A CRITICAL REVIEW OF THE CRIMINALISATION OF SEX WORK IN SOUTH AFRICA: A COMPARATIVE LEGAL STUDY

by

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Table of Contents

Page

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DECLARATION

This research is submitted in accordance with the requirements for the degree of Doctor of Laws (LLD) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **A CRITICAL REVIEW OF THE CRIMINALISATION OF SEX WORK IN SOUTH AFRICA: A COMPARATIVE LEGAL STUDY** is my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature: .  Date: 20 January 2022

Antonio Muinde Mutiso

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Lastly, I acknowledge my entire family and workmates for affording me humble time and space during my studies.

DEDICATION

"Parents wonder why the streams are bitter, when they themselves have poisoned the fountain"

John Locke

"Don't limit a child to your own learning, for he was born in another time"

Rabindranath Thakur

I first dedicate this work to my late father, Mutiso Mwangangi, and late mother, Emma Kanungui, who never poisoned the fountain of my education, and therefore as a stream from them, I never became bitter or polluted (that is, a disgrace).

"If you have a garden and a library, you have everything you need"

Cicero

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"It is easy to build strong children than to repair broken men"

Frederick Douglass

Lastly, I dedicate this work to my three sons, Mutuku Muinde, Mutiso Muinde and Ngovi Muinde. The trio were strong inspirational and strategic combatants in matters academic.

SUMMARY

The objective of this research is to critically examine the causes and consequences of the criminalisation of sex work between consenting adults in South Africa by means of a comparative approach. In order to achieve this objective, the Constitution of the Republic of South Africa, foreign- and international law were consulted. Sex work is criminalised in South Africa in terms of the Sexual Offences Act, 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It is argued in this study that the criminalisation of sex work and sex workers unfairly discriminates against the sex work profession as other transactional sexual acts are deemed acceptable. It seems that the law is applied selectively and discretionary to the detriment of sex workers. The criminalisation of sex work infringes on the sex worker's right to equality; dignity; freedom and security of a person; privacy; freedom to receive and pass information or ideas; freedom of trade, occupation, and trade; and fair labour practises. The issue of prostitution should not be dealt with on a moral basis, but on a human-rights basis. In order to test the impact of the criminalisation of sex work in South Africa, it was necessary to investigate comparable countries' legislative approaches to the purchasing of sex, and their various models of prostitution. The laws and policies pertaining to prostitution in three common-law countries of similar legal background to South Africa, i.e. Canada, India and Great Britain (UK), were compared to the approach followed in South Africa. International instruments that impact on sex work were also examined, and a conceptual and historical analysis of sex work and the law undertaken. After researching the adequacy and implications of the criminalisation of sex work in South Africa and comparing sex work legislation and policies in comparable foreign jurisdictions, the research recommends that sex work be decriminalised, amongst other substantive suggestions.

KEY WORDS: Sex work, prostitution, Sexual Offences Act, sexuality, models of prostitution, transactional sex, trafficking in persons, morality, human rights, limitations

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Asijiki	:	Asijiki Coalition for the Decriminalisation of Sex Work
APNSW	:	Asian Pacific Network of Sex Workers
ASWA	:	African Sex Worker Alliance
CCMA	:	Commission for Conciliation, Mediation and Arbitration
CEDAW	:	Convention on the Elimination of Discrimination Against Women
CRC	:	Convention on the Rights of the Child
CREAA	:	Centre for Human Rights Education, Advice and Assistance
DEVAW	:	Declaration on the Elimination of Violence Against Women
DPP	:	Director of Public Prosecutions
DRSWE	:	Declaration of Rights of Sex Workers in Europe
GDP	:	Gross Domestic Product
HSRC	:	Human Sciences Research Council
ICCPR	:	International Convention on Civil and Political Rights
ICERD	:	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	:	International Covenant on Economic, Social & Cultural Rights
ICPR	:	International Committee of Prostitute' Rights
ICRSE	:	International Committee on the Rights of Sex Workers in Europe
ILO	:	International Labour Organisation

NPA	:	National Prosecuting Authority
NSWP	:	Network of Sex Work Projects
Palermo Protocol		Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
SACTA	:	Southern Africa Counter Trafficking Assistance
SAHRC	:	South African Human Rights Commission
SALRC	:	South African Law Reform Commission
SALC	:	Southern Africa Litigation Centre
SANAC	:	South African National AIDS Council
SOCA	:	Sexual Offences and Community Affairs
SPOC	:	Sex Professionals of Canada
SWEAT	:	Sex Workers Education and Advocacy Taskforce
UDHR	:	Universal Declarations of Human Rights
UK	:	United Kingdom
UN	:	United Nations
UNHRC	:	United Nations Human Rights Commission
VOC	:	Vereenigde Oost-Indische Compagnie

CHAPTER ONE

INTRODUCTION

1.1 Introduction

Human sexuality is a complex issue to deal with, especially that of adults, owing to the diversities in an individual's sexual orientations or inclinations.[1] Sexuality concerns an individual's inviolable inner sanctum on how to explore or exploit sexual abilities. There are those who hold the views that there must be no sexual intercourse until one is married, and then the sexual act must only occur between the husband (in most cases a man) and the wife (mostly a woman);[2] or no sexual activities until one reaches a predetermined mature age; or no commoditised sex where sexual acts are performed as a source of earning a living.[3]

Some states, including South Africa, have limited the conduct of human sexuality to the extent of encroaching on the sexual intimacy between consenting adults done in seclusion.[4] Critics have protested these states' acts as an unreasonable or unjustifiable limitation to one's privacy, or the freedom of determination of own sexual choices. Some sexual behaviours limited by certain governments concern heterosexual, homosexual (gays or lesbians);[5] bisexual; intersexual; and transgender persons. All of these persons may be involved in selling (and buying) sexual services for reward (sex work or prostitution).[6]

Sex work can broadly be defined as receiving, or giving, or benefiting monetarily or in kind, in return for expected sexual acts. The proscribed sexual conduct includes,

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1 De Wet 2017 *SAJHE* 117; Ilyayambwa 2012 *Int Journal of Humanities and Social Sciences* M 50.

2 In *Hyde v Hyde* (LR) 1 PD 130, Lord Penzance held: "…marriage … in Christendom may be … defined as the voluntary (sexual) union for life of one man and one woman to the exclusion of all others".

3 Hendin https://www.hrw.org/report/2019/08/07/why-sex-work-should-be-decriminalised-south-africa (Date of use: 10 November 2021).

4 De Vos and Freedman *South African constitutional law in context* 464.

5 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (hereinafter *National Coalition*).

6 Although the term 'prostitution' has always been utilised to describe commercial sex acts, and is used in most legislation, many persons find the term derogatory. This study will employ the phrases 'sex work' or 'sexual services' interchangeably with the term 'prostitution', in accordance with the World Health Organisation (WHO) and the United Nations (UN).

amongst others, sexual penetration, sexual stimulation, or immoral public exposure of a person's prescribed sexual parts. Sex work has, since ancient times, been a thorny issue in the realms of the so-called societal morality or public policy. An immense problem is that the providing of sexual services for reward has been equated to sexual exploitation, the trafficking in persons, or other types of sexual violations, and that all sex work encompasses the interplay of culture, power, and difference.[7] Although the above conduct may intersect with one another, sex work does not necessarily entail sexual exploitation, sexual violation, or the trafficking in persons.

In South Africa, sex work is criminalised.[8] The criminalisation of sex work is, as this study will argue, state-sponsored sexual harassment – conduct which makes a person feel more sexually vulnerable. Section 4A of the United Kingdom's (UK) Sex Discrimination Act 1975 expounds that a person suffers from sexual harassment if that person suffers from unwelcome conduct that has the purpose or effect of violating dignity; creating intimidation, hostility, degradation; or abuses of verbal or physical conduct of sexual nature that have the effect of violating the dignity and security of the person. Similar content is found in South Africa's Code of Good Practice on Sexual Harassment,[9] as established in the Labour Relations Act 66 of 1995 (hereinafter Labour Relations Act).

This study focuses primarily on sex work and the law regulating this type of conduct in South Africa. The preamble of the supreme law[10] in South Africa, the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution), in the utter inclusivity of everyone or exclusivity of none, rightly puts it that:

> South Africa belongs to all who live in it, united in (their) diversity ... that every citizen is equally protected by law ... to improve the quality of life ... and to free the potential of each person.[11]

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7 Schulze et al *Sexual exploitation and prostitution and its impact on gender equality* 6.

8 Retired South African Constitutional Court Judge Zak Yacoob opined: "...making sex work criminal … is against the prostitutes' right to make their own decisions", see Shange https://www.timeslive.co.za/news/south-africa/2017-12-11-sex-work-must-be-legal/ (Date of access: 25 September 2021).

9 Code of Good Practice on the Handling of Sexual Harassment Cases 1998 (Government Notice R1367 of 17 July 1998), as amended in 2005.

10 Section 2 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

11 Preamble of the Constitution.

Further, section 9(3) of the Constitution requires the state, subject to limitation clause 36 of the Constitution, not to unfairly discriminate directly or indirectly against anyone on, amongst others, the grounds of gender, sex, marital status, sexual orientation, age, or conscience. This means that sex workers should also not be unfairly discriminated against.

The South African law on prostitution was greatly influenced by English law, in particular, the English criminal law. In the UK, sex work was not unlawful, but any sexual activity meant to promote prostitution – a form of immorality and illegality – was highly restricted. The common law punished those who benefited from assisting in the corruption of public morals, particularly contracts promoting sexual immorality or any act against public policy.[12] It was also possible under English law, in the total disregard of individuals' privacy, to arrest, prosecute and punish acts of carnal knowledge, other than that between a husband and a wife.[13] However, the legal restrictions on morality and public policy were not found free of violations, as Lord Viscount Simonds expressed:

> Amongst many other points of happiness and freedom which your Majesty's subjects have enjoyed there is none which they have accounted more dear and more precious than this, to be guided and governed by certain rules of law which giveth both to the head and members that which of right belongeth to them and not by any arbitrary or uncertain form of government.[14]

The causing of prostitution,[15] living on avails of prostitution,[16] soliciting,[17] running of brothels,[18] and obscenity (indecency)[19] in English law found its inclusion in the South African statutes punishing acts of commercial sex. The English case law on the interpretations of "living on avails of prostitution"[20] or public indecency has also had its influence on South African jurisprudence. The difference between English

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12 See, e.g. the case of *Pearce v Brooks* (1866) LR 1 Ex 213 as discussed in paragraph 3.3.1 below.

13 *Hyde v Hyde* (1866) 81, *Galloway v Galloway* (1914) 135; s 7 of the Immorality Act 23 of 1927 (UK).

14 *Pearce* 213; *Shaw v DPP* [1961] UKHL 1. See also a discussion of *Shaw* in para 3.3.1 below.

15 Section 22 of the British Sexual Offences Act 1956.

16 Sections 30 and 31 of Sexual Offences Act 1956.

17 Section 32 of Sexual Offences Act 1956.

18 Section 33 of Sexual Offences Act 1956.

19 Sections 1, 2 of the British Obscene Publications Act 1959. See also the South African Indecent or Obscene Photographic Matter Act of 1967.

20 *Shaw v DPP* 1.

and South African laws are that courts in South Africa can declare a law unconstitutional,[21] while the English courts must enforce the statutes. This is because English law is founded on a parliamentary democracy, unlike in South Africa where the foundation has shifted from a parliamentary supremacy to a constitutional supremacy. The South African courts thus have the power to change legislation pertaining to sex work. The Constitutional Court is the highest court in all constitutional matters and sets a final precedence in all contested matters as regards their validity based on the Constitution.[22] As regards the constitutionality of sex work, the Constitutional Court has stated in *Jordan*[23] that the constitutional framework requires the legislature to pass laws that foster morality grounded on the constitutional values of equality, dignity, and freedom.[24]

Despite the above criminal legislation prohibiting this 'vice' or so-called social evil or immorality,[25] sexual acts for payment, favour, reward, or compensation are still thriving in the Republic of South Africa. South Africans have been ambivalent about sex work. Some religious groups, NGO's or anti-trafficking organisations are in favour of the criminalisation of commercialised sexual acts. Those against the conduct argue that it is against public policy and erodes society's moral fibre as it leads to degradation, corruption, assaults, immorality and insecurity. Others again, among them the Embrace Dignity organisation,[26] are in support of the partial criminalisation of sex work (described as the Nordic model).[27] They argue that the law should recognise and protect the suppliers of commercial sex, and at time punish the buyers of commercial sex. Those in favour of sex work, and, therefore, decriminalisation,[28] are amongst others, the Sex Workers Education and Advocacy Task Force (SWEAT); Sisonke (national sex workers' movement); African Sex

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21 Section 172 of the Constitution.
22 Section 167(3) of the Constitution.
23 *S v Jordan* 2002 (2) SACR 499 (CC) para [16] (hereinafter *Jordan*). See also a discussion of the case in para 4.3.1 below.
24 Section 7 of the Constitution.
25 *Jordan* para [102].
26 Hendin https://www.hrw.org/report/2019/08/07/why-sex-work-should-be-decriminalised-south-africa (Date of use: 10 November 2021).
27 The Nordic model views sex work as a consequence of male oppression of females. As such, the buying of sexual services by male clients are criminalised, and not the sex workers themselves. See Kingston and Thomas 2019 *Crime, Law and Social Change* 423. For a discussion of the different models, see para 3.2 below.
28 Hendin https://www.hrw.org/report/2019/08/07/why-sex-work-should-be-decriminalised-south-africa (Date of use: 10 November 2021).

Worker Alliance (ASWA); and Asijiki Coalition for the Decriminalisation of Sex Work (Asijiki). Those who opt to commoditise their sexuality argue that sex work is a protected personal choice as to how to exploit their bodily potentials wisely, or to resourcefully deal with their own bodies. They rely on the protection of the law in terms of the right to dignity and the right to privacy (the right to be left alone). The right to privacy is said to embody, among others, protection against intrusion into one's private affairs; or avoidance of disclosure of one's embarrassing private facts.[29] Section 10 of the Constitution grants everyone the right to privacy, which includes the right not to have their person or home searched, or the privacy of their communications infringed. Privacy (i.e., the 'inner sanctum' of a personhood), especially in sexual intimacy relationships, espouses to:

> …establish and nurture human relationships (for instance, sexual preference) without interference from the outside community[30] to the extent which a legitimate expectation of the privacy can be harboured.[31]

In *Jordan*, the minority court rightly held that commercial sex involves the most intimate of all personal activities,[32] and that the invasion of the activity would indicate a violation close to the core of privacy.[33] Furthermore, the Republic of South Africa is founded on human dignity, equality, advancement of human rights and freedoms, and/or non-sexism.[34] This means that, according to the Constitution, all persons have dignity, human rights and freedoms, and no person should be discriminated against, whether this person is a sex worker or not.

To this end, it will be argued that South African common law, case precedent or legislation restricting commercial sexual intercourse between individuals is overbroad, intrusive, arbitrary, and disproportional. Therefore, the validity of the laws criminalising sexual acts for recompense must be tested against especially a constitutional background.

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29 Moskalenko 2015 *International Comparative Jurisprudence* 114.
30 *National Coalition* para 32; *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 para [4] (hereinafter *Bernstein*).
31 *Bernstein* para 75.
32 *Jordan* para [78]; *Bernstein* para 81.
33 *Jordan* para [76]; *Bernstein* para 82.
34 Section 1 of the Constitution.

1.2 Research problem

This research problem is founded on the criminalisation of sexual acts for remuneration, reward or favour in South Africa.[35] Internationally, there are four legal models pertaining to the regulation of sex work, namely, decriminalisation; legalisation; total criminalisation; and regulation.[36] The decriminalisation model,[37] founded in New Zealand, intends to remove all legal barriers on those involved in sex work, i.e. the service provider as well as the buyer of the service. This model recognises the right of self-determination and provides lawful security measures against abuses. Despite the decriminalisation of sex work, laws still exist to handle public policies. The regulatory model, also called the legalising and liberalising model,[38] does not intend to end prostitution *per se*. It recognises sex work as an economic activity, and that it should be governed by labour law. It frees persons to meaningfully exploit their sexual potential within the confines of the law. The regulatory model does create a stringent code of conduct for sex workers, for instance, working in certain geographical areas and at specific times; being registered, and undergoing regular health examinations. Germany, the Netherlands, India, Mali, Senegal, Canada, and the UK are some of the countries that follow the regulatory model. The partial criminalisation of sex work makes it a crime to purchase or buy sex, but the selling of sex is not a crime. Sweden was the first state to partly criminalise sex work. The Swedish (or Nordic)[39] legal regime, as will be argued in this study, unfairly discriminates between sellers and customers, and furthers the inchoate offences of attempt and incitement. The criminalisation model,[40] as found in South Africa, completely bans the giving of money or favours in the return for sexual acts and intends to eradicate prostitution. Everyone found in the service chain of the sex work industry; be it aiding, operating brothels, living on the earnings of sex work, or performing the actual sexual activity for reward, is guilty

35 Sexual Offences Act 1956; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter Sexual Offences Act 2007); Trafficking in Persons Act 7 of 2013 (hereafter Trafficking in Persons Act 2013).

36 Schulze et al *Sexual exploitation and prostitution and its impact on gender equality* 7-8. For an in-depth discussion of the different models, see para 3.2 below.

37 See para 3.2.1 below.

38 See para 3.2.3 below.

39 Also called the neo-abolition regime. See footnote 27 above, as well as para 3.2.5 below.

40 See para 3.2.2 below.

of an offence. This, as will be argued, is not only completely injudicious but also entirely untenable.

Prostitution or sex work is a multifaceted concept, and includes consensual sexual acts of prostitution, forced prostitution, adult prostitution, and child prostitution.[41] Where force, threat, fraud, misrepresentation, deprivation, or deceptions are present in pursuit of sexual gratification, the personal and public peace and security are endangered. Sexual acts between an adult and a child, whether gratis, consensual, or forced, is a crime.[42] The Constitution specifically dwells on the welfare of children and places a burden on the state or those *in loco parentis* to take appropriate measures to ensure the well-being of a child. It provides in section 28 that every child has a right to be protected from maltreatment, abuse or degradation; to be protected from exploitative labour practices; and not to be required to perform work or provide services that are inappropriate for a person of that child's age.[43] This study will not deal with the sexual conduct between children, but will focus on the criminalisation of adult sex work, that is, where adults exercise their free choice, voluntary and informed,[44] to have consensual sexual intercourse in return for a fee, reward or favour.

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41 In the South Africa, as in most jurisdictions internationally, the law distinguishes a child from an adult. Section 28(3) of the Constitution defines a child as a person under the age of 18 years. This is confirmed in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (hereafter the Sexual Offences Act 2015). Yet for ss 15 and 16 of this Act, a child is a person 12 years or older but under the age of 16.

42 Sexual Offences Act 2007 ss 15-20. Consensual sexual conduct between children, whether without charge or not, is a contentious issue. Consensual sexual intercourse with a child aged 12 years and older but under the age of 16 years is criminalised. Section 15(1) of the Sexual Offences Act 2015 which deals with the consensual sexual penetration of a child provides that any person who commits an act of sexual penetration with a child who is 12 years of age or older but under the age of 16 is, despite the consent of the child, guilty of the offence of having committed an act of consensual sexual penetration with a child. The only exceptions are if the person committing the sexual act with the child was, at the time of the commission of such act, also 12 years of age or older, but under the age of 16 years; or the person was either 16 or 17 years; and the age difference between the person and the child was not more than two years. Sexual penetration with a child under the age of 12, whether consensual or not, constitutes rape. In *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC), ss 15 and 16 were found to be inconsistent with the Constitution, and invalid to the extent that they impose criminal liability on children under the age of 16 years.

43 Constitution s 28(1)(c), (e), (f).

44 Where consent is absent in sexual intercourse between adults, this will amount to rape.

The situation currently in South Africa is that all illicit adult sexual intercourse is punishable.[45] Section 20(1A)*(a)* of the Sexual Offences Act 1957 declares that any person 18 years or older who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward, commits a crime. The legislation purports to punish unreasonably or indiscriminately any or all those who knowingly or negligently make their dependencies wholly or partly out of the proceeds of prostitution. The criminal law, it will be argued, seeks to punish, for example, an advocate appearing for sex worker in a sex work lawsuit, a child of a sex worker, brothel managers or owners, dependant relatives, and health workers paid by a sex worker, et cetera. This study intends to show the over-broadness (which is against the *ius strictum* rule),[46] ambiguity, incoherence, and unconstitutionality of some of provisions of the current law which makes it untenable.

South African courts have already dealt with the constitutionality of the criminalisation of the 'living on the avails or earnings of or from prostitution'.[47] In two cases, *S v Jordan*[48] and *Kylie v Commission for Conciliation Mediation and Arbitration and Others,*[49] the complainants were employed in massage parlours to perform sexual services for pay, contrary to the provisions of the Sexual Offences law. In the *Jordan* case, the accused was arrested and charged with committing unlawful carnal knowledge for reward, contrary to section 20(1A)*(a)* of the Sexual Offences Act of 1957. The accused did not plea but challenged the constitutionality of the contravened law's provision on the grounds that it infringed the dignity, freed, privacy and economic activity of sex workers.[50] In dismissing the challenges, the majority of the court held that:

> …prostitutes are entitled to engage in sex, use their bodies in any manner whatsoever and to engage in any trade so long as this does not involve sale of sex.[51]

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45 Section 1 of the Sexual Offences Act 1957, as read with s 18 of the Riotous Assemblies Act 17 of 1957 (hereinafter Riotous Assemblies Act 1957).

46 Snyman *Criminal law* 43-45.

47 Sexual Offences Act 1957 s 20(1A)*(a)*. See *Jordan* para 34; *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); 2010 (10) BCLR 1029 (LAC); (2010) 31 ILJ 1600 (LAC); [2010] 7 BLLR 705 (LAC) (26 May 2010) (hereinafter *Kylie*).

48 *Jordan* para 34. Also see the discussion of the case in para 4.3.1 below.

49 *Kylie* para [1]. See also the discussion of the case in para 4.3.2 below.

50 *Jordan* para 1.

51 *Jordan* para 29.

The court was of the view that commercial sex lowered the dignity of the prostitutes. The purpose of section 20(1A)*(a)* of the Sexual Offences Act 1957, the court stated, was to entrench a constitutional purpose to outlaw commercial sex. The minority of the court held that section 20(1A)*(a)* unfairly discriminated against sex workers, and therefore is unconstitutional. The court in *Jordan*[52] settled on assertion that the only way to curb prostitution was by imposing criminal sanctions on the sellers. It will be contested that the court's assertion, in view of *Bedford,*[53] is not arbitrary or disproportional.

In the *Kylie* case, a sex worker was employed to perform various sexual services for reward and was dismissed allegedly without due process. The Labour Court had to consider whether sex work is employment as envisioned in the Labour Relations Act, and its enforceability in the light of section 20(1) of the Sexual Offences Act 1957 which criminalises acts of sex work. The review court held that the Sexual Offences Act 1957 outlawed the running of brothels and performing unlawful carnal knowledge for remuneration.[54] Cheadle AJ came to the conclusion that:

> …in terms of the Labour Relations Act 66 of 1995, a sex worker was not entitled to protection against unfair dismissal because in terms of the common law principle courts ought not to sanction or encourage illegal or immoral activities (*ex turpi cause non oritur action)*.[55]

Kylie lodged an appeal against the decision of the Labour Court. The Labour Appeal Court considered Kylie's dignity and her right to fair labour practises. Dignity is associated with a person's autonomy – their capacity to be the master of their own fate and the shaper of their own future or destiny.[56]

It is in the interest of this study to examine the double standards of these court decisions as well as specific sections of the Sexual Offences law, especially considering the conclusion reached by this court, in that it:

> …cannot and does not sanction sex work; sex work is unlawful... a sex worker has no constitutional protection despite being an employee in terms of the

52 *Jordan* para 29.
53 *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101 (hereinafter *Bedford*).
54 *Kylie* para [6].
55 *Kylie* paras [3], [7].
56 McCrudden 2008 *EJIL* 659, referring to the views of Immanuel Kant.

Labour Relations Act.[57]

In this case, the court contended that the terms of employment as a sex worker or the remedies for the unfair dismissal from employment, was unenforceable because the act of performing various sexual services for reward was unlawful. The appellant was therefore not entitled to section 23(1) of the Constitution which entitles everyone's right to fair labour practises. The court held the view that the criminalisation of prostitution in the *Jordan* case did not necessarily deny a sex worker the constitutional right to fair labour practises as provided for in section 23(1) of the Constitution.[58] The definition of an employee in terms of the Labour Relations Act is:

> *any person* (with exception of none – *my emphasis*), excluding an independent contractor, who works for another person…and who receives, or is entitled to receive any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.[59]

The law was further amended to bring in a rebuttable presumption as regarding 'employee' and went ahead to provide:

> Until the contrary is proved … a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee if any one or more of the following factors are present: manner in which the person works is subject to the control or direction of another person; person (service provider) is economically dependent on the other person for whom he or she renders service; person only works for or renders services to one person (at a time).[60]

The above legal provisions, as will be argued, provide for the legal framework of sex workers whose nature of the services provisions would fall in the listed categories of permanent employees, casual workers, contract workers, part-time employees, self-employed people, et cetera.[61] The court's conclusion in the *Kylie's* case that sex work was unlawful is, argumentatively, premised on the *Jordan's* case precedence as regards the constitutional validity of section 20(1A)*(a)* of the Sexual Offences Act 1957. It will be argued that the *Jordan*[62] case, having been decided on

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57 *Kylie* para [54].
58 *Kylie* para [39].
59 Section 213 of the Labour Relations Act.
60 Section 200A(1) of the Labour Relations Act.
61 McGregor and Dekker (eds) *Labour law rules!* 16.
62 *Jordan* para [4]; see similar version in *R v Kam Cham* [1921] EDL 327 328.

a law that had already been wholly repealed, should not have set a precedence in the *Kylie*[63] case, which was tried after a judiciously tested and certified final Constitution was already in place. It will furthermore be contended in this research that some sections of the Sexual Offences Act 1957 and any other related laws infringe on the constitutional rights of equality,[64] human dignity,[65] freedom and security of the person,[66] privacy,[67] freedom of trade, occupation, and profession,[68] and lastly, on fair labour practices.[69] Sex work has been accepted as work in terms of the Labour Relations Act, however:

> Even though appellant is an employee for the purposes of section 185 of the LRA, this does not mean that collective agreements purportedly concluded between brothels and sex worker unions which amount to the commission of crime or the furtherance of the commission of a crime are enforceable under the LRA nor does it imply that sex worker unions would be entitled to exercise organisational rights, including the right to strike to that end. On the contrary, although sex workers would, as employees, be entitled to form and join trade unions, they would not be entitled to participate in any activities, including collective bargaining, that amounted to the furthering of the commission of crime.[70]

This court has held that section 20 of the Sexual Offences Act 1957 and section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are constitutional, and do not offend any of the sex workers' protected rights in the Bill of Rights. It will be reasoned in this study that, with the exception of the definition of a worker, and that a sex worker is captured in the definition, all other findings by this court are contestable.

The South African Law Reform Commission (SALRC)[71] has reconsidered the legal framework regulating adult prostitution with views to reform the law. The Commission had to decide which legislative model of regulating adult prostitution was in line with the government's vision and strategies as well as the Constitution. The SALRC also adopted a definition of prostitution which seems restrictive in that

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63 *Kylie* para [54]; *Jordan* para [33].
64 Section 9 of the Constitution.
65 Section 10 of the Constitution.
66 Section 12 of the Constitution.
67 Section 14 of the Constitution.
68 Section 22 of the Constitution.
69 Section 23 of the Constitution.
70 *Kylie* paras [59]-[60].
71 SALRC *Sexual offences: Adult prostitution* 2009 para 4.

a prostitute or sex worker is delineated as the offerer of sexual services for reward. In this study, as decided in the *Jordan*[72] case, prostitution is held to be the giving and receiving (exchange) of financial benefits, offers or other favours or compensation between persons as a result of committing sexual act(s). It is irreconcilable with the criminal justice system when courts[73] hold that there is a difference (in liability) between a person who has prostituted repeatedly and one who has done it only once. The study intends to challenge the criminalisation of prostitution both statutorily and on the basis of common law.

One of the narratives the SALRC had to consider was whether prostitution is (decent) work or exploitation. It was the SALRC's view that prostitution does not fit suitably in the international definition of decent work for the purposes of labour-law protection.[74] These views were made against the background of the labour law-related findings in *Kylie* by the Labour Appeal Court.[75] Although the respondents averred that sexual acts for reward were a personal and private choice,[76] the SALRC contends that exploitation seems inherent in prostitution. It further holds that the non-criminalisation of prostitution would not give prostitutes labour-related benefits. The Commission further states that by retaining the law,[77] third parties (including brothel owners, managers, or administrators) will be held criminally liable if they knowingly live or benefit from the proceeds of prostitution.[78] This, the SALRC feels, does not infringe on the individual's rights to freedom of trade, occupation or profession.[79]

Whereas the SALRC was seen as the avenue to bring about the total decriminalisation of prostitution, this did not turn out to be, even with the courts' opposing views. The outcome was met with a fierce outcry by pro-decriminalisation groups and individuals. It was stated that the Commission was working towards

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72 *Jordan* para [14].
73 *Jordan* para [10]; *R v Kam Cham* [1921] EDL 327 328.
74 SALRC *Sexual offences: Adult prostitution* 2009 para 13.
75 *Kylie* paras [58]-[60].
76 Ngalo https://www.dailymaverick.co.za/article/2018-03-08-reflections-from-a-parliamentary-summit-sex-work-vs-prostitution-time-to-get-the-difference/ (Date of access: 11 June 2021).
77 Section 20(1) of the Sexual Offences Act 1957 and the Sexual Offences Act 2007.
78 SALRC *Sexual offences: Adult prostitution* 2009 para 25.
79 SALRC *Sexual offences: Adult prostitution* 2009 para 61.

decriminalisation of sex work, but the final report never reflected this.[80] Allegations were made that:

> …the SALRC project was driven essentially by one person with none of the original commissioners and researchers which began compiling the report.[81]

In order to test the impact of the criminalisation of sex work in South Africa, it is necessary to examine the circumstances in comparable jurisprudences. When comparing other countries' legislative approaches to the purchasing of sex, and their various models of prostitution, it must also be mentioned that even comparable law provisions may not have analogous judicial interpretations. The laws and policies pertaining to prostitution in three common-law countries of similar legal background to South Africa, i.e. Canada, India and Great Britain,[82] will be compared to the approach followed in South Africa. The motivating background of this study is the decriminalisation model of sex work between free consenting adults in the New Zealand or the Netherlands. Furthermore, the South African common law is partly founded on the Roman-Dutch law[83] whereas the New Zealand law is founded on the English law.

Supporters of the decriminalisation of consensual sex work in South Africa highlight the fact that there is a supply and demand, and that sexual services is provided in exchange for money.[84] Others have called for the total decriminalisation of prostitution citing constitutional protection to the right of equality, dignity, freedom and security, privacy, freedom of trade, occupation and profession, fair labour practises and health.[85] These, and other perspectives, will be examined in the thesis. As evidenced from the above discussion, there are several aspects of the law on sex work that will subjected to a critical review in this thesis in order to make an ultimate conclusion that the criminalisation of sex work is legally unsound and

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80 SWEAT *Why sex work should be decriminalised in South Africa* 17.

81 According to Sally Shackleton, director of SWEAT. See Tlhabye et al https://www.iol.co.za/saturday-star/news/legal-blow-for-sa-sex-trade-9380126 (Date of use: 20 March 2021).

82 Great Britain consists of the countries of England, Wales and Scotland.

83 The Roman-Dutch common law is the uncodified law of Holland that was inherited from the original Dutch settlers who arrived in South Africa in 1652. See Burchell and Milton *Principles of criminal law* 34-40.

84 SWEAT *Why sex work should be decriminalised in South Africa* 11.

85 Mgbako et al 2013 *Georgetown J Int'l L* 1423; Le Roux 2003 *SALJ* 452; Pudifin and Bosch 2012 *PER* 3-31; Radebe *The unconstitutional criminalisation of adult sex work* 7-8.

unconstitutional.

1.3. Research questions and hypothesis

This research critically examines the causes and consequences of the criminalisation of sex work in South Africa by means of a comparative approach. In order to achieve the research objectives, the following research questions are asked:

- What are the reasons behind endemic sex work in South Africa?
- Has the criminalisation of sex work in South Africa reasonably met the state's objective of eradicating the conduct?
- What are some of the challenges that have been faced in the criminalisation of sex work in South Arica?
- Are the legal doctrines *ex turpi causa non oritur actio* (from a disgraceful cause, no action arises) and *in pari delicto portio est conditio defendentis seu possidentis* (i.e., where the two are equally guilty, the possessor is in a stronger position) still sacrosanct with regard to sex work in South Africa?
- Does the criminalisation of sex work infringe on the sex worker's right to equality; dignity; freedom and security of a person; privacy; freedom to receive and pass information or ideas; freedom of trade, occupation, and trade; and fair labour practises in the democratic Republic of South Africa?
- Does the current model of criminalisation of sex work in South Africa find support in comparative foreign law and or international law?
- What legal framework ideally suits sex work and sex workers in South Africa?

The hypotheses underlying the research in this study are:

- The criminalisation of adult sex work in the democratic constitutional state of South Africa, is untenable due to its arbitrariness, over-broadness, and disproportion.

- The interpretations of the concepts of sex work in South Africa are based on judicial activism.

- The discretionary relaxations of the common-law doctrines of *ex turpi causa non oritur actio* and *in pari delicto portio est conditio defendentis seu possidentis* as established in *Jajbhay v Cassim*[86] and the divergences[87] thereof have added to confusion in the sex industry trade.

- Comparative international- and foreign law interpretations about sex work will assist the South African jurisprudence to either decriminalise or at least legalise sex work.

- Removing the criminal law and delictual law restrictions on sex work and sex workers in South Africa are compatible with the Constitution of the Republic of South Africa, as well with international law.

1.4 Methodology

The problem under investigation is the critical examination of the validity of criminalisation of commercial sex work in South Africa. This examination will not be of much success unless a comparison of sex work vis-à-vis the law in other selected and comparable states jurisprudence with a similar English law foundation as well as the international law is done.

This is desktop or literature-based research. It is a content-based (descriptive, qualitative) approach analysis. A qualitative research design relates to investigating a phenomena involving quality or kind.[88] In examining the reasons for certain human behaviour or reasons why certain acts are conducted, a type of motivation research is done, which is an important type of qualitative research. This type of research aims at discovering the underlying motives for the reason why certain phenomena or matters have occurred; it is "concerned with subjective assessment of attitudes,

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86 *Jajbhay v Cassim* 1939 AD 537 held that "where simple justice between a man and a man" is so required, courts can judiciously and discretionary deviate from the common-law maxims of *ex turpi* and *pari delicto*.

87 *R v Masego* 1915 TPD 1; *Brandt v Bergstedt* 1917 CPD 344.

88 Kothari *Research methodology: Methods and techniques* 3.

opinions and behaviour".[89] The study will investigate and analyse the attitudes, expressions, or motives of South Africans as regards prostitution or sex work.

Content-analysis consists of analysing the contents of documentary materials[90] such as books, articles, case law, legislation, et cetera, in order to import the general communication of the documents. It is stated that: "Content-analysis is measurement through proportion. Content analysis measures pervasiveness and that is sometimes an index of the intensity of the force".[91] This study will examine primary data (legislation, case law, international instruments et cetera) as well as secondary data (i.e., data that are already available in the public domain that have already been collected and analysed by someone else). In this regard, documents such as unpublished research, reports, internet sources, and newspapers focusing on sex work in South Africa will be utilised. The documentary analysis will not only be confined to South Africa but also examine comparative jurisdictions. After doing an in-depth investigation of all materials relating to adult sex work, the researcher will provide insights into and impressions of the accumulated knowledge base.

The literature research has already indicated that there are enough resources to successively carry out this study. Primary resources that will be of use are the Constitution of the Republic of South Africa, statutes and case law (of South Africa), as well as comparative case law and international law. Other resources are articles, textbooks, reports, research papers, and internet sources.

