex. One of the ways of curbing commercial sex is to strike at the merchant by means of criminal sanctions.”

In this regard, the Court takes a total criminalisation approach towards prostitution in that it asserts that one of the ways of eradicating prostitution is to criminalise the seller of sex. However, the Court had not taken into account the effects of the Swedish model and the criminalisation of the buyer of sex. To this extent, the Sweden has had noted success in ‘curbing commercial sex’ without having to resort to ‘striking at the merchant’. Merely relying on the one of the means, regardless of whether it is successful or not, amounts to a problematic assumption and one can therefore argue that the Court in this instance has erred in its decision by not taking into account the particular merits of various methods of dealing with prostitution. It is important to note that at the time of the judgment, the Swedish Government had already implemented the ban on the purchase of sexual services and had already reported on the success of this intervention. Moreover, the act of selling sexual services cannot exist without the buyer and therefore it seems odd that the Court relies solely on striking at the seller and not the buyer. To this extent, the particular basis for its decision is problematic as one would assume that the Court would have taken into account striking at both the demand and supply especially on the grounds that it is making a finding in terms of discrimination.⁴⁸²

Moreover, the Court does not take into account the realities of prostitution and the context within which these prostitutes operate. The majority of prostitutes are poor, uneducated women of “low socio-economic status who have few other options to earn a living.”⁴⁸³ It can therefore be said that the impugned law criminalises women who are “less powerful, socially and economic vulnerable

⁴⁸² Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 20.

⁴⁸³ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yarekko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 8.

and oppressed.”⁴⁸⁴ The result of criminalising the seller of ‘commercial sex’ is that vulnerable women suffer the consequences of this sanction. This is a factor that the Court had failed to take into account.

The Court also asserts that:

“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*⁴⁸⁵ 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.”

The assertion made by the Constitutional Court in this regard is problematic. The Court relies on section 18 of the Riotous Assemblies Act⁴⁸⁶ and the legal concept of *socius criminis* in order to establish the guilt of the ‘complicit’ buyer of ‘commercial sex’. However, it is not clear whether it was indeed the intention of the legislature at the time to criminalise the purchaser of commercial sex under the Riotous Assemblies Act⁴⁸⁷. The specific piece of legislation was passed for a specific purpose (in order to protect the State from perceived harm) which did not include the purchasing of ‘commercial sex’. The assertion by the Court that the Riotous Assemblies Act⁴⁸⁸ could be used as a basis for the criminalisation of the buyer of ‘commercial sex’ is therefore incorrect. The fact that the criminalisation buyer in ‘commercial sex’ is later expressly included in the amendment to the Sexual Offences Act⁴⁸⁹ further serves to prove that the intention of the legislature at the time was not to criminalise the buyer of ‘commercial sex’. The latter inclusion highlights the fact that the Sexual Offences Act⁴⁹⁰ contained a loophole that could lead to the interpretation that only the prostitute was criminalised. Moreover, in the court *a quo* and in the Pretoria High Court, the buyer (that is to say the policeman) was not sued *socius criminis* and therefore any reference at this point to such a notion would be unconvincing.⁴⁹¹ Any reliance on *socius criminis* at this stage should have been alleged and relied upon in the court of first instance. To this extent, criminally

⁴⁸⁴ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 8.

⁴⁸⁵ A person who ‘aids, abets, counsels or assists’ another to commit a crime. Such a person is as guilty and as liable to the same punishment as the person who actually committed the crime.

⁴⁸⁶ 17 of 1956.

⁴⁸⁷ 17 of 1956.

⁴⁸⁸ 17 of 1956.

⁴⁸⁹ 23 of 1957.

⁴⁹⁰ 23 of 1957.

⁴⁹¹ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 20.

charging the buyer of the sexual service in question should have fallen under the purview of the National Prosecuting Authority, who is party to the proceedings at hand.⁴⁹²

In relation to discrimination on the basis of gender, the Court goes further to state that:

“The Act pursues an important and legitimate constitutional purpose, namely, to outlaw commercial sex. The only significant difference in the proscribed behaviour is that the prostitute sells sex and the patron buys it. Gender is not a differentiating factor. Indeed one of the effective ways of curbing prostitution is to strike at the supply. Two points to note here are the ones already stressed: first, the prohibition is gender neutral, it punishes both female and male prostitutes; and, second, guilt and punishment are equal for both the prostitute and the customer. In the circumstances any “discrimination” resulting from the prostitute and the customer being dealt with under different provisions of the law cannot be said to be unfair.”⁴⁹³

In this regard, it is not clear as to what constitutional purpose the act of outlawing commercial sex seems to serve.⁴⁹⁴ The Court does however rely on submissions made by the State in this regard.

These submissions state that:

“First, the business is said to breed crime which is not confined to the sale of sex but which extends into violent crimes. Second, the business results in the exploitation of women and children. Third, it leads to trafficking in children. Fourth, it leads to the spread of sexually transmitted diseases.”⁴⁹⁵

The reasons submitted by the State, which form the basis for the Courts assertion that the outlawing of ‘commercial sex’, seems unsubstantiated and weak.⁴⁹⁶ The fact that prostitution breeds crime is not disputed. However, the crimes associated with prostitution relate specifically to the vulnerabilities of women in situation of sexual relations.⁴⁹⁷ Women engaged in prostitution are not able to negotiate the terms of the interaction, specifically safe sex, and as such are vulnerable to physical and gender-based violence.⁴⁹⁸ In relying on the submissions of the State, the Court has therefore failed to take the aforementioned into account. While the State submits (and the Court accepts) that the prostitution leads to exploitation of women and children, it does not take into account that women and children are forced into prostitution because of these very vulnerabilities

⁴⁹² Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 9.

⁴⁹³ S v Jordan, para. 15.

