

THE HEALTH NEEDS OF SEX WORKERS IN THE CONTEXT OF HIV/AIDS
SUSCEPTIBILITY: A LEGAL PERSPECTIVE

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Chapter I

Introduction: Background and Purpose

It is a shocking fact that sex workers in South Africa are fourteen times more susceptible to being infected by the HI Virus than the rest of the population.¹ This position is heightened by the circumstance that sex work is criminalised in South African law by the Sexual Offences Act 23 of 1957 (previously known as the Immorality Act). It is submitted that the legal criminalisation of sex work directly impacts the vulnerability of sex workers to exploitation and abuse which exposes sex workers to a further risk of sexual exploitation and contraction of HIV. In the context of HIV/AIDS, the issue of sexual violence takes on alarming proportions since violence against women fuels the epidemic and the epidemic worsens the impact of violence against women.

This thesis examines the extent to which the health needs of sex workers and in particular their HIV/AIDS susceptibility are violated/ infringed in the context of legal criminalisation of the sex work industry. It further questions the extent to which South Africa has adequately managed to protect sex workers by contextualising their susceptibility to HIV/AIDS as a health rights issue, or whether they have failed to protect women sex workers by silencing their reality in favour of a masculine interpretation of sexual freedom. It will be argued that although South African law has made progress towards the feminisation of the law in some jurisdictions, significant gaps and problems persist particularly in relation to the “masculinist” judicial approach to women’s sexuality in the context of the sex work industry, with little or no understanding of the implications for sex worker’s health needs and increasing susceptibility to HIV/AIDS infection. Legislative and legal responses in the form of protective and coercive measures are examined with the intention of showing that the criminalisation of sex work operates as a pre-disposing factor to HIV/AIDS susceptibility and violence against sex workers.

¹Baral S ‘Burden of HIV Among Female Sex Workers in Low-income and Middle-income Countries: A Systematic Review and Meta-analysis available at www.thelancet.com/infection Vol 12 July 2012 accessed on 23 October 2012.

It is submitted that as a consequence of the stubborn persistence of a patriarchal attitude and approach to women's sexuality, sex worker's susceptibility to HIV/AIDS and economic vulnerability is heightened.

Why do women enter the sex work industry? A common perception for women's entry into the sex work industry market is located within explanations of socio-economic disadvantage, patriarchal hold in intimate partner relationships, and poverty. In fact the poor quality of their lives and poverty stricken situation is often the primary reason that forces them to enter the sex work industry. As a consequence of the criminalisation of the sex work industry there is an increasing feminisation of the HIV/AIDS epidemic that renders women and in particular female sex workers world wide the main sufferers who are unable to protect themselves and their healthcare needs. In the context of HIV/AIDS susceptibility the sex worker and the criminalisation of the sex work industry displays alarming proportions of violations of women's rights.

This thesis addresses the aforementioned concern within the human rights framework together with major legislative initiatives, as an attempt to highlight areas of concern where protection is lacking and/or intervention is required. Further it will focus on and offer critique on mainstream legal theory, jurisprudence and legal practice suggesting that its male-centred approach fails to pay adequate attention to the real experiences of women in the sex work industry in the context of HIV/AIDS infection and susceptibility. It is thus important to understand the actual gendered context in which women infected/affected by HIV live and how this impacts on their susceptibility and health needs.

1.1 Brief History of the Regulation of Sex Work in South Africa

Historically sex work in South Africa was criminalised, based on health regulatory reasons and not primarily based on moralistic stances as it is now. The current legislation on the matter is the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 and the Sexual Offences Act 23 of 1957 (previously known as The Immorality Act). Due to the fact that the Constitution of the Republic of South Africa 1996 contains a Bill of Rights that encompasses fundamental rights for all its citizens, there have been serious debates around whether it is justifiable for the current legislation to limit sex workers' rights to dignity, privacy, bodily integrity and healthcare.

Due to the challenges and hardships sex workers face in terms of healthcare it is clear that there is a need to develop the law in such a way that the industry is regulated to realise their rights; rather than not dealing with an issue that has been around for centuries and will not go away anytime soon.

Bodin and Richter² are of the opinion that by focusing on the 'reward' element being a criminal offence of sex work it appears not to help curb the challenges surrounding it and is a problem that has arisen in various cultural contexts. Rewards, inducements or payments often lie at the heart of sexual relationships which the law fails to recognise. Both marriage and sex work can have three similarities drawn from them. Firstly there is consent, secondly in exchange for goods or services and thirdly on the basis of intimacy taking place.

Women being a vulnerable group in society and resort to sex work out of desperation. Without this income their chances of survival would be minimal to none. Due to the fact that the National Health Act³ and state agenda is very weak in realising the right to healthcare for the vulnerable groups in society; healthcare cannot be accessed by many people within those vulnerable groups in society because they would need an income.

Nussbaum (2006)⁴ argues that most people use their bodies for economic advantage. She suggests that the majority of people use their bodies for money in some way or another unless for the exceptionally wealthy or unemployed. Failure to realise that sex work is a job that a women would resort to due to their socio-economic disadvantage is dangerous because it is through the criminalisation of sex work that their right to healthcare is overlook and not met. This is more dangerous for a sex worker whose reproductive health and general health needs are far greater than most because of the exploitative risks and exposure to HIV/AIDS they encounter due to the lack of legal protection in terms of clients, procurement and brothel owners.

Therefore the issue in dispute in this study is what can be done to decrease sex workers' vulnerability to sexual exploitation and contraction of HIV because as will be illustrated below the statistics indicate that criminalisation of the sex work industry makes it acceptable to exploit this vulnerable group and therefore increase their susceptibility to HIV/AIDS.

²Bodin C and Richter M "Adult, consensual sex work in South Africa - The Cautionary Message of Criminal Law and Sexual Morality"(2009) 25 SAJHR145.

³ Act 61 of 2003.

⁴Martha Nussbaum, "Whether from Reason or Prejudice' Taking money for bodily services" in *Prostitution and Pornography: Philosophical debate about the sex industry*, 175-6 (Jessica Spector ed., 2006).

1.2 Nature and Extent of the Problem

The World Health Organisation Global Programme on AIDS has highlighted the high prevalence of HIV among female sex workers and their clients in Africa and has called attention to their unmet needs for HIV prevention.⁵ In Sub-Saharan Africa research has shown that sex workers in particular are heavily affected by HIV and other sexually transmitted diseases with levels of infection exceeding the rate among other groups. According to Chen et al (2007) sex work forms a significant aspect within transmission dynamics of HIV. HIV prevalence among sex workers and their clients currently is perceived to be between 10%-20% than among the general population. In fact according to the World Health Organisation “with high rates of client change, the potential for onward transmission of HIV from an infected sex worker to other clients or partners may be more than 100 times greater than from other people living with HIV(PLHIV). In addition, sex workers who have other STI’s (especially ulcerative STIs such as herpes simplex virus [HSV]-2 and chancroid) are more likely to transmit HIV, particularly in settings where men are uncircumcised. Together, these factors may contribute to a differential in HIV transmission potential of more than 1000 times compared with lower-risk populations.”⁶ Sex workers constitute a key population within the general population affected by the HIV epidemic.

It is submitted in light of this that different populations have an unequal risk of acquiring the disease. Sex workers constituting a unique group of higher risk therefore require specific services and attention which in the context of the criminalisation of the sex work industry must differ in intensity and type of service that lower-risk groups enjoy. According to the World Health Organisation (2011) in sub-Sahara Africa there are no programmes within the country that specifically target HIV prevention among sex workers on an adequate scale.⁷ In fact the same study suggests that currently approximately one in three sex workers receives adequate HIV prevention services in sub-Saharan Africa, with even fewer having access to HIV treatment, care and support. Given that sex work is characterised by high rates of client change and unprotected sex, it is associated with high rates of HIV and other sexually transmitted

⁵ WHO and Global Programme on AIDS: *Consensus Statement from the Consultation on HIV epidemiology and prostitution*, Geneva, 3-6

⁶ WHO, Prevention and treatment of HIV/AIDS and other STIs targeting sex workers and their partners in Cote d’Ivoire, Report of the WHO Technical Support Mission, 15-17 October 2008.
<http://www.who.int/hiv/pub/populations/CI-PS-en08.pdf> (accessed on 21 November 2011)

⁷ World Health Organisation 2011 Preventing HIV Among Sex Workers in Sub-Sahara Africa: A literature Review November 2011

diseases. As Lurie points out (1999) “If you want to spread a sexually transmitted disease, you’d take thousands of young men away from their families, isolate them in single-sex hostels, and give them easy access to alcohol and commercial sex. Then, to spread the disease around the country, you’d send them home every once in a while to their wives and girlfriends”⁸

Internationally the statistical experience mirrors sub-Saharan experience. According to the World Health Organisation (2012) the prevalence of HIV among the sex worker population in some countries is as high as 65%.⁹ A national HIV surveillance was conducted in Bangladesh in the year 2000 which discovered that female sex workers were found to have been raped at a rate of 52% - 62% by men within a year.¹⁰

The extent of the problem is worse than most can imagine. In Namibia 148 sex workers were interviewed.¹¹ 72% of those sex workers had reported abuse either at the hand of a client, intimate partner or the police, the highest being client at 18%.¹² In India a survey conducted revealed that 80% of sex workers had been arrested without reason and 70% abused at the hands of the police.¹³

These statistics clearly indicate that there is a high rate of abuse and exploitation of sex workers and that their rights to privacy, human dignity, health, autonomy and equality are not being lawfully protected.¹⁴ It is submitted that such violation and risk exposure bares a direct link to the unregulated criminalised sex work industry which increases their susceptibility to the contraction of HIV. Therefore an urgent call for law reform is required to regulate the industry in order to meet the health needs amongst others of female sex workers.

1.3 Structure of Thesis

This thesis is divided into 5 chapters. The first chapter contextualises the aims of the study and gives a brief history of sex work in South Africa. It also offers to shed some light on the nature

⁸ Lurie MN (South Africa Medical Research Council, speaking about mines in South Africa). Quoted from, Schoofs M, All that glitters: How HIV Caught Fire in South Africa, The Village Voice, 28 April-4 May 1999.

⁹Note 7 above.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Ibid.

¹⁴Ibid.

and extent of the challenges and exploitation sex workers face due to criminalisation of the sex work industry.

The second chapter examines aggravating factors that accelerate and facilitate the spread of HIV/AIDS among sex workers and the socio-economic backgrounds that would place them in a disadvantaged position leading them to a life of sex work.

The third chapter sets out the legal status of sex work in South Africa and examines the case of *Jordan and Others v S* 2002 (11) BCLR in respect of the court's missed opportunity to vindicate the fundamental human rights of sex workers. Furthermore a discussion on the right to health which the Constitutional Court in *Jordan* (2002) failed to address. An examination of International Covenants will be briefly discussed in support of the decriminalisation and regulation of the sex work industry to vindicate their rights.

The fourth chapter sheds light on the initiatives taken in South Africa by institutions such as the South African Human Rights Commission and the National Strategic Plan (2012-2016) to address the HIV epidemic in South Africa and recognising sex workers as a minority group who are at a high risk to the susceptibility of HIV. The New Zealand Prostitution Reform Act (2003) is examined in light of its positive results in order to provide a model, parts of which could be adapted within a South African climate.