1.5. Literature review

The primary purpose of this research is to seek any justification for the current criminalisation of sex work in South Africa. In order to achieve this goal, an analysis of the relevant literature on the domestic legislation and policies on adult commercialised sex work, as well as applicable foreign laws and international instruments was done.

89 Kothari *Research methodology: Methods and techniques* 5.
90 Kothari *Research methodology: Methods and techniques* 110.
91 Good and Scates *Methods of research* 670.

The topic of sex work has always been a highly emotive and contentious subject matter, not only in South Africa, but in the world. Despite the importance of this research problem, not much post-graduate research focussing specifically on the legal aspects of prostitution has been performed on the subject matter. Many publications centre on other topics such as the psychological effect of sex work on the workers themselves, sex workers' lived experiences, the history of sex work throughout the ages, issues on gender and sexuality in prostitution, socio-economic, socio-cultural, and political considerations as regards sex work, and so forth.

The first postgraduate research located on this topic is Stone's *The decriminalisation of victimless sexual offences*[92] which was completed in 1996. The author examines the legislation criminalising both the crimes of prostitution and homosexuality. Of importance to this thesis is the examination on prostitution. The law as regards prostitution is examined as well as the legislative trends that emerge within the historical context. The researcher also explores the laws on prostitution and its relation to morality in order to determine whether morality can serve as a sufficient justification for the criminalisation of conduct. The legislative justification for criminalising prostitution is explored so as to establish the legitimacy thereof. It is concluded that this specific area of criminal law must be decriminalised on the premise that the criminalisation thereof is not justified. It is submitted that the criminalisation of prostitution is unconstitutional, and infringes the rights to privacy, to be treated equally, the dignity of the person, the right to engage in free economic activity, and the right against discrimination on the basis of race, gender, sex etcetera.

In 2005, Kalwahali completed an LLM on the topic *The criminalization of prostitution in South African criminal law.*[93] In his mini-dissertation, the author briefly discusses the problem of prostitution as provided by section 20(1A)*(a)* of the Sexual Offences Act of 1957. The focus of the discussion is to ascertain whether criminalisation is the designated means to reduce or eliminate prostitution in South Africa. In providing a background to the study, the most important systems for addressing prostitution are presented, and the South African model is evaluated in brief. The conclusion is

92 Stone *The decriminalisation of victimless sexual offences* 1-238.
93 Kalwahali *The criminalization of prostitution in South African criminal law* 1-45.

reached that the existing South African legislation discriminates against women, and that the law should focus on forced prostitution and the exploitation of prostitution by a third party, rather than criminalising consensual prostitution.

Five years later, another mini-dissertation appeared written by Rhoda titled *The decriminalisation of prostitution in South Africa: Towards a legal framework* (2010).[94] In his research, Rhoda contends that the current legal framework on sex work in South Africa has failed in its desired aims and in addressing prostitution effectively. The author consequently argues for a new South African legal framework to address prostitution. In order to establish the foundation for the research, the connection between prostitution and human rights is explained, and the necessity for a human-rights approach to prostitution is emphasised. It is established in the study that there are a myriad of interrelated factors driving entrance into sex work in South Africa, such as poverty, low education, addiction, and discrimination, for example. Except for the domestic legal framework that currently governs prostitution in South Africa, Rhoda also examines the international legal framework on the topic. In his conclusion, the author recommends that a best practice legislative framework based on a human rights approach must be adopted wherein the legislative methods for the criminalisation of the demand for prostitution are set out while also providing alternatives to the victims of prostitution and sexual exploitation.

It has been argued by many researchers that consensual adult sex work should be acknowledged as decent work, and that the conduct is not criminal or against the provisions of the Constitution. One such scholar is Radebe, who wrote a mini-dissertation on *The unconstitutional criminalisation of adult sex work*[95] in 2013. The author argues that by continuing to criminalise adult sex work, the South African government unjustly violates sex workers' constitutional rights of human dignity, equality, privacy, and the right to bodily integrity. The South African laws enforcing sexual morality also increase the stigmatisation and marginalisation of especially minority groups in adult commercial sex work. This dissertation also includes a detailed discussion of the *Teddy Bear*[96] case which concerned the criminalisation of

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94 Rhoda *The decriminalisation of prostitution in South Africa: Towards a legal framework* 1-131.
95 Radebe *The unconstitutional criminalisation of adult sex work* 1-65.
96 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC). Also see footnote 42 above.

consensual sexual intercourse between minors of ages 12 to 15. This court held that the criminalisation constituted a violation of children's rights to dignity, privacy and self-autonomy; the same argument can be made for adult sex work. The author proposes that the legislature should enact a human-rights based law on adult sex work, such as that found in New Zealand. This type of approach aims to empower sex workers in order to make informed choices as regards health- and safety issues. By applying such perspective, a shift from oppressive laws based on morality to that based on the human rights of sex workers will be effected.

In 2014, Oppenheimer completed an MPhil dissertation on *Prostitution as the exploitation of women and a violation of women's rights.*[97] Although this study is not based in law, it addresses legal concerns in that the proposed legislative reforms in South Africa on adult prostitution are examined. The various suggested legal prototypes are examined and evaluated in order to determine which model best upholds the international human rights standards. In this regard, the international and foreign best practices as regards sex work are assessed as to their successes and failures. In conclusion, the author recommends the Nordic model[98] for South Africa, as this model will not only improve the sociocultural status of women, but also penalise the demand for female sex work, which is globally considered as the primary force behind the existence and growth of the sex industry. This dissertation has exemplified again the shift in perspective on sex work research South Africa from being a criminal offence to a human rights concern.

Mdhluli provided a labour-law perspective on the topic of sex work in *A definition of an employee and the legal protection of sex workers in the workplace: A comparative study between South Africa and Germany* (2014).[99] The mini-dissertation considers the challenges faced by sex workers in South Africa, the violation of their constitutionally enshrined rights such as dignity, and the fact that their plight is being neglected by the South African government. After briefly reflecting on the history and evolution of commercial sex in South Africa, the point is made that criminalisation has not discouraged the continuance of sex work in the

97 Oppenheimer *Prostitution as the exploitation of women and a violation of women's rights* 1-119.
98 See footnote 27 above, and para 3.2.5 below.
99 Mdhluli *A definition of an employee and the legal protection of sex workers in the workplace* 1-66.

country. It is suggested that the challenges that encourage sex work should be addressed, and that South Africa could benefit from the German best practices as to sex work legislation where the practice is decriminalised. The decision of the Labour Appeal Court in *Kylie*[100] is also briefly touched on where the interpretation of an employee was clarified, and a sex worker classified as an employee. However, a sex worker is still not entitled to protection against unfair dismissal.

The issue of human-rights violations against sex workers was also the topic of Ndhlovu's mini-dissertation titled *The criminalisation of prostitution as a human rights violation against women in South Africa* (2019).[101] The author investigates whether criminalising sex work constitutes a human-rights violation of female sex workers. The research subsequently focusses on the negative impact of the criminalisation of sex work in South Africa by examining not only the legislative framework on sex work, but also the Constitution and policy documents, gender inequality, and the jurisdiction's commitment to international human rights instruments. The author recommends that the South African government develop a new legal response to sex work based on decriminalisation.

The latest post-graduate research that could be traced on the topic is the mini-dissertation of Vaveki titled *The legalisation of prostitution in South Africa* (2019).[102] Following the trend set in previous dissertations, Vaveki traces the history of sex work in South Africa very succinctly. It is established in the research that the conduct was not explicitly criminalised in South Africa, and the government was depended on various laws to regulate and contend with the phenomenon. However, specific legislation was enacted to deal with the problem of prostitution, and these legislative measures still exist nowadays to ensure that sex work remains a crime in the country. The pivotal cases of *Kylie*[103] and *Jordan*[104] are briefly outlined as examples where courts have been tasked to consider the status of sex workers in the context of their constitutionally provided human rights. The writer argues that the criminalisation of sex work is a case of the state legislating morality, and thereby

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100 For a brief outline of the case see para 1.2 above as well as discussion in para 4.3.2 below.
101 Ndhlovu *The criminalisation of prostitution as a human rights violation against women in South Africa* 1-73.
102 Vaveki *The legalisation of prostitution in South Africa* 1-50.
103 For a brief outline of the case, see para 1.2 above as well as discussion in para 4.3.2 below.
104 For a brief outline of the case, see para 1.2 above as well as discussion in para 4.3.1 below.

interfering with individuals' private affairs. Such state interference should be strictly guarded against as this is reminiscent of the Apartheid state's politics. Vaveki recommends that the legislature adopt the New Zealand model of decriminalisation in order to safeguard the human rights of sex workers.

There have been quite a few articles written on the criminalisation of prostitution, the utilisation of criminal sanction in the sphere of sexual morality, human rights issues in sex work, and especially on the two seminal cases of *Kylie* and *Jordan*, as mentioned above, and most of the articles will be made use of in this study. For example, Boudin and Richter authored an article on consensual adult sex work in South Africa wherein they caution against the confluence of criminal law and sexual morality in prostitution laws.[105] As most human relationships involve some degree of contractual or transactional behaviour, any criminal laws inserted into the fray of complex social and sexual relations will draw arbitrary distinctions and create standards that are not judicially manageable.[106] This article is very useful as it discusses the SALRC's *Discussion Paper on Adult Prostitution* 2007, and investigates the New Zealand approach to sex work for possible implementation in South Africa. As regards the specific topic of decriminalisation of sex work, Mgbako[107] is a notable author on the subject. Not only does she focus on this particular issue, but she also considers the human rights of sex workers in another article.[108] As to human rights and the constitutionality of the criminalisation of prostitution, Nyathi-Mokoena and Choma investigate the constitutionality of the crime of prostitution in the Sexual Offences Act 1957 as to whether the criminalisation of sex work is in line with the right to freedom of trade, occupation and profession and the right to fair labour practices as enshrined in the South African Constitution.[109]

The authoritative case law that ruled on the constitutionality of the law proscribing sex work in South Africa, as in *Jordan*, has been greatly denounced. In her article on the *Jordan* case, Fritz[110] criticises the court's decision, and argues that the

105 Boudin and Richter 2009 *SAJHR* 179-197.
106 Boudin and Richter 2009 *SAJHR* 180.
107 Mgbako et al 2013 *Geogetown J'Int'l L* 1423-1454. See also Peté 2010 *Obiter* 535-555.
108 Mgbako 2020 *Harvard Journal of Law & Gender* 91-136.
109 Nyathi-Mokoena and Choma 2013 *Int J of Humanities and Social Science* 233-237.
110 Fritz 2004 *SAJHR* 177-248.

decriminalising of prostitution should be compelled chiefly by those primarily affected, i.e., prostitutes' rights to autonomy, to determine lives of their choosing; to decisional and spatial privacy; and to equality, dignity and security of the person. The government's justification for the limitation of prostitutes' rights, i.e. the dangers associated with prostitution, are in most cases the function of criminalisation itself, and would be more effectively addressed were the practice decriminalised. Krüger[111] supports the view that female sex workers' or a feminist perspective should have played a part in the court's decision. This argument is further supported in that the majority decision (comprising six male judges of the Constitutional Court) held that section 20(1A)*(a)* of the Sexual Offences Act 1957 did not constitute unfair discrimination against women, while the minority (the remaining five judges which included one female judge) found that the specific section did constitute unfair indirect discrimination against women. Many authors have also pointed out that the *Jordan* case was based on the Interim Constitution, and not the final Constitution. The final Constitution greatly limited the application of any law which encroached on the elaborate protected human rights of all South African citizens.[112]

The *Kylie* case has also been the subject of quite a few articles. Smit and Du Plessis[113] discussed this case by focussing on the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) in this matter. It is interesting to note that the CCMA can only be approached to resolve labour disputes between an employer and employee where an employment relationship between these parties exists. In this regard, the CCMA refused to deal with Kylie's complaint of unfair dismissal, as prostitution is a proscribed activity, and Kylie was therefore not considered an employee in terms of the law (and consequently not entitled to relief or compensation). The CCMA also stated that it remained the task of the legislature or the Constitutional Court to determine whether the criminalisation of prostitution is appropriate or not; this was not the task of the CCMA. On appeal, Kylie's quest for justice changed the existing law based on the *ex turpi causa* rule to allow for the labour law protection of a prostitute. Highlighting the constitutional issues in *Kylie*,

111 Krüger 2004 *SAJHR* 1-150.
112 See, e.g., Louw 2003 *Agenda* 104-110.
113 Smit and Du Plessis 2011 *SA Merc LJ* 476-487.

Nyathi-Mokoena and Choma[114] explore the right to fair labour practices as presented in the case. They briefly examine the decision of the CCMA in claiming no jurisdiction to hear the matter as sex work is a proscribed activity in South Africa. The CCMA also held that sex workers are not explicitly excluded from protection by the Labour Relations Act, however, this does not mean that they are included either. The writers conclude by stating that although the common law prevents the enforcement of illegal contracts, sex workers are protected by the Bill of Rights which jettisons the common-law principle. Section 23 of the Constitution guarantees everyone the right to fair labour practice, which includes sex workers.[115] The most recent article on this subject matter is that of Rapatsa.[116] In his article, Rapatsa argues that the legislature should acknowledge that the decision taken that Kylie met the requirements of being an employee (as per the Labour Relations Act s 213) and consequently is eligible to receive labour law protection has expanded the scope of labour law. The legal imperatives arising out of this case should therefore be extended to afford protection to all sex workers, who are the most socially vulnerable members of society, yet they are much neglected by government.

A legal review of the evolution of sex work in South Africa has previously been researched and conducted by authors such as Thusi,[117] Wojcicki,[118] Trotter[119] and Spies,[120] amongst others. Various domestic, foreign, and international case law that deal with the constitutionality of criminalising sex work or the infringement of sex workers' human rights were also consulted. Many reports exist on the proscription on prostitution in South Africa, and especially the constitutional validity of illegalising all commercial sex industry conduct, and the human rights of sex workers. As already mentioned, the SALRC has on several occasions (re)visited the discourse of sex work but it has been criticised as being guided by moral arguments not founded on the principles of the Constitution.[121] All of these reports will be made use of in this study, and especially the most recent narratives on the decriminalising of

114 Nyathi-Mokoena and Choma 2013 *Int J of Humanities and Social Science* 233-237.
115 See discussion in para 1.2 above and footnote 59.
116 Rapatsa 2021 *Journal of Legal, Ethical and Regulatory Issues* 1-8.
117 Thusi 2015 *Fordham Int LJ* 205-244.
118 Wojcicki 2003 *African Studies Review* 83-109.
119 Trotter 2008 *History Compass* 673-690.
120 Spies 2021 *Journal of African Law* 327-349.
121 See the discussion in paras 1.2 above and 4.3.4 below.

sex work in South Africa, and the accounts of sex workers themselves who have, on several occasions, challenged the criminalisation of sex work in South Africa.[122] As mentioned above, sex workers live wholly or partly on the earnings of sexual acts. These may constitute those who facilitate the commission of commercial sexual acts, or those who perform the actual sexual acts themselves.

Prostitution and the criminalisation thereof have been a predicament in this jurisdiction and has been reported on in many media platforms. Many of these newspaper- and online articles will be utilised in this research.

As evidenced from the above literature review, there are several sources to conduct a successful research on. However, none of the above sources have holistically presented the various perspectives on sex work or provided a historical account thereof. There has also not been in-depth, amalgamated research completed on international and regional law perspectives concerning sex work regulations as well as on the relevant sex work legislation and case law in the jurisdictions of South Africa, the United Kingdom, India, and Canada. The current research will aim to fulfil this knowledge gap in existing literature on sex work.

1.6 Layout of thesis

The thesis consists of five chapters, as summarised as follows:

Chapter 1: Introduction

The introductory chapter explores the need to decriminalise the existing legal framework pertaining to prostitution. The chapter further provides a general overview of the identified research problems, poses the research questions, explore the hypotheses underpinning the problem and exposit the aims of the research study. Lastly, a literature review on the available sources is conducted.

Chapter 2: A conceptual and historical analysis of sex work and the law

122 See, e.g. the article by Madzika and Mnono 2020 *De Rebus* 11-13 where the question is asked as to whether during the Covid-19 pandemic in South Africa, sex works should be classified as essential workers.

This chapter investigates the concept and the facets of prostitution. In this regard, the origin of the concepts of ‘prostitute’ and ‘prostitution’ are considered. The chapter furthermore examines the history of what is currently punished as prostitution. The historical perceptions on prostitution include views on sex work in the Ancient Near East and India, early Greece, Medieval Europe, and in England and its colonies, 1600-1950s.

Chapter 3: Foreign and international law perspectives on prostitution

The third chapter commences by providing a background to the different national legal approaches regulating sex work. This consists of discussing the various models by means of which governments control the phenomenon of sex work. The various systems reflected on are the decriminalisation regime, the criminalisation regime, the legalisation regime, the abolition regime and the neo-abolition regime. As explained in Chapter 1 and Chapter 4, the South African legal framework with regard to prostitution is founded on English law regulating prostitution; from the time South Africa became a British colony up to when the country became republic in a parliamentary regime. Under the parliamentary system, a parliament can make any law as it thinks fit; case law can be overruled; and the validity of a statute cannot be challenged. Studying British as well as Canadian and Indian statutes and court decisions (with English law foundations) on prostitution will give a better insight into this research problem. Further, judicial interpretations of sexual offences laws in these jurisdictions with a similar law background as South Africa will enhance the South African legal interpretations of the law on prostitution. Consequently, these three foreign countries’ perspectives on prostitution are considered in this chapter. International law is also deliberated on when examining the criminalisation of sex work, arguably an impaired human right, in South Africa. It is a constitutional mandatory to consider and give to the effects of the international law when interpreting Bill of Rights. As such, the international instruments applicable to sex work are examined, as well as certain relevant regional instruments.

Chapter 4: A critical perspective on the legal framework of prostitution in South Africa

Chapter 4 examines the legal developments in the law on prostitution in South Africa

covering from when the Dutch East India Company docked in South Africa in 1652, to the British colonisation of South Africa, until current arguments on prostitution. The historical perspectives on prostitution are divided into two periods consisting of the pre-Constitutional era, and the Constitutional period. In discussing the legal developments as regards sex work in South Africa pre-1993, the concept of prostitution in pre-colonial South Africa, the Dutch East India Company and regulation of early sex work in the Cape, sex work vis-à-vis the law under the British occupation, prostitution from 1910, and prostitution laws under the apartheid regime are reflected on. In the second period as mentioned above, the legal and policy framework on prostitution during the constitution era are considered. This section reviews the constitutional validity of the law criminalising prostitution by critically examining the legislation, municipal by-laws, case law and jurisprudence. The seminal case of *Jordan* and *Kylie* are discussed in depth in this chapter, as well as the prostitution debate and public discourse on prostitution in the jurisdiction. In brief, this chapter explores the criminalisation regime of sex work and whether the law conforms to the Constitution.

Chapter 5: Recommendations and conclusion

This chapter makes findings of the research problem and gives recommendations that will persuade on how the legislature and public policy should treat sex work in South Africa.

1.7 Summary

Sex work in South Africa is criminally and delictually unlawful. It is, however, endemic. Declaring prostitution unlawful has contributed to other offences occurring due to the clandestine nature of the conduct, which include murder, rape, corruption, sexual violations and other related diseases like HIV and AIDS. Sex work has been recognised in some countries as a form of labour, and sex workers as employees in an employment relationship. This, however, is not the situation in South Africa. Sex work contracts have therefore been termed unenforceable in this country owing to illegality. Though case law provides that sex workers can engage in sex as long as they do not commercialise it, what if the payments are in the form of intangibles or

unobservable like giving a legal opinion or counsel? This is a point to contest.

The first chapter laid the foundation for the intended research by introducing the research problem and research issues. The research was subsequently substantiated, the research questions were presented, the methodology was briefly described and justified, the research layout was outlined, and the limitations were given. On these foundations, the second chapter can proceed with a detailed historical analysis of sex work and the law.

CHAPTER TWO

A CONCEPTUAL AND HISTORICAL ANALYSIS OF SEX WORK AND THE LAW

2.1 Introduction

> The money paid to a harlot, however, cannot be recovered, as Lebeo and Marcellus state; … the question is not whether there is immorality on both sides, but it exists only on the part of the giver; as the woman acts in an immoral manner because she is a harlot, but she is not immoral when she accepts the money since she is a harlot.[1]

This chapter will explore the concept of sex work, and the historical journey of prostitution and the law in selected jurisdictions. This process entails tracing the historical literature on sex work, and countries' intolerance or tolerance thereof – beginning in India and the Ancient Near East which encloses the Mesopotamian regions of Sumeria, Babylon and Assyria. Together with the Ancient Near Eastern societies' culture, its Biblical exposition, especially of prostitution as recorded in the Old Testament, will be examined. Another locality of interest neighbouring the Ancient Near East societies is the Mediterranean region of Greece – particularly Athens. In Greece, the independent city-states of Athens or Sparta that existed are of significance. The study will also examine sex work and the law in ancient Rome and Pompeii; as well as the Imperial Rome (Classical) era. It will also research sex work and the law during the Medieval period, especially in the Netherlands and England (and Great Britain between the 17th century to the 19th century).

The Dutch and the English (or the UK as currently recognised) settled and colonised South Africa at diverse periods since 1652. The Roman-Dutch law and the English law are therefore sources of the South African common law and statutory law that have had a profound impact on legislation regarding sex work in South Africa. The historical background to sex work in these and other jurisdictions are consequently of the utmost importance to gain a broader perspective on the current laws on

[1] Ulpianus in the *Edict* Book 26. See ProCon.org https://prostitution.procon.org/historical-timeline/ (Date of use: 20 March 2021).

prostitution in South Africa.

For most societies, sexual activity is primarily a source of procreation, while sex-for-pay contradicts this ideal completely. Traditionally, men were seen to be the providers[2] of money,[3] or the material upkeep for their women in return sexual intercourses,[4] besides other domestic chores. In the play *The Taming of shrew,* Shakespeare's Kate depicts the dependency of the women folk by the satire:

> Thy husband is thy lord, thy life, thy keeper, thy head, thy sovereign; one that care for thee and for thy maintenance.[5]

One of the Founding Fathers of the United States, Benjamin Franklin, saw a woman as a dependent as well as a man's sexual object, and stated that a woman always required a wise man's counsel and directions. In his counsel to Catherine Ray Greene, he said:

> Let me give you some fatherly advice … be a good girl … get a good husband; then stay at home and nurse children.[6]

The woman is depicted as a person who cannot provide for herself and must rely on a man as a provider. Therefore, she had to get married or submit herself to a man for compensation in whichever form and render services as a dependent person. One of the services that she may render, as mentioned above, is that of sexual services.

As will be expounded on in this chapter, sex workers were historically not only women but also men (although women were more commonly the providers of sex). For example, in the Assyrian cult of goddess Istar (goddess of fertility), men and women in the temple could interchange roles in that the men (*kezrus*) could dress like *kezurtu* (female prostitutes) that is, *ut cum muliere*.[7] In Sippar in Mesopotamia, rites performed in the temple of goddess Annunitum included 'the role of the whore'

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2 NRSV Bible Committee *Holy Bible* 1 Timothy 5:8 states that "if anyone (husband) does not provide … for his immediate family … he is worse than an unbeliever".

3 NRSV Bible Committee *Holy Bible* Proverbs 7:19 – "For my husband … has gone on a long journey"; 7:20 – "He took a bag of money with him, at full moon he will come home".

4 NRSV Bible Committee *Holy Bible* Ephesians 5:2 – "Wives should submit to their husbands in everything".

5 Fletcher *Gender, sex and subordination in England 1500-1800* 109.

6 Roelker (ed) *Benjamin Franklin and Catharine Ray Greene* 20. See also Fox 2002 *Journal of the International Women's Studies* 15.

7 Stol *Women in the ancient Near East* 421.

(*harimutu*). The men would concessionary play the role of *harimutu* whereas the women could play the role of suitor or lover.[8]

As such, consensual sex work between adults includes homosexual acts, and these sexual acts have existed since Adam and Eve found their existence.[9] However, it seems that although heterosexual prostitution may still be acceptable in some societies, same-sex sex workers are frowned upon, as evidenced by certain state laws or international laws in which courts have adjudicated, for example, and held that:

> The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom.[10]

This subject as well as others pointed out above will consequently be discussed in the following paragraphs. It will be evidenced in this chapter that human sexuality has since ancient times been an individual or a societal common area of concern. Certain societies take great efforts in educating their youth on the importance of understanding and handling their sexuality and outlawing certain acts of commoditised sexual conduct. The following sub-paragraphs will first examine the origins of terms 'prostitute' and 'prostitution'; where after the perception of prostitution and the regulation thereof by selected societies throughout the ages will be discussed.

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8 Stol *Women in the ancient Near East* 423.

9 NRSV Bible Committee *Holy Bible* Judges 19: 22 – "…the men of the city, a perverse lot … said to the old man … bring out the man who came in to your house so that we may have intercourse with him", 19:23 – "…and the man of the house … said to them "No my brothers, do not act wickedly … do not do this vile thing"; 19:24 – "Here are my virgin daughters and his concubine … ravish them and do whatever you want. Compare also Genesis 19:5 – "...and they called Lot, 'where are the men who came to you tonight? Bring them to us, so that we may know them'"; 19: 7 – "…and (Lot) said 'I beg you my brothers, do not act so wickedly'"; 19:8 – "Look, I have two daughters who have not known a man; let me bring them out to you and do to them as you please"; Leviticus 18:22 – "You shall not lie a male as with a woman, it is abomination", 20:13 – "if a man lies with a male as with a woman, both of them have committed an abomination and they shall be put to death".

10 *National Coalition* para 36 (see footnote 5 in Chapter 1). In *Obergefell v Hodges* 135 S Ct 2584 (2015), the majority (5:4) court in the US held that the 14th Amendment required marriage equality and that all the states must allow same marriage.

2.2 The origin of the concepts of prostitute and prostitution

Prostitution arose as a 'natural' by-product of societal (human) formation, and it is as old as the society itself.[11] Different societies have interpreted prostitution by ways of multiple sexual relationships as in promiscuity, or polygamy[12] or just the exchange of sexual services for money or other favours. Prostitution has been damned as "the great social evil",[13] a form of promiscuity or unregulated sex that has coexisted with the civilization of societies.[14] It is a creature of human social civilization.[15] Iwan Bloch, a German physician, on the other hand, states that prostitution arose as a result of the societal regulation in human sexuality especially whenever free sexual intercourse was curtailed or limited.[16] Arguments have been advanced to the effect that prostitution is a vital ineradicable element in the society; that what is best and purest in civilisation could not have existed were it not for the sacrifice of a proportion of sex workers to immorality; and that prostitution is the inevitable result of causes which society has never yet been able to control.[17] Prostitution or sex work as a form of expression of human sexuality between humans has for long been coloured with reciprocation of promises, undertakings or expectations *inter se*.

The traditional debate of prostitution revolves around the fundamental analysis of what is popularly acceptable (the *boni mores* vis-à-vis *contra bonos mores*), and what the individual's choice is.[18] These are purely philosophical analytical issues which Socrates (ca 469-399 BC) emphasised that one must pursuit its correctness, be willing to being critiqued of any stated opinion, and constantly (re)search for elusive, latent truths.[19]

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11 Seligman *The social evil* 2; Barkan *Criminology: A sociological understanding* 445; Özaşçilar and Ziyalar 2015 *IJCJS* 152; Sarode *Historical study of prostitution trade in India* 18, 24; Bala 2016 *SRJIS* 1805.

12 Polygamy, here, would mean polygyny as in where a husband has more than one wife; and polyandry where one woman has two or more husbands.

13 Seligman *The social evil* 2.

14 Seligman *The social evil* 1.

15 Seligman *The social evil* 2.

16 Lerner 1986 *Signs* 236.

17 Seligman *The social evil* 2, 3.

18 Soble 2009 *Journal of Sex Research* 1.

19 Soble 2009 *Journal of Sex Research* 1.

The word 'prostitution' comes from the Latin word *prostituere*[20] (meaning to put in front, to expose) or *meretrix*[21] derived from *mereo*, (meaning a woman who earns) which involved a practice of women waiting for clients in front of their residence. A woman who had sex with men indiscriminately was referred to as a common prostitute or *meretrix publica or muliere publice*.[22] The ancient Roman public places where prostitution took place were referred to as 'public houses', which are brothels (*hostal publique or maison publique or maison commune dumus lupanari, or postribulum or dumus meretricum*).[23] Other terminologies for brothels, in Latin language, were *fornix, lupanar, praesaepa and stabulum*.[24] In the Dutch language, prostitution as a sexual 'immorality' was referred to as *ontucht* and in the old Greek, a prostitute was the lowest cadre of such a woman referred to as *pornéia* (*Πορνεία*),[25] *hetaira* or a *pornê* (derived from Greek word *pernemi*, meaning a woman who sells).[26] Ulpian, a Roman jurist, defined a prostitute as a person engaging in sexual activities with several clients for money or other material remuneration.[27] Thus, prostitutes were a category of members of society known by their willingness to engage in entrepreneurial exchanges in return of sexual services as a means of survival.[28]

The act of prostitution has been interpreted by many persons in a variety of manners. For example, according to Augustine, a canonist and theologian; when married couples engaged in sexual acts for pleasure but not for procreation, then the wife played harlotry whereas the husband played the role of an adulterous lover.[29] For Karl Marx, prostitution was the alienation of the worker from his or her wages or labour. When the fruits or the returns of a sex worker were treated as not belonging to her or him, but to the avail of a third party, then this constituted prostitution. Marx said that money possessed the property of being able to buy

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20 Danna *Report on prostitution laws in the European Union* 5.
21 Flemming 1999 *Journal of Roman Studies* 40.
22 Otis *Prostitution in Medieval society* 50.
23 Otis *Prostitution in Medieval society* 49, 50.
24 Parr *Lupanar: Rethinking the Roman brothel* 15.
25 Danna *Report on prostitution laws in the European Union* 5.
26 Flemming 1999 *Journal of Roman Studies* 40.
27 Otis *Prostitution in Medieval society* 2.
28 Daniels *So much hard work* 38.
29 Augustine *On marriage and concupiscence* 102; Soble 2009 *Journal of Sex Research* 6.

everything, even the most beautiful woman.[30] Accordingly, money was the pimp (facilitator) between the need (sexual services) and the object (sexual provider).[31] Marx and Friedrich Engels opined that prostitution and marriage were not quite dissimilar.[32] According to Engels, the difference between a wife and ordinary courtesan was that a wife sells her body once and for all and forever into slavery, whereas a courtesan sells her sex regularly, and is paid upon completion of the service rendered.[33]

In Plato's analysis of *eros*, a man's desire to quench his sexual needs by all means ranked above all other actions that a man engaged in, in his life.[34] The vulgar *eros* bore lustfulness, wantonness or lewdness that were all aspects in prostitution.[35] In Aristotle's *philia* (friendship-love), sexual desire was based on 'likes' – similar to the appetites in food (hunger) or drink (thirst), and, therefore, one must seek and obtain it at all costs.[36] Schopenhauer, on the other hand, pronounced the belief that human beings sought to satisfy their erotic (sexual) desire or pleasure for their own good.[37] In the sex-work business, this 'own good' could either be physical (acquisition of money or other benefits) or psychological (feeling of achievement or satiation). Accordingly, in his view, indulging in sexual intercourse in moderation, even the purchasing of sexual services from a sex worker, was or is not a moral vice.[38]

Conventionally, commoditised sexual acts are founded on the principle of 'something for something'[39] (*quid pro quo)*. Sex work is the interplay or convergences of human needs and human wants. As in any other entrepreneurship, the higher demand (of sex) will provide higher prices of the sexual services, and, therefore, creates a greater supply (sexual providers).[40] Sex work is regarded by sex workers as sexual service they deliver. A prostitute has traditionally been held

30 Soble 2009 *Journal of Sex Research* 17.
31 Marx *Economic and philosophic manuscripts of 1844* 137; Soble 2009 *Journal of Sex Research* 17.
32 Soble 2009 *Journal of Sex Research* 18.
33 Soble 2009 *Journal of Sex Research* 17.
34 Soble 2009 *Journal of Sex Research* 5, Danielsson 2017 *Strathclyde LR* 30.
35 According to Plato and other philosophers, as in Soble 2009 *Journal of Sex Research* 4; Danielsson 2017 *Strathclyde LR* 30.
36 Soble 2009 *Journal of Sex Research* 31.
37 Danielsson 2017 *Strathclyde LR* 35.
38 Soble 2009 *Journal of Sex Research* 4; Danielsson 2017 *Strathclyde LR* 35.
39 Giambona and Ribas 2018 *SSRN Electronic Journal* 2.
40 Seligman *The social evil* 12, 63.

to be a female[41] person availing her sexual prowess to be exploited by a man, in return for compensation or other monetary-related gestures.[42] Customarily, the customer of the sex act for money has always been the man. As revealed in the previous section, there were both male and female prostitutes in ancient Greece already. However, nowadays sex work and sex workers have undergone a further gender-neutral metamorphosis.[43] Accordingly, a client (customer) in sex work could either be a man or a woman, and so also the provider of the sexual services. The UK has recognised both males and females as being as prostitutes.[44] In terms of the Sexual Offences Act 2003, the provider of the sexual services, or the one who is paid in order to provide the other with the sexual service, is the prostitute.[45] Danna, though she does not define what a prostitute is, defines prostitution as "the direct exchange of sexual services for money and other utilities".[46]

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41 See para 2.1 above. In *DPP v Bull* (1995) QB 88, the court dismissed a case against a male prostitute, holding that s 1(1) of the Street Offences Act 1959 stating that "it shall be an offence for a common prostitute to loiter or solicit in the street or public place for the purposes of prostitution" applied to females only.

42 In *R v Kam Cham* (1921) EDL 327 (concurring with *R v Munck* (1981) 1 KB 635), a prostitute was woman or a girl who indiscriminately consorted with men for hire or gain. See Karras *Common women* 92.

43 Scott *Ladies of vice* 13 defines a prostitute as an individual, female or a male, who, for some kind of reward, monetary or otherwise, or for some form of personal satisfaction other than pure gratification or an awareness of love, and as a part-time or whole-time profession, engages in normal or abnormal sexual intercourse with a number of persons, who may be of the same sex as, or the opposite sex to, herself or himself. Kinsey, Pomeroy and Martin 2003 *American Journal of Public Health* 595 classify a prostitute as an individual who indiscriminately provides sexual services in return for money payments. Mancini *Prostitutes and their parasites* 14 delineates prostitution as the act of a woman repeatedly and constantly practicing sexual relationships with anybody, on demand, without choosing or refusing any partner, for gain, freely and without force; her principal object being profit and not pleasure. Henriques *Prostitution and society* 17 describes prostitution as any sexual act, including those which do not actually involve copulation, habitually performed by individuals with other individuals of their own or of the opposite sex, for consideration which is non-sexual (note that a prostitute is not defined here). Tait *Magdalenism* 1 labels a prostitute as a person (woman) who openly delivers herself up to a life of impunity and licentiousness, who is indiscriminate in selection of her lover, and who depends for her livelihood upon the proceeds arising from her life of prostitution. See also Wendelin *The genealogy of the prostitute* 64.

44 See s 36 of the Sexual Offences Act 1956, or s 1(1) of the Street Offences Act 1959, as amended by Sexual Offences Act 2003. This Act added new offences as regards sex work, such as soliciting in public places for the purpose of prostitution.

45 Section 51(2) defines a prostitute (and prostitution) as a person (A) who on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return of payment or promise of payment to A or third person; and prostitution is to be interpreted accordingly.