⁴⁹⁴ To this extent, it is not clear whether the constitutional purpose referred to in the majority judgment relates to the purpose of the legislation in question. The majority judgment refers to the constitutional purpose of outlawing commercial sex, yet the provision in question forms part of the Sexual Offences Act which does not seek to outlaw commercial sex but rather deal with sexual offences in general. See further Irma Kroeze, “Sin and Simulacra: Some Comments on the Jordan Case,” *Journal of South African Law*, no. 3 (2003): 558-563.

⁴⁹⁵ S v Jordan, FN. 11.

⁴⁹⁶ Rósaan Krüger, “Sex Work from a Feminist Perspective: A Visit to the Jordan Case,” *South African Journal on Human Rights*, Vol. 20 (2004): 149.

⁴⁹⁷ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 8.

⁴⁹⁸ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 8.

and because of exploitation.⁴⁹⁹ The Court, and the State, incorrectly assumes that the majority of women and men enter into prostitution by their own volition, and without duress, coercion or threat of violence.⁵⁰⁰ This is an incorrect assumption and in my opinion, the Court has neglected to take into account the specific gender roles in the practice of prostitution. The Court accepts the States submission that the practice of prostitution leads to the trafficking of children. While this is correct, the Court and the State had failed to take into account the fact that women (and to a certain degree, men) who are engaged in prostitution do so as a result of trafficking and that prostitution leads to an increase in the trafficking of women, and not only children.⁵⁰¹ Finally, the Court readily accepts the States assertion that prostitution leads to an increase in sexually transmitted diseases. However, it is not clear the extent to which this is based on fact. No quantitative or qualitative evidence had been provided to substantiate this claim which the Court so readily accepts. Moreover, the increased risk of sexually transmitted diseases results directly from the inability of women and men engaged in prostitution to access health and sexual health care services for fear of being exposed as a prostitute, secondary victimisation and, in the case of women, biological vulnerabilities to STDs.⁵⁰² The particular vulnerability and inequality of women, not only in prostitution, but normal relationships, to negotiate safe sex is not taken into account by the court as the Court assumes that it is by the own action that prostitutes risk and spread sexually transmitted diseases. It is my opinion that in interpreting the gender neutral provisions of the Act in question, the Court has failed to take into account that women are mostly engaged in the selling of sexual services, that there exists unequal gender roles in the sexual relations and that women are particularly vulnerable to be exploited and being forced into prostitution.⁵⁰³ In this regard, the Court has erred in its reliance on the assertions made by the State.

In this matter, the majority judgement found that:

“if the public sees the recipient of reward as being ‘more to blame’ than the ‘client’, and a conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. In this regard I agree with the joint

⁴⁹⁹ Rósaan Krüger, “Sex Work from a Feminist Perspective: A Visit to the Jordan Case,” *South African Journal on Human Rights*, Vol. 20 (2004): 140.

⁵⁰⁰ Rósaan Krüger, “Sex Work from a Feminist Perspective: A Visit to the Jordan Case,” *South African Journal on Human Rights*, Vol. 20 (2004): 140.

⁵⁰¹ Luke Hilton, “Contemporary Slavery: Sex trafficking in South Africa and Suggested Solutions,” *Postamble Journal*, No. 3(1) (2007): 51.

⁵⁰² Nicole Fritz, “Crossing Jordan: Constitutional Space for (Un)Civil Sex?” *South African Journal on Human Rights*, Vol. 20 (2004): 232.

⁵⁰³ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 9.

judgment that by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable.”⁵⁰⁴

In examining the paragraph above as a reason for the majority decision, various issues emerge. Firstly, the majority judgment asserts that the stigma experienced by prostitutes exists as a result of societal attitudes towards to prostitutes and not as a result of the law that criminalises their actions. While the practice of prostitution does indeed draw stigma from societal attitudes, stigma is also drawn from the criminalisation of prostitution as well.⁵⁰⁵ The mere criminalisation of an action draws stigma because it attaches a notion of deviancy to that action.⁵⁰⁶ However, the assertion that men and women willingly engage in prostitution is problematic. The Court does not take into account the particular vulnerabilities of women to being sexual exploited and the fact that women and men (and indeed children) are forced into prostitution because of debt bondage, coercion, duress or fear of violence.⁵⁰⁷ In this regard, the Constitutional Court incorrectly assumes that every man and woman who engages in prostitution does so voluntarily. The Court therefore incorrectly asserts that despite these vulnerabilities that women and men willingly submit to societal stigma and becoming vulnerable. The Court does however go further to state that:

“It was not suggested that prostitutes have no choice but to engage in prostitution. It was accepted that they have a choice but it was contended that the choice is limited or ‘constrained’...I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.”⁵⁰⁸

This statement is highly problematic. The Court in this instance takes cognisance of the fact that those who are engaged in prostitution might do so against their own free will, or under duress or fear of violence, but highlights that these factors were not forwarded to the Court as substantiation for the fact that section 20(1)(aA) amounts to discrimination.⁵⁰⁹ As has already been stated, the Court is more than willing to infer certain facts from pieces of legislation (like the Riotous Assemblies Act⁵¹⁰) but seems unwilling to do so where those inferences might lead to the assumption that prostitutes engage in prostitution because they are forced or coerced.

⁵⁰⁴ S. v Jordan, para. 16.

⁵⁰⁵ Rósaan Krüger, “Sex Work from a Feminist Perspective: A Visit to the Jordan Case,” *South African Journal on Human Rights*, Vol. 20 (2004): 140.

⁵⁰⁶ “‘Criminalisation’ increases stigma and punishes vulnerability,” *Speaking Up: Diary of an HIV+ Activist*, <<http://hivpolicyspeakup.wordpress.com/2010/09/20/‘criminalisation’-increases-stigma-and-punishes-vulnerability/>> (accessed on Oct. 29, 2010).