Finally the concluding chapter summarises the findings of the dissertation and reiterates the opinion that decriminalisation and regulation of the sex work industry will lead to a better quality of life for sex workers especially in light of their susceptibility to the contraction HIV.

Chapter II

Factors Contributing to Sex Worker's HIV Susceptibility

Women are a vulnerable group and have found to be a high risk group to the susceptibility of HIV.¹⁵ There are factors influencing women's vulnerability to HIV in South Africa. Those factors are their biological-make-up, socio-economic factors, gender-based factors, economic factors, challenges in safe sex practices and stigmatisation. Each of these will be discussed in turn.

2.1 Biological make-up

Due to the majority of sex workers being women there are biological factors that render them more susceptible to being infected with HIV/AIDS.¹⁶ Furthermore a study in a report of the South African Law Reform Commission¹⁷(SALRC) confirmed that women in particular younger women were more susceptible due to biological make up. An additional aggravating factor is that sex work usually occurs within "sexual debut."¹⁸ The reason being was that the cervix of a young woman is not very mature and a high load in vaginal secretions makes for a weaker barrier against HIV.¹⁹ Furthermore sex work is a high risk job in the context of healthcare because it involves multiple partners which expose them to the risk of HIV contraction.²⁰

"Sexual debut" would cause the tearing of tissue resulting in bleeding and the virus is then carried through the blood stream.²¹ Transmission occurs easier through sexual activity because the virus usually responds to a load of genital secretions. Particularly if sexual activity occurs in the context of sexual debut it could result in a higher risk of exposure to HIV transmission. The virus will set in the gut at the initial stage and thereafter cause massive destruction of the CD4+Tcells.

¹⁵ SA Law Commission Sexual Offences: Adult Prostitution Project 107 Issue Paper 19 (2002) 74.

¹⁶ Ibid.

¹⁷ S Kaim and Q Karim 'HIV/ AIDS in South Africa' Cambridge University Press 2005 2nd Ed. at page 289.

¹⁸ Ibid.

¹⁹ Note 15 above.

²⁰ Ibid.

²¹ Ibid.

Co-factors to biological susceptibility would be the presence of STI's, in particular ulcerative STI's such as chancroid, syphilis and herpes. There is further a prevalence of multiple partners which would facilitate a high rate of STD and STI's transmission and violence during forced or coercive sexual intercourse.²² STI's are relatively easy to treat in women and in men. The effects that a STI causes in woman may be asymptomatic therefore early detection thereof would be highly unlikely as no health affects would have prevailed. Due to the set back of the inability for early detection of the STI, women are then placed at a higher risk of contracting HIV.²³

Children who become prey to abduction and child trafficking are extremely vulnerable to the contraction of HIV.²⁴ It was found that children are at a greater risk of contracting HIV/AIDS because of their biological vulnerability with regards to their physique and lack of socio-economical bargaining power in safer sex practices.²⁵

Even through an infected person may appear to be well and healthy the virus will continue with its replication. Therefore the drop in the amount of cells can indicate the rapidness of the progression of the virus. Absence of therapy would mean that AIDS can set in from eight to ten years and death could occur within three to four years. It was found that most South African's carry the genetic make-up for rapid progression of the HI Virus to AIDS. Therefore because sex workers are not given opportunities to access healthcare to control and limit the severity of the symptoms HIV/AIDS it would usually result in death.²⁶ This would result in an unbearable quality of life until eventual death.

2.2 Socio-Economic Factors

Socio-economic factors can influence access to information, education, counseling and treatment. Cultural practices can also have the effect of lowering the social status of women.²⁷ This could limit their access to opportunities of development such as education, employment,

²² Note 15 above, 73.

²³ Onwuliri and Jolayemit: *Reaching Vulnerable and High Risk Groups in Nigeria* 311, available at www.apin.harvard.edu/Chater14.pdf accessed on 23/02/13.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Note 15 above, 94.

²⁷ Ellenore Meyer *Access to Health Care in South Africa: An Ethical Human Rights Obligation* (an unpublished MSc Med thesis, University of Witwaterstrand, Johannesburg 2010) available at www.wiredspace.wits.ac.za/bitstream/han accessed on 23/02/13

training, resources and the freedom to make choices about their own sexuality. It is usually younger women that are susceptible to exploitation and are exposed to non-consensual and unsafe sex.²⁸ The lack of autonomy they are able to practice increases the threat of HIV contraction. In light of condom use, women find it challenging to even suggest the idea in their relationships out of fear of abuse or violence from their male counterparts towards them.²⁹ In addition cultural practices involving wife inheritance, traditional wife sharing, polygamy and multiple partnering by their male partners accelerate the spread of the HIV epidemic.³⁰ Marrying girls off at a young age and in particular intergenerational sex also increase the risk and spread of HIV contraction.³¹

In a study done in Nigeria sexual matters are often not discussed.³² Schools are governed by moral and religious policies where sex would not be mentioned to or discussed with a child.³³ This reserved upbringing and moral stance can actually perpetuate the contraction of HIV through lack of knowledge about the consequences of multiple partner sexual relationships and unsafe sex practices. Furthermore it poses a danger to the health of young people in Nigeria because studies show that sexual debut sets off from the ages of 13-18 years of age.³⁴ In a 1992 National Demographic and Health Survey results showed that 62% of young people in Nigeria would have engaged in unprotected sex by the age of 19 years.³⁵

2.3 Gender Based factors

The gender inequalities occur in a South African climate in traditional cultures where war and violence was emphasised in a system of patriarchy. It was a system of masculinity and obedience to a specific hierarchy of order. This would then simultaneously leave women subordinate to men and vulnerable to exploitation and human rights abuses.

A system of patriarchy would only consider the needs and wants of men. Women are seen as mere objects and property to be used to give birth to heirs or satisfy the men's sexual needs.

²⁸ Ibid

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

Women's vulnerability would stem from a history of not being considered as human beings with special needs. They would not be afforded opportunities like education because that previously was for men only. Furthermore access to healthcare would sometimes require permission from a male figure (husband or father or elder brother) regardless of age or understanding. This would hinder a woman's development and limit their quality of life.

Through this system their socio-economic rights have been impaired. Currently women need to work harder than that of their male counterparts in order to succeed.³⁶ This is because they first need to overcome their gendered disadvantage and then take steps to achieve their goal. This process is often not possible which would lead them to turn to a readily available opportunity which is sex work.³⁷

There are clear gender imbalances in light of the HIV epidemic.³⁸ Gender roles and the relationships people have with one another are determinants of how the HIV epidemic will spread.³⁹ The imbalance occurs mainly in the age group of 15-24 years. This age group is found to have an imbalance where women are three times more likely to contract HIV than their male counterparts.⁴⁰

Even though it was found above that multiple sexual partners can result in the spread of HIV it does not mean that being in a monogamous sexual relationship or marriage will keep you safe and protected from the HIV epidemic.⁴¹ It was found that marriage increased the women's risk to contracting HIV.⁴² In a study conducted in Cambodia results showed that married men or men with steady girlfriends would have sex with them as well as with commercial sex workers. Furthermore the study revealed the reason for the high rate of HIV prevalence among these married and partnered women of monogamous relationships is lack of protection. It was found that 1% of women in these type of relations would have used a condom on their last sexual activity with their husband or partner.⁴³ The reason stems from feeling secure and safe in this form of relationship or as mentioned above out of fear of violence and abuse from their male partners.

³⁶ Note 23 above, 311

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid 312.

⁴⁰ Ibid 312.

⁴¹ Ibid 313.

⁴² Ibid.

⁴³ Ibid.

Furthermore with monogamous partnerships there is a prevalence of violence through sexual intercourse particularly anal sex where abrasions are caused and the contraction of HIV occurs more easily.⁴⁴

When caregivers and parents of the family fall ill and eventually die from AIDS it is then the responsibility of the young female to take it upon herself to take care of the family and drop out of school.⁴⁵ This can happen also where there is found to be no more funds available for the support of the household or to continue with their education.⁴⁶ Furthermore the consequences of this are that they may even have to look after their siblings. Their lack of education will hinder their goals of self-development. This will create a vicious cycle of poverty and vulnerability of women in society. As a result of these circumstances they may end up depending on family members, to whom they may represent an economic burden and find themselves vulnerable to abuse.

Women are frequently blamed for the spread of HIV despite their disadvantaged position in society and lack of opportunity to overcome their disadvantage due to a history of discrimination through cultural and traditional practices and moralised reasoning. Their position will remain as the “disadvantaged group” if the only available opportunity is the criminalised industry of sex work. Through the industry’s criminalisation they are not able to vindicate their right to protection from exploitative and abusive behaviour advocated towards them by their partners or anyone else in society.

2.4 Economic Factors

It is common cause that poverty facilitates the spread of the HIV pandemic.⁴⁷ Poverty also limits access to preventive measure to inhibit the spread or contraction of HIV. The spread of HIV increases the gap between the rich and poor and undermines an individual’s need for economic security.⁴⁸ Women who come from poor economic backgrounds are more susceptible to contracting HIV. It was found in a study in Nigeria that poor people are more susceptible to transactional sex and unprotected sex.⁴⁹ Female school children as mentioned above may be

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

forced to leave school to reduce financial expenses and increase the help around the home. In some cases widowed women may have to resort to participating in sex for reward in order to survive.⁵⁰

Sex work is not done out of choice but out of desperation.⁵¹ The criminalisation of the industry is not going to make it disappear nor will it help the sex workers leave the industry. It will merely perpetuate a viscous cycle of gender disadvantage and stigmatisation of sex workers.⁵² It will not enable them to vindicate their rights and improve the current standing in society or increase their chances for economic development.

2.5 Challenges in safe sex practices

Due to a sex worker being involved in constant high risk sexual behaviour they become more aware than most of the risks involved in their actions. They acknowledge and often wish to implement safe sex practices in their lifestyle in order to mitigate their chances of becoming infected with sexually transmitted diseases.

The South African Law Reform Commission in their reported that twenty four of the twenty five sex workers said that they have protected sex with casual clients and the other twenty three said they always use condoms with regular clients.⁵³ All sex workers involved in the study realised that negotiation of the use of condoms was a greater challenge with casual clients because they would not want to jeopardise a regular source of income. In a recent study⁵⁴ 28 out of 349 sex workers admitted to engaging in condom free sex with clients in respect of oral sex. However the study found that the sex workers do not use condoms for sex with personal partners.

Research conducted by the SALRC found that it is the clients rather than the sex workers that initiate unsafe sex practices. It was found that refusal to engage in sex without a condom would lead to the sex worker not being paid or being paid less which would be an aggravating factor as to how much they get paid. The entire reason they are in such work is because of their economic desperation and financial vulnerability. Furthermore insisting on using a condom

⁵⁰ Ibid 314.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Note 15 above, 66.