46 Danna *Report on prostitution laws in the European Union* 6.

The South African law does not define who or what a prostitute or a sex worker is.[47] According to the SALRC, a prostitute as an adult person (aged 18 years or older) who provides or offers sexual services for financial or other reward, favour or compensation, irrespective of whether sexual acts occur or not.[48] The SALRC further defines adult prostitution as engaging in sexual acts against the exchange of financial reward, favour or compensation.[49] The South African one-dimensional definition of a customer, a prostitute or a sex worker seems to partly follow the SALRC's phrasing:

> …a person ('A') who unlawfully and intentionally engages the sexual services of a person ('B') aged 18 years or above; for financial, favours or material benefits to 'B' or to another person 'C'.[50]

When, in the *S v Jordan*[51] case, the issue of what a prostitute and prostitution are came up; the court seemingly kept to the tradition that a prostitute was usually a female. In fact, the court established the precept that prostitutes could engage in indiscriminate sexual acts as long as they do not accept money for the act, cementing the common-law concept of common prostitute or 'common woman'. It held that:

> Prostitutes … are prohibited from selling their sexual services … they (prostitutes) are entitled to engage in sex, to use their bodies in any manner whatsoever and engage in any trade as long as this does not involve the sale of sex and breaking a law validly made.[52]

Prostitutes have been referred to as "women without morals or (*wanita tuna susila)*",[53] who are predatory. Since prostitution is primarily a 'two-horse' affair in a sexual relationship; men are consequently equally without morals (*pria tuna sisula*).[54] The *Jordan* case, appreciatively, saw a joint criminal enterprise in prostitution.[55] The sexual service provider (woman) would be guilty of the sexual

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47 See the definition section in the Sexual Offences Act of 1957, the Sexual Offences Act 2007, and the Labour Relations Act 66 of 1995 (hereafter the Labour Relations Act).
48 SALRC *Sexual Offences: Adult Prostitution* 2017 45.
49 SALRC *Sexual Offences: Adult Prostitution* 2009 10; SALRC *Sexual Offences: Adult Prostitution* 2017 22.
50 Section 11 of the Sexual Offences Act 2007.
51 See footnote 23 in Chapter 1 above.
52 *Jordan* para [29].
53 Hull 2017 *Moussons* 65.
54 Hull 2017 *Moussons* 65.
55 *Jordan* para [11].

offence in terms of the relevant law, and the customer of the commercialised sexual services would be equally guilty on the same offence, but based on another law other than the Sexual Offences Act. The court fairly enlarged the definition of a prostitute when it expressed itself as:

> …a man who pays for sex and the woman who receives the payment are equally guilty of criminal conduct … at common law and in terms of the Riotous Assemblies Act, the customer commits an offence and … is liable to the same punishment to which the prostitute is liable.[56]

Consequently, as held in *Jordan*, a man who pays for sex and the woman who receives the payment for sex are equally guilty of a criminal offence involving prostitution.

After providing a background to the origin and evolution of the terms 'prostitute' and 'prostitution' in this section, and the next section will look into different historical perceptions of prostitution during the ages.

2.3 Historical perceptions of prostitution

Throughout the ages, societies have been at a cross-road between proponents and opponents of prostitution. The proponents have seen sex work as decent work (an economic activity)[57] or a resource (an inalienable right), while the opponents have seen it as a social plague or a great social evil destroying the social fibre of society, and causing individual damage or humiliation.[58] In most Western cultures and legal systems, prostitution – a sexual relationship outside the lawful marriage between one man and one woman – was a serious crime.[59] For example, polygamy, which may be argued would be a form of prostitution in Western cultures or legal systems, was denounced as unnatural, unfair, unjust to wives and children, a source of harm, a crime, a threat to good citizenship, a cause of social disorder and of political

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56 *Jordan* para [14].

57 Plambech 2017 *Feminist Economics* 134 states that in Benin city in Southern Nigeria, for some families to pay for food or medicine or school fees, they relied on the remittances from their daughters, or mothers or sisters who sell sexual services in European cities.

58 Danna *Report on prostitution laws in the European Union* 6. Joyce 2008 *Reinvention* 1.

59 Witte 2015 *Emory LJ* 1677.

instability as well as an impediment to civilization towards liberty and equality.[60] Similarly, opponents to prostitution have always seen the conduct as a form of sexual violence,[61] while advocates cite prostitution as a form of economic empowerment.[62] It has been argued that:

> …service and labour power are inseparably connected to the body … when sex becomes commodity in the capital markets, so … do the bodies and the self … prostitute cannot sell sexual services alone, what she sells is her body.[63]

According to Aquinas, seeking sexual intercourse not for the purposes of procreation was not only sinful but self-abuse.[64] However, although he regarded the sexual acts of masturbation, same-sex or bestiality as the only sexual crimes against nature (*criminal carnis contra naturum*),[65] heterosexual prostitution was not viewed in this light. He argued that the unnatural sex or lust (premarital or extramarital sex) was not the morally worst crime, for it injures no one. Heterosexual rape, heterosexual adultery or seduction were all injurious, and, therefore, actionable.[66] Augustine, again, argued that human sexual indulgences ruined the mental capacities to the detriment of an individual as well as members of the society.[67] According to David Hume (1711-1776), sexual lust which arose between the sexes was motivated by beauty; the bodily appetite or erotic pressure and pleasure to release; as well as a generous kindness or good-will.[68]

Thus law, in one particular instance, would treat prostitution as a crime committed by the actors, and at another time, sex work is seen as contractual arising from the willingness, freedom, choice and explicit consent given by mature principal participants. The considerations that pass and the services that are rendered are

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60 Witte 2015 *Emory LJ* 1678. Due to migration, education and cultural interchanges, polygamy has been challenged in some quarters and declared unconstitutional. See *Brown v Buhman* 947 F Supp 2d 1170 (D Utah 2013); *Brown v Herbert* 850 F Supp 2d 1240 (D Utah 2012).

61 The Declaration on the Elimination of Violence Against Women (DEVAW) defines violence against woman as any act that results in physical or psychological harm or suffering to woman, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private.

62 International Covenant on Economic, Social and Cultural Rights (ICESCR) art 6(1): The right to work includes the right of everyone to the opportunity to gain his living by work which he freely, chooses or accepts.

63 Pateman 1983 *Ethics* 56.

64 Soble 2009 *Journal of Sex Research* 11.

65 Soble 2009 *Journal of Sex Research* 14.

66 Soble 2009 *Journal of Sex Research* 11.

67 See Soble 2009 *Journal of Sex Research* 6.

68 See Soble 2009 *Journal of Sex Research* 13.

mutually agreed obligations. So long as each party performs its contractual duty, no one is wronged or has a claim. A contract is based on the maxim *volenti non-fit iniuria* (he or she who volutes cannot reasonably raise a claim of injury) unless the boundaries of voluntariness have been forcibly exceeded, which then becomes invasion. These perceptions of sex work have changed over the years. It is, therefore, required that these views must be examined as from the earliest representations of sex work. This will be achieved in the following paragraphs.

2.3.1 Views on prostitution in the Ancient Near East and India

In the Near East societies, prostitution is interwoven between the people's culture and the Biblical Old Testament. Some of the early currencies of anticipated purchase of sexual acts or relationships could, for instance, be the provision of labour.[69] This is a manifestation that living on the proceeds of sex was tolerated. The giving and accepting of valuables or favours of equivalent value worth in the exchange of sexual services have thrived since ancient generations before Christ.[70] The hypothetical first human society of Adam and Eve set the sexual lust discourse.[71] Women have been depicted in the Old Testament as the source of sexual immorality, weakness or sexual deviance, seductresses, and flatterers of men.[72] In most cases, it was usually the men who paid for harlotry, though in

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69 NRSV Bible Committee *Holy Bible* Genesis 29:15 – "Laban said to Jacob…should you therefore serve me for nothing? … What shall your wages be?" 29:18 – "I will serve you for seven years for your young daughter Rachel".

70 NRSV Bible Committee *Holy Bible* Deuteronomy 23:18 – "you shall not bring the fee of a prostitute or the wages of a *keleb* (dog, i.e. Hebrew male prostitute) into the house of the Lord your God"; Micah 1:7 – "for from the hire of harlot she gathered"; Isaiah 23:17 – "Tyre … will return to hire and will play the harlot with all the kingdoms"; 23:18 – "Her merchandise and her hire will be dedicated to the Lord, it will not be stored or hoarded, but her merchandise will supply abundant food and fine clothing for those who dwell before the Lord".

71 NRSV Bible Committee *Holy Bible* Genesis 4:1 – "The man (Adam) carnally knew his wife Eve".

72 NRSV Bible Committee *Holy Bible* Proverbs 7:7 – "and I have seen among the simple, I have perceived among the youths, a young man without sense"; 7:8 – "passing along the street near her corner"; 7:10 – "And lo, a woman meets him dressed as a harlot"; 7:13 – "She seizes him and kisses him and with impudent face she says to him"; 7:15 – "So now I have come out to meet you, to seek you eagerly, and I have found you"; 7:17 – "I have perfumed my bed with myrrh, aloes, and cinnamon"; 7:18 – "Come, let us take our fill of love till morning; and delight ourselves with love"; 7:19 – "For my husband is not at home; he has gone on a long journey"; 7:20 – "He took a bag of money with him, at full moon he will come home". See also Ezekiel 23:2 – "Son of man, there were two women, the daughters of one mother"; 23:3 – "they played harlot in Egypt; they played the harlot in their youth; there their breasts were pressed and their virgin bosoms handled".

exceptional cases a woman paid men to have sex with her.[73] A harlot could be hired for sex upon giving her a piece of bread.[74] It is also stated in the Bible that Judah pledged his signet and cord as a security for the payment of a goat for sex with his daughter-in-law, Tamar.[75] Third parties could furthermore earn their livelihoods from the sexual commerce of their young girls.[76] However, the top hierarchy leadership (the priesthood) were not supposed to engage in lewdness.[77]

In Mesopotamia (Akkadia, Assyria, Babylon, and Sumeria) in the Ancient Near East, women were categorised according to their conjugal status. There was that cadre of women considered consecrated or sanctified (*naditu, qadesa, kulmasitu or ugbabtu*) whose sexual behaviour was regulated by celibacy or marriage. The regulations required such modesty that women veil themselves so as to hide their beauty for their husbands, and also not to expose themselves to promiscuous men.[78] Veiled women received recognition and honour from the public.[79] Thus, in Mesopotamia, men, generally, provided for or looked after the household-provisions,[80] for example, grains or wool. The women would process the raw materials while at home, and prepare meals, brew beer, and do weaving, among

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73 NRSV Bible Committee *Holy Bible* Ezekiel 16: 33 – "Gifts are given to all whores; but you gave your gifts to all your lovers, bringing them to come to you from all around for your whoring", 16:34 – "so you were different from other women in your whoring: no one solicited you to play the whore; and you gave payment, while no payment was given to you"; Leviticus 21:9.

74 NRSV Bible Committee *Holy Bible* Proverbs 6:26 – "For a prostitute can be had for a loaf of bread".

75 NRSV Bible Committee *Holy Bible* Genesis 38:15 – "Then Judah saw her (Tamar), thought she was a harlot"; 38:16 – "…let me (Judah) come in to you (*have sex with you*)". Tamar asked "what will you give me, that you may come in to me?"; 38:17 – "Judah answered, I will send you a young goat from the flock".

76 NRSV Bible Committee *Holy Bible* Proverbs 7:19; Deuteronomy 23:18. NRSV Bible Committee *Holy Bible* Deuteronomy 22: 28 – "If a man meets a virgin who is not engaged … seizes her and lies with her and … are caught in the act", 22:29 – "the man … shall give fifty shekels of silver to the virgin's father".

77 NRSV Bible Committee *Holy Bible* Leviticus 21:7 – "They (priests, the sons of Aaron) shall not marry a prostitute or a woman who has been defiled; neither marry a woman divorced from her husband"; 21:9 – "When the daughter of a priest profanes herself through prostitution, she profanes (disrespects) her father".

78 Stol *Women in the ancient Near East* 24.

79 NRSV Bible Committee *Holy Bible* Genesis 38:14 – "So she (Tamar) … covered herself with a garment, covered herself with a veil and wrapped herself". In Itani *The Quran* 33:59, it is stated: "O prophet, say to thy wives, and thy daughters, and the womenfolk of the believers, that they let down part of their mantles (*hijab*) over them; that is more suitable for their being recognised and not insulted".

80 Dercksen *The Old Assyrian copper trade in Anatolia* 42 states that an Assyrian merchant (man) had to provide his Anatolian wife with eight minas of copper every month for her food, oil and wood.

other domestic chores. Modest women would stay in their family houses, and serve the interests of bringing up a good family:

> The wife is known not for her beauty or femininity but rather for her faithfulness and fertility.[81]

The *Kar-kid* (Sumerian name for a prostitute),[82] or Akkadian *harimtu, samhatu* (Babylonian name for a prostitute) or *kezertu* (Assyrian name for a prostitute) were free women whose sexuality was not regulated by the patriarchy, and, as such, they could indulge in indiscriminate sexual acts.[83] In the Gilgamesh epic, for example, Enkidu is described in a prostituting encounter with the seductive Šamḫat (a provocative gorgeous woman and a prostitute):

> Šamḫat unfastened the clothes of her loins … She bared her sex … She spread her clothing and he lay upon her. She treated the man to the work of a woman … For six days and seven nights Enkidu was erect, as he coupled with Šamḫat.[84]

Prostitutes could either be slave-girls,[85] or adulterous women.[86] It is recorded that when a married woman from Mari solicited for her sustenance after her husband had left her without sufficient food and firewood, she exchanged her sexual favours in return for provisions.[87]

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81 Stol *Women in the ancient Near East* 404 quoting Glassner *Polygynie ou prostitution* 162. Women pose a threat because the honour of a man depends on the purity of his women, and therefore "the woman's purity is the husband's affair because his honor lies first in his capacity to defend his wife". See also Glassner *Women, hospitality and the honour of the family* 76.

82 According to Stol *Women in the ancient Near East* 399, prostitutes (*kar-kid*) earned their wages in the city square. A *kar-kid* is described as a person standing on the street; standing on the quayside; walking over the quay; walking through the city; walking across the bank; walking through the irrigated fields; or with pointed sandal.

83 Stol *Women in the ancient Near East* 404. Westenholz 1989 *Harvard Theological Review* 245.

84 George *The epic of Gilgamesh* lines 188-194.

85 Stol *Women in the ancient Near East* 413.

86 Stol *Women in the ancient Near East* 234.

87 Dercksen *The Old Assyrian copper trade in Anatolia* 42.

During this period of time, the Hammurabi Code,[88] one of the earliest and most complete ancient legal codes, punished sexual offences such as adultery,[89] rape,[90] sexual slander,[91] incest[92] between a father and a daughter, incest[93] between a mother and a son, and sex between a father and his daughter-in-law.[94] In Mesopotamia, both adulterous men and women were submerged in water to die, or were physically assaulted, as chronicled in the Code of Hammurabi:

> If a man's wife be surprised (*in flagrante delicto*) with another man, both shall be tied and thrown into the water, but the husband may pardon his wife and the king his slaves.[95]

If a man had sex with a wife of another man in a tavern or in a public place knowing that she was the wife of another man, whatever the husband decided to be done to the wife was also applicable to the paramour.[96] When a young man had a sexual encounter with a prostitute from the street, and the judges ordered him not to go back to the prostitute but he became deviant and went back to the prostitute, he could not marry the prostitute even if he had formerly divorced his wife.[97] A man who defiled the virgin wife of another man was put to death:

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88 The Code of Hammurabi was proclaimed by the Babylonian king Hammurabi, who reigned from 1792-1750 BC. See King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021).

89 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021) s 129 states that the offended husband could throw both the wife and the copulator into the water or pardon them. See also Roth *Law collections from Mesopotamia and Asia Minor* 105: s 129 of the Laws of Hammurabi.

90 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021) s 130 requires for death of the rapist, as also in Roth *Law collections from Mesopotamia and Asia Minor* 105: s 130 of the Laws of Hammurabi.

91 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021) s 132 provides if the wife is caught sleeping with a man other than her husband, she would undergo the divine river ordeal. See also Roth *Law collections from Mesopotamia and Asia Minor* 105: s 132 of the Laws of Hammurabi.

92 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021) s 154 requires for the father to be exiled. Roth *Law collections from Mesopotamia and Asia Minor* 110: s 154 of the Laws of Hammurabi.

93 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021) s 157 necessitates the killing of both. Roth *Law collections from Mesopotamia and Asia Minor* 111: s 157 of the Laws of Hammurabi.

94 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021) s 155 stipulates that the father must be drowned in a river. See also Roth *Law collections from Mesopotamia and Asia Minor* 110: s 155 of the Laws of Hammurabi.

95 Section 129 in King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021); Westbrook *Law in the ancient world* 41 quoting ss 13 and 15 of the Middle Assyrian Laws.

96 Westbrook *Law in the ancient world* 40 quoting s 14 of the Middle Assyrian Laws.

97 Roth *Law collections from Mesopotamia and Asia Minor* 32: s 30 of Laws of Lipit-Ishtar.

> If a man violates the wife (betrothed or child-wife) of another man, who has never known a man, and still lives in her father's house, and sleeps with her and be surprised, this man shall be put to death, but the wife is blameless.[98]

The allegations of unchasteness of married women required a very hard rebut by especially the women, as seen in the following provision of the Code of Hammurabi:

> If a man brings a charge against one's wife, but she is not surprised with another man, she must take an oath and then may return to her house ... If the 'finger is pointed' at a man's wife about another man, but she is not caught sleeping with the other man, she shall jump into the river for her husband.[99]

Despite the strict rules surrounding sexual intercourse within and outside of marriage, prostitution was one among the many means of earning a livelihood for both married and unmarried females in the ancient Near East. Not only were the prostitutes dependant on the income, but also those who purchased and coercively prostituted[100] slave-girls, and who depended on their sexual acts' proceeds. However, non-consensual prostitution seemed to have been abhorred. A Nuzian edict thus decreed:

> No one whether a servant or dependant of the palace, may without permission from the king force his daughter to serve as a beggar or a prostitute.[101]

Prostitutes were associated with and had a divine connection to the goddesses Inanna and Istar (goddess of fertility), who were both seducers of men. The goddess Ishtar described herself in the light that whenever she stayed in the door-way of a drinking house, she was the whore that every man knew or had sex with.[102] The goddesses Inanna and Istar wore items of beauty such as mascara referred to as "Let a man come, let him come"[103] which in the Sumerian *hili* or Akkadian *kuzbu* would be items of sex appeal. Proper prostitutes were known in their free lifestyle, attractive dressings and hair make-ups, idling, standing, or walking in the streets, fields or in taverns.[104] They were dressed in sharp-pointed sandals to draw the

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98 Section 130 in King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021); Westbrook *Law in the ancient world* 39.

99 Sections 131, 132 in King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2021); Roth *Law collections from Mesopotamia and Asia Minor* 33: s 33 of Laws of Lipit-Ishtar

100 Stol *Women in the ancient Near East* 413.

101 Stol *Women in the ancient Near East* 413. See also Itani *The Quran* 24: 33 where it declares "but do not force your slave-girls to prostitution, if they desire chastity".

102 Stol *Women in the ancient Near East* 427

103 Black et al https://etcsl.orinst.ox.ac.uk/ (Date of use: 10 November 2021).

104 Stol *Women in the ancient Near East* 399.

attention of customers, and also wore the necklace of Istar. The necklace was threaded with cowry shells (representing a woman's genitals) as well as models of penises and conveyed the message: "I am available for any man".[105] The *sabu* (men who brewed) and some *sabitu* (women innkeepers or ale-wives) brewed and sold beer in taverns.[106] It is in these taverns where most indoor sex work took place. The whoredom in the streets and in taverns was amplified by, and described as:

> The beautiful girl, who stands in the street, the girl, the whore, the daughter of Inanna, the girl, the daughter of Inanna, who stands in the drinking-house, she is a cow brimming with fat, brimming with cream, the cow, the abundant vulva of Inanna.[107]

A Sumerian literary text reports of the (Mesopotamian) goddess Inanna asking for one shekel (money) when she has sex in her standing position against a wall, or one-and-half shekels of silver when bending over a wall.[108] That prostitution had divine and currency factors is provided in the Sumerian song on the goddess Inanna in a sexual state which went as:

> Don't dig a canal! I am your canal. Don't plough a field! I am your field. Don't look for moist ground! I am your moist ground.[109]

The Sumerian Code permitted a man to cohabit with a prostitute for the purpose of getting a child in the circumstances that his first wife was barren.[110] The man would provide such a prostitute (*kar-kid*) with grain, oil and clothing.

In Babylon, prostitution was institutionalised.[111] According to the Hammurabi Code, prostitutes were never punished for their actions.[112] However, they (*ugbabtu*

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105 Stol *Women in the ancient Near East* 405.
106 Stol *Women in the ancient Near East* 402.
107 Stol *Women in the ancient Near East* 404.
108 Cooper *The job of sex* 213.
109 Stol *Women in the ancient Near East* 407; Cooper *The job of sex* 213.
110 Roth *Law collections from Mesopotamia and Asia Minor* 33: Art 27 of the Laws of Lipit-Ishtar provides that if a man's wife does not bear him a child but a prostitute (*kar-kid)* from the street does bear him a child, he shall provide barley, oil and wool for the upkeep of the prostitute.
111 NRSV Bible Committee *Holy Bible* Revelation 17:1 – "Come, I will show you the judgment of the great whore is seated in many waters"; 17:2 – "with whom the kings of the Earth have committed fornication, and with the wine of whose fornication the inhabitants of the earth have become drunk; 17:3 – and I saw a woman"; 17:4 – "holding in her hand a golden cup full abominations and the impurities of her fornication"; 17:5 – "and on her forehead was written a name, a mystery: Babylon the great mother of whores".
112 Bala 2016 *SRJIS* 1808.

'devoted woman',[113] *naditu* 'sister of god',[114] or *sekretu* 'the unmarriageable'[115]) could inherit from their fathers but could not dispose of the inheritance unless there was an explicit and unambiguous will in which they had a right to dispense their bequest in the manner wanted.[116] The Hammurabi Code further stipulated that men could bequeath their property to their daughters who had even become prostitutes. If a woman and a man (not the husband) hired a house for a sexual contract, they both incurred a contractual debt, and were required to pay the housekeeper or the merchant.[117] Whenever there was no purchase price for the sexual services, the man would give the woman one mina of gold as a gift of release.[118]

Save for adultery, proper prostitution in Mesopotamia was tolerated. Still, the public life of a prostitute was despised and impeachable. In the Gilgamesh epic, Enkidu described a prostitute's life as:

> …the crossroads shall be where you sit … a field of ruins shall be where you sleep … drunk and sober shall strike your cheek.[119]

A prostitute was deemed promiscuous, and not fit to marry to make a stable family:

> Never marry a prostitute; her husbands are legion … The house that she entered will be scattered. Whoever marries her has no stable life.[120]

In another ancient Near East country, Assyria, sex was regulated by authorities since 1075 BC.[121] The Assyrian Code required respectable women to dress in a particular manner so as to guard themselves against promiscuous men. It provided that:

> …if the wives of a man or the daughter of a man got out in the street; their heads are to be veiled. Maidservants are not to veil themselves. Veiled harlots and maidservants shall have their garments seized and fifty blows inflicted on them

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113 Roth *Law collections from Mesopotamia and Asia Minor* 117: Laws of Hammurabi s 178.
114 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2020) s 179; Roth *Law collections from Mesopotamia and Asia Minor* 117.
115 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2020) s 180.
116 Section 179 in King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2020); Roth *Law collections from Mesopotamia and Asia Minor* 117: ss 178 and 179 of the Laws of Hammurabi.
117 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2020) s 152; Roth *Law collections from Mesopotamia and Asia Minor* 110: Laws of Hammurabi s 152.
118 King https://avalon.law.yale.edu/ancient/hamframe.asp (Date of use: 10 November 2020) s 139; Roth *Law collections from Mesopotamia and Asia Minor* 107.
119 Cooper *The job of sex* 212.
120 Stol *Women in the ancient Near East* 416.
121 Roth Law collections from Mesopotamia and Asia Minor 153.

and bitumen poured on their heads.[122]

Some of the sexual acts tolerated but punishable upon proof were rape, adultery or fornication, procuration, homosexuality, or sex by deceit. Those found guilty of rape of a woman were put to death.[123] Consensual sex between married people, other than that of a husband and a wife, was deemed an aspect of prostitution for it would in most cases involve 'treats' and promises of favours in return of sex. If a married woman prostituted or fornicated herself in the house of another man, punishment would be death or in some instances, being pardoned.[124] A man who knowingly fornicated with another man's wife in an inn or a tavern or in a public road, was left at the mercy of the wife's husband to decide on what to do to the fornicator.[125] A man's allegedly unfaithful wife would prove her innocence by being subjected to a divine river ordeal. The divine river ordeal required one to jump into the river, and if she drowned, she was proved guilty of sexual misconducts, otherwise she was vindicated.[126] Any person who brought allegations of unsubstantiated lack of chastity of someone's wife, such person would undergo the punishment of the divine river ordeal[127] or be beaten 40 strokes of the cane, serve imprisonment for one month, his hair cut off and he must pay 3600 shekels of lead.[128] A man who spread allegations of illicit sexual encounters between men would suffer 40 strokes of the cane, serve imprisonment for one month, his hair cut off and 3600 shekels of lead must be paid if the allegations are false.[129] Upon proof that the accusations spread were false, the man (propagating the allegations) would be sodomised, and turned into eunuch.[130]

As evidenced from the above discussions, promiscuity, an aspect of prostitution, was common in the Ancient Near East countries, but would be permissible if the act did not happen with someone's wife. If this was indeed the case, upon discovery the

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122 ProCon.org https://prostitution.procon.org/historical-timeline/ (Date of use: 20 March 2020). Stol *Women in the ancient Near East* 676.

123 Roth *Law collections from Mesopotamia and Asia Minor* 157: s 12 of the Middle Assyrian Laws.

124 Roth *Law collections from Mesopotamia and Asia Minor* 158: s 13 of the Middle Assyrian Laws.

125 Roth *Law collections from Mesopotamia and Asia Minor* 158: s 14 of the Middle Assyrian Laws.

126 Stol *Women in the ancient Near East* 248, 249 citing s 132 of the Hammurabi Code, s 17 of the Middle Assyrian Laws and s 14 of the Sumerian laws of Ur-Nammu.

127 Stol *Women in the ancient Near East* 248.

128 Roth *Law collections from Mesopotamia and Asia Minor* 159: ss 17, 18 of the Middle Assyrian Laws.

129 Roth *Law collections from Mesopotamia and Asia Minor* 159: s 19 of the Middle Assyrian Laws.

130 Roth *Law collections from Mesopotamia and Asia Minor* 160: s 19 of the Middle Assyrian Laws.

man who had sex with another's wife would pay some money to the woman's husband.[131] Procuration by a wife of the man on another wife of a man into the house of the procurer was an offence.[132] 'Proper prostitutes' were indeed protected from physical assaults, and anyone who assaulted a prostitute to the extent that her foetus got aborted, that assaulter would compensate her full payment of a life.[133]

The Ancient Near East perspectives on sex work were dispersed to other regions, such as India. It is thought that the Aryans, who were nomadic cattle keepers, might have brought prostitution in India.[134] These peoples migrated from the Near East around 1700 BC, and invaded India around 1500 BC, usurping and enslaving the Dasyus (Dravidians), the indigenous inhabitants of India.[135] The Aryans had female deities called Apsaras, youthful and elegant dancers who danced to the music made by the Gandharvas (the court musicians of Indira – the king of heaven and the gods). Not only did the Apsaras dance and entertain gods and men, but they also seduced them and gained the reputation as the mistresses of the gods.[136] One of the social gatherings during the Vedic period was the *samana*, an occasion of chariot racing and archery, where men and women mingled freely to the extent that prostitution took place.[137] Prostitution may even have occurred in their meeting halls or *sabha* where events like gambling or beer taking transpired. An ancient Vedic text discusses a *sabhavat yosha*, which in this particular context may refer to a woman visiting a *sabha* as a prostitute.[138] The Brahamana period was the first era in the post-Vedic age, and it is during this period that prostitution as a profession was

131 Stol *Women in the ancient Near East* 671 citing s 22 of the Middle Assyrian Laws.
132 Stol *Women in the ancient Near East* 671 citing s 23 of the Middle Assyrian Laws. Roth *Law collections from Mesopotamia and Asia Minor* 160: s 23 of the Middle Assyrian Laws.
133 Stol *Women in the ancient Near East* 680 citing s 52 of the Middle Assyrian Laws. Roth *Law collections from Mesopotamia and Asia Minor* 174: s 52 of the Middle Assyrian Laws.
134 Manikandan https://www.sjctni.edu/Department/hs/eLecture/Vedic%20Period.ppt (Date of use: 10 January 2021).
135 Manikandan https://www.sjctni.edu/Department/hs/eLecture/Vedic%20Period.ppt (Date of use: 10 January 2021). The Aryans developed the Vedic culture which is based on *Vedas* (knowledge), the earliest known Indian literature. The Vedic period thus is an era of enlightenment associated with the coming of Aryans.
136 Manikandan https://www.sjctni.edu/Department/hs/eLecture/Vedic%20Period.ppt (Date of use: 10 January 2021).
137 Sarode *Historical study of prostitution trade in India* 29; Kulkarni 2015 *Bulletin of the Deccan College Research Institute* 286.
138 Sarode *Historical study of prostitution trade in India* 29, quoting from the *Rig Veda*.

acknowledged.[139] The prostitutes were called *vishya*,[140] and they had to specifically service travelling merchants who were cut off from their homes and wives.[141] Except for the *vishya* (and later *beshya*), prostitutes were also named *ganika*, *bandhki*, *rupjiva*, *varangana*, *kultani*, *sambhali*, *pumscali*, amongst others, all referring to their sex work profession.[142] Prostitution seems not to have been frowned on during this period, and one could even marry a prostitute.[143] Still, no laws relating to and regulating prostitution were discovered in any of the Brahamana literatures.

During the following Epic era (600-500 BC), the *beshyas* became the courtesans of high-class men where they would attend social functions dressed in red clothes, red garlands, and wear ornaments of red gold to distinguish them from other women.[144] These courtesans also had legal status. During the last period of the Epic age, law books called the *Dharmasutras* and *Dharmashatras* were introduced, where, in an attempt to maintain chastity amongst members of society, stern laws were introduced to keep the flourishing sex trade in check.[145] These laws clearly defined the diverse rights and privileges of moral and immoral women.[146]

In India, the first effort to control prostitution occurred during the Mauryan (Buddhist) age (600 BC-600 AD), when the state obliged brothels to pay taxes since these enterprises were seen as an important source of government revenue.[147] The *Arthashastra* contained rules prostitutes had to follow – their activities were regulated as to their behaviour and how their lives had to be ordered.[148] It is interesting to note that during this period sex workers performed not only for entertainment (sexual) purposes, but they were also employed as spies for political purposes.[149]

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139 Sarode *Historical study of prostitution trade in India* 29.

140 The moniker *vishya* later changed to *beshya* meaning ‘‘one who is approachable to and by all’ or ‘one who nicely bedecks herself’ See Sarode *Historical study of prostitution trade in India* 30.

141 Sarode *Historical study of prostitution trade in India* 30.

142 Sarode *Historical study of prostitution trade in India* 30.

143 As stated by Sarode *Historical study of prostitution trade in India* 30: “The great sage Vashistha, was the son of women engaged in prostitution”.

144 Sarode *Historical study of prostitution trade in India* 31, 74.

145 Sarode *Historical study of prostitution trade in India* 31.

146 Sarode *Historical study of prostitution trade in India* 31.

147 Sarode *Historical study of prostitution trade in India* 32. The Greeks occupied Mathura by the second century AD, and Solon had introduced taxation in the business of prostitution.

148 Kangle *The Kautilya Arthashastra* 158; Bala 2016 *SRJIS* 1804.

149 Bala 2016 *SRJIS* 1805.

During the early Medieval period (750-1000 AD), prostitution became widely entrenched. The Muslim rulers of the period generally recognised prostitution as a profession which caused the conduct to flourish under royal patronage.[150] Prostitution took place in Vesyasraya, Pura or Vesa where beer-taking was a common occurrence.[151] The prostitutes went by the names *sandharanastri* or *sambhali* (a common prostitute), *ganika* (courtesan), *bhujishya* (a mistress), *lanjika rupajiva* (one who lived on her beauty) *varavadhu* or *varamukhya* (chief courtesan), and *kuttan* (a bawd).[152] It was also during the Medieval period that temples became prostitute zones. The functionaries in the temple included the priests, dancing girls, dancing tutors, singers, and others. Parents would dedicate their daughters to the services of mother gods in the temple where part of worship included dancing.[153] The temple service women were called *devadasis*, meaning 'slaves of god'.[154] Under the devadasis system, priests started temple prostitution.

During the Mughal era (1526-1787 AD), the *tawaifs* (courtesans serving the nobility of Northern India) were not only paramours to the rich and wealthy, by also impacted on the literary as such as music and dance. As the weakening of Mughal rule weakened in the mid-18th century, *tawaifs* became more prominent and institutionalised.[155] Emperor Akbar (1556–1605 AD) made provisions that prostitutes would ply their trade outside the city to a place called the 'devil's quarters' or Shaitanpura.[156] Outside Shaitanpura, a register for clients was maintained wherein they would sign their names and addresses.[157]

During the British regime (1858-1947 AD), the British rulers deemed it necessary to control and regulate prostitution, and several laws were enacted which sanctioned the establishment of brothels and allowed for prostitution in a regularised form.[158] For example, in 1867, the chief Commissioner of Burma established specific

150 Bala 2016 *SRJIS* 1806.
151 Sarode *Historical study of prostitution trade in India* 35.
152 Sarode *Historical study of prostitution trade in India* 35.
153 Sarode *Historical study of prostitution trade in India* 36, 91.
154 Sarode *Historical study of prostitution trade in India* 36, 80.
155 Schoffield 2012 *Gender & History* 150.
156 Acharya 2011 *Trayectorias* 97.
157 Acharya 2011 *Trayectorias* 97.
158 This period and its laws associated with prostitution will be discussed in Chapter 3.

prostitutes' quarters at Rangoon.[159] Yet prostitutes were also segregated on the basis of races and geographies. The Bengal government justified its segregation of prostitutes that it was in conformity with the native ideas and traditions, and that localising prostitution would produce a greater scandal and evil, that is, unnatural sex or homosexuality.[160] Segregation did not prove successful as in 1868, the Sanitary Commissioner to Punjab already complained of cantonment prostitutes leaving their places of regulations, and settling beyond the prescribed borders, thereby exacerbating the control of the venereal diseases.[161] Prostitutes (and prostitution) were damned the greatest threat to the society. A prostitute was described as:

> she who inflicts upon it the greatest scandal and damage … selecting her clients at the opera or theatre, the … flaunting (boasting), extravagant quean (prostitute) … would demand abject submission from her lover until his wealth was drained after which she would switch … even to his best friend …she is far to the eye but full of rottenness.[162]

As evidenced from the above paragraphs, prostitution in ancient Near East societies and India was a fact of life. Sex work has existed in some form or the other from time period to period, and still continue to persist. Due to commercial transactions between this region with Greece especially, transmission of the ancient Near East culture and socialisation (where under prostitution) were transported to Greece. This will be further elaborated on in the next section.