⁵⁰⁷ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 9.

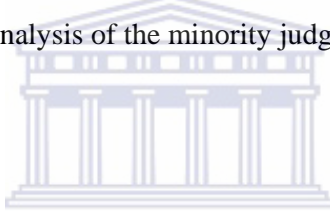
⁵⁰⁸ S. v Jordan, para. 10.

⁵⁰⁹ Rósaan Krüger, “Sex Work from a Feminist Perspective: A Visit to the Jordan Case,” *South African Journal on Human Rights*, Vol. 20 (2004): 143.

⁵¹⁰ 17 of 1956.

Moreover, it is asserted that the Court in this instance had failed to take into account previous judgments made in which the Court accepted that the consequences of the actions had indirectly discriminated against one party.⁵¹¹ In looking at whether specific conduct was discriminatory, the Court needed to look at the differential impacts of that legislation. In that case, the Court held that while conduct may appear on the face of it to be non-discriminatory, it may still result in discrimination.⁵¹² In relation to prostitution, the Court had failed to take into account its previous judgment that while the provisions of section 20(1)(aA) might appear to be non-discriminatory, it might still have discriminatory impacts insofar as women are concerned.⁵¹³

On the basis of the discussion above that there appears to be major deficiencies in the majority judgment of the Constitutional Court in this matter. However, the majority judgment cannot be viewed in isolation and it is therefore necessary to investigate the discussion provided in the minority judgment as these might affirm the arguments provided above. The following section will therefore provide a discussion and analysis of the minority judgment in the matter of *S v Jordan*⁵¹⁴.



6.4 The Minority Judgment

An important consideration in the analysis of this case is the minority judgment and the importance for the development of the law in answering the legal question. In the case of *S v Jordan*⁵¹⁵, Judges O'Reagan and Sachs wrote the minority judgment, which is considered a more “contextual analysis on a substantive understanding of gender equality.”⁵¹⁶

The first issue the minority judgment dealt with, was how the section 20(1)(aA) was interpreted. The minority judgment held that on the face of it, the section appears to be gender-neutral but that this did not take into account the subjective application of the section in practice.⁵¹⁷ In support of this assertion, the minority judgment stated 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

⁵¹¹ City Council of Pretoria v Walker 1998 (3) BCLR 257.

⁵¹² Roets Louw, “The Constitutional Court Upholds the Criminalisation of Sex Work,” *Agenda* no. 57 (2003).

⁵¹³ Roets Louw, “The Constitutional Court Upholds the Criminalisation of Sex Work,” *Agenda* no. 57 (2003).

⁵¹⁴ 2002 (2) SACR 499 (CC).

⁵¹⁵ 2002 (2) SACR 499 (CC).

⁵¹⁶ Jennifer Simpson, “Stereotyping Sex Workers: S v. Jordan and others,” *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women’s Human Rights*, 2009: 7.

⁵¹⁷ *S v Jordan*, para. 40.

the statute) was brought to our attention, and the state did not seek to challenge the assertion that in practice only the prostitutes were charged in terms of the section.”⁵¹⁸

The reasoning of the minority judgment highlights the problematic nature of the practical application of the section and how it is used to target the seller of sexual intercourse.⁵¹⁹ In this way, the Judges in the minority judgment developed a more subtle understanding of gender inequality.⁵²⁰

The minority judgment further supports an earlier assertion that the intention of the legislature in terms of the Sexual Offences Act⁵²¹ was not to criminalise the buyer, but only the actions associated with the seller of carnal sexual intercourse for reward.⁵²² This is the case in most Commonwealth jurisdictions around the world, and reflected the purport of the legislation at hand.⁵²³ It was clearly not the intention of the legislature to criminalise the actions of the buyer or the legislation would have reflected so.⁵²⁴ Moreover, this assertion is supported by the later amendment to the Sexual Offences Act⁵²⁵ which includes the criminalisation of the buyer of carnal sexual intercourse. This view is supported by the minority judgment when it says:

“In the circumstances, we cannot accept that it is in accord with our constitutional values for an extended definition to be given to section 20(1)(aA). Indeed, in our respectful view, to do so would be contrary to constitutional values. First, it would be destructive of the principle of legality which requires certainty as to the definition of crimes, and secondly it would intrude on the legitimate sphere of the Legislature in an area of considerable public controversy.”⁵²⁶

The minority judgment also used Constitutional Court jurisprudence in order to support this view. It relied on the judgment in the case of *President of the Republic of South Africa v Hugo*⁵²⁷ in which it was found that it is necessary for the court to look at the heading of the legislative section when interpreting the a statute.⁵²⁸ In this regard, the heading of section 20(1)(aA) refers to: “Persons living off the proceeds of prostitution.” One can therefore assume that the section refers only to

⁵¹⁸ S v Jordan, para. 42.

⁵¹⁹ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 23.

⁵²⁰ Roets Louw, “The Constitutional Court Upholds the Criminalisation of Sex Work,” *Agenda* no. 57 (2003).

⁵²¹ 23 of 1957.

⁵²² Rósaan Krüger, “Sex Work from a Feminist Perspective: A Visit to the Jordan Case,” *South African Journal on Human Rights*, Vol. 20 (2004): 148.

⁵²³ S v Jordan, para. 44.

⁵²⁴ Kakule Kalwahali, “The Criminalisation of Prostitution in South African Criminal Law,” (LL.M. diss., University of South Africa, 2009), 22.

⁵²⁵ 23 of 1957.

⁵²⁶ S v Jordan, para. 46.

⁵²⁷ 1997 (6) BCLR 708.