⁵⁴ Ibid.

would often lead to physical abuse. Sex workers would settle for as little as R10 extra for having sex without a condom because of their financial desperation.⁵⁵

A number of socio-economic factors would be dependent on whether they can demand condom use or not. This reiterates the point that women in the context of sex work due to the unequal bargaining power between men and women are unable to practice safe sex. Sex workers are aware and realise the implications of their high risk activity. Due to their socio-economic background they do not want to risk losing an income.

Therefore sex workers are generally more aware of the need to practice safe sex but cannot do anything about it. Most female sex workers are aware that their vulnerability is in their biological make-up and socio-economic background but unfortunately can do nothing about it because they are in unequal bargaining positions as opposed to the male client and have to succumb to their request if they want to receive payment.⁵⁶

2.6 The conditions of sex work

There are different systems of sex work. Indoor sex work would entail sex work being conducted in the form of a brothel and outdoor sex work would be solicitation by the sex worker or her procurer in public to attract customers to purchase commercial sex. Both unregulated environments place the sex worker in a vulnerable position which exposes her to the risk of exploitation and violation of her rights.

Factors that usually cause people to engage in outdoor sex work are that they are younger and poorer and more likely to be alcohol and drug dependant.⁵⁷ Even if the outdoor sex worker is aware that they need to practice safe sex, it is very rare that they can exercise their will in this regard because as mentioned above they are in unequal bargaining power to the police and clients.⁵⁸

⁵⁵A Karim 'Reducing the Risk of HIV Infection Among South African Sex Workers Socio-economic and Gender Barriers' (1995) at 1523.

⁵⁶Note 15 above

⁵⁷Ibid.

⁵⁸Ibid

It was found that the sex worker outside the Central Bureau District were least likely to be drug abusers.⁵⁹ However there has been an introduction of new drugs like “crack” and cocaine.⁶⁰ Research showed in the SALRC report⁶¹ that “crack” users were susceptible to HIV/AIDS because of its effects and would influence people to partake in risky sexual behaviour such as anal sex. Sex workers are particularly more susceptible to exploitation if they are drug addicts. They will agree to anything and engage in any type of conduct in order to receive money for the drug or the drug itself.⁶²

The non-regulation of brothel keeping also poses a risk to sex worker’s contracting HIV. It is very difficult for sex workers to have control over the manner in which they practice sex, whether it is safely or not.⁶³ This is due to the fact that sex workers are usually surrounded by many people that are in charge or in control of them. The reasons that people have control over them could be because of unpaid debt the sex worker may have or compliance for the supply of drugs or for money due to poverty stricken circumstances.⁶⁴ One of the members possibly involved in the “team” of the sex work industry is the "gatekeeper." Gatekeepers are the managers of the sex worker. They control how much he or she makes, whether they use condoms or not during the sexual intercourse and who their clients are.⁶⁵ In several settings police use anti-prostitution laws to harass, intimidate, abuse and rape sex workers in order for them to be set free.⁶⁶

It was discovered that sex workers who resided in Vancouver, Canada and New York did not report incidences of harassment, assault; rape, kidnapping and murder to the authorities. The reason for this is that they would be dismissed and often not registered as offences committed because it would not be taken seriously.⁶⁷ Studies also showed that in Indonesia and India where police raids were done, sex workers would be rounded up or beaten and forced to have

⁵⁹ World Health Organisation Information Bulletin ' Violence Against Women and HIV/AIDS: Critical Intersections' Series Number 3 page 2 available at:

<http://www.who.int/gender/documents/sexworkers.pdf> accessed on 27 October 2012.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Note 4 above.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

sex with corrupt police in exchange for their release.⁶⁸ Alternatively they would be placed in punitive institutions where they would be sexually abused and exploited.⁶⁹

A further study done in the United States on the issue of police raids found that police would often confiscate condoms on a large scale as it was thought to be evidence of intention to commit sex work.⁷⁰ This in turn would defeat the public health outreach programmes that attempted to encourage safer sex practices among sex workers and clients involved in the sex work industry.⁷¹

Sex workers themselves believe that exploitative and violent behaviour advocated towards them is normal behaviour and that it is an expected aspect of the job. This is because they are not informed of their rights and further believe that nothing will be done if their rights are infringed.⁷² Therefore an urgent call for law reform is required to regulate the industry and suffice to the needs of sex workers.

Another aggravating factor in terms of inability to access public healthcare was the stigma being perpetuated by the healthcare providers themselves.⁷³ Sex workers from the Russian Federation and India reported that hospital staff were rude and treated them very callously as oppose to other patients because of them being sex workers.⁷⁴ They were made to wait for longer periods and sometimes refused treatment if they returned to the healthcare facility and the healthcare provider knew of them being a sex worker.⁷⁵

2.7 Stigmatisation

It was suggested by the World Health Organisation (WHO) that the reason for the violence against sex workers is as a result of the stigma that is perpetuated against them.⁷⁶ More importantly it was found that the criminalisation of sex work allows for acceptance of abuse

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

and violence advocated towards sex workers.⁷⁷ In a recent study conducted in 2011 the results showed that sex workers are fourteen times more susceptible to the contraction of HIV than the rest of the population.⁷⁸ Sex worker's as part of the community have been neglected immensely particularly in the response to the HIV/AIDS pandemic.

Prevention of HIV infection is often limited for sex workers because of the lack of access to health care services or facilities. Research shown according to the SALRC is that sex workers are less likely to visit state funded clinics because of the possible ostracism that could be encountered by them.⁷⁹ Therefore primary healthcare and protection from STI's are continuously compromised.

The SALRC in a report found staff at public clinics to be rude to sex workers. The health clinic staff is often found to be unaccommodating to sex workers based on the type of conduct they engage in. Furthermore participants of the study did not inform the health staff that they were sex workers out of fear of discrimination and that their confidentiality might not be respected. Vital information such as being a sex worker is needed by a healthcare professional in order to treat and advise adequately on healthcare because of the high risks involved. Compromised healthcare on this level is unacceptable and is due to the criminalisation of the sex work industry. Through criminalisation the attached stigma to sex work has been allowed to perpetuate over many years and be used as an excuse to not treat and protect them.⁸⁰

Therefore it is clear that the nature and extent of challenges that sex workers face are grave and far reaching to each generation. The challenges that sex workers encounter are not being remedied through criminalisation but are being perpetuated through a vicious circle of exploitation, abuse and poverty. There is a clear need for a new approach towards the sex work industry in order to curb the spread of HIV among sex workers and afford them a better quality of life by providing them with the means to do so within a regulated framework. This will allow them to access amenities afforded to the rest of the population.

⁷⁷ Ibid.

⁷⁸ Note 8 above.

⁷⁹ Note 15 above, 82.

⁸⁰ Ibid.

Chapter III

The Legal Status of Sex Work in South African Law.

Sex work has not and never has been an offence in terms of the common law.⁸¹ Notwithstanding this position the first South African legislation regarding sex work appeared in the 19th century. However early legislation only pertained to specific matters relating to sex work and not sex work *per se*. In fact indecency was addressed in more general terms as opposed to sex work in any direct manner. The legislature aimed at outlawing vagrancy and loitering.⁸² Sex work was therefore not the primary problem being addressed in this and similar legislation, although the provisions could be interpreted to include soliciting for sex. At the turn of the century brothel-keeping, earnings of sex work and soliciting were addressed through the law.

Sex work was criminalised in the Zuid Afrikaansche Republiek in terms of section 4 of Law 11 of 1899. Gaum (2003) comments as follows “only women could be prosecuted in terms of this section; male prostitution either did not exist at the time (or was not acknowledged to exist) or was not considered worth criminalising. Women who occasionally stepped over the line fell outside the scope of this section. The provision clearly stipulated that only a woman who made her income through prostitution (Dutch: “... die van het plegen van ontucht hare broodwinning maakt...”) by taking or receiving money or any other consideration or by allowing a third person to receive money or any other consideration, whether directly or indirectly, could be prosecuted. The punishment was harsh indeed and included either a maximum fine of £500 or two years’ imprisonment, with or without hard labour. The prostitute could also face exile from the Zuid Afrikaansche Republiek.”⁸³

Another piece of legislation which was relevant to the prostitution trade was The Contagious Disease Prevention Act 39 of 1885. This Act was specifically applied in the Cape and was aimed at as the name suggests the spreading of contagious diseases with particular reference to gonorrhoea. Section 10 of the 1885 Act provided that any female could be brought before the resident magistrate to answer allegations of prostitution. A magistrate in the circumstances could order the woman to undergo medical examinations to determine whether she had any

⁸¹ *S v Jordan* 2002 (1) SA at 797 (TPD) at 799H

⁸² The Vagrancy Act of 1879 (C)

⁸³ L. Gaum “Turning Tricks: A Brief History of the Regulation and Prohibition of Prostitution in South Africa” (2003) *Stellenbosch L. Rev* 326.

contagious diseases.⁸⁴ Hospital detention for a maximum period of six months or discharge by a medical inspector was the appropriate sanction imposed should the woman be found to be affected.⁸⁵ Gaum (2003) comments that no provision was made for any mitigating factors when the detention of the women was ordered by the magistrate. In real terms this Act implied that women prostitutes were the main and direct cause for the spread of contagious diseases.

The Immorality Act of 1957 ensued and was aimed at prohibiting “illicit carnal intercourse between Europeans and Natives and other acts in relation thereto.”⁸⁶ This Act did not deal with prostitution or prostitution related offences directly, the latter was only addressed when the Immorality Act of 1957 changed to the Sexual Offences Act of 1988 which is still applicable today. Section 20(1)(aA) of the Sexual Offences Act of 1988 provides that a person who has unlawful; carnal intercourse or commits an act of indecency with any other person for reward is guilty of an offence. This provision entrenched the criminalisation of sex work for reward. It is important to note that this section was solely aimed at criminalising the conduct of the person accepting the reward (primarily female sex worker) and not at the person giving the reward. Clearly the sex worker is punished and not the client.

The South African Law Reform Commission released their report on adult prostitution.⁸⁷ The report entertained three concerns surrounding adult prostitution in South Africa; criminalisation, legalisation and decriminalisation. That report was not released pending a decision of the Constitutional Court which concerned the question of the Constitutional validity of the criminalisation of prostitution and brothel keeping.⁸⁸

The preamble of the Constitution aims to establish a society that is based on democratic values, social justice and fundamental human rights. Furthermore it states that we should aim to improve the quality of life for all citizens and have them equally protected by the law. The preamble sets out objectives so that through the Constitution society can achieve these fundamental human rights. A healthy society for all should be ensured. Everyone should be “equally” protected before the law. Everyone is inclusive of sex workers of South Africa.

The rights implicated in the regulation of sex work in order to breathe life into the preamble of the Constitution for sex workers are the rights to equality, dignity, privacy, bodily and psychological integrity and health.

⁸⁴ Section 12

⁸⁵ Subsections 19, 22 and 24 read together.

⁸⁶ Preamble to the Immorality Act 5 of 1927.

⁸⁷ SA Law Commission: Sexual Offences: The Substantive Law Project 107 Discussion Paper 85(1999)

⁸⁸ *Jordan and Others vs Sate* 2002 (11) BCLR 1117 CC

A discussion of the Jordan case highlighting the human rights implications for sex workers particularly their susceptibility to HIV/AIDS in a criminalised industry is now discussed.