2.3.2 Views on prostitution in early Greece

During the Bronze Age, the Minoan civilisation of Crete influenced the Mycenaean Greece culture. The Minoan civilisation was again influenced by the Egyptian, the East Mediterranean and Mesopotamian cultures.[163] As alluded to above in paragraph 3.2.1,[164] the origin of prostitution in ancient Greece is mostly attributed to Ionians, who under the influence of the people of the Ancient Near East, especially

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159 Blackwell 2008 *Education about Asia* 1464.
160 Legg 2012 *Modern Asian studies* 1488, 1491.
161 Blackwell 2008 *Education about Asia* 1465; Legg 2012 *Modern Asian studies* 1465.
162 Blackwell 2008 *Education about Asia* 1496.
163 Cyprus was a home for Semites, Hurrians, Egyptians and Aegean (Greeks), and its proximity to Syrian coast helped in infusing the Ancient Near East culture in Greece. Noegel *Greek religion and the ancient Near East* 26, 27.
164 See para 2.3.1 above.

the Lydians, started the exclusion of women from the public, and instituted prostitution.[165] Prostitution also found its way into Greece around the 12th century BC as a result of the contact between the Phoenician maritime traders from the East Mediterranean coastal region of Syro-Canaan (Tyre, Sidon, and Byblos).[166] The Phoenicians had a female naked deity called Astarte (the goddess of love or lust), from which the Greeks derived their own goddess of love called Aphrodite. Prostitutes in Greece worshiped and made offerings to Aphrodite who was thought to aid prostitutes obtain wealthy clients.[167] The satire in *Iliad* attests to the powers of Aphrodite as:

> …Aphrodite spoke, and then loosened her breasts, the finely decorated embroidered garment in which all her magic charms were fixed for love, erotic lusts, flirtation and seduction; which steals the wits even of clear-thinking men. Aphrodite put this (garment) in Hera's (prostitute) hands and said: "take this … tie it round your breasts … I don't think you will come back unsuccessful in getting what is your heart desires".[168]

Later contact around the 8th century to the 5th century BC between the Greeks and the Assyrians, especially during the reign of King Sennacharib who encouraged foreign trade in Greece, might have amplified prostitution.[169]

Ancient Greek sex workers were originally foreigners and slaves from the Ancient Near East brought in by traders for the purposes of prostitution and entertainment.[170] The Attic pottery of between 550-450 BC provides copious evidence of prostitution. In these vase-paintings, prostitutes were easily identifiable on account of their nudity, and in their various sexual postures.[171] Other attributes of ancient prostitutes in Greece were their expensive clothing, jewellery, musical instruments, and erotic magic devices. In the imagery of the Near East practises of veiling or hair dressing (*kezertu*, that is, female prostitutes known for their hair make-ups), Greek prostitutes also had the snood, hood, turban, hairnet and sack (with Greek translations: μίζρα ,

165 Fischer 2013 *Classical World* 224.
166 Noegel *Greek religion and the ancient Near East* 28; Tanner 2013 *Nebraska Anthropologist* 23.
167 Fischer 2013 *Classical World* 219, 229, 250.
168 Iliad 14.214-221, as in Fischer 2013 *Classical World* 254.
169 Pomeroy *Goddesses, whores, wives and slaves* 89; Noel *Greek religion and ancient Near East* 29.
170 Fischer 2013 *Classical World* 220.
171 Fischer 2013 *Classical World* 223.

σάκκος, κεκρνάλς).[172]

In the ancient Greek world, prostitution was very widespread, legal, and an acceptable fact of life and unavoidable necessity.[173] Sexual relations were regulated by the law. The law punished an adulterer, a rapist, and procurers unless the assaulted woman was a prostitute. According to *Solon* 23.1-2:

> …if someone raped a woman, he was fines 100 dramachas; and if he procured her for prostitution, he would be fined 20 dramachas unless the woman was an *etaipai* (prostitute) for they (prostitutes) had sex with those who offered the right price.[174]

In some ancient Greek cities, for example, Athens and Sparta – consisting of highly patriarchal and aristocratic societies – most men viewed women as purely for procreation. Simonides, a Greek lyric poet, citing sexual deviancy and commoditisation of sex by women, stated:

> …women are sexual creatures who are not able to control their sexuality … women drain men of all things such as physical and sexual power, food and wealth, and they are the source of all vices.[175]

In the same vein, Socrates in his *Oeconomicus,* I.13 states derogatively that a man who pays a *hetaira* (prostitute) becomes as a result "worse in body, worse in soul, and worse in the matter of his household".[176] Solon, the Athenian lawmaker, created legislation which obliged everyone to make financial contributions to run the operations of the 'Polis' or the city-states, and through such laws prostitutes were taxed for their sex labour earnings.[177] According to him, the cost of sexual services was one Obole which was the equivalent of an ordinary worker's day salary. From the taxes, the city-states (especially Athens) were able to put up cheap state-owned

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172 Fischer 2013 *Classical World* 225. μίζρα was a Mesopotamian headband or turban (*mitra*) used for tying up hair, *sakkos* (σάκκος) was a closed cap, hood or sack, and *Kekryphalos* (κεκρνάλς) was a hairnet or cloth for keeping the hair arranged. See Fischer *The prostitute and her headdress* 30. According to Fischer 2013 *Classical World* 225; Fischer *The prostitute and her headdress* 32, The text Greek μίζρα had its origin in Iran with a root meaning 'to bind' whereas the Greek *sakkos* (σάκκος) was of Semetic origin associated with the *sqq* for Phoenicians, or *saqqu* for Akkadians.

173 Kapparis *Prostitution in the ancient Greek world* 1.

174 See Glazebrook 2006 *Dike* 41. Solon was a legislator from Athens around the 5th century BC.

175 Rostamzadeh, Rahim and Mohseni 2016 *Mediterranean Journal of Social Sciences* 234.

176 Whiteley *Courtesans and kings: Ancient Greek perspectives on the Hetairai* 15.

177 Pomeroy *Goddesses, whores, wives and slaves* 9; Bernardi *Sex working and taxation in European countries* 2. See also ProCon.org https://prostitution.procon.org/historical-timeline/ (Date of use: 20 March 2021).

brothels (*dicteria*) which were populated by the low-cadre prostitutes. Solon prohibited forced prostitution upon chaste free women unless such person was not a virgin, having already had sex with a man.[178]

In Greece, prostitutes were categorised as *hetairae* (courtesans and very expensive service providers), or the lower-cadre prostitutes, the *pornai*[179] (composed of *demos* 'one who is available to everyone'), *misete* ('lewd woman'), *leophoros* ('much trafficked woman') *auletrides* (flute players and dancers), concubines, and *dictariades* (slaves). As recorded by Glazebrook, Neaira was a slave prostitute, and was at first bought by Nikarete for the purposes of prostitution, and then later resold to two male clients, Timanoridas and Eukrates, for 30 minas for the purposes of performing sex.[180] However, a prostitute could also be a free woman (a daughter or sister) of a Greek citizen whom he could prostitute or even force her into prostitution.[181] In the play *Memorabilia*, Socrates describes a hypothetical beautiful Athenian woman, named Theodote – a *hetaira*, who is willing to consort with any friend (*philia*) who persuades her. When Socrates enters Theodote's house to see for himself, he finds her having exposed her erotic beauty (nudity) to a painter; and lastly asks who owes gratitude in reciprocity, that is, payments in return for exposing her sexual beauty:

> …ought we to be more grateful to Theodote for showing us her beauty, or she to us for looking at it? Should she thank us, if she profits more by showing it, or we her, if we profit more by looking.[182]

Theodote never sells sex for money openly but earns her living (βίος) from male friends (φιλία) who extend favours on her; to which Socrates advises "you must repay their favours".[183] The Greek tradition depicts *hetaira* as very well-known manipulators, and always a threat to their lovers. Socrates compares how *hetaira* makes her living with that of a spider's hunting for food. Theodote's pursuits, that is, hunting, of her lovers ('friends'), the most 'precious prey in the world', is exclusively a male upper-class activity.[184] The solicitous Theodote states: "spiders … hunt for

178 Glazebrook 2006 *Dike* 49.
179 Whiteley *Courtesans and kings: Ancient Greek perspectives on the Hetairai* 15.
180 Glazebrook 2014 *EuGeStA* 58.
181 Glazebrook 2006 *Dike* 46.
182 Rösch 2018 *Archimède* 59.
183 Rösch 2018 *Archimède* 59.
184 Rösch 2018 *Archimède* 59.

a living … they weave a thin web … and feed on anything that gets into it[185] … whenever someone who has become my friend wants to do me a favour, this is how I make a living".[186] In the metaphor of the hunting spider, Socrates compares a spider's poisonous bite to a kiss from a *hetaira* and wonders:

> …do you think, you foolish fellow, that the fair (*hetaira*) inject nothing whenever they kiss, just because you do not see it? Don't you know that this wild beast called 'fair and young' is more dangerous than the spider, seeing that it need not even come in contact, like the insect, but at any distance can inject a maddening poison into anyone who only look at it![187]

Theodote pleads with Socrates to become a partner (a teacher in the skills of hunting) in her hunting for her friends;[188] a pimping or procuration service he extended to Crioboulos and Callias respectively. In the play, Callias says to Socrates: "will you then be my pimp to the city so that I can … have my favours?"[189] In talking about his excellence in helping connect a *hetaira* and a lover, Socrates brags:

> …good matchmakers (pimps) are successful in making marriages only when the good reports they carry to and fro are true; we should not praise lying matchmakers, for the victims of deception (or fraud) hate one another and the matchmaker too. [190]

This *Memorabilia* reveals that in the Athenian society, sex work and sex workers ranged from nudism, penetration and pimping.

In Athenian prostitution, the *pornai* is depicted as supervised sex workers, that is, they are submissively confined in a brothel, which implies a "compulsory sexual submission".[191] The *hetairai* were free sex workers and worked contractively exclusively for their own returns.[192] The *hetairai* is represented as licentious, manipulative, and morally and financially ruinous to noble Athens' men and their families.[193]

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185 Rösch 2018 *Archimède* 61.
186 Rösch 2018 *Archimède* 60.
187 Rösch 2018 *Archimède* 62.
188 Rösch 2018 *Archimède* 66.
189 Rösch 2018 *Archimède* 67.
190 Rösch 2018 *Archimède* 67.
191 Assante 2007 *Historiae* 120.
192 Assante 2007 *Historiae* 120.
193 Glazebrook *The bad girls of Athens* 125; Assante 2007 *Historiae* 120.

The law in Athens as from 346-345 BC condoned prostitution between men. Athenian men were a superior species and were supposed to remain as the 'penetrators'' or the 'men'. Men who played the 'woman' passive partners were usually slaves, consenting youth, or either a *pornoi* or a *catamie* (a male who accepted money or any other reward in exchange of him being sexually penetrated).[194] If any Athenian mature man was penetrated, then he would lose his public status. To show the seriousness of this transgression, it was provided in the Aiskhines law that:

> …if any Athenian is a catamie, let him not be allowed to become one of the nine *arkhons* (a 'ruler'), nor hold a priesthood (because his body is not pure), nor be a *syndikos* (a 'litigant') for the public, let him never hold a public office neither at home or abroad, neither by lot nor by vote; and let him not be an herald or an ambassador; let him never deliver an opinion either in Boule or in the assembly (even if he is a very clever person).[195]

Young boys were protected from sexual invasions by mature men. Any mature person (or guardian) who hired an Athenian free boy as a *catamie*, both persons – the one who bought and the one who sold – were liable in terms of Aiskhines legislation.[196] Further, anyone taking part in procuring a free Athenian boy, such a person would be put to death.[197]

In ancient Rome, society was dichotomised into the rich (*patricians* – the ruling class, including pimps) and the poor (*plebians* – the labouring or the working or lower class). The patriarchal class of fathers, husbands and masters treated women, children, and slaves as their own property. The *patria potestas* (power of the father as the head of the family) was so entrenched that he could sell his wife or daughter for purely economic reasons. Thus, Roman fathers and pimps (*lenos*) could engage in the sale of their wives, children, or slaves for proprietary or monetary gains.[198] Under the Roman law, rape (*raptus*) of woman was a property crime (something of economic value stolen) that the father or the husband could sue for damages and

194 MacDowell 2000 *RIDA* 13.
195 Aiskhines 1.19-20 as in MacDowell 2000 *RIDA* 21.
196 Aiskhines 1.13 as in MacDowell 2000 *RIDA* 18.
197 Aiskhines 1.14, 1.18 as in MacDowell 2000 *RIDA* 19.
198 Flemming 1999 *Journal of Roman Studies* 42.

be granted,[199] as stated:

> So, becoming a *meretrix* is, … primarily understood as an economic act, but one that belongs far less to the prostituted woman than those around her; those who profit from her initial and recurrent sale … she (woman) might be prostituted, first and foremost as a slave or secondly a wife or daughter; otherwise, she herself might be driven to sell her body systematically by her depraved lust or indigence.[200]

Certain Roman women (called *infames* meaning 'persons of ill-repute') also performed sex work, but their sexual indulgences were highly discreet or guarded. They dressed very uniquely and would wear a distinctive dress called a *stola* (a dress code for ideal femininity or chastity).[201] Male sex workers (*pornoi*) also wore distinguishing clothes called the *toga*; similarly, the *togata* (a female prostitute who 'penetrated' another female) also wore a *toga* to depict *vir* (man-ness; or an 'impenetrable penetrator').[202]

A sexual act was between an active penetrator (*vir*) and a passive penetrated (*cinaedus*). Essentially, as in Athens, Roman men were the *vir.*[203] Prostitutes or those 'penetrated' were either the slaves, young boys of pre-puberty age (*puer*), or male slaves (also *puer*), or old men (*senex*).[204] In order to keep the social distance between the 'uncontaminated' Romans and the *infames,* that is, the sex workers, slaves and the pimps; the law required prostitutes and pimps to marry within their ranks.[205] The *lex Iulia et papia* prohibited prostitutes and pimps from marrying outside the brackets of the *infames*.[206]

Placentinus, in his *Summa codicis*, stated that a woman who openly sold her sex (*qui palam corpole quaestum fecerit*) could not testify in court.[207] This amounted to unfair discrimination as regards sexual orientation and status. The statute *Lex Iulia*

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199 McNellis *Let her be taken: Sexual violence in Medieval England* 59; NRSV Bible Committee *Holy Bible* Deutoronomy 22: 28; 22:29.
200 Flemming 1999 *Journal of Roman Studies* 42.
201 Goetting *A comparison of ancient Roman and Greek norms regarding sexuality and gender* 221; Ackerman 2015 *The Post Hole* 49.
202 Goetting *A comparison of ancient Roman and Greek norms regarding sexuality and gender* 2; Hallet and Skinner (eds) *Roman sexualities* 30. Clarke *Roman sex* 90.
203 Goetting *A comparison of ancient Roman and Greek norms regarding sexuality and gender* 2.
204 Clarke *Roman sex* 87.
205 Weisner 2014 *Grand Valley Journal of History* 3.
206 McGinn *The economy of prostitution in Roman world* 341.
207 Otis *Prostitution in Medieval society* 15.

de adulteriis coercendis, enacted by Emperor Augustus, exempted sex workers from the punishments meted on all other citizens for the offences of unlawful sexual relationships.[208] Indeed, it were better for a Roman man to release on a prostitute (which was not seen as adultery), than releasing on his slave or another man's wife.[209] Sex workers were seen as deviants (*infamia*).[210] Someone who made a living by selling her body (*quae corpore quaestum facit*)[211] was commonly represented as:

> …a woman [who] openly makes a living (by her body) not only where she makes herself available in a brothel, but also if she squanders (without remuneration) her chastity in taverns, inns and other places … we understand "openly" as indiscriminately – without selection – not a woman who commits adultery or fornication but one who maintains herself in the manner of a prostitute … because she has intercourse with one or two, having taken money, it is not understood that she has openly made a living by her body.[212]

Being a *meretrix* (a woman who earns) was just but another way of someone commercialising on another's sexual prowess. The pimps controlled the activities of the sex workers. The comedy *Pseudolus,* authored by Plautus, explains the expectation by a pimp from a sex worker. In the comedy, a pimp named Ballio tells his sex workers to:

> …see to it that today many gifts come to me from your lovers. For, unless annual provisions come to me today, tomorrow I will prostitute you to the common herd.[213]

In the ancient Roman cities of Rome and Pompeii, sex work took place in *domus* and *insulae* (apartments or flats), brothels (*cauponae*), taverns (*popinae*), or bath-houses and lodgings.[214] Public prostitution took place in these types of abodes in which pimps (*lenones* or *lenas*) or *lenones patres* (the father who prostituted a daughter or a wife) controlled the business.[215] Many Roman upper class persons invested in real estates where sex work was performed, which would bring in

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208 McGinn *The economy of prostitution in Roman world* 341; Weisner 2014 *Grand Valley Journal of History* 4.
209 Laurence *Roman Pompeii* 61.
210 Laurence *Roman Pompeii* 60.
211 Flemming 1999 *Journal of Roman Studies* 50.
212 Flemming 1999 *Journal of Roman Studies* 66; Laurence *Roman Pompeii* 66.
213 Weisner 2014 *Grand Valley Journal of History* 2.
214 McGinn *The economy of prostitution in Roman world* 32; Laurence *Roman Pompeii* 66.
215 Flemming 1999 *Journal of Roman Studies* 51.

guaranteed income in the form of rents.[216] Given that the patriarchs wielded both the political and economic powers, elitism helped prostitution to thrive at their will and behest.

Sexual services were paid for using hard cash.[217] Prostitutes never owned the proceeds of their work, but only received part thereof as their wages from their pimps upon getting the service payments from the customers.[218] Thus, the *lenone*s, *lenas* and the *lenones patres* earned their living from the bodies of others, namely, the prostitutes. In most cases, prostitution was extremely exploitative in Roman society.

Though prostitutes and procurers were *infames*, the authorities tolerated their activities. In 37 BC-41 AD, Emperor Caligula[219] issued a decree requiring that all adults in the Empire pay income taxes to the state. This included prostitutes, their pimps, and the brothel owners, that is, all the operators of sex work industry[220] were taxed for the amounts they collected from their enterprises.[221] Under the Emperor, taxes[222] were at first collected by the *publican* (tax agents), and later by the *aediles* (Praetorian guards or junior magistrates), or by the army in areas outside Rome.[223] The *aediles* regulated the sex work industry, and ensured the effective collection of the revenue.[224] The *aediles* maintained a register of sex workers that contained personal information as well as their physical addresses.[225] The tax received from sex workers was used to fund state activities.

During Caligula's reign, the Pharisees asked Jesus whether it was lawful to pay tax (inclusive that derived from sex work to the emperor), and He confirmed with

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216 McGinn *The economy of prostitution in Roman world* 32.
217 McGinn *The economy of prostitution in Roman world* 41 – the price of sexual services ranged between 0.25 to 16 asses or more.
218 Fenton 2006 *Studies in Mediterranean Antiquity and Classics* 3.
219 Fenton 2006 *Studies in Mediterranean Antiquity and Classics* 5; McGinn *The economy of prostitution in Roman world* 36.
220 Weisner 2014 *Grand Valley Journal of History* 4.
221 Laurence *Roman Pompeii* 61; Weisner 2014 *Grand Valley Journal of History* 4.
222 Laurence *Roman Pompeii* 61: in Pompeii, a prostitute, pimp and brothel owner were taxed between 2 to 16 asses per one sexual act.
223 Sanger *The history of prostitution* 65; Laurence *Roman Pompeii* 61; Weisner 2014 *Grand Valley Journal of History* 4.
224 Laurence *Roman Pompeii* 62.
225 Laurence *Roman Pompeii* 62; Weisner 2014 *Grand Valley Journal of History* 4.

approval of this imperial obligation obligation.[226] The emperors coming after Caligula, Claudius (41-54 AD), and others, including Alexander (222-235 AD), maintained the tax on sex work for the funding of state activities. Even the Roman Catholic Church relied on it, until the law requiring that sex-work tax be abolished which appeared in statutes around 498 AD.[227] The influence of the Roman Catholic Church and Canon law was already evident during this period, but in Medieval times, they came to play a very important role in regulating prostitution. This will be discussed in the following paragraphs.

2.3.3 Views on prostitution in Medieval Europe

The Medieval period spans from the 5th century to the 15th century. This is a period marked by the decline of Western Roman Empire (as from the 5th century) and the Eastern Roman Empire. The states' laws were influenced by Roman law (*corpus iulis civilis)* as well as the Canon law (*corpus iulis canonis*) – the Roman Catholic Church law – which later became *ius commune* (common law), or *Corncordia discordantium canonum* or *Decrutum*. The common law had both elements of substantive law and adjectival law. Although Anastasius (491-498 AD), a Christian emperor of the Western Roman Empire, had abolished tax, it flourished within the Empire.

Prostitution in Medieval Europe operated against the Judeo-Christian and Greco-Roman social, political and cultural influential backgrounds. The common law was commonly applied by the Roman Catholic Church to the separate states and had its hierarchy with the Pope as the supreme authority. In Medieval society, prostitution was either tolerated, or repressed (criminalised), or institutionalised.[228] The Church's role, as a perfected society (*societas perfectas*), was to guide its adherents to attaining a religious moral belief[229] of eternal bliss, that is, the *visio beatifica*.[230]

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226 NRSV Bible Committee *Holy Bible* Mathew 22:17 – "Is it lawful to pay taxes to the emperor, or not?"; 22:19 – "(Jesus asked) show me the coin used for the tax. And they brought him a denarius; 22:20 – He (Jesus) asked them, "whose head is this, and whose title?"; 22:21 – "They answered, 'the emperor's'. Then Jesus said to them, 'Give therefore to the emperor the things that are emperor's, and to God things that are God's'".

227 Weisner 2014 *Grand Valley Journal of History* 5.

228 Otis *Prostitution in Medieval society* 13.

229 Perciaccante 1996 *Cornell Journal of Law and Public Policy* 173.

230 Maesschalck *The subjective element of crime* 9.

Sexual deviancy was not the ultimate destiny to men's impiousness, but the Church encouraged women to uphold sexual fidelity or chastity. Pope Innocent IV, the apex authority in the Canon law, supported promiscuity in men,[231] but held that a woman who had sex with several men betrayed herself.[232] Pope Innocent IV (1243-1254 AD) compared men to Christ, and held that:

> Men were like Christ who was joined to the Synagogue and then to the Church. Thus, no harm was done if a man 'divided his flesh' between several women … But women were like the Church, which always remained a virgin, at least mentally, and hence a woman who 'divided her flesh' between several men betrayed her symbolic archetype.[233]

Cases of sexual transgression of which the punishments were not publicised, were not inhuman or harsh, but rehabilitative.[234] Although the Roman Catholic Church discouraged pre-marital sex and extra-marital sex, it tolerated prostitution which was a societal problem.[235] The Church Canonists and theologians saw prostitution as a necessary evil in that married women would be saved from the temptations of lechery by the lustful, unmarried men since they could easily obtain sexual releases on common women.[236] Prostitution was an immoral sexual sin, but confession, contrition and penance could wipe out such wickedness.[237] So venial was prostitution that a priest could pay for sex to as many prostitutes as possible, seduced countless 'good women' but this would not be impediment to him becoming a bishop, a cardinal, or even a pope.[238] Still, section 2 of Canon 1395 punished clerics who committed sex by force or threats, or in the open, or with a person aged below sixteen years.[239]

As in the Imperial period when sex work was infamous but tolerated, in the Medieval states sex work was tolerated first and foremost because the Church, as an authority over the people, allowed prostitution as well as that some of the political leaders

231 Brundage *Law, sex, and Christian society in Medieval Europe* 427.
232 Brundage *Law, sex, and Christian society in Medieval Europe* 427.
233 Brundage *Law, sex, and Christian society in Medieval Europe* 427.
234 Elliot *Sexual scandal and the clergy* 93; Poos 1995 *The Journal of Interdisciplinary History* 585.
235 Otis *Prostitution in Medieval society* 12, 13.
236 Perry 2016 *Historia* 113.
237 Perry 2016 *Historia* 116.
238 Richards 1979 *Univ of Pennsylvania LR* 1211.
239 Brooten 2003 *Center for Lesbian and Gay Studies* 2.

were faithful to the Church.[240] The authorities regarded prostitution as a 'great evil and damage' (*magnum malum et dampnum*),[241] but saw it as necessary, especially for 'journey men and apprentices' – the voyagers, soldiers or young unmarried, and, therefore, designated a specific site to engage in prostitution.[242]

As a powerful institution, the Church had the authority to execute legislation (*ius cogendi*), to legislate and pass laws, and to punish the guilty (*ius puniendi*).[243] Canon 1311 gave the Church the inherent power to punish offending church members with penal sanctions. Canon 1311 was repealed, and replaced by Canon 2214 which empowered the Church, regardless of any human authority, to chasten the wrongdoers with both the spiritual and temporal or 'here on earth' punishments.[244] The ecclesiastical criminal-justice system defined a crime as an unjust and imputable act or omission which impairs the social order of the Church. In section 1917 of Canon 2195, the definition of a crime was refined to be an external and culpable infraction of a law which a consistory court could, at least, punish.[245] By the 13th century, the Church distinguished between a sin (*peccatum*) and crime (*crimen*) as settled by Pope Innocent III.[246] The Church penalised the most outrageous and flagrant sins.[247] Father Augustine of Hippo in North Africa, a priest in the 4th century, termed a 'crime' a serious 'sin' that "deserves an accusation and deep condemnation".[248] He made a hierarchy of human sexual acts from the most

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240 Byars *Prostitutes and prostitution in late Medieval Barcelona* 22: "In 1330, both Alfonse III, the King of Aragon, and Pere petitioned to the *Consell de cent* (Council of 100 – lowest Ecclesiastical court) that bad women may not live in the streets where good women live" and that prostitutes should not live in the streets with good or decent people. As such, they should have their own places to do their trade. In 1358, the *Consell de cent* decreed that "no woman vile of body, neither of brothel nor not of brothel, are to continue publicly their work outside the brothel of the said city, called Viladalls and En Torre Volran, nor dare to work or live outside of the said brothels in whatever streets". In 1445, Vagueria, a feudal administration within the jurisdiction of Catalonia, passed an Ordinance to prohibit prostitution which provided: "None of these said women are permitted to live in the said boundaries (of the city) nor in any other manner allowed to pass their licentiousness out to others." In 1457, the *Consell de cent* decreed "no women of the brothel, publicly vile in body and common, dare or presume to stay or live … in the street called Bares de basaya, but must work in the brothels of the said city to pursue their work". See Byars *Prostitutes and prostitution in late Medieval Barcelona* 22.

241 Otis *Prostitution in Medieval society* 17.

242 Perry 2016 *Historia* 115.

243 Maesschalck *The subjective element of crime* 9.

244 Maesschalck *The subjective element of crime* 10.

245 Maesschalck *The subjective element of crime* 24.

246 Maesschalck *The subjective element of crime* 24.

247 Maesschalck *The subjective element of crime* 24.

248 Maesschalck *The subjective element of crime* 26.

immoral (commonly unacceptable) to the least immoral or acceptable. The ranking placed unnatural sex (that does not lead to procreation) as the most immoral, followed by incest, adultery, fornication (that is, sex with a prostitute), and marital intercourse (most acceptable).[249]

Both the Church and the state had concurrent jurisdictions on matters of prostitution though the two powers occasionally clashed over their jurisdictions as regards prostitution.[250] The Church guarded the internal soul of a person through its canons, confessionals, and the consistory or the ecclesiastical courts, whereas the state protected the external body of a human being by policing, prosecutions, and punishments of sexual crime, especially of prostitution. The Church tolerated prostitution as a misdemeanour, but the state would criminally prohibit the act due to its associated societal evil (venereal diseases, threat to family foundations, abduction, kidnapping or promiscuity, et cetera). According to the Church, to engage a prostitute in a sexual act was morally better than having with sex with another man's wife.[251] Saint Jerome, a canonist, defined a prostitute as a whore availing her sexual lust to many men or simply a promiscuous woman.[252] He opined that without promiscuity, a key factor in prostitution, no woman would enter into the prostitution.[253] Promiscuity was prohibited for ordinary women in order to check on the sin of prostitution, and any such adulterous women were more severely punished than men.[254] Cardinal Hostiensis, a 13th century canonist, reiterated that a prostitute was not only sexually promiscuous, but openly and publicly promiscuous.[255] Augustine justified pre-nuptial sex acts with prostitutes by men as a preparatory ground to the complete marital sexual act. Augustine clarified that sanctioned sexual activity was only lawful and pleasurable in a valid marriage and purposed on procreation.[256] He argued that married men cannot totally be satiated by their wives, and that prostitutes were necessary to maintain intact families. In his double-speak argument in support of prostitution, Augustine reasoned that though

249 Brooten 2003 *Center for Lesbian and Gay Studies* 13.
250 Witte 2003 *Punishment and Society* 327.
251 Brooten 2003 *Center for Lesbian and Gay Studies* 14.
252 Perry 2016 *Historia* 113; Brundage 1976 *Signs* 826.
253 Perry 2016 *Historia* 113.
254 Perry 2016 *Historia* 114.
255 Brundage 1976 *Signs* 827; Perry 2016 *Historia* 114.
256 Richards 1979 *Univ of Pennsylvania LR* 1210.

prostitution was disreputable, immoral, and shameful; if it was eradicated then honest-matrons will be preyed upon by lust men.[257] In his argument to tolerate prostitution, Augustine quips:

> What can be called more sordid, more void of modesty, more full of shame than prostitutes, brothels and every evil of this kind? Yet remove prostitutes from human affairs, and you will pollute all things with lust; set them among honest-matrons, and you will dishonour all things with disgrace and turpitude.[258]

Thomas Aquinas, who followed Augustine in his toleration for prostitution, contended that it was reasonable to tolerate a lesser evil, like prostitution, if a greater evil, like rape, could be avoided.[259] Aquinas lamented that prostitution:

> …is like filth in the sea, or a sewer in a place. Take way the sewer, and you will fill the palace with pollution; and likewise with the filth (in the sea). Take away prostitution from the world, and you will fill it with sodomy.[260]

He urged for the tolerance of prostitution as a safety valve for sexual morality arguing that if prostitution was removed from the society, sodomy (a greater evil of unnatural sex) will thrive.[261] Aquinas also observed that some of the female saints were converted prostitutes, as such, he argued that prostitutes sinned, but could be redeemed.[262] Thomas of Chobham, in *Summa Confessorum*, held that prostitutes had the right to keep their earnings from prostitution, offer alms, go to church, but could not commune, and that the money the prostitutes received in return of their services was, thus, lawful. Accordingly, prostitutes were to pay tithes from such earnings.[263] However, not all in the Church were so forgiving towards prostitutes. Robert of Coursons, who later became a Cardinal, insisted that the Church not receive alms from prostitutes, and that they be excommunicated or expelled.[264]

Similarly, the Protestant Reformers in Medieval society were against pre-marital sex, extra-marital sex and prostitution. John Wycliffe, the founder of Lollards, a

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257 Augustine *On marriage and concupiscence* 127-128. See also Richards 1979 *Univ of Pennsylvania LR* 1979.
258 Augustine as in Richards 1979 *Univ of Pennsylvania LR* 1210.
259 Van der Pol 2010 *Journal of Historians of Netherlandish Art* 2.
260 Aquinas, as in Richards 1979 *Univ of Pennsylvania LR* 1211.
261 Aquinas, as in Richards 1979 *Univ of Pennsylvania LR* 1211.
262 Van der Pol 2010 *Journal of Historians of Netherlandish Art* 3.
263 Brundage 1976 *Signs* 838; Perry 2016 *Historia* 115.
264 Otis *Prostitution in Medieval society* 23.

puritanical religious sect that rose in England in the 14th century, stated in his *Trialogus* that sex outside marriage was not permissible.[265] Luther likened prostitution with the devil's stinking tools, and, therefore, having sex with a prostitute was evil.[266] Those opposed to extra-marital sex argued that sexual indulgence outside of marriage was a sin against nature.[267] The Church of Christ of the Latter Day-Saints also prescribed that sexual relationships should only be between those lawfully married male and female spouses.[268] It is from these Protestants' or Reformers' mind-set that the English common-law courts defined the limits of marriage.[269] William Hale, an Evangelical reformer (1809-1812) termed a prostitute a wilful harlot of "awful depravity, from a principle of lust, idleness, profligacy, or avarice, [who] deliberately chooses to prostitute herself to any man".[270] These harlots entrapped wholesome middle-class sons with their "serpentine allurements".[271] Hale described a woman who practises prostitution as a:

> Whorish woman who hunts for the precious life … whose infamous conduct marks the diabolical (evil) depravity (wickedness) of her heart … one who continues, by choice, in her abominable career, seducing hundreds.[272]

For Hale, prostitution was a gross deviancy or immorality against society.[273]

Despite all the views for and against prostitution during this period, sex work continued, and it tended to occur in popular cities or urban centres.[274] Prostitutes were unfortunately not always welcome in these areas. In 1231, Robert, at the Council of Paris, decreed that public prostitutes were prohibited from residing in the city or burg, and if once warned and they did not comply, they would be

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265 Elliot *Sexual scandal and the clergy* 93; Poos 1995 *The Journal of Interdisciplinary History* 585.
266 Crook, Gill and Taithe (eds) *Evil, barbarism and empire* 36.
267 Crook, Gill and Taithe (eds) *Evil, barbarism and empire* 37. Fornication, as an exchange of love for the mere lust of the beast, was also a sin.
268 The Church of Jesus Christ of Latter-day Saints https://www.churchofjesuschrist.org/study/manual/gospel-principles/chapter-39-the-law-of-chastity?lang=eng (Date of use: 20 March 2021). See chapter 39.
269 In *Hyde v Hyde* (LR) 1 PD130, Lord Penzance held that marriage as understood in Christendom, was a voluntary union for life of one man and one woman to the exclusion of others.
270 Hale *Considerations on the causes and prevalence of female prostitution* 12.
271 Hale *Considerations on the causes and prevalence of female prostitution* 35; Wendelin *The genealogy of the prostitute* 4.
272 Hale *Considerations on the causes and prevalence of female prostitution* 11; Wendelin *The genealogy of the prostitute* 27
273 Hale *Considerations on the causes and prevalence of female prostitution* 66; Wendelin *The genealogy of the prostitute* 4.
274 Karras *Common women* 14.

excommunicated.[275] Similarly, the customs of Carcassonne and charters of eastern Languedoc prohibited public prostitutes and procurers (*meretrix publice*) from residing in the cities, else they were to be forcibly evicted by the public.[276] In France, it was only during the reign of King Marjorca in 1285, that red-light-districts were firstly and officially recognised and designated, when the bailiff (*baylus*) of the king declared that prostitutes must reside unmolested in the 'Hot street' in the suburb of Villanova.[277]

Though each of the Medieval Europe states could have its own law based on its people's aspirations, the *Ius commune* (the Canon law) remained the same in all the jurisdictions. The Canon law regarded prostitution as a social necessary evil and advocated for its regulation. Yet, there were certain sexual acts which were not tolerated by the Church. In the city of Venice in Italy, in the mid-14th century, a passive male transsexual prostitute, Rolandino, disguised himself as a woman, called himself Rolandina, and copulated with some men.[278] When Rolandino was discovered, he was charged, convicted, and burned between the Columns of Justice. This harsh punishment meted out was not because of him being a passive male prostitute, but because of his disguising as a female. Generally, passive partners were mildly punished whereas active partners were put to death.

The Netherlands is one of the Medieval European countries whose legal foundations were partly influenced by Roman law. Prostitution was rampant in all Dutch cities.[279] In the early Netherlands, extra-marital sex, that is, whoredom, was considered illicit but not the payment of the sexual services rendered thereof; and a whore could be a licentious woman.[280] The city port of Amsterdam, which dates back to the 13th century, but was not granted city status until in the 14th century, became important as a red light district (the term refers to any city district notoriously for the vice of sex work and sex workers) due to its being a sea port.[281] De Wallen, a suburb in

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275 Otis *Prostitution in Medieval society* 23.
276 Otis *Prostitution in Medieval society* 17, 18.
277 Otis *Prostitution in Medieval society* 25, 26.
278 Rugiero *Sodom and Venice* 136.
279 Van de Pol *Prostitution in early modern Amsterdam* 86.
280 Van de Pol *Prostitution in early modern Amsterdam* 90.
281 Crabtree https://theculturetrip.com/europe/the-netherlands/articles/a-brief-history-of-amsterdams-red-light-district/ (Date of use: 20 August 2021).

Amsterdam, was one of the infamous red light districts where sex work between sailors and city environs women thrived in the refresh joints (bars, inns, taverns and brothels) at the sea port.[282] In an attempt to regulate prostitution in 1413, the administration of Amsterdam decreed:

> Because whores are necessary in big cities and especially in cities of big commerce such as ours, indeed it is far better to have these women than not to have them – as also because the holy church tolerates whores on good grounds, for these reasons the court and the sheriff of Amsterdam shall not entirely forbid keeping brothels.[283]

In the 16th century, contagious venereal diseases (especially syphilis) hit Europe, bringing with it a hatred of sex workers and brothels (*bordeeltjes*).[284] In 1578, the Calvinist leadership in Amsterdam outlawed all forms of illicit sex including whoring (*hoererij*), that is, any extra-marital sexual relations.[285] The promoters of sex work during this period were the procurers; the bawds (*hoerewaardinnen*) – women facilitators of prostitution; and procuress (*hoerebesteedters*) – women specialising in the negotiation process.[286]

The first brothel in Amsterdam was established in 1675.[287] Whenever the seafarers docked in Amsterdam, they spent most of their monies they earned on widows, women whose husbands had long gone for voyages, on underpaid women who worked to augment their means, as well as on prostitutes. To curb these activities, the Protestant authorities tried to arrest and punish those found engaging in the act, especially the prostitutes residing in spin houses, and they also closed brothels. However, the adulterers, especially rich Jewish men, bought their freedom by paying fines that went directly to the pockets of the bailiff.[288] The authorities' efforts to combat prostitution, with its high supply and demand, were costly and decidedly

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282 Crabtree https://theculturetrip.com/europe/the-netherlands/articles/a-brief-history-of-amsterdams-red-light-district/ (Date of use: 20 August 2021).