⁵²⁸ Gretchen Carpenter, “Of prostitutes, pimps and patrons - some still more equal than others?,” *South African Public Law*, Vol. 19 (1) (2004):235.

prostitutes and not to those who purchase sexual intercourse.⁵²⁹ As such, the only reasonable interpretation of section 20(1)(aA) amounts to discrimination.

In terms the stigma against prostitutes, Judges Sachs and O'Reagan did not agree with the grounds of Judge Ngcobo's decision. They found that criminalising primarily the prostitute reinforces and perpetuates sexual stereotypes "which degrade the prostitute but does not equally stigmatise the client, if it does so at all."⁵³⁰ Such criminalisation only serves to reinforce the notion that prostitutes are women who repeatedly allow themselves to be defiled and are women who are unclean and unhealthy and there they deserve to be punished.⁵³¹ Moreover, these stereotypes prohibit women from accessing health and sexual health services as they are subjected to secondary victimisation and as such deserve to be outlawed.⁵³² In contrast, the men as the buyers of sex are not subjected to the same stereotypes, and are rather seen as faceless victims who have temporarily fallen from respectability.⁵³³

It is clear that the minority decision in the case of *S v Jordan* takes into account the gender-related aspects of prostitution and uses these factors when it interpreted the facts of the case, but only to a limited degree.⁵³⁴ This is an important finding and can speak to the need for the South African Government should approach prostitution. The minority judgment strikes at the notion of stereotypical roles of men and women: where men are so virile that it necessitates the spreading around of sex and that this virility is too much for one woman.⁵³⁵ The minority judgment finds these stereotypes problematic and is of the opinion that they further reinforce the notions of women's weakness and vulnerability.⁵³⁶

⁵²⁹ Gretchen Carpenter, "Of prostitutes, pimps and patrons - some still more equal than others?", *South African Public Law*, Vol. 19 (1) (2004):235.

⁵³⁰ *S v Jordan*, para. 72.

⁵³¹ Jennifer Simpson, "Stereotyping Sex Workers: *S v. Jordan* and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 7.

⁵³² Jennifer Simpson, "Stereotyping Sex Workers: *S v. Jordan* and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 10.

⁵³³ Jennifer Simpson, "Stereotyping Sex Workers: *S v. Jordan* and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 12.

⁵³⁴ While the minority judgment took a somewhat different view to that of the majority judgment, the minority judgment still concurred with the majority judgment on important aspects, including the notion that prostitutes diminish their dignity by commodifying their bodies. See further Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 146.

⁵³⁵ Simpson, J. (2009).

⁵³⁶ Roets Louw, "The Constitutional Court Upholds the Criminalisation of Sex Work," *Agenda* no. 57 (2003): 105.

6.5 Implications of *S v Jordan* on the South African Legal Framework

The case of *S v Jordan*⁵³⁷ has not only had a profound impact on the prostitution discourse within South Africa but has also revealed the way in which the Constitutional Court views the realities of gender inequalities.⁵³⁸ More critically, it has acted as a precursor to the way in which South African Courts have begun to look at the gender inequality in terms of sexuality.

On the one side, the majority judgment has highlighted the entrenched notions of female sexuality in relation to the law and how the law has been used to restrict the freedom of sexuality of women.⁵³⁹ Moreover, the majority judgments reliance on unproven facts in support of the criminalisation of prostitution for a legitimate constitutional purpose is problematic.⁵⁴⁰ Effectively, it punishes the prostitute alone for the social ills and vices that are bred out of prostitution. By proscribing 'commercial sex' in the way that the majority judgment has, the Court does not take into account the inherent vulnerabilities of women who are involved in prostitution and that the law is subjectively applied to punish mostly women.⁵⁴¹

The majority judgment illustrates its unwillingness to accept a wider definition of equality by choosing rather to rely on obtuse references to legislation that has no bearing on the issue in question (namely prostitution) and uses unsubstantiated assertions (by the prosecution) in order to reinforce this unwillingness.⁵⁴² The objective of the Act concerned stems from legislation that sought to restrict intercourse in a specific way - forbidding sexual intercourse between men and women of different races.⁵⁴³ Furthermore, by relying on the gender neutrality of legislation, the majority judgment does not take into account the differential impacts of gender neutral legislation on men and women, particularly in an area where women are more at risk than men.⁵⁴⁴ In doing so, it negated to take in cognisance jurisprudence that highlighted differential impacts of legislative action on both men and women, and in this case, between the buyer and seller of prostitution.

⁵³⁷ 2002 (2) SACR 499 (CC).

⁵³⁸ Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 138.

⁵³⁹ Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 145.

⁵⁴⁰ Nicole Fritz, "Crossing Jordan: Constitutional Space for (Un)Civil Sex?" *South African Journal on Human Rights*, Vol. 20 (2004): 235.

⁵⁴¹ Kakule Kalwahali, "The Criminalisation of Prostitution in South African Criminal Law," (LL.M. diss., University of South Africa, 2009), 22.

⁵⁴² Jennifer Simpson, "Stereotyping Sex Workers: *S v. Jordan* and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 9.

⁵⁴³ Irma Kroeze, "Sin and Simulacra: Some Comments on the Jordan Case," *Journal of South African Law*, no. 3 (2003): 562.

⁵⁴⁴ Jennifer Simpson, "Stereotyping Sex Workers: *S v. Jordan* and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 9.