3.1 Jordan and Others v S 2002 (11) BCLR 1117 CC

Background of the facts to the Jordan case

Ellen Jordan, Louisa Broodryk and Christine Jacobs were arrested on 20 August 1996 for contravention of the provisions of the Sexual offence Act 23 of 1957. Jordan was convicted on her plea of guilty in the magistrate's court for brothel keeping which is a contravention of section 2 of the 1957 Act. Broodryk pleaded guilty to the contravention of subsections 3(b) and (c) of the Act. Jacobs pleaded guilty for performing indecent acts for reward which is a contravention of section 20(1)(aA). The three accused took their matter on appeal to the high court⁸⁹ where the high court found that section 20(1)(aA) was unconstitutional because it discriminated against the sex worker and allowed the client to remain unpunished but however maintained that brothel keeping was unconstitutional as it amounted to human trafficking. Jordan and Broodryk took their appeal to the Constitutional court⁹⁰ to declare it invalid but were unsuccessful and 20(1)(aA) was found to be constitutionally justifiable.

The High Court Decision

In the decision of the Transvaal Provincial Division Spoelstra J held that section 20(1)(aA) which criminalizes sex work was unconstitutional because it discriminates against the sex worker on the grounds of gender. It discriminates on the grounds of sex and gender because the section in question criminalises the conduct of the sex worker only and not the recipient of the service offered. The court also held that there is very little difference between a sex worker who accepts money for her services than a woman who exchanges sexual favours for luxury holidays, accommodation, paid-for weekends or any alternative type of reward that could amount to a monetary benefit. Section 20(1)(aA) only outlaws the conduct of that of the service provider from the abovementioned instances which is commercial prostitution. The court held that such a provision is discriminatory.⁹¹

⁸⁹ *S v Jordan* 2002 (1) SA 797 (T).

⁹⁰ *Jordan and Others v S* 2002 (6) SA 642 (CC).

⁹¹ Note 89 above, para 800C-G.

The High court then went on to discuss the issue for brothel keeping where the tone transformed from progressive to moralistic. It was held the activities of a third party who manages or controls a sex worker even where it is voluntary is tantamount to human trafficking. The court held that brothel keeping is “loathed and despised or at least heavily frowned upon by all civilized communities.”⁹² As such the rights of those offending individuals would have to be subordinate to the majority of the community. Therefore on that reasoning the provision on brothel keeping was found to be constitutionally justifiable.

The High court had failed to distinguish between voluntary and forced sex work in light of brothel keeping. The common manner of dealing with prostitution world wide is to outlaw forced sex work because it does amount to human trafficking. In a South African climate it unreasonable to paint both voluntary and forced sex work with the same brush. Voluntary sex work has its place in South Africa and criminalising in light of brothel keeping will merely hold them in their vulnerable position further.

The High court’s reasoning for finding the provision justifiable in outlawing brothel keeping was based on the opinion that brothel keeping is offensive to society. Gaum (2003) is of the opinion that the fact that the court reasoned the conduct of such individuals is offensive and as such cannot be accepted. Gaum (2003) goes on to say that the offensiveness of an individual’s conduct is not included in the interim or final Constitution and therefore cannot be found to be a ground in order to justify the limitation of rights. On the other hand if the court had intended for its justification to be interpreted as in the ‘public’s interest’ then it too cannot be accepted. The primary objective of the Constitution is to protect the rights of individuals and to ensure that such said rights are not to be violated by anyone whose viewpoint may differ even if that point is of a moralistic stance.

The court’s decision in the high court is a much-needed progressive approach however the argument that is used in order to reach its progressive conclusion are laced with biased moralistic stances. Gaum (2003) suggests more objective arguments could have been used in order to reach the same conclusion and better decision on the brothel keeping issue. Such alternative arguments would be the arrest and prohibition of sex work would not deter prostitution or people from participating in sex work, but will only force them back to the streets in order to earn money to the pay the fines⁹³ or since the sex of the female is recognised as an economical asset then the female sex should be permitted to use this commodity to their

⁹² Ibid 802G.

⁹³ Gaum 2003 (note 83 above) 332.

economic benefit for financial gain⁹⁴ and further arguments surrounding the rights to financial autonomy, occupational choice and sexual self-determination.⁹⁵

The court although slightly progressive fails to place itself into the shoes of the sex worker and does not deliver a judgment based on merit. The Court finds it challenging to separate itself from its moralistic considerations but however is far more progressive and developed than that of the Constitutional Court judgment.

The Constitutional Court Decision

The author for the Constitutional Court majority judgment was Ngcobo J whilst Sachs J and O'Regan J authored the minority. The judges all agreed that outlawing brothel keeping was justifiable in light of the Constitutional dispute. However in light of whether soliciting sex and living of the earnings thereof was constitutional the court was split on their reasoning as to why the provision section 20(1)(aA) was constitutionally justifiable.

In light of the majority judgment handed down it was decided that section 20(1)(aA) did not unfairly discriminate against the sex worker through criminalization of the conduct of the sex worker and conduct of the client under different sets of legislation. It was reasoned by the majority court that there was no direct discrimination and that female sex workers were not the only target of the prohibition and therefore the provision was gender-neutral.⁹⁶ The aims and objectives of the provision was to prohibit commercial sex and if the consequences happened to be differentiation between the sex worker and the client then it should be allowed as a higher public objective was to be achieved.⁹⁷ Ngcobo J attempted to cover the glaring differentiation and submit that the client was still punishable under the Riotous Assemblies Act.⁹⁸ Ngcobo J went on to say that “if the public sees the recipient of the reward as ‘more to blame’ than the ‘client’, and conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the law.”⁹⁹

⁹⁴ Rene Guyon as quoted by Benjamin & Masters: *Prostitution and Morality A Definitive Report on the Prostitute in Contemporary Society and an Analysis of the Causes and Effects of the Suppression of Prostitution* (1964) 365-366.

⁹⁵ *World Whores' Congress Statements Draft Statements from the Second World Whores' Congress* (1986) in Gruen & Panichas *Sex, Morality and the Law* 127 128-130 available at www.mulr.com.au/issues/31_3/31_3_8.pdf accessed on 23/02/13.

⁹⁶ Note 90 above, para 10.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* 15-19.

⁹⁹ *Ibid*, para 16.

It was not an issue for the majority that most sex workers are female and most of the clients are male.¹⁰⁰ Kruger (2004) submits that the majority did not consider the *Harksen*¹⁰¹ test nor did they view the criminalisation of sex work in a lived reality or even attempt to interpret the consequences of such a provision through a gendered-lexicon.¹⁰² They took a positivist interpretation of the provision and stuck to the black letter of the law suggesting that the law is something that is completely separate from society.

Ngcobo J continued on his narrow reasoning to hold that the disputed provision aims to achieve a legitimate purpose to curb the ‘social-ills’ associated with sex work that society encounters. Examples given of the ‘social-ills’ were violent crimes, drug abuse and trafficking of women and children. These justifications were met with opposing arguments of the view that the provision was merely to uphold the moralistic views of society at the time. The amicus curiae submitted that the link Ngcobo attempted to draw between the presence of sex work and ‘social-ills’ is not because of sex work itself but rather due to the criminalisation thereof.¹⁰³

Ngcobo J did not entertain these submissions and stood by his view that the aforementioned ‘social-ills’ are associated with sex work. Ngcobo J further contended that once the legislature has created an Act is the court’s duty to give effect to the statute and not decide on whether the relation thereof was correct or not.¹⁰⁴ Ngcobo J’s submission on his duty as a judge is very dangerous as he implies he would give effect to legislation at any cost, regardless of its consequences even if those consequences entail human rights violations which are in contravention of the aims of the Constitution.

In light of economic activity Ngcobo J similarly submitted that prostitution is associated with ‘social-ills’ and the legislature aims to overcome those ills through the criminalisation of such conduct.¹⁰⁵

The majority failed to consider the Constitutionality of the provision. The premise Ngcobo J based his view on was that sex work is a crime in itself and as such should be criminalized.

Under the minority judgment they took a different stance and acknowledged that the majority of sex workers were women and the majority of patrons male.¹⁰⁶ The minority also found that

¹⁰⁰ Note 90 above, para 19.

¹⁰¹ *Harksen v Lane* 1998 (1) SA (CC) at para 54.

¹⁰² R Kruger “Sex Work from a Feminist Perspective: A visit to the Jordan Case” (2004) 20 SAJHR 145.

¹⁰³ Note 90 above, para 24-25.

¹⁰⁴ *Ibid* para 25.

¹⁰⁵ *Ibid* para 24-25.

¹⁰⁶ *Ibid* para 59.

as a result the differentiation between the sex worker and the client discrimination does occur and it is not gender-neutral because stereotypes about male and female sexuality are maintained and perpetuated. Perumal and Jivan (2004) submit the following: “In essence, the standard requires the women to be chaste, while allowing the men to be sexually unchaste. Historically prostitutes who are always women, and the unchastely behaviour of their male clients, being considered unchaste, was not seen as deserving of punishment. This crude form of sexist gender discrimination, it is submitted, is what lies under the provision of section 20(1)(aA) of the Act”¹⁰⁷

The sex worker is still regarded as the principal offender and therefore the social stigma attached to them is a heavier burden than that of the client. This is again due to the differences in the social standards attached to male and female sexuality. Gaum (2003) submits that the customer is merely seen as an “ingredient in [the] offence rather than a criminal in his [or her] own right, who returns to respectability after the encounter.”¹⁰⁸

The challenge on the right to dignity was met by the judges with very little sympathy. They admitted that sex workers have a right to dignity in terms of the manner in which they are arrested and detained.¹⁰⁹ However the attitude they give off was one of sex workers deserving their right to dignity being diminished by virtue of the choice to participate in the sex work industry.

In the case of *S v Makwanyane* 1995 (3) SA 391 (CC) O’Regan J held that “Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human being, human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in... [the Bill of Rights].”¹¹⁰ The point is seen again in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) where the court held that “It is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.”(para 28). The court in the Jordan case suggests that commodifying their bodies is in itself diminishing their dignity. Therefore they diminish their

¹⁰⁷ Jivan U and Perumal D “‘Let’s Talk About Sex Baby’-but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the Jordan case: comment” (2004) 17 SACJ at page 62 and 65.

¹⁰⁸ Gaum 2003 (note 83 above) 335.

¹⁰⁹ Ibid

¹¹⁰ Note 90 above, para 144.

dignity by choice. The minority court went on to say that patrons however are not entitled to infringe upon the dignity of sex workers to whatever extent they wish.¹¹¹

The minority court did recognize the limitation on women's choices and that many women resort to sex work out of desperation to support their families and pay for their children's food and education.¹¹² It appears contradictory that the court in one breath admits that sex workers have little choice but then blames them for diminishing their dignity by their own conduct through the most feasible choice in supporting themselves and surviving. A further contradiction is that after stating sex workers do not have a right to dignity the court admits that they have been treated unfairly.¹¹³ Perumal and Jivan (2004) submit that the court is guilty of moralizing the issue. From the provision of section 20(1)(aA) the sex worker is seen as less worthy of dignity than the client.