283 Brants 1998 *Journal of Law and Society* 621.

284 Van der Pol 2010 *Journal of Historians of Netherlandish Art* 3.

285 Van der Pol 2010 *Journal of Historians of Netherlandish Art* 3; Van de Pol *Prostitution in early modern Amsterdam* 91.

286 Van der Pol 2010 *Journal of Historians of Netherlandish Art* 6.

287 RLD Tours https://redlightdistrictamsterdamtours.com/en/history-of-the-red-light-district.php#:~:text=The%20first%20brothel%20in%20Amsterdam,notorious%20all%20over%20the%20world (Date of use: 20 August 2021).

288 Van der Pol 2010 *Journal of Historians of Netherlandish Art* 3.

unsuccessful.

In 1795, France, under Napoleon, invaded Netherlands and replaced the criminalisation policy on prostitution by instead legalising prostitution, and regulated brothels in order to protect soldiers from infectious or contagious venereal diseases.[289] As a result, prostitutes were required to register themselves, and were given a red card, and they were also subjected to mandatory venal medical examinations. Those found to be infected with diseases were not allowed to do sex work until treated and cleared of the disease.

In England, during the Medieval period, two sets of laws of different origin governed its people. There was the English common-law system,[290] which was an aggregate of customs prevailing from the Anglo-Saxon feudalism, and Canon law (the Gratian *Decrutum*). Depending on the locality, prostitution in Medieval England was seen as a sexual deviancy where the actors were operating outside the accepted social norms on human sexuality.[291] Sexual deviancy during this era included transvestism, transsexual, homosexuality, prostitution, adultery, rape or pandering.[292] In the consistory courts, rape was a property crime for it was treated as having taken a property of commercial value of the *pater familia*.[293] The statute of Westminster I of 1275 (3 Edw. 1) provided that: "No one may ravish nor take away (*nei ravie en prenge)* a woman against her will".[294] It was, therefore, an offence to have sexual relations with or abduct a woman, and those found guilty were imprisoned or fined.[295]

If an early English woman did indulge in sex, she was categorised as a 'whore' within the society.[296] It mattered not whether one was a matron or a wench

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289 Crabtree https://theculturetrip.com/europe/the-netherlands/articles/a-brief-history-of-amsterdams-red-light-district/ (Date of use: 20 August 2021).

290 Abbot, Pendlebury and Wardman *Business law* 40. The conquest by Normans kings in 1066 led to unification of local customs and the creation of *Curia Regis* (king's court) with the king as the head. *Curia Regis* had executive, legislative and judicial powers. Importantly, the courts constituted the Court of Common Pleas (dealing with land matters), the Court of Chancery and the Star Chamber (for dealing with offences against a person).

291 Foucault *The history of sexuality* 37.

292 Helmholz *Judges and trials in English ecclesiastical courts* 102.

293 McNellis *Let her be taken: Sexual violence in Medieval England* 59.

294 The Statute of Westminster of 1275 (CAP 13).

295 The Statute of Westminster of 1275 (CAP 13).

296 Karras *Common women* 94.

(prostitute), as Chaucer reckons:

> …there is no smallest difference between a wife who is of a high degree … and a poor unknown wench … if both do what is amiss (sexual intercourse) … the gentle woman is called his lady … but the poor woman is called a wench or his leman (illicit lover) … Men lay the one as low (whore) as lies the other (wife).[297]

The reason for this patriarchal perspective was that women were deemed men's property and their sexual object. By the common law of England, for example, upon marriage, under the doctrine of coverture, a man and a wife became one 'flesh' and that flesh was the husband.[298] Under the doctrine, the wife took her husband's name, and was no longer a legal entity.[299] The doctrine further reinforced the 'master-bondswoman' relationship between a man and woman, where a wife has to submit to her husband's sexual demands.[300] Chaucer describes the sexual transactions between a wife and a husband from the sentiments of Bath's wife when she says: "Till he (husband) had paid his ransom unto me, then would I let him do his nicety".[301] Karras puts it as:

> ...the wife sells her merchandise, her body, to her husband in the exchange of possession just as prostitute sells her merchandise for monetary compensation.[302]

Any young woman who wished not to marry could opt to become a nun, a lay sister, or a nurse, or if very poor, a prostitute.[303] A prostitute was equated to sewers, cesspits, or garbage dumps,[304] but it was nevertheless held that:

> …a prostitute was an unavoidable reality to urban life … a necessary element within the infrastructure of contemporary sexuality.[305]

It was mostly widows and unmarried, independent women who were seen as people who were prone to sexual deviancy behaviour. These were women who were not

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297 Chaucer, as in Martiere *A legal examination of prostitution in late Medieval Greater London* 1.
298 Barron 1989 *Reading Medieval Studies* 35.
299 Ablow https://www.branchcollective.org/?ps_articles=rachel-ablow-one-flesh-one-person-and-the-1870-married-womens-property-act (Date of use: 10 November 2021).
300 Witte 2015 *Emory LJ* 1772.
301 Chaucer as in Martiere *A legal examination of prostitution in late Medieval Greater London* 1.
302 Karras *Common women* 92.
303 Barron 1989 *Reading Medieval Studies* 36.
304 Wendelin *The genealogy of the prostitute* 27, 73. The author quotes Rachelot who stated that prostitutes are as inevitable as vast collection of human beings as are the sewers, sinks and cess-pools.
305 Wendelin *The genealogy of the prostitute* 28.

under the control of any specific man, but on their own, and therefore controlled their own sexuality. Their status as free women and mostly sexually available to all gave them the label of sexual deviants connoting prostitution.[306] The term 'common prostitute' was used for such free women since their sexual indulgencies were:

> …not the exchange of money, not even multiple partners, but the public and indiscriminate availability of the woman's body.[307]

Prostitutes were not only heterosexuals but also males who sold their sex to other males. In Thomas' book, *Calendar of Select Pleas and Memoranda of the City of London 1381-1412,* a transvestite passive male prostitute named John Rykener (alias Eleanor) is written of.[308] Rykener as transvestite-cum-transsexual:

> …used to do broidery and sell ale but his main feminine job was prostitution. Men had sex with Rykener in return of pay; and as a man, Rykener had free sex with women … Rykener was found having sex with John Britby in Soper's Lane – South of Cheapside in London … Rykener was taken to court in women's clothing, that is, '*ut cum muliere*'.[309]

In court, Rykener submitted under oath that a certain woman named Ann, a whore, trained him on how to sell sex as a woman, and another prostitute called Elizabeth Brouderer taught him how to dress like a woman.[310] Because of his confusing transgender sexuality, the court simply discharged him.[311]

During the late Medieval period in England, around the 14th century, prostitution flourished because of the increase in urban settlement and trade in agricultural produce, food, clothes, and manufactured goods.[312] The Medieval English towns (boroughs) that had 'Charters of Liberties'[313] had a limited right to implement their own laws and police. The courts in the borough had the jurisdiction on morals. Prostitution was a moral concern and needed to be controlled. During the mid-

306 Karras *Common women* 114. Bershady 2014 *Primary Source* 12.
307 Flemming 1999 *Journal of Roman Studies* 39.
308 Karras *Common women* 92; Karras and Boyd *Ut cum muliere* 111; Bershady 2014 *Primary Source* 13.
309 Bershady 2014 *Primary Source* 12.
310 Henningsen 2019 *Medieval Feminist Forum* 259; Karras and Boyd *Ut cum muliere* 111.
311 Bershady 2014 *Primary source* 12, 13; Henningsen 2019 *Medieval Feminist Forum* 259.
312 Angelucci, Meraglia and Voigtländer *The Medieval roots of inclusive institutions* 10.
313 By the start of 12th century, the king granted 'Charters of Liberties' to some boroughs giving the local burgesses the authority to appoint their own tax collectors, judges and market officials. In the exchange for the liberties, boroughs would agree to pay larger amounts of taxes to the king. See Angelucci, Meraglia and Voigtländer *The Medieval roots of inclusive institutions* 2, 3.

Medieval period, England developed two methods of regulating prostitution, namely, a prohibitive and a regulative regime. The prohibitive regime criminalised solicitation, fornication, bawdry, and adultery. Prostitution and brothel keeping was prohibited generally by the English common law.[314]

In the borough of London, ecclesiastical courts adjudicated most of the cases of a sexual nature (particularly pimping or prostitution), and the punishments were either penance, fines or acquittals, if not death for rape.[315] The toleration of sexual transgressions by the ecclesiastical courts offended some Londoners, who then petitioned the secular administration to uphold sexual morality. The secular administration came up with ordinances,[316] especially on sexuality and public order to fight the infamous sexual conduct. The Ordinance of 1276 forbade a whore to reside within the city of London; and the Ordinance of 1393 prohibited common harlots to live in the city of London or its suburbs.[317] Indeed, the 1393 Ordinance restricted prostitutes to ply their trade in "the stews of the other side of Themes and Cokkeslane".[318] The Ordinance of 1417 outlawed the keeping in London of stews and public bath-houses other than private ones, and, in addition, landlords found housing prostitutes or procurers would forfeit the rent paid.[319] Seemingly, in London, being a prostitute or engaging in prostitution was not an offence *per se*, but where to ply it and when were quite restricted. Those people found prostituting outside the designated areas were punished.

The English borough of Southwark developed as an early Roman settlement[320] where the Roman soldiers began many brothels, which became notorious for prostitution as well as criminal activities. The borough of Southwark and the Liberty

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314 Martiere *A legal examination of prostitution in late Medieval Greater London* 20.

315 Wunderli *London church courts* 92, 96; Helmholz *Judges and trials in English ecclesiastical courts* 102.

316 Meade *Medieval prostitution in secular law* 86.

317 Meade *Medieval prostitution in secular law* 86, 87.

318 See Martiere *A legal examination of prostitution in late Medieval Greater London* 49.

319 Riley (ed) *Memorials of London and London life* 647. This Ordinance abolished stews in the city "by reason and cause of the common resort, harbouring, and sojourning, which lewd men and women, of bad and evil life, have in the stews". These lewd men and women were seen as the cause of "many grievances, abominations, damages, disturbances, murders, homicides, larcenies, and other common nuisances". See Riley (ed) *Memorials of London and London life* 647-848.

320 Martiere *A legal examination of prostitution in late Medieval Greater London* 80.

of Bishops of Winchester[321] developed a legal system, blended from the secular and ecclesiastical systems, which oversaw the regulation of prostitution and the legalisation of brothels.[322] In England, it was only in the Winchester manor where a legalised brothel system ran.[323] In Southwark, the bishop wielded both the ecclesiastical and secular power to the extent that the king could not interfere with the decisions of the bishop.[324] The bishop's court was the court of first instance as well as the final appellate court. The Ordinance A7 in Southwark provided:

> No man or woman dwellings within the said Lordship and franchise … shall commence or take away any action or process against another for no matter or cause in any court of the Kin, but only within the said Lord's court to be determined and end there.[325]

A petition to the Bishop of Winchester demonstrates a typical case of the period involving prostitution and trafficking. In this case, Elyn Boteler petitioned for her release from Winchester's prison in 1473, where she was sent after Thomas Bowde took out an action of trespass against her, which put her into debt, and finally prison. Bowde, an inn-keeper, lured Boteler to his house in the stews on the pretence that she would perform domestic service. Yet, after transporting her there by boat, he attempted to coerce Boteler into commercial sex. Her refusal was met by his indictment of her in the Bishop of Winchester's court – a typical response to threaten a trafficked victim, and an easy solution to get rid of the evidence.[326]

The manorial administration tolerated prostitution but regulated it via 'customary'[327] rules – a compilation of customs and *leet* articles for the secured functions and operations of brothels. The ecclesiastical regulations only pleaded with prostitutes to leave the vice in order to get a church-cerebrated burial upon their death. The ecclesiastical provisions were that the 'single women', that is, the prostitutes, were forbidden the rights of the church so long as they continued their sinful life and were

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321 The Liberty of Bishops of Winchester was an area in Southwark (on the south bank of the River Thames) in 1127, and which was exempt from the jurisdiction of the county's high sheriff. See Martiere *A legal examination of prostitution in late Medieval Greater London* 80.

322 Martiere *A legal examination of prostitution in late Medieval Greater London* 80.

323 Martiere *A legal examination of prostitution in late Medieval Greater London* 69.

324 Martiere *A legal examination of prostitution in late Medieval Greater London* 75. It should be noted that the ecclesiastical authority was highly structured with the pope as the head (of Papal *curia*), then the archbishops, the bishops, and then the deacons.

325 Martiere *A legal examination of prostitution in late Medieval Greater London* 102, 103.

326 Martiere *A legal examination of prostitution in late Medieval Greater London* 68.

327 Martiere *A legal examination of prostitution in late Medieval Greater London* 86.

excluded from a Christian burial unless they were reconciled before they died.[328] Prostitution and the running of brothels flourished in Southwark under the watch of the bishop. The manorial or ecclesiastical courts only punished sexual offenders when they contravened regulations or failed to pay tax.[329]

It could be argued that the bishopric administration earned revenue from prostitution similar to function of a pimp until the people were against it and sought intervention from the king. The king held that the Church was unable to effectively deal with the rise in sexual nuisance due to brothels, and, as such, widened his jurisdiction to include Southwark. The king blamed the Church for tolerating prostitution via canonical sanctions, yet the prostitutes continued to 'sin' because the Church could not compel them to atone for their crimes by ecclesiastical censure only.[330] In 1529, the autonomy of Southwark came to an end when Cardinal Wolsey bequeathed the manor to King Henry III. As in London, brothels were shut down under the king's proclamation on 12 April 1546.[331]

It can be concluded from the above paragraphs that during the Medieval period, the 'great social evil' never only meant prostitution in the sense of the selling of sexual services, but any sexual transgression, that is, sex outside the marital union. Although the manner in which England managed prostitution during the Medieval period was briefly discussed here, the following section will specifically examine the views of England and its colony of Australia on prostitution from 1660 to the 1950s.

2.3.4 Views on prostitution in England and its colonies, 1600-1950s

In England, the period 1603 to 1714 was marked by the reign of the Stuarts' monarchy. The Stuarts' time in power saw the unification and the formation of Great Britain.[332] In 1603, James IV of Scotland became James I of England, and so united both Scotland and England.[333] James I believed in the divine right of the kings, and decreed:

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328 Stow *Bridge warde without [including Southwark]* 54; Martiere *A legal examination of prostitution in late Medieval Greater London* 105.
329 Martiere *A legal examination of prostitution in late Medieval Greater London* 22.
330 Martiere *A legal examination of prostitution in late Medieval Greater London* 108.
331 Martiere *A legal examination of prostitution in late Medieval Greater London* 112.
332 Brice and Lynch *The early Stuarts* 39.
333 Brice and Lynch *The early Stuarts* 18.

> …kings were the authors and makers of the law , and not and not the laws of the king, and the king is above the law, as both the author and giver of strength thereto.[334]

The Stuarts were mostly Protestants, and, therefore, during their era, Catholicism fell out of favour, and consequently so too the practise of prostitution. James I was himself a Calvinist.[335] Prostitution was to be put under some control via national frameworks, especially because prostitution was a threat to society and its morality:

> …Prostitution is a sign of a weak state, which cannot make its own people respect social laws … which are also the laws of God … prostitution went against the will of God.[336]

Prostitutes interacted with the highest people in society and thus polluted them – prostitutes threatened morality by their indecent behaviour.[337]

During the reign of James I, accusations of sexual immorality or prostitution were heard in ecclesiastical courts;[338] whereas accusations of contagious diseases were heard in the common-law courts.[339] To allege that a woman had an infectious disease was by itself not actionable, but if she kept an inn, and lost her guests due to such accusations, a cause was established. It was not an offence under common law to call a woman a bawd or a whore. If the woman was falsely accused of keeping a house of bawdy, she could bring a case for defamation.[340]

In a very early criminal law text of 1666, it is recorded that crimes are committed by prostitutes, and to prostitutes, as in the following two excerpts:

> A Harlot delivered of a Child, hid it in an Orchard (it being alive) and covered it with leaves, and a Kite struck at it, and the Child died there-of, and the Mother was arraigned, and executed for Murder.[341] ...
>
> And yet to ravish a Harlot, against her will, is Felony; for *licet Meretrix fuerit ante, certé tunc temporis not fuit, cùm nequitiq ejus reclamando confentire voluit* (but it is a good plea in appeal of rape, that the appellee before the time of the ravishment supposed kept and used her as his concubine).[342]

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334 Brice and Lynch *The early Stuarts* 39.
335 Brice and Lynch *The early Stuarts* 31.
336 According to Delamere, police commissioner of Châtelet in Brice and Lynch *The early Stuarts* 9.
337 Brice and Lynch *The early Stuarts* 9.
338 Glanz *The legal position of English women under the early Stuart kings* 131.
339 Glanz *The legal position of English women under the early Stuart kings* 131.
340 Glanz *The legal position of English women under the early Stuart kings* 133.
341 Dalton *The Countrey justice* 277.
342 Dalton *The Countrey justice* 39 Chap 118.

During the post-Medieval period, prostitution was driven purely by financial goals.[343] Prostitution in England became so rampant that the wandering whores (street-based prostitutes) complained that there were so many private whores (indoor prostitutes) to the extent that the wandering whore could not get any clients.[344] It has been asserted that the commercialisation of sex work during this period appeared among the poor, lazy and idle whores who indulged in sex for necessity, but not for pleasure.[345] Cornelia, a professional commercial sex worker of the time, expressed this specific sentiment:

> …not a man received the least testimony of affection from me, unless I was assured I should be paid for it with ready money.[346]

Thus, prostitutes were seen as unfortunate creatures who were obliged out of necessity to gain their livelihood in bawdy houses.[347]

Sex workers during this time were not only women. Dunton complained in *The He-strumpets* (1706), a satyr on the sodomite club, of the surge in gay prostitution because the majority of the female prostitutes had been infected with venereal disease.[348] He thus narrated:

> Your tails are grown so lewd and bad, that now *Mens Tails* (Men penises – my own interpretation) have all the trade.[349]

Within the same time, Lord Hervey, an effeminate nobleman, was insinuated as "fit only for the *Pathick's* (a penetrated partner in homosexual intercourse) loathsome trade".[350] Homosexual male prostitutes were also termed the so-called 'rent boys'.[351]

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343 Cock *Exchanging flesh* 34. This is in contrast to the period before the 17th century, where whoredom more than often 'embodied insatiable sexual desire' than the pursuing merchant sex for purely financial purposes.
344 Garfield *The wandering whore* 34.
345 Garfield *The wandering whore* iv; Cock *Exchanging flesh* 34.
346 Hinnant 2005 *Restoration* 62; Cock *Exchanging flesh* 35.
347 Hinnant 2005 *Restoration* 56.
348 Norton *Mother Clap's Molly House* 50. See also Burns 2000 *Journal of Religion and Society* 2.
349 Norton *Mother Clap's Molly House* 50. See also Burns 2000 *Journal of Religion and Society* 2.
350 Norton *Mother Clap's Molly House* 168.
351 Coleman *Rent: Same sex prostitution in modern Britain, 1885-1957* 4, 12.

The 18th century saw the state's intent to control the indulgences of the population in the cities as vagrancy, poverty and prostitution hit. Prostitution in England was controlled via the Vagrancy Act (1739-1744). Criminals developed domain descriptions of criminal conducts, for example, 'sacking' law for whoring and lechery, 'cheating' law playing with loaded dice in the disorderly houses,[352] and 'cross-biting' law for swindling whores, that is, pimping or procuration.[353] Under the Act, excessive drinking, lewdness, bawdy houses, public gaming houses and other disorderly places, and disorderly practises like being drunk, soliciting, or disturbing public peace, were heavily prosecuted and punished:[354]

> Every Justice of Peace may from time to time (as well within Liberties, as without) enter into any common house or place where any playing of Dice, Tables, Cards, Bowls, Coyts, Cales, Logats, Shove-groat, Tennis, Casting the Stone, Foot-ball or other unlawful Game, now invented, or hereafter to be invented, shall be suspected to be used; and may arrest the keepers of such places, and imprison them until they find Sureties by Recognizance no longer to occupy any such house, Play, Game, Alley, or place.[355]

The Disorderly Houses Act[356] of 1751 placed heavy fines against those who ran disorderly houses and opened them up to the vices of disorderly persons.[357] Being a prostitute *per se* was not a crime, but they could be seen as 'nightwalkers', according to Dalton's classification of crimes and criminals:

> Every Justice of Peace … may cause to be arrested all Night-walkers, be they strangers or other persons that be suspected, or that be of evil behaviour, or of evil fame: and more particularly all such suspected persons as shall sleep in the daytime, and go abroad in the nights; and all such shall in the night-season haunt any house that is suspected for Bawdery…[358]

Up until the 19th century, sex work was tolerated in England, and the conduct only became a punishable offence only if it took place in public or outside of the designated localities and times. It has been averred that much of London was built on the profits of prostitution, and that one in five women were prostitutes during that

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352 Swinden *Crime and the common law in England* 13, 14: Games of dice and cards were played in alleys and ale houses; such houses were where prostitution and crimes of drunkenness would take place.
353 Swinden *Crime and the common law in England* 12.
354 Brice and Lynch *The early Stuarts* 11.
355 Dalton *The Countrey justice* 70; Swinden *Crime and the common law in England* 13.
356 Section 8 of the Disorderly Houses Act 1751 c 36 25 Geo 2, (repealed).
357 Brice and Lynch *The early Stuarts* 12.
358 Dalton *The Countrey justice* 102.

time. Sex work also occurred at all levels of society, for example, many single mothers who had limited means of living survived by trading off their sexual services.[359]

During the Victorian reign, there was a belief that sexual immorality, especially exhibited by prostitutes, portrayed a prostitute as deviant and mentally sick.[360] The Victorian Vagrancy Act of 1824 first criminalised certain unwelcome behaviour in prostitution, and brought the term 'common prostitute' into British law.[361] Persons convicted of prostitution were punished with a hard labour sentence of one month.[362] This Act also introduced the crime of living on the avails of prostitution, whereby a man lives of the 'immoral' earnings of a prostitute.[363] A common prostitute was deemed idle and disorderly if found loitering in the streets or behaving in a riotous manner;[364] or in public soliciting for immoral purposes.[365] Yet, it was still possible to purchase a thirteen-year-old virgin girl for five pounds for the purpose of prostituting her, according to Stead's 1885 expose *The maiden tribute of modern Babylon.*[366]

Rape and sodomy continued to be felonies during this period.[367] The legislature consolidated the sodomy Acts, amended them, and renamed them as Offences Against the Person, with no mention of sex work as an offence.[368] The phrase 'rent

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359 Faure *Early and mid-Victorian attitudes towards Victorian working-class prostitution* 39.

360 McLaughlin 1991 *Critical Studies in Mass Communication* 8.

361 Vagrancy Act 1824 Cap 83 para III: "…every common prostitute wandering in the public streets…and behaving in a riotous or indecent manner…shall be deemed idle and disorderly person", the law was further enhance curb public nuisance when s 1(1) of the Street Offences Act, 1959 provided: "it shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution".

362 Vagrancy Act 1824 Cap 83 para III.

363 Vagrancy Act 1824 Cap 83 para III.

364 Section 3(a) of the Vagrancy Act of 1824.

365 Section 3(c) of the Vagrancy Act of 1824. This provision is carried over in the Sexual Offences Act 1956 which criminalised not only living on the avails of prostitution (ss 30 and 31); but also causing (creating a conducive environment); prostitution (s 20); solicitation for immoral purposes (s 32); and keeping or running brothels (s 33).

366 Coleman *Rent: Same sex prostitution in modern Britain, 1885-1957* 32; Faure *Early and mid-Victorian attitudes towards Victorian working-class prostitution* 11-12.

367 Act for the punishment of the vice of Buggerie 1533 (25 Henry III c 6) required that to prove rape or sodomy, penetration and ejaculation must have taken place; Treason Act 1553, Buggery Act (of 1533) repealed; 1562 Buggery Act of 1533 reinstated: An Act for the punishment of the vyce of sodomye; under the Act, sodomy was defined as "anal penetration between two people or anal or vaginal sex between human and animal."

368 Section 15 of Offences Against the Person Act 1828 stipulated the death sentence for conviction of buggery committed either with a man or a woman. Section 18 of Offences Against the Person

boys' created a hundred years earlier in England, surfaced again in the Oscar Wilde trial of 1895 on same-sex prostitution as the men whom Wilde paid for sex were referred to as 'rent boys' while he was labelled a 'renter'.[369] The 'rent' tendency prompted the enactment of the Criminal Law Amendment Act (the Labouchere's Amendment) which criminalised acts of male same-sex acts, which included prostitution.[370]

Victorian England's regulations of prostitution could also be inferred from laws in its Colonies. The Victorians tolerated prostitution but with hindrances or limitations in the law. For example, in the British Colony of the state of New South Wales in Australia, it was an offence, punishable by payment of a fine of ten pounds, for any person licensed to run a public refreshment house to let prostitutes gather together and spend time in such houses.[371] Women working as prostitutes were accused of being the agencies of the spread of venereal diseases, and therefore earned themselves the label "a small group of abnormal women".[372] In the state of Victoria in Australia, David Blair was appointed in 1873 by the Victorian government to carry out an inquiry into the 'social evil' of prostitution. In the report, he described prostitution as a pestilence which destroys the life of infants, spreads contagion diseases, saps the strength of manhood, ruins families, increases poverty and destitution, and wrecks national wealth by inflicting damage on the most productive population of a society.[373] Blair opined that prostitution was a societal phenomenon in all human societies, and was an ineradicable vice.[374] He also stated that religion and morality were ineffective influences to prostitution, and that any attempt to suppress it on the basis of the law would only amplify its intensity.[375] To this end, Blair concluded that the government should recognise prostitution as an incurable moral malady, and legislate the conduct to ameliorate the consequences of the

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Act 1837 removed the requirement of proof of ejaculation in rape or sodomy cases. With the Offences Against the Person Act 1861, the death sentence for buggery came to an end.

369 Coleman *Rent: Same sex prostitution in modern Britain, 1885-1957* 12, 61. See also footnote 350 above.

370 Section 11 of the Criminal Law Amendment Act of 1885.

371 An Act Licensing of Public Houses and to regulate the sale of Fermented and spirituous Liquors in New South Wales 1849 s 37. See also s 46 of The Wines Beer and Spirit Sales Statute 1864; s 25 of The Police Offences Statute 1864; *Csmor v Haberman* [1900] VR 153.

372 Arnot *Prostitution and the state in Victoria, 1890-1914* 13.

373 Arnot *Prostitution and the state in Victoria, 1890-1914* 12.

374 Arnot *Prostitution and the state in Victoria, 1890-1914* 12.

375 Arnot *Prostitution and the state in Victoria, 1890-1914* 12.

social evil by means of lawfully arresting prostitutes suffering from venereal disease, and detaining them until they are treated of the disease, and are safe from spreading the disease.[376]

In Australia, it was a criminal offence for a female prostitute to be found suffering from syphilis, and on conviction, she was liable to three months confinement.[377] A certain police officer, Albert Tucker, stated that whenever the police suspected that a woman was suffering from syphilis and was soliciting in public, they would arrest the prostitute, charge her under the Vagrancy Act,[378] and take her to court where she will finally be sent to the goal hospital.[379] The object of the Act was to prevent in as much as possible, the spread of syphilis, and it targeted only the prostitutes, especially women.[380]

Because it was thought that the venereal diseases that infected the soldiers came from female prostitutes, laws were also institutionalised in England to protect the soldiers from contracting contagious diseases upon copulating with these women.[381] Under the 1864 Contagious Diseases Act, a police superintendent could inform a magistrate that a particular woman was a common prostitute with a contagious disease. The burden of proof was on the woman that she did not have such disease; else the magistrate would order that she undergoes compulsory vaginal medical screening by an army doctor. If she was found infected, she would be sentenced to three months' detention in a lock hospital,[382] where her infection would be treated. If a prostitute failed to comply with the conditions of the said Act, she would be imprisoned for a month for the offence, and two months for every offence thereafter. It was an offence to refuse to undergo medical examination, or to refuse to be incarcerated. The 1866 Contagious Diseases Act required those women identified as prostitutes to undergo vaginal medical examinations every three months upon

376 Arnot *Prostitution and the state in Victoria, 1890-1914* 12.
377 An Act for the Conservation of Public Health 1878 s 2.
378 An Act for the Prevention of Vagrancy and for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds and Incorrigible Rogues in the Colony of New South Wales, 1838; An Act for the Better Prevention of Vagrancy and Other Offences, 1852.
379 Arnot *Prostitution and the state in Victoria, 1890-1914* 15.
380 Arnot *Prostitution and the state in Victoria, 1890-1914* 10.
381 Baker 2012 *UCL Journal of Law and Jurisprudence* 92; Coleman *Rent: Same sex prostitution in modern Britain, 1885-1957* 33.
382 A lock was an institution in Britain and its territories that specialised in treating sexually transmitted diseases.

evidence of an appointed magistrate. The jurisdiction of the Act stretched from Southampton to Winchester (Southwark), and an extension of five miles around the church parishes. The 1869 Contagious Diseases Act barred prostitution within a radius of fifteen miles from a town, making it difficult for the prostitutes to access their services in town. The Contagious Diseases Acts were a thorn in the flesh of many, and there were numerous efforts to repeal them. Supporters of the Acts opined that although the Acts infringed the liberty of a person; the issues of public health outweighed the comfort or integrity of an individual.[383] Critics of the Contagious Diseases Acts opposed the Acts' objectives, the unfair discrimination (for targeting women only), and procedural requirements.[384] In 1886, the government enacted the Contagious Diseases Acts Repeal Act.[385] Meanwhile, gross indecency and male-on-male procuration became a minor offence.[386] It was considered a minor offence for a person to cause or to facilitate (with or without rewards or payment) a man to have sex with another man. Under the Vagrancy Act, 1898[387] as amended by Criminal Law Amendment Act of 1912, it was an offence for a male to live on the earnings of prostitution, or to solicit in public for immoral purposes.

As was seen earlier, being a prostitute was not an offence so long as one adhered to the laid-down regulations. It is worthy to mention that acts of sodomy, whether for free or for payment between a man and man, remained a crime via the 'gross indecency' clause of 1885, which was carried over into 1956.[388] Initially, the law treated a woman as the sole perpetrator of prostitution, and therefore it sought to protect women. For instance, it was unlawful to be the cause of a woman becoming

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383 Barclay 1974 *Queensland Heritage* 24.

384 In Barclay 1974 *Queensland Heritage* 32, it is stated that "the vaginal medical screening … offends ... public proprietary or individual rights".

385 Barclay 1974 *Queensland Heritage* 27.

386 Section 11 of the Criminal Law Amendment Act – Labouchere Amendment – 1885 provides that "any male person who, in public or private, commits or is a party to commission of, or procures or attempts to procure the commission by any male person, an act of gross indecency (anal sex – *my interpretation*) with another male shall be guilty of misdemeanour". See footnote 369 above.

387 Section 1(1).

388 Section 12 of the Sexual Offences Act, 1956 (C 69) outlawed buggery; while s 13 of the Sexual Offences Act, 1956 (C 69) criminalised the act of a man to commit an act of gross indecency with another man whether in public or in private; or being a party to the commission by a man an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man.

a prostitute,[389] to procure a girl less than 21 years of age to perform unlawful sex,[390] and to forcibly detain a woman in a brothel for the purpose of unlawful sex with a man.[391] Further, it was an offence for a man or a woman (for example, a pimp, a brothel manager or an owner) to live on the earnings or proceeds of prostitution.[392] Solicitation in public for the purpose of prostitution was unlawful.[393] Owning or managing[394] a brothel, a landlord[395] letting a premise to be used a brothel, a tenant[396] permitting a premise to be used as brothel, or a tenant frequently[397] allowing a premise for the use of prostitution were all held unlawful.

The mandate of the Wolfenden Report[398] of 1957 on prostitution was to clean the streets of the nuisance brought about by the prostitutes as they solicit for customers. The report concurred with the Street Offences Committee of 1927 that:

> …the law is plainly concerned with the outward conduct of citizens in so far as the conduct injuriously affects the rights of the other citizens.[399]

The Wolfenden Committee, however, rejected calls to criminalise the profession of prostitution; it also stood against the licencing of prostitutes and brothels, and held that prostitutes must be allowed to ply their trade in private zones provided there was no breach of public peace, or no offence committed in the neighbourhood.[400] The Committee recommended that regular medical screening of prostitutes must take place to minimise any hazards of venereal diseases. In a show to tolerate prostitution, the Wolfenden Report recommended that those prostitutes found frequently or persistently soliciting in the streets should first be warned by the police, whereas a repeat of the offence will see them taken to court for further caution. In

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389 Section 22 of the Sexual Offences Act, 1956 (C 69).
390 Section 23 of the Sexual Offences Act 1956 (C 69).
391 Section 24 of the Sexual Offences Act, 1956 (C 69).
392 Sections 30, 31 of the Sexual Offences Act, 1956 (C 69).
393 Section 32 of the Sexual Offences Act, 1956 (C 69) criminalised a man who persistently to solicited or importuned in a public place for immoral purposes. Section 1(1) of the Street Offences Act 1959 criminalised a common prostitute who loitered or solicited in a street or public place for the purpose of prostitution.
394 Section 33 of the Sexual Offences Act,1956 (C 69).
395 Section 34 of the Sexual Offences Act, 1956 (C 69).
396 Section 35 of the Sexual Offences Act, 1956 (C 69).
397 Section 36 of the Sexual Offences Act, 1956 (C 69).
398 Wolfenden *Report of the Committee on homosexual offences and prostitution* 205.
399 Wolfenden *Report of the Committee on homosexual offences and prostitution* 205.
400 In *R v McFarlane* [1994] 99 Cr App R 28, Lord Taylor commenting on s 1(1) of the Street Offences Act 1959 by stating that "the mischief [of prostitution] being … the harassment and nuisance to the members of the public on the streets".

any subsequent repeat of the offence, they will be fined heavily. It was imagined that the heavy fines would drive the prostitutes away from the streets.

It is obvious from the foregoing that during the Victorian age a woman was either delineated as a 'bad', a 'good', or an 'ideal' woman. Harrold describes an ideal woman as a wife, mother, moral, virtuous, home maker, and sexually passive.[401] Acton caps the aggregate of the ideal Victorian woman as modest who seldom desired any sexual gratification.[402] The Victorians valued sexual purity which stood for virginity in a woman, and any deviation from such precept made a woman undesirable. It is suggested that whenever a woman fell from sexual purity, there could never be a return for her, but a man could sexually stray ('sin'), and be forgiven.[403] For a woman, the purpose of sexual intercourse was to produce children, and any female who had sexual relations but who refrained from child birth, was equated to a whore.[404] These were the so-called 'bad' women or prostitutes, who were despised, degraded, and victimised as agents of disease[405] and immorality.

2.4 Conclusion

From the preceding exposition, prostitution has existed since the formation of a society or societies. The definition of prostitution, depending on societies and cultures, has ranged from promiscuity, indiscriminate sexual relationships or even sex outside marriage, that is, sex outside the exclusion of another or others. Again, where sex is performed in return of a promise, a favour or a service or monetary provisions, then all human sexual relations are in their very nature a form of prostitution or sex work, save where there is an immediate threat to one's physical integrity. In a nutshell, prostitution is and has been a societal phenomenon with mixed feelings of it either being an infamy or an individual sexuality choice.

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401 Harrold *An ideal woman* 1.