In my opinion, the majority judgment has subjectively ruled in favour of the buyer of prostitution, in that it has not taken into account the complex nature of prostitution, where women are more vulnerable than men, and where men are able to crudely take control of the resources of women, even if temporarily.⁵⁴⁵ Moreover, the whilst the majority correctly points out that subjective implementation of the law does not mean that there is a defect in it, it does not begin to address the issue of prostitution and gender equality.⁵⁴⁶

It has to be said that both these judgments have served to illustrate the limitations of the current and later legal framework in addressing the issue of prostitution and the stigma that is attached to prostitutes.⁵⁴⁷

On the other hand, the minority judgment has highlighted the (limited) progressive view of those sexualities.⁵⁴⁸ The minority judgment took a view that the existing legal framework sought to strike only at the person receiving the reward.⁵⁴⁹ In so doing, the minority examined the legislative purpose of the specific Act. The minority added that to extend the scope of the definition of the section in order to avoid unfair discrimination would contravene the principle of equality before the law.⁵⁵⁰ Simply put, in attempting to extend the definition of the prohibition in order to strike at both the buyer and seller of sexual intercourse, the majority had entered into the exclusive arena of the legislature.⁵⁵¹

It has to be said that the most important impact of the case is the amendment of the Sexual Offences Act⁵⁵² that now includes the explicit criminalisation of both the buyer and seller of sexual intercourse. The subsequent legislative changes can be seen as an attempt to prevent against further court challenges to the Act. However, this has not begun to address the subjective implementation of the Act. As recently as the 14 October 2010, police vice squads in the City of Cape Town have

⁵⁴⁵ Jennifer Simpson, "Stereotyping Sex Workers: S v. Jordan and others," *Paper Submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights*, 2009: 9.

⁵⁴⁶ Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 149-150.

⁵⁴⁷ Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 146.

⁵⁴⁸ Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 146.

⁵⁴⁹ Kakule Kalwahali, "The Criminalisation of Prostitution in South African Criminal Law," (LL.M. diss., University of South Africa, 2009), 20.

⁵⁵⁰ Gretchen Carpenter, "Of prostitutes, pimps and patrons - some still more equal than others?," *South African Public Law*, Vol. 19(1) (2004):235.

⁵⁵¹ Kakule Kalwahali, "The Criminalisation of Prostitution in South African Criminal Law," (LL.M. diss., University of South Africa, 2009), 20.

⁵⁵² 23 of 1957.

continued to target prostitutes by arresting and profiling them.⁵⁵³ It is clear that the majority judgment and the subsequent amendments to the Sexual Offences Act has not had the desired effect.

6.6 *Kylie v CCMA and Others*⁵⁵⁴

Since the outcome of the case of *S v Jordan* and the ensuing public discourse around prostitution, the South African legal landscape (and the accompanying dialogue) has considerably changed in relation to prostitution and the law. While the *S v Jordan* might have been the precursor for the way in which South African Courts view prostitution, the case of *Kylie v CCMA and Others* acts as a barometer in the way South African Courts view prostitution today. The following section will set out the facts of the case and then provide an analysis of the implications of the case on the way in which Courts view prostitution.

6.6.1 The facts of *Kylie v CCMA and Others*

The applicant, Kylie, was a sex worker who was employed in a massage parlour (Brigittes), owned by the third respondent, Michelle van Zyl, to provide various sexual services for reward. During this time, Kylie worked 14 hours a day and was paid a salary in exchange for the provision of sexual services. According to Kylie, she was ‘employed’ under a strict regime or rules and fines, and was dismissed because of an infraction of those rules.⁵⁵⁵

Kylie considered her dismissal to be unfair and referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for consideration. During the proceedings at the CCMA, the second respondent raised the issue of whether the CCMA had jurisdiction in hearing the dispute between an employee and an employer given that the two parties were engaged in an illegal activity. The second respondent allowed both the applicant and the third respondent to make submissions in this regard.

Upon consideration of the submissions, the second respondent however ruled that the CCMA did not have jurisdiction to arbitrate the dispute on the basis that the nature of the work being

⁵⁵³ Rafiq Wagiet, “Cape authorities plan to root out prostitution,” Eye Witness News, Oct. 14, 2010 <<http://www.ewn.co.za/articleprog.aspx?id=50701>> (accessed on the Oct. 14, 2010).

⁵⁵⁴ (CA 10/08) 2010 (4) SA 383.

⁵⁵⁵ *Kylie v CCMA and Others* (CA 10/08) 2010 (4) SA 383.

considered in the dispute was prohibited by the Sexual Offences Act⁵⁵⁶ and that the subsequent employment contract between the applicant and the third respondent was accordingly invalid. Essentially, the CCMA rules that Section 23 of the Constitution⁵⁵⁷.

The applicant subsequently approached the Labour Court (the Court *a quo*) for review, who upheld the CCMA's ruling. The Labour Court agreed with the CCMA and upheld the ruling of the CCMA. The basis for the Labour Court's judgment was based on the fact that the Court accepted that the relationship between Kylie and her employer did not constitute a valid employment relationship as Kylie was involved in illegal employment.⁵⁵⁸ As such, the applicant was not entitled to remedies under the Labour Relations Act, 66 of 1995.

The applicant based her appeal on the ground that the Labour Relations Act defines an employee as anyone who works for another person, and therefore the Labour Relations Act applies to all employment relationships regardless of whether they are underpinned by enforceable contracts or not. Moreover, the applicant forwarded that the Labour Relations Act does not require the existence of an enforceable employment contract in order to draw benefit from the Act.

The applicant then appealed to the Labour Appeal Court for a ruling. The Labour Appeal Court then had to decide whether the applicant was indeed protected by section 23 of the Constitution and the right to fair labour practices, and therefore would be entitled to a remedy for unfair dismissal as provided by the Labour Relations Act.⁵⁵⁹

6.6.2 The Judgment

The judgment in the case of Kylie is particularly important as it represents a development in the South African jurisprudence in relation to prostitution. While this is purely a labour relations case, it does have an impact on the way in which the Courts view prostitution in the future. The judgment is important for two reasons: firstly, the Court accepts the notion that prostitution is considered a form of labour for the purposes of the Labour Relations Act and that as such,

⁵⁵⁶ 32 of 2007.