The judges worked through the issue of the right to freedom of the person along the same lines. The judges suggested that a sex worker opens herself up for violation of this right by engaging in such an activity. Even though the Interim Constitution protects the rights of freedom and personal security of everyone the Constitutional Court did not consider to give a purposive interpretation of the provision in light of a sex workers activities but has done so on numerous occasions.¹¹⁴ However on this occasion both the minority and majority judgment were of the view that sex work constituted a crime and as such any violation of a sex worker's human rights were justified through her engagement in sex work.

O'Regan and Sach JJ both found that the right to privacy is justifiably violated on the premise that even though sex in exchange for money did fall within the ambit of privacy, because of its commercial nature it would become less private.¹¹⁵

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) Ackerman J stated the following: "Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act

¹¹¹Note 90 above, para 75.

¹¹²Ibid para 68.

¹¹³Ibid para 71.

¹¹⁴*S v Mhlungu* 1995 (3) SA 867 (CC) at para 8: Mohamed J warned against a strict literal interpretation of the Constitution that would result in denial of human rights for some people while the same rights of other people are protected.

¹¹⁵Note 90 above, para 83.

consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”¹¹⁶

Ngcobo J was of the view that a person who commits a criminal offence in private cannot vindicate their right to privacy in order to protect them in performing such an offence. He bases this on the premise that sex workers invite the public to engage in sexual intercourse with them for reward.¹¹⁷ However even such said sexual activity is done for commercial gain alone it should remain within the realm of privacy. Perumal and Jivan (2004) submit that “Granted, the commercial aspect might remove it from the inner core of privacy, thus making it easier to justify the prohibition; but it does not, contrary to Ngcobo’s view, remove it from the scope of privacy altogether, because even if the expression of sexuality in this context is loveless (as both judgments deem it to be), it is still very personal.”

The constitutional court therefore suggest that a sex worker’s right to privacy is acceptably diminished because the type of sexual relationship she has and that it is one not prescribed by the Act.¹¹⁸ Again this interpretation stems from moralistic views where sexual relations should be between a married couple or out of love where such said relationship is caring and nurturing. Perumal and Jivan (2004) submit that the commercial factor attached to sex work should not remove their right to privacy. The Act may be less private because of its commercial nature and through the manner in which it is performed and solicited but it should not be removed from the privacy realm completely.

A transaction between consenting adults becomes a private one where the parties participating chose it to be so. It appears that if such transaction is not within the prescription of the provision of the Act then such transaction is not worthy of privacy.

This is dangerous because such a prohibition on sex work will intrude upon the personal sphere of sexual relations between members of society. This will limit the right to privacy and sexual expression in such relations through interference of the state.

The Commission on Gender Equality submitted that women who choose to go into sex work have limited choices but it is a choice nonetheless to do so voluntarily by an autonomous person.¹¹⁹ There were affidavits filed on the experiences and struggles of sex workers in

¹¹⁶ Note 90 above, para 32.

¹¹⁷ Ibid para 28.

¹¹⁸ Ibid para 83.

¹¹⁹ Submissions on behalf of the Commission for Gender Equality’ 79-80 available at <http://www.concourt.gov.za/files/jordan/courtrecords/jordan51.doc> accessed 12/11/12

support of the commission's submission. They were not the representation of all women but gave good insight into the out-casted group in society.

This was a golden opportunity for the Constitutional Court to vindicate the rights of sex workers. The Constitutional Court failed to seriously consider the submissions made by the Commission as reference was made no more than twice.¹²⁰ Even though the minority judgment was more sympathetic to the needs of sex workers they also failed to sincerely engage in a lived reality of a sex work in order to understand and realize the grave consequences of the inability of sex workers to vindicate their rights because of criminalisation of their conduct through the provision of section 20(1)(aA). The court conveniently hid behind the doctrine of separation of powers in order to excuse themselves from not being able to grapple with the task of dealing with the issue purposively in light of the aims and objectives of the Constitution.

Therefore it is clear from the judgment that the judges agree that the human rights violation that occur within the commercial sex industry is because of sex work itself. Kruger (2004) submits that "The Court's approach perpetuates the silence and invisibility of women working in the sex industry. I can only hope that the SA Law Reform Commission will listen to the voices and the stories of these vulnerable women – they have been here since time immemorial and are here to stay."¹²¹

The court in *Jordan* failed to consider the right to health for sex workers. It is discussed below in light of HIV/AIDS susceptibility.

3.2 The Right to Healthcare in Light of Sex Work and HIV Susceptibility in South Africa

South Africa is now fifteen years into democracy with many new opportunities awaiting it. In 1994 South Africa saw the birth of the Constitution of the Republic of South Africa which affirmed socio-economic and cultural rights for all. The Constitution (1996) echoes the provisions set out in the international Covenant of Economic, Social and Cultural Right (ICESR). South Africa is a signatory to the Covenant but it still has to be ratified. The formation of the Constitution (1996) set the stage for South Africa to show its commitment to the realisation of right in light of equality through legislation and in particular access to health care for all.

¹²⁰ Note 90 above, para 8.

¹²¹ Note 102 above, 150.

South Africa currently faces many challenges in providing access to healthcare for the entire population.¹²² The public healthcare system has a clear lack of resources and is one of the many challenges that South Africa encounters.¹²³ The lack of resources in South Africa is a consequence from the lack of funds or inadequate allocation of funds to provided for public health.

Approximately 5.6 million people had lived with HIV in South Africa in 2011.¹²⁴ These statistics were found to be the highest of any country. Furthermore in 2011 the number of South Africans who died from AIDS- related causes was a staggering 270,190. However statistics also show that because of improvements in providing healthcare in light of HIV there were 100 000 fewer deaths.

South Africa's history illustrates an impediment on the response to the HIV epidemic because of political views questioning the science of HIV currently South Africa has the world's largest HIV programme and the life-expectancy of its people has gained five years. However HIV prevalence is still very high and varies among each region. In KwaZulu-Natal just under 40% of 15-49 year olds are HIV positive.¹²⁵ Whereas in the Western Cape the percentages of HIV positive people are much lower.¹²⁶

The most susceptible to the contraction of HIV are thus women. The United Nations Declaration in 2001 stated that : “Nothing that all people, rich and poor, without distinction of age, gender or race are affected by the HIV/AIDS epidemic, further nothing that people in developing countries are the most affected and that women, young children, adults and children in particular girls are the most vulnerable... Stressing that gender equality and empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS...”¹²⁷

Therefore there is a need for women and children's healthcare to be focused on by state as they are a more vulnerable population group and more easily susceptible to the contraction of HIV. Furthermore a large amount of sex workers are female as mentioned above and they are individuals of society who should be considered.

¹²² Note 27 above, 6.

¹²³ Ibid 9.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ United Nations General Assembly Special Session, June 2001, para 4 available at www.un.org/ga/aids/conference.html on 23/02/13.

It is submitted that there are ethical and legal obligations on the state to provide access to public healthcare for the population. A South African Human Rights Commission Report in 2009 found South Africa's public health services to be lamentable.¹²⁸ The public health system serves approximately 90% of the country's 47 million people. However the South African Human Rights Commission's report has stated that the above statistic could not be relied on to assess whether the access to public healthcare was improving or not.¹²⁹ The Human Rights Commission submitted that there is no solid definition of what the right to access healthcare entails and what standard that may be.¹³⁰

Bio-medical ethics takes on a principle-based angle in light of medical care. Two of the main ethical principles are beneficence and non-maleficence.¹³¹ The principle of beneficence which entails a duty to do good or to actively promote good and well being can be used to argue there is a moral obligation on the state to provide access to healthcare for individuals of society.¹³² Individuals would be inclusive of sex workers. Ideally this principle means that through access to healthcare and health services the promotion of good and doing good can be achieved.

The principle of non-maleficence on the other hand which promotes the obligation of "do no harm or do not cause unnecessary harm" can be used to argue a case for the vulnerable, in particular sex workers by hampering their access to healthcare through criminalisation of the sex work industry. Therefore there would be an ethical obligation on the state to provide healthcare to individuals of society particularly sex workers who form part of the weak and vulnerable. As mentioned above the weak and vulnerable would be women and in particular sex workers. The number of women living with HIV has been increasing world wide.¹³³

Legally there would also be an obligation on the state under the National Health Act 61 of 2003 and the Constitution (1996). The broad provision set out in the Constitution (1996) can be limited by the section 36 clause. The right to health is encompassed in section 27 of the Constitution. It provides that every person has the right to have "access to healthcare services, including reproductive health care." Furthermore subsection (2) entails that the state must provide for the progressive realization of these rights, within the country's available resources.

¹²⁸ South Africa: Public healthcare "is lamentable." 20 April 2009. IRIN NEWS, (online) Available from: <http://www.IRINnews.org> accessed on 22/06/2009.

¹²⁹ Van der Heer, A. SAHRC Public Inquiry into Access to Healthcare Service Available from: www.sahrc.org.za/sahrc_cms/downloads/Dept%20Health.ppt accessed on 20/06/2009. 6-9

¹³⁰ Note 27 above, 12.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

The purpose of section 27 is to ensure substantive and formal equality among the individuals of South Africa in an attempt to access health care services.¹³⁴

The fact that these rights are grouped together with other basic needs under the Constitution leads would instil the belief that one right cannot be realised without the other. Therefore it must be noted that the right to access healthcare in South Africa cannot be adequately realised unless the right to shelter, food, water and sanitation are met.

The right to health is also promised in the National Health Act 61 of 2003 the objectives are to regulate and provide equal access to healthcare services and facilities to provide all South Africans with an environment that is not harmful and to promote their health state in particular addressing the vulnerable groups in society like women, children, older persons and disabled persons. Therefore this Act is for all South Africans and does not discriminate against any group due to their work or actions and aims. It aims at particularly vulnerable groups as mentioned women which would include sex workers as the majority of sex workers are women.

Under section 3, within the states available resource sex workers should be afforded health services that will promote and maintain their health. In terms of eligibility for free health services there is a means test that needs to be conducted to determine whether or not the individual qualifies for free health services.¹³⁵ Thus it is not dependant on what type of work the individual does or their sexual behaviour. In practice however many sex workers are turned away due to the stigma that is perpetuated towards them by the healthcare professionals.

Under section 5 a healthcare provider or worker may not refuse a person emergency, medical treatment. A person would be inclusive of sex workers and although it is stipulated in the Act, once again, in a lived reality many sex workers are turned away even in emergency situations due to the nature of the work they are involve in. Many do not approach or access healthcare due to the fear of being ostracised. Also there is duty on health care providers to take heed of the confidentiality¹³⁶ that follows the disclosure of information to them by the patient. Many healthcare providers are not concerned with the manner in which they handle healthcare records or the status of a patient's health.

¹³⁴ Note 27 above, page 22.

¹³⁵ Section 4 of Act 61 of 2003.

¹³⁶ Ibid at Section 14.