402 Arnot *Prostitution and the state in Victoria, 1890-1914* viii. Still, it has been stated that in the Victorian England, there were 210,000 unmarried females who had strayed from the path of the virtue, that is – committing premarital carnal knowledge.

403 Faure *Early and mid-Victorian attitudes towards Victorian working-class prostitution* 18-19.

404 Faure *Early and mid-Victorian attitudes towards Victorian working-class prostitution* 8-9.

405 McClintock *Imperial leather: Race, gender, and sexuality in the Colonial contest* 47.

In perceiving the views on prostitution in the Ancient Near East and India, early Greece, Medieval Europe, and England and its colony of Australia in this chapter, it can be concluded that sex work has always been present, whether it is performed more openly or clandestine, depending on the particular ruler or government's tolerance of the conduct. Whenever laws were implemented to regulate prostitution, it occurred because of suspected unruliness or criminality, or preventing the spreading of contagious diseases.

In the chapter to following more recent foreign legislation regulation sex work will be focused on. The various national legal approaches regulating sex work will also be examined, and the international and regional law perspectives on prostitution will be presented.

CHAPTER THREE

FOREIGN AND INTERNATIONAL LAW PERSPECTIVES ON PROSTITUTION

3.1 Introduction

In this chapter, prostitution will be explored vis-à-vis the law in selected domestic legislation that have had a similar foundation of the law as in South Africa, as well as an international perspective on prostitution. The international society constitutes the whole human race, which is the aggregate society of all diverse cultured and legal societies.[1] At the international plane, international law seeks to protect both the state as well as human beings as the subjects. As already commented on in previous chapters, all individuals have inalienable rights to fundamental freedoms worth protection in the event of any violations.[2] Any conflict which may exist between an individual and the state may require a third person to adjudicate in the form of a 'higher' law than that of the state. In order to provide guidance in this regard, the UN's Economic and Social Council established a Human Rights Commission (UNHRC) in 1946, whose first task was to draft an International Bill of Rights.[3] As a result, the Universal Declaration of Human Rights (UDHR) was approved on 10 December 1948. The UDHR proclaims both civil and political rights as well as economic, social, and cultural rights. The Declaration has become a point of reference to the Bill of Rights in most human-rights statutes, and international conventions.

The aim of international law is for the protection of human rights of a person from the abuses of political system.[4] Thus, the international legal system is an integral system of all subordinate domestic legal systems. Sex work as an occupation is a commercial service rendered by one person to another and attracts in return remuneration.[5] Under the international law everyone, including a sex worker, has a

1 Allott 1999 *European Journal of International Law* 32.
2 Salk *Closing the gap between international law and morality* 13; Doyle 2011 *International Studies Review* 77.
3 Dugard et al *Dugard's international law: A South African perspective* 325.
4 Dugard et al Dugard's international law: A South African perspective 320.
5 Article 23(3) of UDHR.

right to work or to freely make a choice of employment one wants to engage in as well as to be protected by the state against unemployment.[6]

The manner in which free human beings have exploited their own sexuality has always been one of a society's legal issues.[7] One of society's concerns of humans' exploitation of sexuality has been the sale and purchase of sexuality, that is prostitution, especially between consenting adults.[8] The prostitution discourse has always been concerned with whether these consenting acts represent abuse, or are immoral, that is, against the conviction of the general public, or whether the human rights of the participants of these acts must be protected.[9] As the ultimate guarantor and guardian of the universal standards that provide for the rights of all human beings against the violations by individuals or states, it is important to examine not only the international law perspectives on sex work, but also various foreign jurisdictions' views on the topic. This will consequently be first explored in this chapter.[10]

3.2 Background to the different national legal approaches regulating sex work

Different jurisdictions within the international society have responded to the prostitution discourse with various laws, bylaws, licenses, prohibitions, inspections, or enforcements. Prostitution has remained one of the most controversial debates across some social, cultural, and political spheres.[11] Prostitution has been viewed as a social plague, a violation of moral principles or an offence against common

6 Article 23(1) of UDHR.
7 Singh *Law as a system of values* 21 quotes the Wolfenden Report of the Committee on Homosexuality Offences and Prostitution (1957) in that there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. See also para 2.3.4 footnote 393 above.
8 Saiz-Echezarreta 2019 *Mediterranean Journal of Communication* 96.
9 Mathieson, Branam and Noble 2016 Seattle Journal for Social Sciences 367.
10 Salk *Closing the gap between international law and morality* 7.
11 Nanni *The 2017 Germany Prostitute Protection Act* 2.

decency;[12] causing individual damage;[13] it has been championed as a resource;[14] or a job.[15]

While handling prostitution regulation issues within states in the light of international law, it is of interest to understand how public officials perceive and interpret prostitution, who and what are problematized, or how sex workers and clients are categorised.[16] It is also of interest to take note whether a sex worker recognises sex work as means of earning livelihood or an evil that destroys body and soul;[17] or how the law, for example, the labour laws or the criminal-justice systems deal with prostitution.[18]

It is because of the need of an individual's desire for a better living standard that the UDHR recognises everyone's right, including that of sex workers, to a standard of adequate living which provides for food, clothing, housing and medical care for the well-being of herself and her family.[19] The acquisition of these economic and social rights may require some trade,[20] or an exchange of services between people in the form of some barter or some services for monetary exchange.[21] Sex work is arguably a form of work recognised as a right and protected under international law.[22] It can only be limited by a determined law whose purpose would be the

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12 Danna *Report on prostitution laws in the European Union* 10. In *Ex parte Carey* 57 Cal App 297, 306 (1922) 207, the court describing prostitutes as 'fallen women' stated: "They (prostitutes) stand apart … No other body of malefactors constitute so distinctly a class as do the fallen women … they present a greater single element of economic, social, moral, and hygienic loss". See also in *People v Link* 107 Misc 2d 973, 979 80 (New York Crim Ct 1981) where the court stated: "From the Biblical times and throughout the world today, to mark a woman a prostitute is to designate her a pariah … whether she is described as a 'hustler', a 'hooker', a 'bawd' or a 'harlot', a 'biffer', a 'trull', a 'pigmeat' or a 'whore', the prostitute bears the infamy of 'the fallen woman'". In 2001, a German court stated that prostitution could no longer be viewed as offences against common decency or good morals. See Vorheyer 2018 *Oñati Socio-Legal Series* 1182.

13 Danna *Report on prostitution laws in the European Union* 11; Tiosavljević et al *Psychiatria Danubina* 353.

14 Danna *Report on prostitution laws in the European Union* 11.

15 Danna *Report on prostitution laws in the European Union* 11. Wagenaar 2017 *Social Sciences* 3. In Nanni *The 2017 Germany Prostitute Protection Act* 2, the German Federal Government regard prostitution as autonomous risk decision and a job but not a job like any other, and a choice that the law must respect.

16 Vorheyer 2018 *Oñati Socio-Legal Series* 1187.

17 Vorheyer 2018 *Oñati Socio-Legal Series* 1187.

18 Vorheyer 2018 *Oñati Socio-Legal Series* 1187.

19 Article 25(1) of UDHR.

20 Article 23(1) of UDHR provides for everyone's right to work, to a free choice of employment, to just and favourable conditions and protection against unemployment.

21 Article 23(3) of UDHR provides for the right of remuneration of everyone who works.

22 Article 23(1) of UDHR.

recognition and respect of the rights and freedoms of others in order to maintain public order in a democratic society.[23] Governments have, therefore, come up with ways to control the 'unconventional' promiscuity[24] with reference to sex work, by means of various models such as abolition, prohibition (or criminalisation), regulation (legalisation), or decriminalisation. These various systems will consequently be discussed.

3.2.1 The decriminalisation regime

This regime seeks to remove or repeal all legal obstacles upon those free and consenting adults engaging in sex work.[25] A sex worker will not be arrested for performing sex work within the limits of the law. Sex work is furthermore recognised in labour laws as a professional occupation. Those who offend against sex workers can legally be dealt within these justice systems.[26] The decriminalisation of prostitution gives role-players in the sex industry the right to determine their own destiny as sex workers. The dignity of a person is never affected because the person is respected as a human being. The decriminalisation of prostitution recognises the inherent dignity of a person, and the freedom to make any determination of their personhood so long as it does not injure the psychological or physical integrity of any other person.

The jurisdiction of New Zealand is the leading proponent of this regime. The country enacted the Prostitution Reform Act, 2003 whose purpose is to decriminalise prostitution.[27] The objects of the Act with regard to sex workers were to safeguard human rights; promote the welfare and occupational health and safety; provide a conducive health working environment; and prohibit prostitution for those aged less than eighteen years.[28] Prior to the Prostitution Reform Act, provision of commercial sexual services between the provider and the client was not illegal; but activities

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23 Article 29(2) of UDHR.

24 According to English common law (see *Hyde v Hyde* (LR) 1 PD 130), conventional sex was grounded on marital status where marriage was a voluntary sexual union for life of one man and one woman to the exclusion of others.

25 Abel, Fitzgerald and Brunton *The impact of the Prostitution Reform Act on the health and safety of sex workers* 21.

26 Peters *Sex work and policing* 2.

27 Section 3 of Prostitution Reform Act of 2003 (hereinafter Prostitution Reform Act).

28 Section 3 of the Prostitution Reform Act.

that seemed to abet, promote or encourage prostitution were prohibited. The Prostitution Reform Act defines a sex worker as any provider of commercialised sexual services; a client as any recipient who seeks or receives sold sexual services; a brothel as any premises kept or habitually used for sex work but does not include lodgings or hostels or guest house; and prostitution as the provision of sexual services for money or other benefits.[29] Pimping, procuration, the running of brothels, guarding, escorting or getting paid for enabling or arranging for prostitution of another were decriminalised.[30] It is a punishable offence for an adult (male or female) to engage in activities of commercial sex with another person under the age of 18 years.[31] For the purposes of the Health and Safety at Work Act, 2015, a sex worker is considered to be at work while providing commercial sexual services.[32] Sex workers and clients must observe health requirements, like wearing condoms whenever the sexual act is one of penetration.[33] Brothel operators must also observe the required health standards.[34] The law does not allow for any advertisement for prostitution purposes; this is deemed as possibly being invasive as to the freedom of expression or access to information.

3.2.2 The criminalisation regime

This regime makes it a crime to engage in all activities of commercial sex. The criminalisation of sex work aims at punishing those who sell or buy sexual services, as well as those persons whose means of livelihood is derived from the sale of sexual services, for example, the brothels operators, pimps, procurers, escorts, guards or any employee of the prostitute, or an agent of the prostitute. Examples of countries that adhere to the criminalisation regime are Russia, China, Egypt, Libya, and the Middle Eastern countries, amongst others. South Africa also adheres to this regime, which will be fully discussed in the following chapter.

29 Section 4 of the Prostitution Reform Act.
30 Section 7 of the Prostitution Reform Act.
31 Sections 20-23 of the Prostitution Reform Act.
32 See s 10(1) of the Prostitution Reform Act.
33 Section 9 of the Prostitution Reform Act.
34 Section 8 of the Prostitution Reform Act.

3.2.3 The legalisation regime

Where prostitution is legalised, commercial sexual acts between free consenting adults are lawful subject to some limitations. Sex workers, for instance, should not solicit in public for purposes of prostitution; it is unlawful to run a brothel, procuration, or pimping, et cetera. Sex workers may be required to undergo medical check-ups for the well-being of all role players, they are also licenced; or where permitted, operators of brothels are required to observe health regulations, and even pay for their licences. The various participants in the sex industry pay taxes to the authorities. The UK, Germany, Canada, India, and Netherlands are, amongst others, some of the jurisdictions that have legalised adult prostitution.

3.2.4 The abolition regime

Proponents calling for the abolition of prostitution demand the punishment of pimps, procurers or brothel managers, for these persons are viewed as encouraging and exploiting prostitutes by attaining their earnings from the labour of prostitutes. Abolition radical feminists consider all forms of prostitution as exploitative and degrading to women, and see prostitution as an abuse of human rights, whether the service provider consent to the sexual act or not.[35] On the other hand, liberal abolition feminists consider sex work as legitimate work and advocate for the freedom to exchange sexual services for money and no punishment for consensual sex done in any private place.[36] Liberal abolition feminists urge governments to repeal laws that criminalise sex workers, their clients and non-exploitative third parties.[37]

3.2.5 The neo-abolition regime – the Nordic model

This regime seeks to fight the vice of prostitution from the demand side. The law seeks to criminalise and punish both the demander and the aider sides (the clients,

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35 International Committee on the Rights of Sex Workers in Europe (ICRSE) *Feminism needs sex workers; sex workers need feminism* 8.

36 Sex Worker Forum of Vienna *Persistent and systematic violations of Article 6* CEDAW by Austria 16; ICRSE *Feminism needs sex workers; sex workers need feminism* 8.

37 ICRSE *Feminism needs sex workers; sex workers need feminism* 9.

pimps or procurers), and to set the actual providers of sexual services free.[38] Sweden is the chief proponent of this regime. The state can use police traps to arrest clients. The state considers the presence of the sex providers as an incitement to do crime.

3.3 Prostitution in a foreign law perspective

In the previous paragraphs, background information was provided on the different models of prostitution countries may employ. In this section, an attempt will be made to explore prostitution vis-à-vis the law in selected foreign jurisdictions, which will ultimately be compared to the legal system of that in South Africa in Chapter 4. The conduct of prostitution touches on the protected rights of an individual. Some of the jurisdictions of comparable jurisprudence that will be considered hereunder are the UK as well as jurisdictions that have been influenced by English law such as India and Canada. The first jurisdiction's legislation and case law on prostitution to be considered will be the UK.

3.3.1 Prostitution in the United Kingdom

In the UK, prostitution has been legalised for quite some time already.[39] Sex workers could always perform their trade uninterrupted so long as it was within the confines of the law. However, the UK has openly been in the forefront in the fight against those who gain in kind or monetarily benefit from the prostitution of others.[40] The

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38 Sex Worker Forum of Vienna *Persistent and systematic violations of Article 6 CEDAW by Austria* 16. See also para 1.1 footnote 27 above.

39 Sexual relations, whether for free or for consideration, with fallen women or common prostitutes was not illicit *per se* but a necessary evil. See Anson *Principles of the English law of contract and agency in its relation to contract* 228 in that contracts could be made unlawful either by a statute or rules of common law, i.e., judicial decisions. See also McKibbin *Substantive public policy in cross-border litigation* 37 – where in the 17th century Georgian England, contracts promoting prostitution were regarded as immoral or contrary to public policy (*contra bonos mores*).

40 The UK is a signatory to the following international conventions that stood against prostitution of persons by others: Article 1 of Suppression of White Slave Traffic (1904) required member states to act against procuration of women or girls for purposes of debauchery in foreign countries; Articles 1 and 2 of the International Convention for the Suppression of White Slave Traffic (1910) called upon member states to punish any person who hired, abducted or fraudulently enticed or threatened any woman under the age of 21 years to be trafficked for sexual purposes; Article 2 of the International Convention for the Suppression of the Traffic in Women and Children (1921) required states to investigate and prosecute persons engaged in trafficking of children.

jurisdiction recognises and gives effect to some human rights provisions as enshrined in the 'higher law',[41] and is especially favourable towards sex work and sex workers. Sex workers' right to privacy – as against invasion by any person as well as the right to freedom of expression – are guaranteed,[42] and it is held that these workers should enjoy their rights without any unfair discrimination based on sex or any other status.[43] Still subject to the 'higher law', the UK is obliged to effectively protect the rights of every worker, including sex workers, to have the opportunity to earn a living in any occupation or profession freely chosen and entered into.[44]

The UK's Sexual Offences Act, 1956[45] repealed the Vagrancy Act[46] and the Criminal Law Amendment Act, 1912, and the law relating to sexual crimes, abduction, procuration, and prostitution was consolidated. The law did not define a prostitute but criminalised the activities related to commercial sexual services carried over from the vagrancy laws. A prostitute was later defined in law as any person who at least for one occasion offered or provided sexual services to another person in return for payment or promise to the person who offered the sexual services or to another third person.[47] The UK's Sexual Offences Act, 1956 punishes acts of procuration;[48] as well as detaining women in a brothel against their will for purposes of unlawful sex or prostituting them; permitting girls under the age of 16 years to use

41 Section 1(a) of the Human Rights Act 1998 recognises 'conventional rights'; s 2 of the Human Rights Act 1998 calls upon the UK to give effect to the decisions of 'higher law' which includes pronouncements of European Court of Human Rights, or the decisions made by the Council's Committee of Ministers in terms of Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

42 See Articles 8 and 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms. See also Council of Europe Committee of Ministers Recommendations No R (91) 11 of the Committee of Ministers to member states concerning sexual exploitation, pornography and prostitution of, and trafficking in children and young adults 113.

43 See Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

44 Article 1(2) of the European Social Charter, 1961; and Article 15(1) of the Charter of Fundamental Rights of the European Union. In *Jany v Staatssecretaris van Justitie* ECJ C-268/99, the court held that prostitution was an activity of commercial character and the applicants had a right to protection so as to earn a living from the profession freely chosen and entered upon. In *Adoui v Belgium and City of Liege*, *Cournualle v Belgium* (115-116/81) [1982] ECR 1665, the court ruled against deportation of two French women on accusations of prostitution. The UK is still bound to certain EU decisions, even after it ended its EU membership on 31 January 2020.

45 Sexual Offences Act, 1956 (4 and 5 Eliz 2 C 69). Also see para 2.3.4 footnotes 383-392 above.

46 Vagrancy Act 1898 (61 and 62 Vict 39).

47 Section 51(2) of the Sexual Offences Act, 2003.

48 Sections 22, 23 of the Sexual Offences Act, 1956.

brothels for intercourse; the causing or encouraging of prostitution of a girl under sixteen; the causing or encouraging of prostitution of a defective; the keeping or letting of, or permitting premises to be used as brothels;[49] to solicit or importune in public or the indecent exposure for immoral purposes;[50] men living on the earnings of prostitution of others;[51] and women exercising control over a prostitute.[52] The law further punishes those who, for their personal gain or that of others, exploit the prostitution of persons.[53] In short, in the UK, consensual[54] adult prostitution is lawful, and it is only the activities linked to exploitation of others, or controlling prostitution, managing brothels, or selling or buying sex in public that are punished by the law.[55]

The UK courts have over the years dealt with various matters concerning prostitution. For example, in *Delaval*,[56] the accused was indicted on a conspiracy to abduct a minor girl from her household so that she could become his prostitute. The court found conspiracy and established jurisdiction as the superintendent of offences against morals (*contra bonos mores*) to prohibit crimes of forced prostitution and rape. Those who ran disorderly houses were found guilty upon conviction of conspiracy to corrupt public morals as well as to debauch those resorting in such houses.[57] A person who ran a disorderly house was to do so persistently.[58] Disorderly houses included brothels, quasi-brothels; gaming houses; public places of refreshment; theatres, and cinemas halls.[59] In *Quinn and Bloom*,[60]

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49 Sections 33, 34, 35 of the Sexual Offences Act, 1956.

50 Section 32 of the Sexual Offences Act, 1956; a carry-over of section 1(b) Vagrancy Act, 1898 (repealed).

51 Section 30 of the Sexual Offences Act, 1956; an import of sections 1(a) and 1(3) of Vagrancy Act, 1898 (repealed).

52 Section 31 of the Sexual Offences Act, 1956.

53 See s 52, 53 of the Sexual Offences Act, 2003.

54 Under s 72 of the Sexual Offences Act, 2003 'consent' is arrived at if a person agrees by choice and that person has the requisite freedom and capacity to make the choice.

55 House of Commons *Prostitution* 8; Brouwers and Herrmann 2020 *Social Sciences* 2.

56 *R v Delaval* [1763] 3 Burr 143. Also see *R v Mackenzie and Higginson* (1910) 6 Cr App R 64.

57 *R v Berg* (1927) 20 Cr App R 38; *R v Dale and Others* (1960) unreported, as cited in *Shaw v DPP* [1962] AC 220, 288.

58 *R v Brady and Ram* (1963) 47 Cr App R 196.

59 *R v Berg* (1927) 20 Cr App R 38; The Law Commission *Codification of the criminal law – Conspiracies relating to morals and decency* 16. See *Shaw v DPP* [1961] 3 All ER 88 91, where a disorderly house is defined as: "...a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency or (b) tends to corrupt or deprave or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment".

60 *R v Quinn*, *R v Bloom* (1962) 2 QB 245, the premises there in question were used for the performance of an act of strip-tease; it was stated in *R v Tan and Others* [1983] QBD 1053 8

it was stated that a disorderly house is a house where unlawful acts were performed; acts which, if performed in a place of common resort or a public place, would amount to public indecency, and which tend to corrupt, deprave, or injure the public image.

In *Saunders*,[61] certain showmen were convicted of having kept a booth for the purpose of an indecent exhibition for recompense. The indecent exposure was limited to include the exposure of the whole body or sexual organs,[62] or sexual intercourse in public;[63] or homosexual conduct in public.[64] It later became a statutory offence upon any person to expose their genitals for public viewing so as to cause alarm or distress.[65] The offences of sexual indecency had to meet certain thresholds, for example, there ought to have been witnesses. In *Watson*,[66] the court held that sexual exposure to one witness was not sufficient ground to sustain a conviction, and, therefore, a minimum of two was required.[67] Further, the offensive conduct ought to have occurred in a 'public' place, for example, on the top deck of a vehicle;[68] on a roof of a house which could be observed from the other houses;[69] areas within the sight of houses;[70] places where the public habitually went even if they had no permission;[71] or public urinals if the exposure was to the public.[72]

In *Mears and Chalk*,[73] the defendants (sex workers) attempted to procure an unwilling girl to join in them in prostitution. Under the Protection of Women Act of 1849, the attempt and conspiracy to solicit for prostitution were considered common-law offences "against good morals and public decency".[74] In *Howell*,[75] a man and a

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that strip-tease performance was not a crime unless it overpassed what is acceptable. Also see *Knuller v DPP* [1973] AC 435.

61 *R v Saunders* (1875) 1 QBD 15.

62 *R v Rouverard* (1830) unreported; *R v Webb* (1848) 3 Cox CC 183; *R v Holmes* (1853) Dears 207; *R v Thalmann* (1863) 9 Cox CC 388.

63 *R v Elliot and White* (1861) Le and Ca 103; *Carnill v Edwards* (1953) 1 WLR 290 as in The Law Commission *Codification of the criminal law - Conspiracies relating to morals and decency* 11.

64 *R v Bunyan and Morgan* (1844) 1 Cox CC 74, *R v Harris and Cocks* (1871) LR 1 CCR 282.

65 Section 66 of Sexual Offences Act, 2003.

66 *R v Watson* (1847) 2 Cox CC 376.

67 *R v Webb* (1848) 3 Cox CC 183; *R v Mayling* (1963) 2 QB 717.

68 R v Holmes (1853) Dears 207.

69 *R v Thalmann* (1863) 9 Cox CC 388.

70 *R v Reed* (1871) 12 Cox CC 1.

71 *The Queen v Wellard* (1884) 14 QBD 63.

72 *R v Harris and Cocks* (1871) LR 1 CCR 282.

73 *R v Mears and Chalk* (1851) 4 Cox CC 423.

74 The Law Commission *Codification of the criminal law - Conspiracies relating to morals and decency* 17.

75 *R v Howell* (1864) 4 F 160.

woman were convicted for having effected the ruin upon the conspiracy to procure a minor girl to be a prostitute. The court ruled that prostitution incited by another was unlawful, and that the conspiracy was meant to bring about unlawfulness.

In *R v Kirkup*,[76] a male appellant was convicted for the solicitation of sexual services in public which the prosecution argued was for immoral purposes. The court reasoned that the immorality clause[77] implied some sexual activity. Soliciting for the purposes of prostitution or any immoral purpose included loitering, importuning prospective customers,[78] the physical presence of a prostitute in public,[79] or conduct which implied persistently persuading,[80] begging, or entreating.[81] To solicit in public never necessarily required a sex worker to be physically found street-walking in public but it was sufficient that they were seen by public even if the sex workers exposed their person by a window, doorway, or balcony.[82]

Living on the earnings or receiving payments by a third party from a client or provider of prostitution in order to bring about or to aid in prostitution was an offence. In *Calvert v Mayes*,[83] the accused received some payments from American airmen who sought the accused's services to direct them to where they could obtain the services of prostitutes. Sellers J described the accused as "trading in prostitution",[84] and rejected the defence that the accused did not live on the earnings of prostitution. It was an offence for anyone to cause the procuration of a woman to become a prostitute,[85] or for a person to make gains from the exercise of control of a prostitute's prostitution,[86] or for a man or woman to knowingly live wholly or partly from the earnings of prostitution.[87] Contracts whose considerations were founded

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76 *R v Kirkup* (1993) 2 All ER 802.
77 In s 32 of the Sexual Offences Act, 1956.
78 Meerkotter et al *No justice for the poor* 41.
79 *Weisz and Another v Monahan* (1962) 1 All ER 664.
80 *R v Hutt* (1978) 2 SCR 476 para 17.
81 *Weisz and Another v Monahan* (1962) 1 All ER 664.
82 *Smith v Hughes* (1960) 2 All ER 857. The court in *Behrendt v Burridge* [1977] 1 WLR 29 held that a scantily-clad woman in a window with a red light amounted to soliciting since by her presence at the window sought to call the attention of prospective customers for the purpose of prostitution.
83 *Calvert v Mayes* [1954] 1 QB 342.
84 See *Shaw v DPP* [1961] UKHL 1 (1961) 4, 5.
85 Section 22 of the Sexual Offences Act, 1956.
86 Section 31 of the Sexual Offences Act, 1956; s 53 of the Sexual Offences Act, 2003.
87 Sections 30 of the Sexual Offences Act, 1956. In *R v Tan and Others* [1983] QBD 1053 12 13, Brian Greaves, who habitually was in the company of his prostitute wife, Gloria Greaves, was acquitted on a count of living on the earnings of prostitution from his transgendered wife, but

on the proceeds of the prostitution of others were unenforceable. In the *Pearce v Brooks*[88] case, the court reinforced the common-law principle against living on the earnings of prostitution as socially immoral and illegal. In this case, Brooks (a sex worker) contracted Pearce to provide her with a carriage for the purpose of her prostitution. She did not pay the contracting price, and the creditor sued to recover the cost. The court determined that it was illegal and immoral for a prostitute to hire a carriage for the purpose of plying her profession. Pollock J renounced the contract by means of the legal maxim *ex turpi causa non oritur action* (i.e., no action arises to enforce where the performance is immoral or against public policy):

> I have always considered it settled law that any person who knowingly contributes or is an ancillary to the performance of an illegal act by supplying a thing which is going to be used for that purpose cannot recover the price of the thing so supplied.[89]

Courts tended to discourage abetting prostitution by letting hostels or residential property to prostitutes. There were questions whether those who received rents from prostitutes in residing in disorderly houses or flats live on the earnings derived from the immoral vice of prostitution. In *Upfill v Wright*,[90] the question was whether a landlord had a right to ask for the unpaid rent on a flat let which was used for the purposes of prostitution. The evidence was that the female tenant was a prostitute of a man who actually paid the rent. The court saw no difference whether the defendant was a common prostitute or just a mistress of one man, so long as the flat was let for the purpose of committing an immorality. The court found the rent as a price of immorality, and, therefore, irrecoverable on the strength of *ex turpi non oritur actio*.[91] In *R v Silver*,[92] however, Maude J held that it was not an offence for

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convicted of keeping a brothel as he stayed in the private premise that Gloria invited clients in. In *R v Berg, Britt, Carr and Lummies* (1927) 20 Cr App R 38 41, 42, the appellants were convicted of, among others, debauchery (causing prostitution) of persons visiting to certain disorderly houses. It has always been unlawful for another person to cause the prostitution of others.

88 *Pearce v Brooks* (1866) LR 1 Ex 213.

89 *Pearce v Brooks* (1866) LR 1 Ex 213.

90 *Upfill v Wright* [1911] 1 KB 506.

91 In *Girardy v Richardson* (1973) 1 ESP 13, the court held that action to recover damages was not possible where a plaintiff let a room to a prostitute and gave her the liberty to receive male visitors for the purpose of prostitution; see also *Appleton v Campbell* (1826) 2 Car and P 342; *Pearce v Brooks* (1866) LR 1 Ex 213 above in footnote 89.

92 *R v Silver* 40 CAR 32. See also *R v Tan and Others* [1983] QBD 1053 where a prostitute rented private premises from another prostitute named Moira Tan which she used as a place for meeting clients.

the landlord or agents to receive 'prostitute rents' upon letting flats to prostitutes, even on knowing the kind of business that might take place. In *R v Thomas*,[93] Pilcher J differed with the ruling in *Silver* when he convicted Thomas on the offence of living on the earnings of prostitution when he rented a room for prostitution at £3 per night. The Court of Criminal Appeal upheld this ruling. The House of Lords finally settled the matter in *Shaw,*[94] when Viscount, J stated that if a flat is let for occupation (residential), then the landlord does not commit an offence even if he knew that the tenants are prostitutes, and that might ply their trade in the premises.[95] The court opined that a prostitute must have a place or a home to stay or reside in.

In the above-mentioned case of *Shaw v DPP,*[96] the appellant compiled an advertisement or publication called the 'Ladies Directory', containing the names, addresses and telephone numbers of prostitutes for the purposes of their being accessed by clients. The adverts also contained photographs of nude females in different sexual positions. Shaw received fees from the prostitutes in order to put their trade details in the Directory. It was the prosecution's case that Shaw received money from both the prostitutes (in order to advertise their services) as well selling copies of the publication to the public. The law described a person who lived on the earnings derived from prostitution as one who habitually lived in the company of prostitutes, or exercised control, direction, or influence over prostitutes' movement for the purposes of prostitution.[97] It was the defence's case that not every person whose livelihood depended in whole or in part upon payments lived on the earning of prostitution. The court held that a prostitute had to live on necessities and even the luxuries of life. Lord Viscount explained that a person who is paid for goods or services out of the earnings of prostitution does not necessarily commit an offence under the Act, yet a person did not necessarily escape from its provision by receiving payment for the goods or services that he supplies to a prostitute.[98] To limit the

93 *R v Thomas* 41 CAR 117.
94 *Shaw v DPP* [1962] AC 220.
95 In *R v Tan and Others* [1983] QBD 1053, it is submitted, with regard to *Shaw v DPP* [1962] AC 220, that the court wrongly convicted and upheld the conviction of the two prostitutes (the landlord and the tenant) as keepers of brothels when both ran their private premises as meeting for clients.
96 *Shaw v DPP* [1962] AC 220.
97 Section 30(2) of Sexual Offences Act, 1956.
98 *Shaw v DPP* [1962] AC 220.

operations of the Act, Viscount J (Reid J concurring) held that a person fairly lives wholly or in part on the earnings of prostitution if such person is paid by the prostitute for the goods or services rendered to the prostitute for the purposes of prostitution. Thus, a person who advertises prostitutes and is paid by the prostitutes earns money from the proceeds of prostitution. Pimps, touts, protectors, brothels handlers, or enablers unlawfully control and live on the earnings or gains of prostitution.[99] A gain in the prostitution was described as a financial advantage which included a discharge of an obligation to pay, or the provision of goods or services gratuitously or at a discount or at the good will of a person which appears likely at the time to bring a financial advantage.[100]

As such, the consensual exchange of money or kind in a sexual relationship is considered an act of prostitution. In *Ayerst v Jenkins,*[101] a consideration was transferred in contemplation of future unlawful cohabitation. A case was made by the legal representative of the transferor for the recovery of the consideration. Lord Selborne declining the prayers sought and stated that a court of equity could not adversely set aside a settlement by which the settlor conferred on a stranger the absolute beneficial interest in property legally vested in the trustees, although such settlement might have been made for illegal consideration not appearing in the instrument.

As can be observed from the afore going case law discussion, although sex work is legalised in the UK, and sex workers may provide their services as long as the trade was within the confines of the law – how the law is interpreted by certain courts seem to impede the practising of the profession. It is very clear from the judgments that the UK does not tolerate any persons who gain in kind or monetarily benefit from the prostitution of others. In the following section, it will be investigated whether India, as a colony of the UK, followed suit in this regard.

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99 Section 53 of Sexual Offences Act, 2003.
100 Section 54 of Sexual Offences Act, 2003.
101 *Ayerst v Jenkins* (1874) 16 EQ 275 (A). See also Williams 1991 *Bankruptcy Developments Journal* 55.

3.3.2 Prostitution in India

In 1600, the British East India Company obtained a Royal Charter for the purposes of trading in the East Indies.[102] The British first obtained the right to trade with India through a treaty negotiated between Thomas Roe and Prince Khurram in the Port of Surat in 1624.[103] Via the treaty, the British East India Company was to be the sole determinant, as against other European trades, to whom Indian traders would sell their goods to. The trade between India and British was solely in favour of Britain, and this led to a revolt in trade against the British. As a result, the British used 'gun boat diplomacy' to counter the uprising which saw the destruction of Indian ships sailing through Red Sea.[104] The Charter Act of 1813 ended the British East India Company's monopoly in trade with India.[105]

In 1857, the British government took over the direct rule of India, and replaced the Company administration.[106] British statutes, especially on health and public security, and other administrative instruments would run in British India (Raj). As in other parts of the world, in India streets and public places were locations where people could freely meet and solicit for sex. Consequently, the Metropolitan Paving Act of 1817 was enacted to clean the streets of nuisance, noises and insecurity posed by those soliciting for sexual acts.[107] The Vagrancy Act of 1824 again aimed at punishing common prostitutes who wandered or loitered in public streets in a riotous manner. Also, the Metropolitan Act of 1839 fined any common prostitute or night-walker loitering or being found purposely prostituting or soliciting in any public place, and the Town Police Act of 1847[108] fined any common prostitute or night-walker loitering and importuning passers-by for purposes of prostitution. Lastly, the Public Health Act of 1848 established boards who were authorised to control offensive

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102 Blackwell 2008 *Education about Asia* 34.
103 Watterson http://history.emory.edu/home/documents/endeavors/volume1/_Colins.pdf (Date of use: 10 January 2021) 9.
104 Watterson http://history.emory.edu/home/documents/endeavors/volume1/_Colins.pdf (Date of use: 10 January 2021) 9.
105 Watterson http://history.emory.edu/home/documents/endeavors/volume1/_Colins.pdf (Date of use: 10 January 2021) 8.
106 Blackwell 2008 *Education about Asia* 36.
107 Wallis *Whores and the law* 31.
108 An Act for Promoting Public Health. Also known as the Michael Angelo Taylor Act.

trades, such as prostitution or nuisance in streets, among others.[109]

The control of prostitution in the British India colony can be linked to the history of sexually contagious diseases in the military as evidenced by War Office's concerns over the health and death of soldiers in Victorian England over venereal diseases.[110] The Select Committee on the Contagious Diseases Act underscored the outbreak of syphilis at Aldershot military camp in England where many prostitutes frequented.[111] The Contagious Diseases Act[112] was British government's vehicle to control the spread of venereal diseases in the military. The Contagious Diseases Acts required compulsory medical examination by a military surgeon of women in protected areas and suspected by a police superintendent to be common prostitutes.[113] Women found to be carriers of contagion (a venereal disease) were detained in a lock hospital[114] for treatment or incarcerated.[115]

The British India Penal Code[116] criminalised negligent[117] or malignant[118] acts that could cause the spread of infectious diseases; trade in obscene lascivious publications that tended to corrupt persons;[119] obscene acts and songs in public places to the annoyance of others;[120] the selling of minors to prostitutes or brothel attendants;[121] and the buying of minors[122] for purposes of prostitution. Prostitution was not an offence in the Indian Criminal Code save where it was a person traded in the prostitution of a minor. Prostitutes or common women in India were an evil, but necessary to satiate the sexual needs of the British military personnel.[123]

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109 Fee and Brown 2005 *Bulletin of World Health Organization* 866.
110 DeMasi 2007 *Social Sciences Journal* 96. Also see paras 2.3.1 and 2.3.4 above.
111 Hiersche *Prostitution and the Contagious Diseases Acts* 1.
112 An Act for the Prevention of Contagious Diseases at Certain Naval and Military Stations 1864 (27, 28 Vic c85).
113 DeMasi 2007 *Social Sciences Journal* 96.
114 See para 2.3.4 footnote 377 above.
115 DeMasi 2007 *Social Sciences Journal* 96.
116 Act No 45 of 1860 (hereinafter the India Penal Code).
117 Section 269 of the Indian Penal Code.
118 Section 270 of the Indian Penal Code.
119 Section 292 of the Indian Penal Code.
120 Section 294 of the Indian Penal Code.
121 Section 372 of the Indian Penal Code.
122 Section 373 of the Indian Penal Code.
123 Goyal and Ramanujam 2015 *Akron LR* 1079. The British institutionalised prostitution for the safety of its military (cantonment). In cantonment areas, there were opened state-run brothels called '*chaklas*' for the military's sexual pleasure. See Roy 1998 *Sexually Transmitted Infections* 23 where infectious-free, certified and registered prostitutes in '*chaklas*' were referred to as '*Lal*

In 1863, the Royal Commission made an investigation into the sanitary state of the army, and documented about the venereal diseases infection of the British military personnel in India.[124] In view of the contagion, the Cantonment Act 22 of 1864 was passed which provided for medical health tests and the registration of prostitutes for the safety of the British army.[125] The registration was carried out in the army barracks; the prostitutes would be examined fortnightly, and if found infected, a prostitute would be detained in a lock hospital.[126] The Indian Contagious Diseases Act 14 of 1868 also provided for the compulsory registration of brothels and prostitutes, as well as for regular examinations and compulsory treatment of prostitutes if found infected with venereal diseases.[127] The Contagious Diseases Act was repealed in 1888,[128] and a new Cantonment Act 13 of 1889 enacted. The new Cantonment Act provided for the expulsion from the cantonment anyone who refused treatment for contagious diseases.[129] The Cantonment Act of 1889 granted police the power to supervise prostitutes especially those who loitered, in an attempt to importune the army men in the cantonments.[130] The segregation or the exclusion of prostitutes from the cantonment areas was of necessity to the colonial masters in order to check on the health of the army. In this regard, in June 1897, in Punjab, Maitland PJ commented:

> Women removed far … would no doubt be able to … spread diseases over a wider and less regulated area … they would be practically out of reach of soldiers and be unable to practice the profession until again admitted in the cantonment.[131]

Similarly, in March 1898, the Secretary of Home department stated:

> ...the mere removal from the precincts of a cantonment of a person suffering from the venereal disease will be of little avail unless they are prevented from settling elsewhere with certain results of spreading disease over a wider and less regulated area … the local governments should be empowered … in the

kurti' or 'Queens' ladies', and were controlled by government-appointed personnel called '*mahaldarnis*' who acted as pimps for the soldiers.