⁵⁵⁷ Section 23 of the Constitution deals specifically with labour relations.

⁵⁵⁸ "Case Summary: August 2010," *Construction Industry Development Board*, <http://www.cidb.org.za/Documents/PDM/Court_Cases/PDM_CourtCases_Kylie.pdf> (accessed Feb. 16, 2011).

⁵⁵⁹ "Case Summary: August 2010," *Construction Industry Development Board*, <http://www.cidb.org.za/Documents/PDM/Court_Cases/PDM_CourtCases_Kylie.pdf> (accessed Feb. 16, 2011).

prostitutes (or sex workers for the purposes of the Labour Relations Act) are afforded protections under the Labour Relations Act and Constitution.

In its judgment, the Labour Appeal Court held that sex workers are subject to an employment relationship and as such was afforded protections under section 23 of the Constitution, particularly the right to fair labour practices and the right to dignity.⁵⁶⁰ As such, the CCMA does indeed have the jurisdiction to consider the matter.

However, the court ruled that while prostitutes might be recognised as employees, they might not be entitled to a remedy under the provisions of the Labour Relations Act. The Court or CCMA would have to consider the merits of each case in order to make an order relating to an applicants right to an appropriate remedy.

6.6.3 Analysis

As previously stated, the judgment in *Kylie* presents a clear development in the South African jurisprudence in relation to prostitution. The Labour Appeal Court (the Court) had accepted that the Labour Relations Act applied to all workers in South Africa, regardless whether their conduct was unlawful.



The Court approached the *Kylie* case from a Constitutional perspective and found that section 23 of the Constitution applied to everyone in South Africa, regardless of whether their conduct is indeed unlawful.⁵⁶¹ The Court found that the Constitutional Court had previously held that section 23 of the Constitution focused on the relationship between the worker and the employer as well as the dignity of that relationship.⁵⁶² Moreover, section 23 therefore does not preclude an employer and employee who are not subjected to an enforceable employment contract to draw benefit and protection from the Labour Relations Act. Because the relationship between the applicant and the third respondent mirrors that of a contractual employment relationship, the applicant can indeed derive benefit from section 23 of the Constitution. This finding is highly problematic as it effectively affords those who find themselves in relationships that might meet the requirements of

⁵⁶⁰ “Case Summary: August 2010,” *Construction Industry Development Board*, <http://www.cidb.org.za/Documents/PDM/Court_Cases/PDM_CourtCases_Kylie.pdf> (accessed Feb. 16, 2011).

⁵⁶¹ “Case Summary: August 2010,” *Construction Industry Development Board*, <http://www.cidb.org.za/Documents/PDM/Court_Cases/PDM_CourtCases_Kylie.pdf> (accessed Feb. 16, 2011).

⁵⁶² “Case Summary: August 2010,” *Construction Industry Development Board*, <http://www.cidb.org.za/Documents/PDM/Court_Cases/PDM_CourtCases_Kylie.pdf> (accessed Feb. 16, 2011).

the Labour Relations Act and the Constitution, but whose conduct might be grossly illegal, the protections under the aforementioned Acts. This might be the case of hitmen who are hired to carry out murders. While the conduct is indeed unlawful in terms of the common law, there exists a relationship between the hitman and the person hiring the services of the hitman and as such, the hitman is afforded protections under the Labour Relations Act and the Constitution. The only limitation in this regard relates to the remedies that are available to the hitman.

The Court asserts that the right to life and dignity are absolute and are afforded to even the vilest of offenders. The denial of the fair labour practices can be viewed as tantamount to exploitation and therefore a gross denigration of a persons dignity.⁵⁶³ However, the Court incorrectly assumes that all prostitutes voluntarily participate in prostitution. In fact, the Court asserts that only children under the age of 18 and those who have been trafficked are exempt from the protections of the Labour Relations Act, as they are afforded protection under other pieces of legislation, namely the Sexual Offences Act.⁵⁶⁴ The Court therefore particularly negates those who are forced into prostitution. While the refusal of labour rights to prostitutes might negate them of their dignity, those prostitutes who are forced into prostitution (and indeed form the majority of prostitutes in South Africa) are also robbed of their dignity, freedom of movement, and may be subjected to slavery, servitude and forced labour. It is highly problematic that the Court had not taken this into account in handing down its judgment.

Moreover, the judgment specifically refers to the vulnerability of prostitutes. More specifically, it says that the Court needs to safeguard against the exploitation of prostitutes given their economically and socially weaker status than their employers. This is a particularly important factor as prostitutes are often forced to work in severely dangerous and inhumane circumstances, with curtailments on their movement, working hours, clientele and the like. This is also forwarded as evidence by the applicant in her initial submissions. However, the case of *Kylie* might be an exception to the rule as the majority of prostitutes in South Africa are forced into prostitution. In this case, the employment relationship only exists because the prostitute has been placed their under duress. The aforementioned factors therefore compound the inherent vulnerabilities, as stated by the Court, that exists among prostitutes.

⁵⁶³ *Kylie v CCMA and Others* (CA 10/08) 2010 (4) SA 383.

⁵⁶⁴ "Case Summary: August 2010," Construction Industry Development Board, <http://www.cidb.org.za/Documents/PDM/Court_Cases/PDM_CourtCases_Kylie.pdf> (accessed Feb. 16, 2011).

It would seem that the case of *Kylie* has acted as a catalyst to the development of the concept of prostitution and the way in which the South African Judiciary has viewed the practice. Indeed, the Court in the case of *Kylie* has adjudicated on the basis of the facts; it has taken the case of *Kylie* in isolation of the nature and extent of prostitution in South Africa. *Kylie* represents the upper end of prostitution in South Africa, while the majority of prostitutes work on the streets and are vulnerable to higher degrees of abuse and infractions on their dignity, by the very nature of their work (rather than on the nature of their employment relationship).



8. CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The aim of this dissertation is to find an appropriate legal framework that addresses prostitution in a manner that is guided by the principles of the Constitution.⁵⁶⁵ This was done by analysing primary sources of data around the topic of prostitution. In doing so, it sought to provide: a nexus between human rights and prostitution; an examination of the prevailing international norms and standards that govern prostitution and a discussion on the South African legislative and judicial approach to prostitution. It also provides an analysis of the Swedish legislative framework on prostitution in an attempt to provide a best practice model. The following section will therefore provide the conclusions reached in each of the aforementioned chapters and end with the provision of recommendations in order to meet the aims of this dissertation.

7.2 Conclusions

In viewing the current international legal framework it is clear that there exists a distinction between *forced* and *voluntary* prostitution.⁵⁶⁶ The emerging trend in international legal instruments therefore leans towards the trend of the 'right to self determination' in relation to prostitution and prostitutes. To this extent, one can conclude that the prevailing language used in international instruments speaks to the sovereignty of states and the right to choose a legal approach to prostitution that best addresses the developmental challenges and societal norms and standards.⁵⁶⁷ The explicit inclusion of *forced* prostitution is therefore an extension of the sovereignty of states and speaks directly to the human right to self-determination.⁵⁶⁸ However, it is my contention that this right to self determination should not override the critical fact that the majority of those involved in prostitution are subjected to various types of harm, violence and abuse.⁵⁶⁹ Moreover,

⁵⁶⁵ Act 108 of 1996.

⁵⁶⁶ Jo Doezema, "Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy," in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁵⁶⁷ The choice of legal approach to prostitution is often the outcome of rigorous political debate utilising the dominant definition of prostitution in that specific jurisdiction. This in turn has influenced the nature of state intervention in relation to prostitution. See further Joyce Outshoorn, "Introduction: prostitution, women and politics," in *The Politics of Prostitution - Women's Movements, Democratic States and the Globalisation of Sex Commerce* ed. Joyce Outshoorn. (Cape Town: Cambridge University Press), 6.

⁵⁶⁸ Jo Doezema, "Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy," in *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 37.

⁵⁶⁹ Kimberly Klinger, "Prostitution, Humanism, and a Women's Choice," *The Humanist*, Jan.-Feb. (2003):1.

the need for the eradication of *forced* prostitution is critical the realisation of gender equality internationally. A further conclusion in terms of the international legal framework is that it does not fully address the particular vulnerabilities in relation to men who are involved in prostitution. In realising that mostly women are involved in prostitution, the international legal framework has failed to address the challenges faced by men involved in prostitution.

It was found that the current legislative framework in South Africa has failed in its attempts to deal with prostitution and has ensured that prostitutes remain marginalised.⁵⁷⁰ It has amounted to discrimination on the basis of gender and has entrenched stereotypical and patriarchal notions of gender and sexuality. Moreover, this has been reiterated by the Constitutional Court of South Africa. Regardless of the choice of discourse, the nexus between prostitution and human rights is undeniable. As such, any attempt to address it should depart from the presumption that it is a human rights issue.

Prostitution in South Africa is underpinned by socio-economic factors and the feminisation of poverty that has fed into the consideration of prostitution as a viable option.⁵⁷¹ This is problematic as it merely reinforces the vulnerabilities of women by making them even more susceptible to severe sexual, physical and emotional violence, HIV/AIDS and STD infections and harassment from law enforcement officials. In terms of the demand for prostitution in South Africa, it is concluded that this is based on stereotypical views of gender and sexuality.⁵⁷² Moreover, prostitutes continue to face constant violations of their civil and human rights highlighted by high levels of violence and dismissive attitudes of police officials and health care workers.⁵⁷³

The South African Government also faces a situation where the dichotomy between the intended service provision for those who are trafficked for sexual exploitation and *normal* prostitutes will be highlighted through the promulgation of legislation dealing the trafficking in persons. The Parliament of the Republic of South Africa is currently considering trafficking legislation that provide for health care services to women and men who have been trafficked for the purposes of

⁵⁷⁰ Shane A. Petzer and Gordon M. Issacs, "SWEAT The Development and Implementation of a Sex Worker Advocacy and Intervention Program in Post-Apartheid South Africa (with special reference to the western city of Cape Town)," *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 196.

⁵⁷¹ Johanna Kehler, "Women and Poverty: The South African Experience," *Journal of International Women's Studies*, Fall (2001):1, <<http://www.bridgew.edu/soas/jiws/fall01/kebler.pdf>> (accessed Aug. 12, 2010).

⁵⁷² Donna M. Hughes, "Men Create the Demand; Women Are the Supply," *University of Rhode Island*, <<http://www.uri.edu/artsci/wms/hughes/demand.htm>> accessed on Nov. 10, 2010).