Another provision of high importance in the context of sex workers is the laying of complaints with regard to the manner in which he or she was treated. Sex workers should be enabled to lay complaints if they feel they have not been treated in a manner in line with the Act or their Constitutional rights. They should then either be compensated or the relevant individuals face a disciplinary hearing for the manner in which they treated the patient.¹³⁷

The National Health Act is a key piece of legislation in combatting the spread of HIV/AIDS. However because of the poor implementation of the Act due to incompetent or careless administration the possibility of the rights in terms of healthcare envisaged in the Act are unlikely. Sex workers who are in a worse off socio-economic position than most, have little or no hope of their health needs being met under this Act. This is the reality even though the National Health Act enshrines the rights be met for particularly vulnerable groups such as women whom make-up the majority of sex workers. The provisions under the National Health Act were well thought out and if given substantive realisation would allow for the growth and development of a healthy nation inclusive of sex workers and result in a decrease in the spread of HIV/AIDS.

3.3 International Law

In terms of international law which seeks to protect the rights of vulnerable groups of society who are subjected to human rights violations. The SALRC submits that international human rights laws acknowledge that sex workers are human beings and deserve to enjoy the human rights afforded to all in particular women. Women are a vulnerable group in society.

The initial views on sex work were that no person could give genuine consent to engage in sex work.¹³⁸ Furthermore there was a distinction made between voluntary sex work and trafficking and the latter persons would be protected by instruments specifically designed to help those who were forced or coerced into sex work.¹³⁹

¹³⁷ Ibid at Section 18.

¹³⁸ Note 15 above, 88.

¹³⁹ *International instrument*- The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949. International Covenant on Civil and Political Rights of 1966. International Convention on Economic, Social and Cultural Rights of 1966. Convention on the Elimination of All Forms of Discrimination against Women of 1967. Declaration on the Elimination of Violence against Women of 1993. Beijing Declaration and Platform for Action of 1995. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2003.

Furthermore the stigma of sex work even internationally has been perpetuated from the beginning of time where sex workers were always treated as a separate social class. The initial aim of international treaties and conventions was to end sex work through the “The White Slave Trade” 1895 in Paris dealt with trafficking. The concept of sex work developed further regarding sex work as similar to the institute of slavery and brought about the International Convention for the Suppression of the White Slave Trade in 1910. The conventions that then followed these two were for women and children adopted by the League of Nations, namely, the International Agreement for the Suppression of the White Slave Trade in 1904 and the International Convention to Combat the Traffic in Women and Children of 1921 and the International Convention for the Suppression of Women in Full Age of 1933 which dealt with human trafficking.¹⁴⁰

The international instruments that South Africa has signed to make the distinction between voluntary and forced sex work and protects the latter. One of the instruments South Africa is signed to in 1951 is The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 ('the Trafficking Convention'). It deals primarily with human trafficking for sex work and exploitation of people. It submits that all sex works should come to an end and that sex workers should be helped and rehabilitated from themselves. There is no mention of sex workers who voluntarily enter the field and thus no protection afforded to them under this. The clear message however is that sex work in all its forms should be criminalised.¹⁴¹

The International Covenant on Civil and Political Rights of 1966 ('the ICCPR'); which South Africa ratified in 1998 does provide fundamental civil and political rights¹⁴² which are even encompassed in our Constitution¹⁴³ such as the right to life be provided for all. However in a lived reality it would unlikely be realised due to the stigma attached to sex work and the

African instruments- The African Charter on Human and People's Rights of 1986. The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005. Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government of 1998. SADC Protocol on Gender and Development of 2008. Canadian HIV/AIDS LN Sex, Work, Rights 2005 at 49 and further.

Other international documents- UNAIDS International guidelines on HIV/AIDS and Human Rights of 2006. World Charter for Prostitutes' Rights of 1985.

¹⁴⁰Note 15 above, 88.

¹⁴¹Ibid 91.

¹⁴²Ibid.

¹⁴³ Constitution of the Republic of South Africa 1996

administrators responsible to enforce their right. Sex workers are treated unfairly and hence in practice make the ratification of the ICCPR ineffective in the context of sex work.

Under the International Convention on Economic, Social and Cultural Rights;¹⁴⁴ the convention ensures similar right as in the Constitution¹⁴⁵ to be afforded to all. The right to work, the right to live and work in healthy conditions, the right to fair wage, the right to form a trade union and the right to the highest attainable standard of physical and mental health.

This convention also supports and encourages a non-criminalisation approach towards sex work and encourages fundamental human rights such as health, safety and working condition to be assured and afforded to sex workers. It is therefore present at international level that a call for decriminalisation of sex work is made in order to afford rights to and adequate protection of sex workers.

Another convention that South Africa has signed to is Convention on the Elimination of All Forms of Discrimination against Women of 1979 ('CEDAW'). The Convention is seen as an international bill for women's rights and has codified regulations and protocol that parties to the convention should follow to prohibit and end all forms of discrimination against women. Article 6 states that all party states must take steps to eliminate all trafficking and exploitation of women. This is important because that convention does not submit or suggest that sex work should be prohibited or criminalised only trafficking and forced sex work.

Violence against women is also addressed in general recommendation 19. It looks at sex work in the context of women and their socio-economic disposition in society and submits that equal protection should be afforded to these women who are victims of their own circumstance. There should be an allocation of adequate protection with regards to their safety from rape and other forms of violence advocated toward them due to their status and position in society.¹⁴⁶ Also important to note is General recommendation 24 which addresses women and their health. Specifically in the context of sex work the recommendation looks at HIV/AIDS and how women because of the socio-economic disadvantages do not have equal bargaining power in relationships to practice safe sex and protect themselves from sexually transmitted diseases.

¹⁴⁴International Convention on Economic, Social and Cultural Rights of 1966 ('ICESCR').

¹⁴⁵ Constitution of the Republic of South Africa 1996

¹⁴⁶Note 15 above, 97.

It is suggested by the SALRC that due to there being no criminalisation measures submitted to eradicate all forms of sex work then a regulatory and decriminalisation model would realise the aims of the convention to end all form of discrimination against women in particular sex workers through the implementation of health and occupational safety measures being afforded to them.

The Beijing Declaration, Platform for Action 1995 and Reaffirming Resolution of 2005 only addressed forced sex work and not voluntary. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2003 ('the Trafficking Protocol') only dealt with forced sex work and how those victims as such should be protected and treated. Similar to the "trafficking protocol" it does not address voluntary sex work.¹⁴⁷

South Africa ratified to The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005 ('the Protocol on the Rights of Women') in December 2004 and it entered into force in November 2005. What was significant about this protocol is that it deals with ensuring women's right to reproductive healthcare. The protocol enables them with the means to protect themselves from sexually transmitted diseases through safe sex practices and that all forms of violence inclusive of rape and sexual exploitation be prohibited and abolished.

The UNAIDS Guidelines on HIV/AIDS and Human Rights¹⁴⁸ submits that there should be protection afforded to women who are part of a vulnerable group in society and within that group sex workers. There should be protection and regulation in the context of health and safety services that is afforded to all and not continue the stigma attached to sex workers and marginalise and ostracise this group.

What was admirable was that emphasis was made on protecting rights within a lived reality and identifies how they can best meet their human rights obligations and protects public health within their specific political, cultural and religious contexts. It promotes the decriminalisation and rather regulation of voluntary sex work.¹⁴⁹

¹⁴⁷Note 15 above, 103.

¹⁴⁸The UNAIDS Guidelines on HIV/AIDS and Human Rights 2006 available at www.data.unaids.org/Publications/IRC on 12/11/12.

¹⁴⁹Note 15 above, 106.

The World Charter for Prostitutes Rights¹⁵⁰ set forth to counter socio-political marginalisation. It submitted that sex workers be guaranteed health and housing. It further aims to end unethical abuse and treatment toward sex workers and for such abuse to be prohibited. It further set out for the decriminalisation of sex work that is voluntary and rather implements regulation procedures and practices that can be followed as per business codes and eradication of laws that prohibited freedom of association and employment.¹⁵¹

Despite the fact that the guidelines and conventions generally look at sex work in the context of forced or coercive trafficking it recognises the vulnerability of women and their disposition in society and particularly sex workers and their vulnerability to HIV. However the guidelines do acknowledge that voluntary sex work where, there is no victimisation should be reviewed with the intention of decriminalisation and possible regulation of the practice.

Through decriminalisation of sex work healthcare service and safety regulations can be implemented effectively for safe sex practice and for protection against abuse against sex workers. The guidelines aim to encourage state to help promote safe sex practices through education ad programmes about their rights in the context of HIV and the target group being the vulnerable population of women and children. The guidelines go further to say that underlying prejudices and inequalities should be addressed inclusive of sex workers where support services and community groups should help them. The guidelines note that sex workers are already a marginalised group in society and due to the criminalisation of their activities there are many human rights violations that occur towards them.

There is no current law that condemns voluntary sex work and once again the trend appears to be a distinction between voluntary and forced sex work and where the latter is protected and afforded special rights and protocol on what should be done. Furthermore internationally there is no general consensus as to what sex work should be. Some believe it to be non-legitimate and forced whereas some will say that sex work has its place and it will be dependent on the age and place as to where it takes place and with whom and soliciting according to its regulations so that it will be legal or not. Those who ignore the fact that there is voluntary sex work will just perpetuates the stigma attached to non-voluntary sex work as government would and use it as an excuse to not protect the interest of voluntary sex workers.

¹⁵⁰The World Charter for Prostitutes Rights 1985.

¹⁵¹Note 15 above, 108.

Women are more susceptible to contracting HIV/AIDS than that of their male counterparts. In order to eliminate discrimination against women, action should be taken to develop and enact a national strategic plan to promote and enshrine the right to healthcare of women throughout their life and have a continued development in the quality of their life.

Chapter IV

Initiatives and Recommendations

South Africa has the highest rates of HIV as mentioned above. The prevalence of HIV varies among race groups, age and geographical location. With attending to the healthcare needs of vulnerable groups in light of HIV thorough and strategically panning needs to take place in order for any positive developments to occur. The National Strategic Plan (2012-2016) has collected various reports on HIV and STI statistics to guide their formulation of the initiatives to be implemented in South Africa.

4.1 Initiatives and aims in South Africa

The four main objectives of the National Strategic Plan (2012-2016)¹⁵² aims to address social and structural barriers to HIV, STI and TB prevention, care and impact. The second objective is to prevent new HIV, STI and TB infections. The third objective aimed at sustaining health and wellness while the fourth objective is to increase protection of human rights and improve access to justice. The National Strategic Plan (2012-2016) submit that key enablers in making the outlined goals a success would be governance, effective communication, monitoring and evaluation and research. It is submitted that effective communication will play a vital role to change risky sexual behavior and social situations that accelerate the HIV epidemic. Furthermore each of the National Strategic Plan's goals will require a great deal of effort in order to implement the goals on all levels.

The National Strategic Plan (2003) has had positive results. Approximately 1.4 million people have been put on anti-retrovirals since the programme was implemented in 2003. There was an increase in the number of people being tested. Furthermore education on Sex and HIV implemented as a compulsory part of the curriculum.