124 Legg 2012 *Modern Asian Studies* 1463.
125 Blackwell 2008 *Education about Asia* 1463.
126 Blackwell 2008 *Education about Asia* 1463; Ballhatchet *Race, sex and class under the Raj* 40.
127 Blackwell 2008 *Education about Asia* 1464. Goyal and Ramanujam 2015 *Akron LR* 1079.
128 Goyal and Ramanujam 2015 *Akron LR* 1080.
129 Blackwell 2008 *Education about Asia* 1465.
130 Blackwell 2008 *Education about Asia* 1467.
131 Blackwell 2008 *Education about Asia* 1469.

attempts to check on the spread of the contagious disease.[132]

Removing prostitutes would not eliminate immorality, it was argued, but the colonial army would become a replica of 'Sodom and Gomorrah'.[133] In 1894, Viceroy Elegin claimed that removing women would lead to greater evil, that is, the unnatural sex crime.[134] Viceroy Hardinge, a proponent of segregating prostitutes stated:

> Segregation localized the evil and lead to greater demoralization … if the women were scattered throughout the town; … so long as they are not detained by force or ill-treated, they are probably better off than if left to find separate shelters for themselves.[135]

In the British India Empire, the activities of 'proper prostitutes' were never an offence save that there were some restrictions. For example, the law criminalized running a brothel to the annoyance of the public;[136] a brothel being used by more than one prostitute;[137] or loitering in a public place soliciting for prostitution or committing sexual immorality in the public.[138] In Bombay, the law provided for the segregation of prostitutes and brothel managers;[139] whereas in Bengal, the law empowered a magistrate to order a brothel to be closed if it was in the neighbourhood of a cantonment or educational institution.[140]

Under the law of the Contract Act,[141] it was an immoral act for persons to let their daughter for hire as a concubine to another person for it amounted to slavery or forced prostitution, which is a form of sexual exploitation, and a crime.[142] The case

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132 Blackwell 2008 *Education about Asia* 1468.
133 Blackwell 2008 *Education about Asia* 1489; Hyam *Empire and sexuality* 123.
134 Blackwell 2008 *Education about Asia* 1489; Vanita *Queering India* 17.
135 Blackwell 2008 *Education about Asia* 1503.
136 Section 43A of Burma Act IV of 1899 (hereinafter the Rangoon Police Act). See Blackwell 2008 *Education about Asia* 1473.
137 Section 43B of the Rangoon Police Act; Blackwell 2008 *Education about Asia* 1473.
138 Section 43C of the Rangoon Police Act; Blackwell 2008 *Education about Asia* 1473.
139 Section 28 of Bombay Police Act 4 of 1902; Blackwell 2008 *Education about Asia* 1480.
140 Bengal Disorderly Act 3 of 1906; Eastern Bengal and Assam Disorderly Houses Act 2 of 1907. Blackwell 2008 *Education about Asia* 1483.
141 Contract Act 9 of 1872.
142 Section 23(k) of the Contract Act 109 of 1872. In *Mizra Syed Khan v the Crown* (1917), a young woman named Akootai was sold into a brothel run by Khan and his wife. Akootai was brutally maimed in the brothel and later succumbed. As a result, Khan and his wife were sentenced to death and executed. See Chang *A colonial haunting: Prostitution and the politics of sex trafficking in British India, 1917-1939* 1.

of *Istak Kamu v Ranchod Zipru*[143] involved a transfer[144] of property during a lifetime of illicit cohabitation. Illicit cohabitation could entail sex with a minor, or sex because of an agreement between two majors to the detriment of a minor's choices, or forced marriage, et cetera. The transfer was held not void.[145] The heirs of the transferor were not allowed to recover possession of the properties from the transferee. The court[146] went ahead to state that a gift made of gratitude, or with an idea of compensating past cohabitation was not *per se* void under section 6(h)(2)[147] of the Transfer of Property Act.[148] It is submitted that a gift made out of sexual relations, especially between non-couples, amount to prostitution.

As seen from the examples provided above, British India was tolerant of the trade of prostitution, even though the jurisdiction was already party to many international instruments which were against a person causing the prostitution of another.[149] In 1949, at the climax of constitutionalism, the legality of prostitution became an issue of debate in the Constituent Assembly of India. It was argued for and against prostitution as follows:

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143 *Istak Kamu v Ranchod Zipru* AIR 1947 Bom 198 (S) para 1. Chunilal, a 40-year old wealthy profligate from the *bania* caste bought and kept a prostitute girl, named Rachod Zipru Bhate, aged 15 years, as his mistress. During their cohabitation, Chunilal, by way of deed of gift, in terms of ss 122 and 123 of Transfer of Property Act 4 of 1892, transferred to Bhate a bungalow worth Rs.1000 and two plots of land worth Rs.3000, and another house worth Rs.500 and still more similar gifts. All the gifts were in possession and enjoyment of Bhate.

144 In terms of s 122 of Transfer of Property Act, 1892, a gift transfer of a corporeal is made by a donor voluntarily and without consideration. See also *Deivanayaga Padayachi v Mathu Reddi* (2) ILLR 44 Madras para 2 where the court expressed itself as "it is well established (referring to *Ayerst v Jenkins* (1874)) that when a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the court would not interfere at the instance of the *particeps criminis* to relieve from the legal effects of the transaction".

145 *Istak Kamu v Rachod Zipru* AIR 1947 Bom 198 paras 26, 28. See *Beaumont v Reeve* 8 QB 483 where the court held that consideration made for past illicit cohabitation was not illegal but a gratuitous promise.

146 *Istak Kamu v Rachod Zipru* AIR 1947 Bom 198 para 18, sub-para 2.

147 No transfer of property could be effected for an unlawful object or consideration in terms of s 23 of Contract Act, 1872.

148 The Transfer of Property Act 4 of 1882.

149 Some of these international instruments are: The Suppression of White Slave Traffic (1904) whose Article 1 stood against procuration of females for the purposes of prostitution; the International Convention for the Suppression of White Slave Traffic (1910), which called for punishment of traffickers of females for immoral practices; and the International Convention for the Suppression of Traffic in Women and Children (1921), punishing those who trafficked young girls and boys for sexual purposes. Some states in British India made some enactments to fight the vice of trafficking of women and girls for purposes of prostitution. Some of the enactments are: Calcutta Suppression of Immoral Traffic Act of 1923; the Utta Pradesh Minor Girls Act of 1929; the Utta Pradesh Nayak Girls Protection Act of 1929; the Bombay Devadasi Prevention Act of 1934; and the Madrass Devdasi Prevention of Dedication Act of 1947. See also Pawar 1991 *The Indian Journal of Social Work* 106.

> …prostitution is a very old institution … as old as the hills and it cannot be abolished … the roots of the institution lie deep in our human nature … the only thing that we can do is to regulate it … if you abolish, the whole thing will go underground; … prostitution in India is a disgrace and same to us … to society … and this kind of ting should not be allowed to continue.[150]

India became a constitutional democratic state on 26 January 1950.[151] The different colonial states or provinces united to form India or Bharat.[152] Each state had or has an executive and a legislature.[153] The Constitution of India entrenches its supremacy clause;[154] equal protection before the law;[155] the prohibition against unfair discrimination especially on sexuality;[156] equality of opportunities in the public employment regardless of one's sexuality;[157] right of freedom to move or reside in any place with the territory of India;[158] the right to practise any profession, occupation or trade or business;[159] protection of personal liberty;[160] the prohibition and unlawfulness of traffic in humans;[161] freedom of trade, commerce and intercourse;[162] and the prohibition of employment of children below the age of 14 years in any hazardous employment.[163]

Trafficking in human beings for the purpose of sexual exploitation and forced labour are criminal offences under the Constitution of India.[164] Pursuant to the UN Convention,[165] India enacted the Suppression of Immoral Traffic in Women and Girls Act, 1956 (hereinafter SITA). The SITA was the first federal sexual offences law to uniformly apply in the whole of independent India territory.[166] Under the SITA Act of

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150 Goyal and Ramanujam 2015 *Akron LR* 1072. See also *Pramod Bhagwan Nayak v State of Gujarat* (2007) 1 GLR 796 para 41 where the court stated that prostitution is a very old and ineradicable profession.

151 Batra http://mea.gov.in/Images/attach/Article_on_Constitution_of_India.pdf (Date of use: 10 January 2021).

152 Section 1 of the Constitution of India.

153 Section 168 of the Constitution of India.

154 Section 4(2) of the Constitution of India.

155 Section 14 of the Constitution of India.

156 Section 15 of the Constitution of India.

157 Section 16 of the Constitution of India.

158 Section 19(1)(d), (e) of the Constitution of India.

159 Section 19(1)(g) of the Constitution of India.

160 Section 21 of the Constitution of India.

161 Section 23 of the Constitution of India.

162 Section 301 of the Constitution of India.

163 Section 24 of the Constitution of India.

164 Section 23 of the Constitution of India.

165 Convention for the Suppression of the Traffic in Persons and Exploitation of Prostitution of Others (1951) to which India became party to on 9 May 1950.

166 Section 1(2) of SITA.

1956,[167] a prostitute was restrictively defined as a female who offers her body for promiscuous sexual intercourse for hire, whether it was for money or kind. Prostitution meant the act of a female offering her body for promiscuous sexual services for hire.[168] The Act defined a brothel as an enclosed place where prostitution takes place for gain of another person, or for the mutual gain of at least two prostitutes.[169] The SITA punished anyone who kept a brothel or allowed their premises to be used as a brothel.[170] It was an offence to live on the earnings of prostitution,[171] or to procure women for the purposes of prostitution.[172] The selling or buying of sexual services was, however, not explicitly outlawed. Still, it was an offence to carry out prostitution in certain proximities or neighbourhoods of public places.[173] A magistrate could direct that prostitutes residing within their area of jurisdiction be removed,[174] and a court could order for the closure of a brothel within the local limits of their area of jurisdiction.[175] The constitutionality of section 20 of SITA, 1956 which empowers a magistrate to order for the removal of prostitutes away from their local limits of jurisdiction was challenged[176] in that it infringed section 19(1)(d) and (e)[177] of the Constitution of India which provide for the rights of an individual to move freely throughout or reside anywhere within the territory of India. The court in the *Shama Bai*, *Kamala China* and *Seethera Mamma* held that section 20 did not offend section 19(1)(d) and (e), whereas the court in *Begum*[178] held the

167 Section 2 (e) of SITA.
168 Section 2 (f) of SITA.
169 Section 2 (A) of SITA.
170 Section 3 of SITA.
171 Section 4 of SITA. In *Pramod Bhagwan Nayak v State of Gujarat* (2007) 1 GLR 796 para 15, the court found the petitioner, as an 'immoral traffic offender', earning livelihood on prostitution of others when he took rent on the premises, brought girls and women to the city for the purposes of prostitution, introduced the girls and women to customers in return for money, and secured rooms for purposes of prostitution.
172 Section 5 of SITA. In *State v Gaya* AIR 1960 BOM 289, the court held that the object of SITA was the suppression of immoral trafficking of women and girls; in *Re: Ratnamala and Another* AIR 1962 MAD 31, the court stated that the purpose of SITA was to abolish commercialised traffic in women and girls for the purposes of prostitution as an organised means of earning a living; but not to render prostitution *per se* a crime, or to punish a woman merely because she is a prostitute.
173 Section 7 of SITA.
174 Section 20 of SITA.
175 Section 18 of SITA.
176 *Shama Bai v State* AIR 1959 All 57; *Begum v State* AIR 1963 Pun 17; *Kamala China v State* AIR 1963 Pun 36; *Seethera Mamma v Sambasiva Rao* AIR 1964 AP 400.
177 Article 19(1)(d) of the Indian Constitution guarantees to all citizens of India the right "to move freely throughout the territory of India", while Article 19(1)(e) grants every citizen of India the right "to reside and settle in any part of the territory of India".
178 *Begum v State* AIR 1963 Pun 17.

contrary view. The confusion as regards section 20 was settled in *State of Uttar Pradesh v Kaushailya*,[179] where the court decided that a magistrate was not to act arbitrary but was to follow guidelines laid down by the law in order to draw a conclusion. The court therefore opined that section 20 did not offend section 19(1) of the Constitution.

Soliciting in public for the purposes of prostitution,[180] or seducing a woman in custody for prostitution was an offence.[181] In *Bai Shanta v State of Gujarat*,[182] the court considered that section 8 of SITA 1956 was not aimed at abolishing prostitutes or prostitution, or to punish women because they prostituted themselves, but to punish them for soliciting for the purpose of prostitution, to rescue the fallen women and stop the trafficking of women in return of money.

Prostitution as a chosen profession is entrenched in and given protection by the Indian Constitution.[183] In the case of *Smt Shama Bai and Others*, the petitioner, aged 24 years was a singer and averred that prostitution was her hereditary trade; her only means of livelihood, and that her cousin's sister and two young brothers were her dependants who wholly survived on her earnings made from prostitution.[184] She alleged that SITA, 1956 was unconstitutional in that it prohibited her from carrying on her trade and imposed unreasonable and illegal restrictions. The court considered a petition with respect to "living on the earnings of prostitution".[185] The court held that SITA did not prohibit the pursuing of the profession of a prostitute, though it imposed restrictions on the same. The court considered and analysed the offence of living on the earnings of prostitution. Section 4 of SITA penalised any person over the age of 18 years who lived on the earning of prostitution of others; who habitually lived with a prostitute; exercised some control of a prostitute; or who facilitated prostitution. It was also accepted by the court that third party (forced) prostitution and trafficking in persons for the purpose of prostitution demean human dignity and endanger the welfare of the individual, the

179 *State of Uttar Pradesh v Kaushaliya* AIR 1964 SC 421.
180 Section 8 of SITA.
181 Section 9 of SITA.
182 *Bai Shanta v State of Gujarat* AIR 1967 Guj 211. See also *State of Uttar Pradesh v Kaushaliya* AIR 1964 SC 416 419, 420.
183 Section 19(1)(g) of the Constitution of India.
184 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 para 1a.
185 Section 4 of SITA.

family, and the community.[186] It was argued that it was almost impossible to completely wipe out prostitution, but that restrictions should be imposed to protect the interest of general public, and to mitigate the negative effects of the trade.[187] However, where the restrictions prevented a person from practising a profession or carrying on an occupation, trade or business; then such a restriction is unreasonable and void. Further, the court opined that there could be some people, for example, family members or others who depend on the prostitute's earnings but they did not necessarily encourage, aid, or abet the prostitute's trade.[188] The court was of the opinion that it would be extremely risky and not free from danger to draw any presumption that any person in communication with a prostitute was living on the earnings of prostitution, or was aiding or abetting, or encouraging prostitution.[189] This, in the public interest, limited touts, pimps or those who exercise control, direction or influence over the whereabouts of a prostitute in a manner to encourage, aid or abet her prostitution.[190] The learned judge found that SITA, 1956 did not prohibit the petitioner from practicing her trade, and the respondent's petition was accordingly rejected.[191] The court concluded that performing sex work, and, therefore, living on the earnings of prostitution by a prostitute was a profession, occupation or trade in terms of section 19(1)(g) of the Constitution of India, and, therefore, protected. It was previously determined in *Chintaman Rao and Others v State of Madhya Pradesh*[192] that where the effect of a law was to bar a citizen from carrying on a trade, business, or profession, then such a law was void.

The Act 44 of 1986 amended the SITA Act, 1956 and it was renamed as the Immoral Traffic (Prevention) Act, 1956. The Immoral Traffic (Prevention) Act does not define what immorality entails. Whether the selling or buying of sexual services is moral or immoral was an issue of legislation. In *Pramod Bhagwan Nayak v State of*

186 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 para 3.
187 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 para 4.
188 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 paras 2, 3.
189 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 61.
190 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 62.
191 *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 para 22.
192 *Chintaman Rao and Others v State of Madhaya Pradesh* AIR [1951] SCC 18. See also *Rashid Ahmed v Municipal Board, Kairana* AIR 1950 SC 163; *TB Ibrahim v Regional Transport Authority, Tanjore* AIR 1953 SC 79; *Smt Shama Bai and Others v State of Uttar Pradesh AIR* 1959 All 57 paras 2, 3.

Gujarat,[193] it was correctly stated that what social standards (morals) should be reflected in the laws about prostitution was a matter within the legislative power but not any other person. Under the Immoral Traffic (Prevention) Act, the age of majority shifted from 21 years to 18 years.[194]

The Immoral Traffic (Prevention) Act changed the old definition of a prostitute[195] to being a person[196] who is sexually being exploited or abused for commercial purposes, and prostitution to mean the sexual exploitation or abuse of a person for commercial purposes.[197] Accordingly, prostitutes were not considered as the providers of sexual services, but as persons who are sexually exploited for consideration in money or in any other kind. A key amendment to the Immoral Traffic (Prevention) Act was the use of gender-neutral references[198] in prostitution. The Immoral Traffic (Prevention) Act 1956 determined that people involved in sex work could ply their trade but still not within the proscribed regional limits.[199]

In the Act, the definition of a brothel[200] as any house or room meant that even one's own house would qualify as a brothel if used for the purposes of prostitution, as confirmed by the courts.[201] However, the English law, on which the Indian law is largely founded, determined that where prostitutes in their own room received clients, the prostitutes could not be convicted of keeping a brothel.[202] Similarly, the Indian law also stated that prostitutes are entitled to have their privacies, that is, in

193 *Pramod Bhagwan Nayak v State of Gujarat* (2007) 1 GLR 796 para 33. Whether prostitution by free and willed choice was immoral and a crime should unequivocally have been defined by the legislature.

194 Section 2 of the Immoral Traffic (Prevention) Act. A child is therefore a person aged below 18 years old and cannot, by standards, give a free and willed consent even in matters to do with sexual acts.

195 Only being a female as in s 2(f) of SITA.

196 Male or female.

197 Section 2(f) of the Immoral Traffic (Prevention) Act. In *T Jacob v State of Kerala* AIR 1971 KER 166, it was stated that prostitution was not an offence except when carrying on prostitution within the prohibited or proscribed areas in contravention of s 7 of the Immoral Traffic (Prevention) Act, 1956 or seducing or soliciting for purposes of prostitution in the view of the public contrary to s 8 of Immoral Traffic (Prevention) Act, 1956. In *Gaurav Jain v Union of India* AIR 1997 SC 3021 as well as in *Pramod Bhagwan Nayak v State of Gujarat* (2007) 1 GLR 796 para 28, it was stated that a woman found in the 'flesh' trade should be viewed more as a victim of adverse socio-economic conditions rather than offender of the system.

198 Sections 5, 6, 7 and 9 of the Immoral Traffic (Prevention) Act.

199 Section 7(1) of the Immoral Traffic (Prevention) Act.

200 Section 2 of the Immoral Traffic (Prevention) Act.

201 *In re: Unni Kumar* (1975) 1 MLJ 22 (Mad); *Sushila vs State of Tamil Nadu* 1982 Cr LJ 702 (Mad).

202 *Singleton v Ellison* (1895) QB 607; *State v Fox* 1 QB 67.

their own rooms, and this right must not be unreasonably invaded.[203]

In *Pranballav Saha and Others v Smt Tulsibala Dassi and Another,*[204] (hereinafter *Pranballav Saha*), it was held that a person participating in immorality could not to be legally assisted by the court to enforce her right of recovery to the transfer in breach of statute. In *Pranballav Saha,*[205] Ranubala Dassi died testate on 23 June 1946, leaving behind a will dated 22 June 1946. Dassi bequeathed a premise in Sonagachi lane, Calcutta, to the defendant, an active prostitute, to run it as a brothel. Sonagachi was notoriously known for prostitution and brothels. Within a month of grant of probate, the plaintiffs served a notice on the defendant requiring her to vacate the premises on the ground that she was a prostitute carrying on the business of prostitution in the premises.[206] In the eviction case, allegations were made against the defendant of being a prostitute, running the premise as a brothel; disorderliness; annoyance; and being a nuisance. The defendant filed a defence statement denying being a prostitute or running a brothel but pleaded merely being a tenant of the premise. It was the defendant's aversion that upon the Ranubala's death, the plaintiffs served her with a notice of their having acquired grant of the probate of the premises. She further stated that she had been paying rent since July 1946. The prosecution called witnesses to prove the defendant's occupation (of prostitution), who all testified in corroboration. In the judgment (in the court of the first instance), the court dismissed the plaintiffs' case as their case for letting for immoral purposes was not proven, and even it was, "the Plaintiff could not recover possession in action".[207] The trial court based its decision citing authorities that "property let out for immoral purpose is irrecoverable in a court of law".[208]

The case of *Deivanayaga Padayachi v Muthu Reddi*[209] concerned a settlement based on the object and consideration of the donee to cohabit with the settlor

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203 *State of Maharashtra and Another v Madhukar Narayan Mardikar* AIR 1991 SC 207.

204 *Pranballav Saha and Others v Smt Tulsibala Dassi and Another* AIR 1958 Cal 713 para 24.

205 Pranballav Saha AIR 1958 Cal 713.

206 It was not a crime to be a prostitute or to engage freely in prostitution of self and using a brothel (or a private residential place) as a place of the activity as in this case; neither was it a crime to run a brothel save where it was used for the prostitution of others at the owner's gain.

207 *Pranballav Saha* AIR 1958 Cal 713.

208 *Ayerst v Jenkins* (1874) 16 EQ 275 (A); *Scott v Brown* (1892) 2 QB 724 (D); *Deivanayaga Padayachi v Mathu Reddi* (2) ILR 44 *Madras; Kali Kumari Baisnabi v Mono Mohini Baisnabi* (3) 40 CWN 402.

209 *Deivanayaga Padayachi v Mathu Reddi* (2) ILR 44 Madras.

(donor). Sir Abdur Rahim J delivering the judgment stated the well-grounded rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out. Thus, section 6(h) of the Transfer of Property Act, 1882 had no effect on the said transaction. The court of the first instance based itself on some English decisions. In the Appellate Court, the appellants challenged the findings of the trial court stating that their evidence was sufficient to convince the trial court otherwise. The defendant's allegations were denied save that of a bad cheque. She, however, averred that she resides in the premises with her family and has been a tenant known to the plaintiffs. At the onset, the Appellate Court stated that it was not concerned with the moral and social perplexities of a prostitute.[210] The question the Appellate Court was faced with was whether it could grant relief sought by the plaintiffs (the executors and trustees of the will). When the plaintiffs acquired the authority to realise the assets and liabilities of the estate or trust, they became the new 'owners'. The Appellate Court held that when a person lets a house (for immoral purposes) he has not dispossessed leasehold, he does not evict his interest in the house; it remains his own for he cannot divest himself of ownership by disregarding the law.[211] The court cited section 6(2)(h) of the Transfer of Property Act, 1882 which barred transfer for an unlawful object or consideration within the meaning of section 23 of the Contract Act of 1872. In terms of section 23 of the Contract Act, it is immoral or even illegal for a person to hire out his or her minor daughter for concubinage as such an agreement was lawfully unenforceable. The Appellate Court found for the appellants and concluded that public policy demands that courts should not allow themselves to be used to grant relief to a claimant or respondent who is party to an immoral contract and whom it finds to be a person in *pari delicto* or *in particeps criminis,* as this would perpetuate prostitution and brothel-keeping.[212]

However, in *Pranballav Saha*, the court stated that the doctrine that a court does not grant relief to a person *in pari delicto* or *in particeps criminis* had been extended past its rational and legitimate limits, and that the maxim is not absolute.[213] It could be

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210 *Pranballav Saha* AIR 1958 Cal 713 para 1.
211 *Pranballav Saha* AIR 1958 Cal 713 para 21.
212 *Pranballav Saha* AIR 1958 Cal 713 para 25.
213 *Pranballav Saha* AIR 1958 Cal 713 para 25.

deviated from or relaxed in some exceptions. The exceptional views of legal scholars have been that parties to an indenture or contract either knew, or had the means of knowing that the contract was executed for an immoral purpose, or in contravention of a statute or public policy, and that neither of them could be stopped from proving those facts which would render the instrument void *ab initio.*[214] The court reasoned that in certain instances a party would be enabled to take advantage of his own wrong; this evil indulgence by the court would be of a trifling nature in comparison with the flagrant evasion of the law.[215]

The case of *Muthukkannu (Dead) and Others v Shanmugavelu Pillai*[216] involved a deed of assignment made in consideration of future illicit cohabitation. The court stated that where the transaction, though completed, was intended to be a consideration, it could be impeached if the consideration is immoral, and it made no difference whether the transaction was executed or was executory. Similarly, in *Ghumna and Another v Ram Chandra Rao and Another*,[217] the transferor transferred property in consideration for future illicit cohabitation. The court allowed the heir of the transferor to recover the property from the transferee. In *Re Mapleback: ex parte Caldecott,*[218] a drawer agreed with the payee to execute a bill of sale of his (the drawer's) property in favour of the payee. After execution of the bill, the drawer became bankrupt. The trustee of the bankruptcy made an application to avoid the sale. The court of appeal declined to order for the recovery of the proceeds of the sale.

From the above case law, it becomes clear that adult sex work between consenting providers and clients is not unlawful in India. This regime is similar to that of the UK, and again it is evidenced that only certain sex work-related activities are criminalised, such as human trafficking and living on the earnings of prostitution, aiding or abetting, or encouraging prostitution. Certain case law discussed above affirm the legality of the sex trade in India, in that sex workers challenge laws which prohibit them from freely practising their profession, or where contract issues as regards

214 *Pranballav Saha* AIR 1958 Cal 713 para 30.
215 *Pranballav Saha* AIR 1958 Cal 713 para 30.
216 *Muthukkannu (Dead) and Others v Shanmugavelu Pillai* 1905 ILR 28 Mad 413 para 418(H).
217 *Ghumna and Another v Ram Chandra Rao and Another* AIR 1925 All 437.
218 *Re Mapleback: Ex parte Caldecott* (1876) 4 Ch D 150 (E). See also Farmers' Mart Ltd v Milne 1915 AC 106.

property or lodgings are concerned. The jurisdiction of Canada, another English common-law country, will be examined next in order to determine the status of prostitution in that country.

3.3.3 Prostitution in Canada

With the coming of the English to the territory of Canada, English criminal law was transplanted onto the very early Canadian legal system. Prostitution was a necessary evil to the newly arrived English colonists. As such, prostitution was regulated[219] but not criminalised.[220] Vagrancy was another social problem especially to the public peace and order. The first British North American vagrancy enactment[221] authorised the confinement of disorderly persons, vagabonds and other persons of lewd behaviour to the house of behavioural correction.[222] The Quebec Act of 1774 brought the criminal law of England to the common-law provinces of British North America.[223] The keeping of bawdy houses or brothels was an English common-law crime which later became a statutory offence.[224] In keeping with the English law,[225] in the British North American provinces, the keeping of brothels was made a statutory crime.[226]

The regulation of prostitution was further medicalised by the enactment of the Contagious Diseases Act.[227] This Act was meant to protect the health and safety of military personnel whenever they indulged in sexual relations with common

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219 Under An ordinance for establishing a system of police for the cities of Quebec and Montreal 2 Vict 1 (1839) c2, the police were authorised to arrest common prostitutes or night-walkers wandering in the fields, public streets or high ways, and not able of giving an account of themselves; this Act is a transplant of the s 2 of the English law An Act for consolidation into one Act and amending the laws relating to idle and disorderly persons, 1822 (3 Geo IV c40) which provided that "all common prostitutes or night walkers wandering in the public highways without reasonable excuses shall be deemed idle and disorderly"; which later became s 3 of An Act for the punishment of idle and disorderly persons and rogues and vagabonds 1824 (5 Geo IV c83).

220 Backhouse 1985 *Social history* 388.

221 Section1 of An Act for regulating and maintaining a house of correction or workhouse within the town of Halifax 33 Geo II (1759) c1.

222 Backhouse 1985 *Social history* 389.

223 Parker 1983 Osgoode Hall LJ 211.

224 Sections 5 and 6 of Disorderly Houses Act 1751 (25 Geo 2 c36) since repealed; Parker 1983 *Osgoode Hall LJ* 195.

225 Backhouse 1985 *Social history* 388.

226 An Act for the further introduction of criminal law of England into Province 40 Geo III (1800) c1; An Act for the speedy and effectual punishment of persons keeping disorderly houses 9 and 10 Geo IV (1829) c8; Offences against public morals RSNS 1851 c158.

227 The Contagious Diseases Act 29 Vict (1865) c8.

prostitutes. The Act authorised the arrest, detention and compulsory vaginal screening and treatment of women suspected of suffering from venereal diseases while plying their trade.[228]

In the provinces, it was a punishable offence to have sexual intercourse with a female aged below the age of 12 years (or younger), even if she freely consented.[229] In 1867, the separately colonised provinces of Ontario, Quebec, Nova Scotia and New Brunswick formed a federation[230] called the Dominion of Canada, under the command of the UK Crown, whose legislation superseded that of the particular provincial governments.[231] This federal government enacted a federal vagrancy statute[232] in order to punish all prostitutes or night-walkers who wander in public places;[233] all keepers of bawdy houses, or visitors to such places for immoral purposes;[234] or persons having no profession other than supporting themselves from the proceeds of the prostitution of others.[235] Obtaining sex from a female by false pretence or fraudulent means, or procuration was an offence.[236] Any person who by false pretence or fraudulent means procured any female aged below 21 years to have illicit sexual intercourse with any other person other than the procurer committed a punishable offence upon conviction.[237] The English Criminal law[238] which had effect in Canada punished any person who procured or attempted to procure a female under the age of 21 years, if such a female was not a common prostitute or a woman of immoral character, to become a prostitute.

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228 Backhouse 1985 *Social history* 390, 391.

229 Section 8 of the Nova Scotia Act 1792; s 11 of the New Brunswick Act; s 11 of Prince Edward Act 1836, Parker (1983) *Osgoode Hall LJ* 211.

230 Sections 3 and 5 of British North America, 1867.

231 Backhouse 1985 *Social history* 394. Under s 91 of British North America, 1867, the legislative authority of the Parliament of Canada extended to all matters concerning criminal law including the procedure in criminal matters, save the constitution of the courts' criminal jurisdiction.

232 An Act respecting Vagrants 32 and 33 Vict (1869) c28.

233 An Act respecting Vagrants 32 and 33 Vict (1869) c28 s 1(1); Backhouse 1985 *Social history* 394.

234 An Act respecting Vagrants 32 and 33 Vict (1869) c28, s 1(2); Backhouse 1985 *Social history* 394.

235 An Act respecting Vagrants 32 and 33 Vict (1869) c28 s 1(3); Backhouse 1985 *Social history* 395.

236 An Act respecting Offences against the Person 32 and 33 Vict (1869) c20.

237 An Act respecting Offences against the Person 32 and 33 Vict (1869) c20 s 50; Parker 1983 *Osgoode Hall LJ* 212.

238 Section 2(1) and (2) of Criminal Law Amendment Act 1885 (48 and 49 Vict c69). Section 13 of Criminal Law Amendment Act 1885 (c69) further punished any person who ran or managed places to be used for the purposes of prostitution of others.

The 1892 Criminal Code[239] was the first comprehensive and unified law to deal with the offences of a sexual nature, especially prostitution. However, prostitution was not defined in the legislation.[240] In the Criminal Code, under Title 4 of 'Offences against religion, morals and public convenience', the offences against morality included gross indecency, obscenity, defilement, seduction, and prostitution of females.[241] The Criminal Code punished any person who procured any minor female to have unlawful sexual intercourse with any other person other than the procurer; or any person who enticed any under-aged female into a disorderly house for the purpose of prostitution; or fraudulently procured any such minor who was not a common prostitute to perform illicit sexual acts.[242] Any person who obtained for consideration the sexual services of a person, or communicated with any person for the purposes of obtaining for consideration the sexual services of another person, was also guilty of an offence.[243] It was a punishable offence to own, keep, or run a disorderly house.[244] A disorderly house included a bawdy house, or a house of entertainment or nudism.[245] Any person who kept, or who was an inmate, or who was in the habit of frequently visiting disorderly houses without reason was treated as a person of bad sexual morals.[246] The vagrancy laws[247] punished common prostitutes since they were a public nuisance, as well as pimps and procurers. Conclusively, during the Dominion of Canada period, the act of exchanging sex for money between free and consenting adults was not considered a crime, save that it was a crime for another person to cause the prostitution of another person.

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239 Criminal Code 1892 SC 55 and 56 Vict c29.

240 Following case law, three elements of prostitution have been identified: "the provision of sexual services, the essentially indiscriminate nature of the act, and the necessity for some form of payment". See Robertson https://publications.gc.ca/collections/Collection-R/LoPBdP/CIR/822-e.htm#issuetxt (Date of use: 20 March 2021).

241 Parker 1983 *Osgoode Hall LJ* 224.

242 Section 185 of Criminal Code 1892 (SC 55 and 56 Vict c29).

243 Section 286.1 Criminal Code 1892 (SC 55 and 56 Vict c29). Section 286.2 of the Criminal Code 1892 was overbroad to the extent of unreasonably punishing any person who received any material or financial benefit from a person who obtained the same as a consideration for sexual services.