⁵⁷³ Shane A. Petzer and Gordon M. Issacs, "SWEAT The Development and Implementation of a Sex Worker Advocacy and Intervention Program in Post-Apartheid South Africa (with special reference to the western city of Cape Town)," *Global Sex Workers*, ed. Kamala Kempadoo and Jo Doezema. (London: Routledge, 1998), 196.

sexual exploitation. In contrast, these services are not available to prostitutes who are not victims of trafficking. This highlights the underlying notions that prostitutes are not considered victims of sexual exploitation, but rather as victims of their own decisions.⁵⁷⁴ Erstwhile, the connection between prostitution and trafficking in persons for the purpose of sexual exploitation and prostitution cannot be denied.⁵⁷⁵

The discussions provided have sought to highlight that total criminalisation, decriminalisation and legalisation of prostitution have not had the desired impacts where these implemented. In contrast, they have merely led to an increase in prostitution and trafficking in women and children.⁵⁷⁶ This is substantiated by the relative success of the Swedish model of dealing with prostitution as it departs from the need for gender equality. It is concluded that a critical feature of this model is that it accords prostitutes victim status and therefore provides services that provides alternatives to prostitution.⁵⁷⁷

In terms of the South African jurisprudence on prostitution, it is concluded that patriarchal notions of sexuality are still entrenched in South African society and this these notions pervade even the highest court in the country.⁵⁷⁸ The case of *S v Jordan*⁵⁷⁹ has highlighted specific concerns with the way in which the Constitutional Court views the plight of women and men who are involved in prostitution by choosing to accept assertions that best suit their individual cultural biases. This is highly problematic as it further entrenches gender inequality in South African society. As such, the Constitutional Court is unable to locate the harms involved with prostitution and the subjective application of legislation in a human rights paradigm.

7.3 Recommendations

Drawing upon the conclusions made above, the following recommendations are made:

⁵⁷⁴ This dichotomy does not take into account the fact that most women and men involved in prostitution do so under duress, coercion and social, economic and physical determinants.

⁵⁷⁵ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Dehli: Apne Aap Women Worldwide, 2007), 87.

⁵⁷⁶ Ruchira Gupta and Ruchi Sinha, *Confronting the Demand for Sex-trafficking: A Handbook for Law-enforcement* (New Dehli: Apne Aap Women Worldwide, 2007), 87.

⁵⁷⁷ Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004):1192.

⁵⁷⁸ Rósaan Krüger, "Sex Work from a Feminist Perspective: A Visit to the Jordan Case," *South African Journal on Human Rights*, Vol. 20 (2004): 138.

⁵⁷⁹ 2002 (2) SACR 499 (C).

It is contended that the size and nature of prostitution internationally remains the topic of much debate. This is particularly true in the case of South Africa.⁵⁸⁰ A critical gap therefore exists in relation to approach to prostitution in the country.⁵⁸¹ It is therefore recommended that the South African Government, in partnership with civil society organisations, undertake a study on the nature and extent of prostitution in South Africa. This will begin to provide an appropriate and informed legal response to prostitution. The approach would also allow for the establishment of a comprehensive legal framework that is owned by South Africans and those involved in prostitution and that best speaks to the prevailing socioeconomic conditions in the country.

To this extent, the work of the South African Law Reform Commission is critical and essential to the development of a legislative framework that deals with prostitution. It is critical that the South African Government consider developing draft legislation that would seek to address prostitution in a manner that is entrenched in human rights. Moreover, it is recommended that such consideration should have due regard for draft legislation (currently being considered by Parliament) as well as the work of the South African Law Reform Commission that highlights the difference in the way that the South African Government deals with prostitutes and those who have been trafficked for the purposes of prostitution.

In addressing prostitution, it is recommended that any legislative and policy framework that is implemented in addressing prostitution be entrenched in the Bill of Rights contained in the Constitution.⁵⁸² This is essential to the realisation that prostitutes face specific vulnerabilities in terms of the lack of services that are guaranteed in the Constitution⁵⁸³.

It is further recommended that, in dealing with prostitution, any legislative measures that are introduced needs to be complemented by programmes and policies that seek to address issues of patriarchy, gender stereotyping and gender inequality. As has already been discussed, prostitution is essentially a gender equality issue. In this regard, it is critical that in order to address prostitution, the legislative framework should seek to suppress the demand for prostitution as oppose to encouraging it.

⁵⁸⁰ Ellen Mattisson and Helen Ekebrand, "Behing the Prostitution Debate in South Africa," (Faculty of Health and Society: Malmo University), 15.

⁵⁸¹ The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences:Adult Prostitution*, 2009, pg. 12.

⁵⁸² Act 108 of 1996.

⁵⁸³ Act 108 of 1996.

Highlighting that the international legal framework emphasises the right of each country to implement a legal approach to prostitution that best speaks to its individual circumstances, the Swedish Government has implemented a legislative framework that best speaks to both the demand and supply for prostitution. In this way, its approach is entrenched in human rights in that it speaks to removing vulnerable men and women from the harms involved with prostitution. It is therefore recommended that in developing a legal approach to prostitution, the South African Government draw on the successes of the Swedish model.

The South African jurisprudence relating to prostitution has not had a favourable impact on the current public discourse surrounding prostitution. It is clear that the jurisprudence is entrenched in patriarchy and conventional norms of sexuality of men and women. This is problematic and needs to be addressed through the development of new jurisprudence in relation to prostitution. To this extent, the role of the civil society and Chapter 9 institutions like the Commission for Gender Equality are critical.⁵⁸⁴ Their contributions to the development of jurisprudence needs to be coordinated in a manner that realises the particular vulnerabilities of women who are involved in prostitution. It is therefore recommended that the current legislative framework and the subjective way in which it is implemented needs to be challenged from a human rights perspective in order to ensure that the rights of vulnerable women and men involved in prostitution are protected.

It is my opinion that partial criminalisation of prostitution would best address the issue of prostitution in South Africa, given our socio-economic situation. However, whichever legal model is adopted in South Africa, it is needs to be borne in mind that prostitution is tantamount to exploitation and discrimination and therefore cannot be tolerated in a constitutional democracy like South Africa.

⁵⁸⁴ In terms of Section 11 of the Commission for Gender Equality Act 39 of 1996, the Commission for Gender Equality is tasked with the evaluation of any Act of Parliament; any system of personal and family law or custom or any system of indigenous law, customs or practices; or any other law. To this extent, its role in the facilitation and development of contemporary jurisprudence is critical.