The SALRC¹⁵³ suggests three divisions where regulations have been employed to prevent the spread of HIV through sex work:

1. "Mandatory testing requirements.
2. Prohibiting persons who have tested positive for HIV from working as prostitutes.

¹⁵² National Strategic Plan on HIV, STI's and TB 2012-2016 available at www.info.gov.za/view/DownloadFileAction accessed on 23/02/13.

¹⁵³ Ibid.

3. Enhancing the penalties for prostitution-related offences when committed by a person with HIV.”

Research has found that laws deeming sex work illegal creates further challenges and disadvantages for sex workers and prevents their access to HIV/AIDS education and being informed about preventative measures.

One of the major arguments put forward by the SALRC¹⁵⁴ for the non-criminalisation and rather regulation of sex work is that to most people’s surprise, decriminalisation and implementation of a regulatory legal framework actually decreases the rate of HIV transmission among sex workers. An example of this is¹⁵⁵ Australia. Some of the factors that were seen as potential advantages of decriminalisation of sex work would be the progressive eradication of the social stigma attached to sex work and a positive influence on safer sex practices during commercial sex.

Furthermore it was suggested that instead of forced or coercive initiatives to be instituted for safe sex practices a more substantive education and condom distribution initiative could be implemented so that sex workers truly understand the risks involved in unsafe sex practices and the way their bodies work in the context of HIV transmission. The disadvantages associated with such educational initiatives as it stands is that sex workers and clients alike may be more accessible to authorities and the legal status in the South Africa as it stand is that sex work is not legal or regulated which would in turn deter sex workers from partaking in these initiatives out of fear of punitive consequences.¹⁵⁶

From a human rights perspective the SALRC¹⁵⁷ suggest that South Africa’s constitutional democracy, human rights are a significant policy consideration. Sex work takes place in an environment where there are very few rights to protect the sex worker. The conditions they work in are unhealthy and unregulated. There is no or little promotion of safe sex and there is usually a high clientele base but no control over the client’s behaviour. The facilities that they should be entitled to they are usually denied because of stigmatisation attached to the type of work they engage in or out of fear. They do not access it such as services or HIV prevention

¹⁵⁴Ibid.

¹⁵⁵Ibid.

¹⁵⁶Ibid.

¹⁵⁷Ibid .

initiatives such as the use of female or male condoms, the prophylaxis treatment after one has been raped, emergency contraception such as the morning after pill, their immediate treatment and control of sexually transmitted diseases and infections, different types of drug treatment and other initiatives that can reduce the sex workers risk of exposure to harm.¹⁵⁸

Furthermore, disciplinary policies curb the sex workers ability to try and negotiate safer sex practices with their client and further isolate the sex worker from the public health system and its advantages. Sex workers, due to the fact that sex work is criminalised, may be hesitant to have condoms on their person for safe sex practices out of fear of the police finding it on them and questioning their conduct. The truth of the matter is that health and safe sex practices cannot be implemented effectively where sex work is criminalised. It appears the only manner in which sex workers can vindicate their rights is through decriminalisation of sex work and then thorough regulation of the industry.

A good example to look at is the New Zealand model. However it must be kept in mind that New Zealand may have a different history to what South Africa has. It is however a good starting point to perhaps examine the model and attempt to adapt what we can in a South African climate.

4.2 The New Zealand Model(The Prostitution Reform Act 2003)

The fear of decriminalising sex work is that the industry will get out of control and cause nuisance to the public encouraging social evils like drugs abuse and human trafficking. These fears will not be realised through decriminalisation. This is possible if decriminalisation is done in collaboration with an implementation of a well thought out regulatory framework in which the sex work industry can holistically operate in society without offence or an acceleration of crime.

The Prostitution Law Reform Act 2003 is a good model for South Africa to adopt because their previous stance of sex work is South Africa's current position of criminalisation. Similar challenges were faced by sex workers of exploitation, stigmatisation by the public and the spread of HIV among sex workers being prevalent. The Prostitution Law Reform Act 2003

¹⁵⁸Note 15 above, 83.

replaced the Massage Parlours Act 1978: subsections 48 and 49 of the Act. The criminalisation of sex work was replaced with a regulatory framework as outlined in the Prostitution Reform Act.

The New Zealand case of *J B International v Auckland City Council*¹⁵⁹ it held that “While the Legislature’s position on the morality of sex work was reserved (s3), the Act can be seen as an acknowledgement that sex work is, and has always been, a social reality and that it is preferable to deal with health, safety and exploitation concerns transparently”. A very good provision implement in the Act was that of by-laws regulated where sex work can operate.

This *J B International v Auckland City Council*¹⁶⁰ dealt with issues of the regulation of zoning where sex work can take place through by-laws under section 12 of the Act. The Auckland City Council had passed a by-law the purpose being to regulate the locations places at which a brothel can be placed within the territorial jurisdiction. The presiding judge had to determine whether the by-law was invalid and whether the power to dispense with full compliance with the by-law was lawfully do against the interests of brothel keeping in Auckland. That by-law was successfully challenged and was as such quashed. The presiding judge recognised that sex work is known as the oldest profession and that it can either cause outrage in the public or endure moral tolerance. New Zealand's previous legal stance was like South Africa’s current position; commercial sex was illegal for many years but changed for New Zealand in 2003 through the Prostitution Reform Act. Section 3 of the Act made it clear that Parliament did not “endorse or morally sanction” sex work or its use.¹⁶¹

It does not in any way limit how the town can plan its landscape but it does prohibit unreasonable prohibition of sex work operations. The different types of zones dealt with in this case were residential areas, school and tertiary.

The challenge on the zone provisions of the Act encompass suggestions that by-laws are ultra vires or that they are contradictory, unreasonable or repugnant in comparison to New Zealand’s legislature. Challenges to the zoning of provisions are usually based on whether such by-law is

¹⁵⁹ HC AK CIV 2005-404-2214 14 March 2006.

¹⁶⁰ Ibid.

¹⁶¹ Prostitution Reform Act 2003: Section 3: Purpose- "The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that— safeguards the human rights of sex workers and protects them from exploitation: promotes the welfare and occupational health and safety of sex workers: is conducive to public health: prohibits the use in prostitution of persons under 18 years of age: implements certain other related reforms."

proportional and certain in context of the main statute. It was further suggested by the presiding judge that the validity of a by-law can be ascertained on whether it is reasonable or unreasonable in context of the facts and inclusive of the nature and condition of the location in which it is to be implemented, and which challenges the by-law seeks to resolve and the remedy that can be implemented to do so and whether any rights of people are invaded or infringed upon and if it is justifiable and is not grossly infringed upon. This value reflects the very essence of the judicial decision making on whether or not a particular by-law is unreasonable to deem it valid or invalid. The enquiry involved is as follows:

“There is a two stage enquiry involved which consists of determining the scope of the by-law: a legal question turning on its true construction. The second is to determine whether a by-law of that scope is unreasonable: a question of judgment based on an evaluation of relevant facts. Small owner-operated brothels may still be established within the scheduled area, or because work in small owner operated brothels is only one facet of the business of sex work and need not be accommodated in terms of a location by-law.”

Firstly section 17 refers to by-laws that are *ultra vires*. This would be where a by-law goes beyond the powers of a particular statute in order to ensure further regulation and smooth substantive implementation of provision of the statute. In order to determine whether or not a by-law can be deemed *ultra vires*; the power delegated to the by-law must be carefully constructed and worded in such a manner that its purposive use and interpretation fulfils the overall objectives of the primary statute. Section 14 is the provision of the Act that deals with by-laws and the extent of their powers in terms of sex work location and operation of brothels and where it can be operated from. It will be *ultra vires* if it exceeds the delegated power.

Furthermore if the by-law is found to be in conflict with or deemed to be in contravention of the objective so found purposes of the statute it will also be *ultra vires* in its delegated power. Secondly a by-law cannot be such that it is in conflict with the laws of New Zealand. A by-law cannot be too broad or ambiguous so as to encompass all possibilities and allowances and possibly override other laws enacted by parliament or the common law. A by-law may also be deemed invalid if it is found in the eyes of the law to be unreasonable. The justification and reasonableness of a by-law must be based in context of its effect, negative or positive, on the community.

Another test that was looked at was that in determining whether a limitation is arbitrary or excessive one has regard to:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

The objective of the by-laws is to regulate and legalise the business of sex work in respect of a controlled and well organised system that would in turn address and achieve policy goals enshrined in section 3 of the Act: “occupational health and safety, public health, and avoidance of exploitation of young and other vulnerable people.” By-laws require those sex workers who want to partake in the sex work industry under legitimate circumstances.

Further there will be limited territorial jurisdiction in which pockets of sex workers can operate and go about conducting their business. The problem may occur where the customers wishing to engage in these services do not in the location allocated to the sex workers safe and conducive to their ideal of where a brothel should be or previously accustomed to. If the undesired by-laws are deemed valid then this could have the consequence of illegal activity occurring outside the designated areas and thereafter defeating the purpose of the Act. It is however a start and step in the correct direction.

The zoning provisions in the Prostitution Reform Act can be easily adopted in South Africa. It will be practical as sex work will be limited to areas that are not in or immediately near the vicinities of schools and churches where possible offence of the conduct could be taken. Further the regulation and decriminalisation would be a step closer to sex workers being able to access their right without fear of prosecution. Stigmatisation against them may still be rife initially but will eventually deteriorate through the development of the law which would have an influence of society’s behaviour towards them.

Heath J also held that sex workers who desire to leave the sex work industry could operate from their households on a very low scale as opposed to being controlled by a pimp or being part of a brothel and perhaps keep regular or casual clients on their customer list to provide an income for further educational studies or other self-development endeavours.

A sex worker under their Act is “a person who provides commercial sexual services.” Sections 20, 21, 22 deals with the age limit. No person under the age of eighteen years may become a sex

worker or solicit sex services. Eighteen years is the age of majority in South Africa therefore it is a regulation that we could adopt too. Section 34 states that every brothel keeper must have a certificate or will encounter a fine.

Decriminalisation of adult sex work does not mean that child sex work is decriminalised. It is referring to adult sex work. A framework was implemented to regulate safer sex practices¹⁶² for brothels to prevent the spread of sexually transmitted disease and for brothels to display and promote these safe sex practices and regulates sex work. This would definitely be an advantage in our South African context where the HIV/AIDS pandemic is rife and where statistics show that women are more susceptible to sexually transmitted diseases especially with respect to the core obligations of the right to health.

Section 25 deals with inspection of the brothel and premises. Under Section 35 there are regulations and procedures outlined to grant Application for, and grant of, certificates for

¹⁶²Prostitution Reform Act of 2003:

Section 8: Health and safety requirements

“ Operators of businesses of prostitution must adopt and promote safer sex practices

(1) Every operator of a business of prostitution must—

- (a) take all reasonable steps to ensure that no commercial sexual services are provided by a sex worker unless a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections; and
- (b) take all reasonable steps to give health information (whether oral or written) to sex workers and clients; and
- (c) if the person operates a brothel, display health information prominently in that brothel; and
- (d) not state or imply that a medical examination of a sex worker means the sex worker is not infected, or likely to be infected, with a sexually transmissible infection; and
- (e) take all other reasonable steps to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections.

(2) Every person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

(3) The obligations in this section apply only in relation to commercial sexual services provided for the business and to sex workers and clients in connection with those services.

(4) In this section, health information means information on safer sex practices and on services for the prevention and treatment of sexually transmissible infections.

9 Sex workers and clients must adopt safer sex practices

(1) A person must not provide or receive commercial sexual services unless he or she has taken all reasonable steps to ensure a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections.

(2) A person must not, for the purpose of providing or receiving commercial sexual services, state or imply that a medical examination of that person means that he or she is not infected, or likely to be infected, with a sexually transmissible infection.

(3) A person who provides or receives commercial sexual services must take all other reasonable steps to minimise the risk of acquiring or transmitting sexually transmissible infections.

(4) Every person who contravenes subsection (1), subsection (2), or subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding \$2,000.”

brothel keeping. This is a positive and practical provision for South Africa to adopt. The environment in which sex workers operate are exploitative and hazardous to their health. Through inspection and a body of regulating on how brothels and sex workers are to operate and engage in sexual conduct it can protect both sex worker and client from sexually transmitted diseases and curb the spread of HIV among sex workers in the industry. From a scientific view point the most important stage of infection with regards to HIV where the disease is most easily spread is several months after infection when there is a large level of viral particles in the vaginal and seminal fluid. This infection would result from high risk sexual behavior without the use of contraceptive protection. As was mentioned in chapter II Infection occurs more likely in younger women as their vaginas are not mature and therefore tear very easily allowing the viral particles to enter into the blood stream and also in cases of rape where there is more force used in sexual activity it would increase the females chances further of contracting HIV.

Therefore one can conclude that there is a link between the high levels of rape and the HIV pandemic and that more than half of the population infected with HIV is women and children. Provisions that should be encompassed in such strategy should be interventions with the objective of treating and preventing diseases that affect the health and reproductive healthcare of women.

Furthermore policies should be implemented in order to afford women access to a reasonable quality and affordability of healthcare services in terms of their sexual and reproductive healthcare. An important initiative should be aimed at curbing women's risk to certain diseases and to lower the rates of death at child birth and further to protect women against grave human rights violations like domestic violence.

In order to realize women's rights and their rights to health and reproductive healthcare there should be a removal of all challenges in acquiring access to medication and healthcare services so that it is smooth and readily accessible to them. This would require access to education and information about their bodies and healthcare so that women themselves can know the risks they are prone to and their rights in terms of healthcare and what can be afforded to them and prevent such risks from occurring. Furthermore in terms of traditional and cultural practices, initiatives and steps needed to be taken to implement measures to protect women from harmful practices that are constituted as human rights violation and are in conflict with objectives of the Constitution and put their reproductive healthcare at risk.

In addition to the Prostitution Reform Act ensuring sex workers be covered by occupational safety and health laws and agencies, they can claim unemployment benefits when and if they choose to leave the sex work industry. There has been no increase of commercial sex in New Zealand with the introduction of the Prostitution Reform Act of 2003. It has reduced the spread of disease and allowed sex workers to report any offences committed against them and to be taken seriously and have been give better working conditions. This also in term has made them feel safer within the legal framework. This just proves that law is able to balance the interests of society and also create a safe environment and working conditions for the oldest profession.

Through New Zealand's new legislation it is now a crime to coerce, threaten, compel or abuse a sex worker to have sex against their will.¹⁶³ Even though sex work is now regulated those who own brothels or offer sex services are not obliged to contract or supply anyone with hose services. There has to be consensus between both parties as it is viewed as a contract. This provision will also protect sex workers form exploitation and to a certain extent rape. They can now organise trade unions, contracts that are recognisable and enforceable.

In a United Nations report onSex Work and the Law,¹⁶⁴New Zealand is praised for its regulatory frameworks and its positive results thus far.¹⁶⁵ There has been an increase in sex workers accessing their healthcare and reproductive rights. Through their access to reproductive healthcare a higher right of condom use has been present. Through better use and

¹⁶³Prostitution Reform Act of 2003:

"Section 17 Refusal to provide commercial sexual services

(1) Despite anything in a contract for the provision of commercial sexual services, a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person.

(2) The fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service.

(3) However, nothing in this section affects a right (if any) to rescind or cancel, or to recover damages for, a contract for the provision of commercial sexual services that is not performed.

18 Refusal to work as sex worker does not affect entitlements

(1) A person's benefit, or entitlement to a benefit, under the Social Security Act 1964 may not be cancelled or affected in another way by his or her refusal to work, or to continue to work, as a sex worker (and, in this case, that work is not suitable employment for that person under that Act).

(2) A person's entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001 may not be lost or affected in any other way by his or her being capable of working as a sex worker if he or she refuses to do, or to continue to do, that kind of work.

(3) In this section, refusal means a refusal to do this kind of work in general, rather than a refusal of a particular job or at a particular time."

¹⁶⁴UNAIDS Report: J Godwin Sex Work and the Law in Asia and the Pacific Laws, HIV and human rights in the context of sex work (2012).

¹⁶⁵ Report - 3 News New Zealand 'UN Praises NZ's Prostitution Laws' (October 2012) available at <http://www.3news.co.nz/UN-praises-NZs-prostitution-laws/tabid/423/articleID/273855/Default.aspx> accessed on 29 November 2012.

access of the healthcare system sex workers can curb the spread of HIV in the industry. The challenge of high HIV rates among sex workers is what South Africa encounters currently. Through a regulatory framework it is clear for the New Zealand model that the spread of HIV can be decreased.

In terms of the effects of decriminalisation on reasons people become sex workers in New Zealand; it did not become the main reason as to why people would enter the sex industry. The main reason still remained financial issues. Advertising¹⁶⁶ in newspapers is no longer prohibited but the newspaper can have a say in how it is advertised and what type of wording. No explicit words to are to be used or graphic images.

Overall the regulations in New Zealand have had positive effects for sex workers and brothel keepers. He by-laws provision creates a balance of interests between the community and the sex worker. However many of the interviewed sex workers said that even if the industry was not legalised; due to their socio-economic position they still would have entered the business.¹⁶⁷ The committee thus came to the conclusion that decriminalisation pre and post legislation had not become a factor in deciding whether to enter the industry or not. Claims that an increase in the number of sex workers were based on assumptions and rating but not actual figures or research conducted. It was said by the committee that greater visibility of the industry does not indicate the growth of the industry. It is because the industry is legalised that soliciting and brothel keeping is more visible now.¹⁶⁸

Decriminalisation appears to be the way forward to aid and protect the vulnerable sex workers in our society and could have the effect of getting them out of the industry as most still only

¹⁶⁶There are even advertising restrictions in section 11:

11 Restrictions on advertising commercial sexual services

(1) Advertisements for commercial sexual services may not be—

(a) broadcast on radio or television; or

(b) published in a newspaper or periodical, except in the classified advertisements section of the newspaper or periodical; or

(c) screened at a public cinema.

(2) A person who does any of the things described in subsection

(1), or who authorises any of the things described in that subsection to be done, commits an offence and is liable on summary conviction to,—

(a) in the case of a body corporate, a fine not exceeding \$50,000; and

(b) in any other case, a fine not exceeding \$10,000.

(3) In this section, advertisement means any words, or any pictorial or other representation, used to notify the availability of, or promote the sale of, commercial sexual services, either generally or specifically.

¹⁶⁷ New Zealand Report on Prostitution Law Reform at page 39 available at www.justice.govt.nz/./report.pdf accessed on 12/11/12.

¹⁶⁸ Ibid.

enter because of their socio-economic challenges. The Prostitution Reform Act retains morality of the community through its restrictions in terms of zoning and mandatory inspections of brothels but still ensures the necessary fundamental human rights required for sex workers as people.

Chapter V

Conclusion

A different approach is needed to remedy the challenges that sex workers encounter in light of their susceptibility to HIV. Criminalisation directly impedes on their right to dignity, privacy, freedom of security and right to health in light of HIV. Criminalisation makes it acceptable to exploit and discriminate against a sex worker. The grave human rights violation that sex workers suffer can be remedied through decriminalisation of sex work. A regulatory framework will allow for more openness of the profession because then the fear of prosecution can no longer stop them to come forth if they have been a victim of a crime.

In respect of the legal response to sex work within the context of sexual exploitation and vulnerability to HIV/AIDS the issue should be handled in two ways. In one way the epidemic in the sex work industry should be controlled through strict legal regulations of sex work and even criminalise some forms of behaviour. The other manner in which to deal with it would be through de-criminalisation and the implementation of programmes to help sex workers develop themselves and their quality of lifestyle in order to be afforded more opportunities and provide them with alternative choices and not sex work as a means to an end as their only option. Both approaches rely on public health as a justification for the implementation however de-criminalisation encompasses a human rights framework.¹⁶⁹

There are legal instruments in place that can be used as instrument to enforce their rights. Besides the use of the Constitution as a method of enforcing the human rights of sex workers there is also national statute such as the National Health Act. Furthermore there are policies and initiatives such as the National Strategic Plan (2012-2016) which proves to be useful in advocating for the right to health in light of the HIV epidemic.

It has been mentioned that most sex workers are aware of the dangers involved in high risk sexual activity the issue emerged from the client or brothel keepers or procurers dictating how sexual activity should take place. The regulatory framework can implement safer sex in the industry. The advantages of instituting a regulatory framework for sex work in South Africa are endless. Criminalisation of the industry in South Africa has been the approach in different

¹⁶⁹Note 15 above, 82.

forms but all have failed to address the human right needs of sex workers. Thorough planning and examination of other models need to be done. The New Zealand model with its practical zoning provision has been effective in regulating the industry thus far and has been in place for 10 years. South Africa can also implement a regulatory framework that is both effective and non-offensive to the public in order to bring about a holistic balance of the regulated sex industry in society.

Furthermore if they need to access medical healthcare the stigmatisation perpetuated against sex works can gradually deteriorate and hence will allow them to feel more at ease to approach healthcare facilities for their reproductive healthcare needs. Access to healthcare will lead them to live a better quality of life, help curb the spread of HIV/AIDS and unwanted pregnancies through contraceptive and birth control measures. Not only will the access to healthcare provide them with a better quality of life but the decriminalisation and regulation of sex work will implement provisions that will require sex work or the running of a brothel ensure safe sex practices.

A sex worker turns to the sex work industry due to socio-economic and gender based factors. Women's vulnerability stems from their lack of socio-economic opportunity in society. They are forced into sex work because they believe there is no other means of earning an income. Sex workers face challenges and encounter exploitation because of no legal protection afforded to them in South Africa. Sex work has been around from the beginning of time and is the oldest profession civilisation has come to know.

The oldest profession in civilisation should be acknowledged to finally give sex workers the opportunities they need to make choices that are not made out of desperation. Sex workers are human beings and should be treated as such. They are victims of a vicious cycle of poverty and lack of opportunity. Instead of allowing the vicious cycle of poverty and lack of opportunity to continue from one generation to the next, it should be broken through a regulatory framework designed to curb the spread of HIV and afford them a better quality of life with dignity.

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