244 Sections 195, 198 of the Criminal Code 1892 (SC 55 and 56 Vict c29).

245 Section 258 of the Criminal Code 1892 (SC 55 and 56 Vict c29).

246 Section 207 of the Criminal Code, 1892 (SC 55 and 56 Vict c29).

247 Sections 207 (i), (l) of the Criminal Code 1892 (SC 55 and 56 Vict c29).

The Criminal Code of 1892 was amended several times in the 20th century as regards prostitution. Whereas the activity was first classified as a vagrancy offence, the Criminal Code of 1972 amended the offence to that of soliciting, while the 1985 Criminal Code labelled the conduct as 'communicating'.[248] The provisions on prostitution remained more or less similar. Section 193(1) of the Criminal Code of 1970[249] criminalised and punished anyone who controlled a bawdy-house or who knowingly permitted it to be resorted into a bawdy-house for the purposes of prostitution. Further, it was a punishable criminal offence for anyone in any place open to the public to stop or attempt to stop any vehicle;[250] interrupt or interfere with the free flow of pedestrians or vehicles;[251] anyone who stopped or attempted to stop any person or in any manner communicated or attempted to communicate with any person[252] for the purposes of prostitution or for obtaining sexual services from a prostitute.

The Charter Rights and Freedoms became Canada's supreme law in 1982.[253] The Charter grants every citizen the right to freedom of expression and communication;[254] the pursuance of the gain of livelihood;[255] liberty and security;[256] privacy – that is, security against unreasonable searches or seizure;[257] and equality.[258] The rights in the Charter are subject to the limitations by a prescribed law demonstratively justified (judicially tested and validated) in a free democratic society.[259] The Canadian courts can declare a law to be unconstitutional. Since the introduction of the Charter, the constitutionality of the law on prostitution has been challenged on several occasions, which will consequently be discussed.

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248 Criminal Code RSC 1985 c C-46 s 213(1.1): 'Communicating to provide sexual services for consideration'.
249 Criminal Code RSC 1970 c C-34.
250 Section 195.1(1)(a) of the Criminal Code RSC 1970.
251 Section 195.1(1)(c) of the Criminal Code RSC 1970.
252 Section 195.1(1)(c) of the Criminal Code RSC 1970.
253 Section 52 of the Constitutional Act, 1982.
254 Sections 2(b) of Constitutional Act, 1982.
255 Section 6 of Constitutional Act, 1982.
256 Section 7 of Constitutional Act, 1982.
257 Section 8 of Constitutional Act, 1982. In terms of ss 162(1) and 183 of the Criminal Code RSC 1970 c C-34, it is a punishable criminal offence to invade the privacy (voyeurism) of a person, including persons engaged in commoditised sexual acts, who reasonably expected are to be nude or exposing their genital organs, anus or breasts, or are engaged in explicit sexual acts.
258 Section 15 of Constitutional Act, 1982.
259 Section 1 of the Charter of Rights and Freedoms; (compare with s 36 of the Constitution).

In *R v Cunningham*,[260] it was determined that section 195.1(1)(c) of the Criminal Code was in contravention of the liberty and security as provided for in section 7 of the Charter. In this case, the appellant argued that section 193 was impermissibly obscure and, therefore, constituted a violation of the Charter. The Court of Appeal[261] was required pursuant to the provisions of the Constitutional Questions Act[262] to determine whether sections 193[263] or 195.1(1)(*c*)[264] of the Criminal Code[265] or the combination of both were constitutional against sections 2(b)[266] and 7[267] of the Charter. A prostitute was defined as any person who engaged in prostitution.[268] This definition was wide enough to include the providers and consumers of commercialised sexual acts, the pimps, agents, or touts whose income came from their involvements in bringing about the sexual activities. A bawdy-house was defined as a place run for the purposes of commercialised sexual activities; whereas a keeper of bawdy-house included an owner, manager, or occupier – whether permanently or temporarily – who had the exclusive right of use of such a house.[269] In the Court of Appeal, Philip JA with Monnin concurring, determined that the issue of the 'over-breadth' of a statute was only relevant once it had been determined that it had breached the Charter. It was held that section 193 was not so vaguely worded as to be void for uncertainty, and, therefore, did not invade section 7 of the Charter. Whether section 193 and section 195.1(1)(c) in combination restrained the lawful trade of prostitutes, Huband JA noted that prostitution in itself was not illegal. He reasoned that by prohibiting public soliciting for purposes of prostitution, parliament had imposed severe restrictions on prostitutes. Monnin CJM and Huband JA held that soliciting for the purposes of prostitution was not protected. They concluded that parliament was right to have criminalised public soliciting for prostitution, and this did not impair section 2(b) of the Charter.

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260 *R v Cunningham* [1986] 31 CCC (3d) 223 (Man Prov Ct).
261 The Reference re ss 193 and 195 1(1)(c) of the Criminal Code (Man) 1990 1 SCR 1123.
262 Constitutional Questions Act CCSM c C-180.
263 Criminalised the keeping of bawdyhouses.
264 Prohibited a person from communicating or attempting to a person in public place for the purposes of prostitution or obtaining sexual services of a prostitute.
265 Criminal Code RSC 1970 c C-34.
266 Section 2(b) of the Charter guarantees freedom of opinion and expression which includes freedom of press and other media of communication
267 Section 7 of the Charter guarantees a person the right to life, liberty and security and the right against being deprived of the same except in accordance with the principles of fundamental justice.
268 Section 179(1) of the Criminal Code RSC 1970 c C-34.
269 Section 179(1) of the Criminal Code RSC 1970 c C-34.

In *Reference re ss 193 and 195.1(1)(c) of Criminal Code (Canada)*,[270] the minority court again stated that prostitution between consenting adults was not a crime under Canadian law. The Supreme Court of Canada considered sections 193 and 195.1(1)(c)[271] in light of section 2(b) of the Charter. Section 2(b) of the Charter entails, amongst others, the freedom of expression or communication. The Court held that criminalising the communicative acts of a person engaged in lawful activity which does not cause injury or harm to anyone, could not be justified under section 2(b) of the Charter. Communications that unleashed violence on the physical liberty and integrity of a person were unprotected under section 2(b) of the Charter. The Court opined that the intent in section 195.1(1)(c) was to prohibit a particular way of expression, and also prohibit the message sought to be conveyed, contrary to section 2(b) of the Charter. The Court considered and held that the expression 'public place'[272] for the purposes of prostitution was overbroad and arbitrary.

In *Hutt v The Queen,*[273] a prostitute was engaged in negotiating the sale of sexual services for fee with an undercover police officer in his car. The court determined that this conversation did not amount to solicitation[274] in public for commercial sex. The concept of 'place' as defined in section 179(1) of the Criminal Code for the purposes of section 2 of the Charter was argued arbitrary and overbroad, and, therefore, invasive to the Charter. It was contended that sections 193 (prohibiting the running of brothels) and section 195.1(1)(c) (prohibiting solicitation in public for sale and the purchase of sex which endangered public safety and decency) infringed sex workers' physical liberty within the meaning of section 7 of the Charter. That is to say, these sections placed unreasonable restrictions on sex workers leading to them being unprotected. The laws made it difficult for the prostitutes to freely trade in their chosen profession and undermined sex workers' choice to engage freely in their preferred

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270 *Reference re ss 193 and 195.1(1)(c) of Criminal Code (Canada)* [1990] 1 SCR 1123.

271 This section sought to punish only those who engaged with or intended to obtain sexual services from prostitutes, but not the prostitutes, that is, the providers of sexual services.

272 Section 195.1(2) of the Criminal Code defines 'public place' as including any place the public would have the access as of right or by invitation or any motor vehicle located in any open place for the public to view whereas Section 179(1) of the Criminal Code defines 'place' to include any place whether or not enclosed where any person has an exclusive right of user with its respect. It is submitted that a 'place' would demand privacy or no trespasser.

273 *Hutt v The Queen* [1978] 2 SCR 476.

274 In *Hutt v The Queen* [1978] 2 SCR 476 482, the court stated that 'soliciting' meant persistently pressing.

activity to earn their living. The majority court[275] confirmed that adult prostitution was not a crime under Canadian law but reasoned that freedom of communication (solicitation) in public for commercial sex did not lie at the core of the guarantee of freedom of expression as found in section 2(b) of the Charter. It was held that though the good intent of section 195.1(1)(c) infringed section 2(b) of the Charter, the same was justifiable under section 1[276] of the Charter. Finally, the Court held that sections 193 and 195.1(1)(c) did not encroach on the freedom of liberty or security as provided for in section 7 of the Charter.

The Criminal Code RSC of 1985 did not criminalise the selling and buying of the sexual services by the actual providers and the clients.[277] The conduct still criminalised was the keeping or visiting of bawdy-houses;[278] living on the earnings of prostitution;[279] and communicating in public for the purposes of prostitution.[280] These restrictions have been lengthily and heavily contested, appealed, and cross-appealed up to the level of the Supreme Court of Canada.

In *The Downtown Eastside Sex Workers United against Violence Society & Sheryl Kiselbach,*[281] (hereinafter the Society), the Society's membership consisted of women and transgender persons who were all prostitutes in Downtown Eastside in Vancouver, British Columbia. Kiselbach was a prostitute until 2002 when she quit the profession. In 2007, the Society challenged sections 210,[282] 211,[283] 212(1),[284]

275 *Reference re ss 193 and 195.1(1)(c) of Criminal Code (Canada)* [1990] 1 SCR 1123.
276 Freedoms can be infringed only by a prescribed reasonable law in a demonstratively justified and free democratic society.
277 Haak 2019 *Windsor Review of Legal and Social Issues* 67.
278 Criminal Code RSC 1985 c C-46 s 210.
279 Criminal Code RSC 1985 c C-46 s 212(j).
280 Criminal Code RSC 1985 c C-46 s 213(1)(c).
281 *The Downtown Eastside Sex Workers United against Violence Society and Sheryl Kiselbach* 2012 SCC 45.
282 Outlawing the running of bawdy-houses (repealed in 2019; see Criminal Code RSC 1985 c C-46 s 1).
283 Punishing every person who knowingly transported or directed any other person to a brothel (repealed in 2019; see Criminal Code RSC 1985 c C-46 s 1).
284 Criminalising the living on earnings of prostitution of another (repealed in 2014; see Criminal Code RSC 1985 c C-46 s 1).

and 213(1)[285] of the Criminal Code[286] in that the impugned sections infringed sections 2(b),[287] 2(d),[288] 7,[289] and 15[290] of the Charter. It was the respondents' case that the law unfairly discriminated against sex workers as compared to persons in other professions by creating barriers to accessing protection rights and entitlements pursuant to workplace, labour, health, and safety. The Attorney-General of the Supreme Court of British Columbia made an application to have the matter dismissed on the ground that the plaintiffs did not have a standing either privately or in the interests of the public. The test of standing had been determined as whether the issue before the court was a serious one; or whether the applicant or plaintiff was directly affected or had a genuine interest in the validity of the matters; or where there was no other reasonable effective way to bring the matter.[291] Ehrcke J dismissed the case on the want of standing stating that the plaintiffs (the Society) did not have standing either publicly or privately. The court reasoned that the constitutional challenge of the impugned provisions could only be brought by a person who had been directly affected by the said provisions. The Society made an appeal to the Court of Appeal. The Court of Appeal held that Kiselbach did not have a private interest standing but it allowed for a public interest standing for both the Society and Kiselbach. The Court of Appeal had reasoned that the test of public interest was whether a person was directly and at the time involved in the challenged law. The court found that Kiselbach had previously, in 1978, suffered under the challenged law, and consequently had the necessary private and public standing in this case.

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285 Criminalising everyone who in a public place or any open place to public view, for the purposes of offering, providing or obtaining sexual services for consideration stopped or attempted to stop a motor vehicle or impeded the free flow of human or vehicular traffic or communicates with any person in public place or in any place open to the public place for the purposes of offering or providing sexual services for consideration (repealed in 2014; see Criminal Code RSC 1985 c C-46 s 1).

286 Criminal Code RSC 1985 c C-46 s 1.

287 On the freedom of expression and communication.

288 On the freedom of association.

289 On the right to life, liberty and security of a person.

290 Right against unfair discrimination based on sex or other statuses.

291 *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 para 253; compare with s 38 of the Constitution.

In *Canada (Attorney General) v Bedford,*[292] Bedford and others[293] challenged, in the Ontario Superior Court of Justice, that sections 210,[294] 212(1)(j)[295] and 213[296] of the Criminal Code RSC 1985 c C-46[297] offended sections 2(b) and 7 of the Charter subject to the limitation clause 1 of the Charter. Bedford worked in various cities in Canada as a street prostitute, a massage parlour attendant, an escort, an owner and a manager of an escort agency, as well as a dominatrix.[298] She had previously been punished for keeping a common bawdy-house as well as being an inmate. Lebovitch was once a street walker as well as indoor prostitute but later became an escort. Scott – an ex-prostitute – was an activist and the executive director of Sex Professionals of Canada (SPOC). The court ruled that the impugned provisions violated the Charter but did not suspend the operations of the impugned laws. Himel J found section 210 excessive since it could even include one's own house, home of residence, or a rented room. Section 212(1)(j) could include anyone in monetary or economic transaction with prostitutes including their own children, family members, grocers, receptionists, drivers et cetera, and section 213 criminalised prostitutes from soliciting in the public for the purposes of prostitution. Himel J explained that while section 210 criminalised working indoors (which was the safest way to sell sex); prostitutes who attempted to increase their levels of safety by working indoors faced criminal sanction. With respect to section 212(1)(j), prostitution could be made less dangerous if prostitutes were allowed to hire or employ an assistant or a bodyguard, yet such business relationships were illegal since living on the earnings of prostitution was a crime. Finally, with section 213(1)(*c*), prostitutes were to meet and negotiate with their clients in a 'market'. Prostitutes were to advertise themselves and take their services closer to the

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292 *Bedford* 1101. See also footnote 53 in Chapter 1 above.

293 Lebovitch and Scott.

294 This section makes it an offence to be an inmate of a bawdy house or to be found in such a house without lawful excuse or to be an owner, manager, lessor, tenant or occupier of such a place knowingly that it is being used as a brothel.

295 Criminalising the activities of anyone who derives living from the avails or earnings of prostitution.

296 Criminalising everyone who in a public place or in any open place to public view, for the purposes of offering, providing or obtaining sexual services for consideration stops or attempts to stop a motor vehicle or impedes the free flow of human or vehicular traffic or communicates with any person in public place or in any place open to the public place for the purposes of offering or providing sexual services for consideration.

297 Criminal Code RSC 1985 c C-46 s 1 (last amended on 17 March 2021).

298 *Bedford* para 8.

consumers. By criminalising solicitation in public, prostitutes were denied an opportunity to openly 'trade out' their services or products. In conclusion, these three provisions prevented prostitutes from taking precautions that could decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of person. Thus, while it may ultimately be the client who inflicts violence upon a prostitute, it is submitted that the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence. The court, therefore, concluded that the impugned section of the Criminal Code was unconstitutional. Upon the determination by the Ontario Superior Court of Justice, the Attorney-General appealed the decision to the Court of Appeal of Ontario, to which Bedford cross-appealed.

The Court of Appeal held that the meaning of bawdy-house attached to section 210 was overbroad, disproportional and, therefore, unconstitutional. The Court struck down the word 'prostitution' in the definition of common bawdy-house in section 197(1) in the Criminal Code, as applied in section 210. Further, the Court of Appeal determined that section 212(1)(j) impaired section 7 of the Charter and is, therefore, unconstitutional. The Court ordered for 'reading in'[299] so that the prohibitions of those living on the earnings of prostitution only meant those who do so in circumstances of (forcible or deceitful) exploitation of others. The majority court, however, held that section 213(1) of the Criminal Code – on the communication for the purpose of prostitution – was not invasive to sections 2(b) and 7 of the Charter. The Court opined that the section's object was to remove prostitutes' nuisance, overcrowding and other public insecurities from the purview of the public and, therefore, served a constitutional purpose. The minority court held that section 213(1) was vital for acquainting or screening purposes, and for the security of prostitutes. The Court found that prostitutes could not solicit in public for fear of being indicted neither could they work indoors as this was also a crime. The Court rightly stated that provision 213 negatively impacted on the safety and lives of prostitutes who could not securely screen their clients before they venture into the trade. The aim of section 213 was

[299] 'Reading in' is a constitutional remedial measure which "can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid". See *Moyo and Another v Minister of Police and Others* (CCT174/18) [2019] para 83. The process consists of reading words into a statutory provision so as to render it compliant with the Constitution.

to rid prostitutes off the public, prevent their communication in the public for commercial sex. The Court held that the prohibitions were disproportionate to the nuisance in the streets.

In the *Bedford* case, again, it was confirmed that prostitution is not an offence in Canada.[300] The case presented a dividing line as regards prostitution laws in Canada.[301] Legislation that deprived sex workers their right to security by forcing them to work clandestinely was challenged.[302] These laws also infringed on the prostitutes' right to pursue their gaining-of-livelihood[303] as well as impaired the right of their privacy against unreasonable searches.[304]

In *Reference re ss 193 and 195.1(1)(c) of Criminal Code (Canada) Reference* and the *Bedford* case, the Supreme Court of Canada dealt with similar case facts, prosecuted on the same law, and decided on the same provisions of the Charter. The same Court arrived at two opposite conclusions. In view of the seemingly two conflicting decisions, the Court in *Bedford* invoked the *stare decisis* doctrine. It held that subordinate courts were bound by the decisions of the Supreme Court of Canada. A court of equivalent or equal status was not bound by its earlier decisions. The final or the later court could not uphold a law which was unconstitutional. Seemingly, the later *Bedford* overruled the former *Reference* case.

After the decision in *Bedford* in 2013,[305] the Parliament of Canada enacted the Protection of Communities and Exploited Persons Act[306] in order to amend the Criminal Code RSC 1985 c C-46.[307] Canada adopted the Swedish or Nordic model[308] where the law, after amendment, now punishes those who obtain or receive sexual services for payment, that is, the clients, as well as those who communicate with anyone for the purpose of obtaining for consideration sexual services, that is,

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300 *Bedford* para 1.
301 *Bedford* para 1.
302 Alcoba https://archive.is/20091009062900/http://www.nationalpost.com/news/story.html?id=2071542 (Date of access: 11 June 2021).
303 Section 6(2)(b) of the Charter of Rights and Freedoms.
304 Section 8 of the Charter of Rights and Freedoms; Haak 2019 *Windsor Review of Legal and Social Issues* 67.
305 Haak 2019 *Windsor Review of Legal and Social Issues* 67.
306 Protection of Communities and Exploited Persons Act RS c C-36 2014.
307 Criminal Code RSC 1985 c C-46 s 1 (as amended on 17 March 2021).
308 See footnotes 27 and 39 in Chapter 1, as well as para 3.2.5 above.

the pimps, procurers or brothel managers who aid, abet, or encourage prostitution.[309] The law retained the criminalisation of sex workers who solicit clients in public places or in any open public view by stopping motor vehicles, or who were a nuisance to humans or vehicular traffic,[310] or who communicate with any person for the purposes of prostitution within the vicinity of a school, playground or day-care centre.[311] The current law still criminalises those sex workers who knowingly advertise their sexual services.[312] The criminalisation of sex work and sex workers from the demand side was argued to have made sex workers vulnerable in that they cannot securely reach their customers, and if they do so, they are open to attacks without any recourse to law.[313] The new law clearly discriminates between clients and providers of sexual services for pay. The law sets up clients against providers since solicitation by the prostitutes tempts the clients to buy sexual services.

Section 286.2(1)[314] punishes persons who received any material benefit or other financial benefits from those who offer or obtain sexual services for consideration. A presumption is also created in that if there is evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration, this constitutes proof that this person received a financial or other material benefit from sexual services (unless evidence to the contrary is provided).[315] Section 286.2(1) does not apply to those who receive the benefit on account of legitimately living with the sexual providers; or as a result of the sexual provider's legal or moral obligations; or any considerations for services or products they would offer on the same terms and conditions to the general public; or in consideration for services or goods that they do not offer to public but that they offered to the person from whose sexual services the benefit came from, if the sexual providers did not counsel or encourage the person to provide the sexual services and that the benefit

309 Haak 2019 *Windsor Review of Legal and Social Issues* 68; Krüsi et al 2014 *BMJ Open* 2; Protection of Communities and Exploited Persons Act RS c C-36 2014 s 19.

310 Protection of Communities and Exploited Persons Act RS c C-36 2014 s 15(1); s 213(1) of Criminal Code RSC 1985 c C-46.

311 Protection of Communities and Exploited Persons Act RS c C-36 2014 s 15(3); s 213(1.1) of Criminal Code RSC 1985 c C-46.

312 Galbally 2016 *Melbourne Journal of International Law* 9; s 286.4 of Criminal Code RSC 1985 c C-46 s 286.4; Protection of Communities and Exploited Persons Act RS c C-36 2014 s 20.

313 Krüsi et al 2014 *BMJ Open* 8.

314 Protection of Communities and Exploited Persons Act RS c C-36 2014 s 20.

315 Protection of Communities and Exploited Persons Act RS c C-36 2014 s 20; Criminal Code RSC 1985 c C-46 s 286.2(3).

was pro-rata to the value of the services or goods.[316] The law criminalises and punishes procurers, that is, persons who recruits, conceals, or harbours a person who offers or provides sexual services for consideration, or exercises control, influence or direction to that person who provides sexual services for consideration.[317] Section 212(2) of the Criminal Code RSC 1985 c C-46 forbids any person over the age of 18 years who lives on the avails of prostitution. From the above, it is evident that the Protection of Communities and Exploited Persons Act 2014 considers sex work as a form of exploitation. The law also exhibits sexual inequality as only women and girls are addressed in the legislation. Despite promises made by the Canadian government to further reform this law, as of 2021, no improvements have been made to the Act.

Since the introduction of the Act, the prohibition against the buying of sexual services, living on the earnings of prostitution, procuration, and advertisement for sexual services for consideration have again been challenged as offending the Charter,[318] as in 2020, in the case of *R v Anwar and Harvey.*[319] Anwar and Harvey operated a business by the name Fantasy World Escorts. The prosecution's case was that the accused placed postings or adverts for prostitution on local bus shelters. In 2015, the police raided their business and indicted them on materially benefitting from the sale of someone's sexual services;[320] procuration;[321] and advertisement.[322] The accused challenged the constitutionality of the sections of the law founding the case. The Ontario court dismissed the Crown's case and held that the impugned law deprived sex workers of those things that are natural, expected and encouraged in all other sectors of economy. As a result, sex workers, who are more likely in need of protection than most workers, were being denied the benefits accorded to the mainstream labour. In particular, the court pointed that section

316 Protection of Communities and Exploited Persons Act RS c C-36 2014 s 20; Criminal Code RSC 1985 c C-46 s 286.2(4)*(a)-(d).*

317 Criminal Code RSC 1985 c C-46 s 286.3(1).

318 The Charter s 2(b) guarantees the freedom of expression and communication; s 6 guarantees the freedom to pursue gain of livelihood; s 7 guarantees the freedom to liberty and security; s 8 guarantees the right to privacy or security against unreasonable searches; and s 15 guarantees the equality before the law.

319 *R v Anwar and Harvey* 2020 ONCJ 103.

320 Section 286.2(1) of the Criminal Code RS c C-34 s.1.

321 Section 286.3(1) of the Criminal Code RS c C-34 s.1.

322 Section 286.4 of the Criminal Code RS c C-34 s.1.

286.3(1) of Criminal Code violated section 2(b) of the Charter, and sections 286.2 of the Criminal Code infringed section 7 of the Charter. As a result, three sections of the Protection of Communities and Exploited Persons Act 2014 were struck down as unconstitutional: the prohibitions on advertising, procuring and materially benefiting from someone else's sexual services.

It is evident that the Canadian Charter guarantees adequate protection, and rights and freedoms to the people in Canada. Prostitution has continually been practised in Canada, but the prohibition of the activities surrounding the sex trade had always made it difficult to perform the service without breaking any law. The purchasing of sexual services or living on the avails of prostitution is currently not lawful in Canada, as per the laws created in 2014, which made the exchange of sexual services for money illegal for the first time in Canadian history. Any form of subordinated prostitution – which is akin to forced prostitution – are criminalised. Prostitution is presently viewed by the government as a form of sexual exploitation. It is submitted that the 2014 law may be considered even worse than the previous statute on prostitution as it forces prostitution further underground, causing sex workers more harm and lesser safety.

This section focussed on three selected foreign countries' legal handling of prostitution in their jurisdictions. The comparison with the domestic legislation of Canada, India and the UK may be of great benefit to South Africa, but the government is obliged by the Constitution to follow the regulations pertained in international instruments. As such, in the following section, the way sex work is treated on an international plane will be investigated.

3.4 An international and regional law perspective on prostitution

Sex work as a form of labour is protected in international law. Similarly, sex workers as human beings may claim human rights' protection as enshrined in international instruments. South Africa is a founding member of the United Nations (UN), and a

signatory to some UN instruments.[323]

The Constitution of South Africa recognises the fact that in interpreting the rights in the Bill of Rights, foreign law may be considered, but international law must be considered.[324] South Africa has recognised and embraced international customary law,[325] as well as covenants that guarantee inviolable rights (subject to reasonable restrictions), individual equality; dignity; privacy; liberty; security; freedom of determination, and choice of economic activity.[326] These human rights are embodied in the Constitution of South Africa.

It is however troubling that, even after experiencing the evil past of apartheid, and that the country now finally has a very progressive human-rights friendly Constitution premised on international law, it has failed to ratify, or domesticate conventions that appear to be in support of the dignity, privacy, freedom of liberty and free choices in commercial sex work.[327] In particular, article 17 of the International Covenant on Civil and Political Rights (ICCPR) impresses upon member states to give effect to the individual's right to privacy, and the protection of the individual's honour and reputation. Article 26 again emphasises that member states must institute in their various jurisdictions' equality before the law, equal protection before the law, and not to be unfairly discriminated against on the basis of sex or other status. The International Covenant on Economic, Social and Cultural Rights (ICESCR) calls upon member states to recognise individuals' right to gain living by *any* work which they freely choose and accept,[328] and to ensure a fair and favourable work environment.[329] Article 23 of the UDHR, as a source of international customary or common law, which the Constitution entrenches,[330] espouses states to recognise an individual's right to work which entails making a free choice of employment. Further, article 6 of the Convention on Elimination Against Women (CEDAW)

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323 The conventions and protocols that South Africa is party to will be discussed in the paragraphs to follow.
324 Constitution s 39(1)(b), (c).
325 Universal Declaration of Human Rights (UDHR).
326 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
327 The International Covenant on Civil and Political Rights (ICCPR); the ICESCR.
328 Article 6(1) of the ICESCR.
329 Article 7 of the ICESCR.
330 Section 39(3) of the Constitution.

impress upon State Parties to take all appropriate measure to supress, among others, the exploitation of prostitution of women. It will be argued that this Convention is in support of protected prostitution. Lastly, the Declaration on the Elimination of Violence Against Women (DEVAW)[331] has gone further in an effort to show a distinction between forced prostitution and voluntary prostitution. This provokes the question of consent, which again triggers the concepts of dignity and freedom.

When South African courts interpret the Bill of Rights, they must consider international law[332] and follow an interpretation consistent with the international law than that which is not.[333] The sources of international laws are conventions,[334] customary law,[335] the general principles of law as recognised by civilized nations, case law and judicial teachings.[336] In *S v Makwanyane,*[337] the Constitutional Court rightly stated that the findings of tribunals dealing with instruments such as the UN Committees on Human Rights, the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, or the reports of specialised agencies such as the International Labour Organisation (ILO) provided guidance to the correct interpretation of the Bill of Rights.

In the paragraphs to follow international law will be analysed with regard to sex work. Most of the international law instruments address prostitution under the umbrella of sexual exploitation and abuse perpetuated by third parties against prostitutes.[338] The exploitation of the prostitution of persons by another has been held to be a violation of the dignity of human beings, and it also endangers the welfare of the individual, the family, and the community.[339] In 2003, Kofi Annan (the then UN General Secretary) adopted a 'zero tolerance policy' which prohibited any

331 GA Res 48/104 (February 23, 1994).
332 Section 39 of the Constitution.
333 Section 233 of the Constitution.
334 Section 231 of the Constitution.
335 Section 232 of the Constitution.
336 *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.
337 *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.
338 Théry *Prostitution under international human rights law* 5.
339 Preamble of the Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others, 1949.

exploitative sexual behaviour based on bribes or coercion for exchange of money including sexual favours in order to secure employment, goods or other services.[340] These views on prostitution will subsequently be discussed, commencing with the UDHR.

3.4.1 The Universal Declaration of Human Rights

The UDHR proclaims the freedom from fear and hardship as the highest aspiration of all people. The instrument declares that all human beings are born free and equal in dignity; these rights place sex workers in a situation where they could, without any undue interference, make their own determinations about their bodies.[341] Under the UDHR, everyone, including sex workers, have the right to liberty and security of their person,[342] the right not to be enslaved,[343] the right not to be subjected to inhumane or degrading treatment,[344] the right to equal protection of the law,[345] the right to have their privacy respected and protected from interference,[346] the right to freedom of opinion and expression which entails the seeking, receiving and imparting of information and ideas through any media,[347] the right to work and to make free choices about employment and to have just and favourable working conditions, as well as the right to form and join trade unions for the protection of one's interests.[348]

The UDHR has declared that all human beings, including sex workers, are born free and equal in dignity;[349] and, as such, have a right to their physical and psychological bodily integrity;[350] a right to privacy;[351] and a right to work and to choose the type of work they to like to perform as well as the right to form or join a workers' union.[352] The UDHR's Human Rights Council has considered the criminalisation of sex work

340 Théry *Prostitution under international human rights law* 5.
341 UDHR art 1.
342 UDHR art 3.
343 UDHR art 4.
344 UDHR art 5.
345 UDHR art 7.
346 UDHR art 12.
347 UDHR art 19.
348 UDHR art 23(1), (4).
349 UDHR art 1.
350 UDHR arts 3, 5.
351 UDHR art 12.
352 UDHR art 23.

as an intrusion of privacy involving consensual sexual acts between adults.[353] The Council acknowledged that, historically, the criminalisation of sex work involved punishing those who actually provided the sexual services, or by punishing the activities associated with prostitution, for example, brothel keeping, pimping or procuration, solicitation, or the giving of information.[354] The Council argued that the criminalisation of sex work and sex workers was a barrier to the health services being provided to these persons, since they feared being harassed by law enforcers.[355] The criminalisation of sex workers' labour also reduces their bargaining power, especially on the costs of the service and the use of condoms. Another problem associated with the criminalisation of sex work that the Council noted was the stigmatisation, sexual violence, and poor working conditions which these persons had to endure. Sex work is also not recognised by the certain labour laws; as such, these contracts are not enforceable via contractual obligations.[356] That sex work has not fully been recognised as a lawful means of livelihood has led to sex workers being victims of extortion, robbery or violence (physical or psychological integrity) from private- and public sources.[357] The Council recommended that states repeal all laws criminalising sex work, and establish appropriate legal frameworks whereby all lawful players in the sex work industry operate within the limits of the law.[358]

Under the UDHR, sex workers have the right to choose sex work as their means of earning a livelihood since they are protected by law against any interference whenever carrying out their trade. The South African law provides for all the rights as prescribed in the UDHR.[359] Despite all these acknowledgments, the South African courts have held contrary views to the freedoms as guaranteed in the

353 Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health* para 29.
354 Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health* para 29.
355 Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health* paras 36, 37.
356 Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health* para 39.
357 UNAIDS *UNAIDS guidance note on HIV and sex work* 5.
358 Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health* 22.
359 Sections 23(1), (2) of the Constitution; ss 4, 185 of the Labour Relations Act.

UDHR,[360] a concern which will be discussed in detail in the following chapter. The South African Constitution guarantees the liberty[361] and security[362] of every person. Yet sex workers are, for fear of being arrested, restrained by the criminal-justice system[363] to ply their trade even in their own private dwellings.

3.4.2 The Convention for the Traffic in Persons and Exploitation of the Prostitution of Others

The international community has never attempted to criminalise acts where mature individuals choose to buy or sell sexual services. What the international community has done is to proscribe any attempts by third parties to trade and enrich themselves from proceeds realised by the prostituting of others.

The early endeavours to halt the unlawful trade in the movement of especially women and girls from one place to another for the purpose of prostitution became an issue of serious concern in the beginning of the 20th century. The trade involved the sexual exploitation of women and young girls by way of pornography, sex tourism or forced prostitution – all for the benefit of third party traffickers.[364] The UK and, by extension, British-India are some of the signatories to the first International Agreement for the Suppression of the White Slave Trade of 1904 ('*Traite des Blances*') which involved the movement of women and girls as slaves from one location to another.[365] The Convention called upon each member state to act against the procuration of women or girls for the purposes of debauchery in foreign countries.[366] Governments were to agree to receive women and girls of foreign nationalities who surrendered themselves to prostitution and, if anything, to try to establish if they were trafficked and by whom, and to possibly return them to their countries of origin.[367] Another Convention[368] criminalised anyone who procured,

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360 See the cases of *Kylie* (footnote 47 in Chapter 1; *Jordan* (footnote 23 in Chapter 1).
361 Section 12(2) of the Constitution.
362 Section 12(1) of the Constitution.
363 See Sexual Offences Act 1957; Sexual Offences Act 2007.
364 Corrigan 2001 *Fordham Int LJ* 154.
365 Suppression of White Slave Traffic (1904).
366 Article 1 of Suppression of White Slave Traffic (1904).
367 Article 3 of Suppression of White Slave Traffic (1904).
368 The International Convention for the Suppression of White Slave Traffic, 1910.

hired or enticed or compelled a young woman to engage in sexual immorality.[369] The Convention[370] of 1921 to which the UK, India, Canada and the Union of South Africa were signatories, called upon member states to investigate and prosecute persons engaged in the traffic of children, or those who procured women or girls for the purposes of sexual exploitation in foreign countries.[371]

The first non-discriminative Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others came into force in 1951.[372] The Convention was gender-neutral as well as non-racial. The Convention's preamble states that trafficking in persons and the exploitation of the prostitution of others was incompatible with the dignity and worth of persons, and that it endangered the welfare of the individual, the family, and the community. Under the 1951 Convention, member states agreed to punish any person who, to the gratification of the desire of another (a third party); procured, enticed or led away for the purposes of prostitution, another person, even with the consent of that other person; or exploited or created an advantageous opportunity for the prostitution of another person, even with the consent of that person.[373] The Convention further called upon the member states to punish any person who kept, managed or knowingly financed brothels, or knowingly let or rented a building or other place for the prostitution of another person.[374] On 9 May 1950, India[375] became a signatory to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others and ratified it on 9 May 1953, while South Africa signed the Convention in 1950 and ratified it in 1951.[376] South Africa has effected some enactments to fight

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369 Under Articles 1 and 2 of The International Convention for the Suppression of White Slave Traffic (1910), state parties were called upon to punish any person who hired, abducted or enticed for sexual immorality purposes any woman under the age of 21 years, or used violence, fraud, threat or any compulsion on a woman for sexual immorality.

370 International Convention for the Suppression of the Traffic in Women and Children.

371 Article 2 of International Convention for the Suppression of the Traffic in Women and Children (1921).

372 The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (hereinafter the Traffic in Persons Convention, 1951).

373 Article 1 of the Traffic in Persons Convention,1951.

374 Article 2 of the Traffic in Persons Convention,1951. The Convention obliged member states to penalise inchoate attempts, conspiracy or any intention to offend Articles 1 and 2 of the Convention.

375 Shetye 2018 *Int J of Criminal Justice Sciences* 70. Section 23 of the Constitution of India criminalises trafficking in persons.

376 Najemy 2010 *Washington Univ Global Studies* LR 179.

the vice of trafficking of human beings.[377]

All the above Conventions' aims were not meant to end prostitution *per se* but to stop third parties, that is, traffickers and pimps, from making gains by trafficking females for their exploitation or to be (forcibly) prostituted. The Conventions never called for the discontinuing of prostitution.

3.4.3 The Convention Against Transnational Organised Crime

The international community went a notch higher to purge the 'sovereignty' of states in terms of crimes that are planned and organised in one country and completed in another country. Under the Convention Against Transnational Organised Crime,[378] if a crime is committed across a border, law enforcement must also traverse countries' borders. States ought to establish mutual legal assistance in the fields of investigations, prosecutions, and transfer proceedings from one state to another so that effective sentences can be meted out.[379] Under Article 2 of the Convention, serious crime includes the trafficking of persons. Sex work is not mentioned among the organised crimes. The Convention recognises the offences such as 'participation in an organised criminal group',[380] 'corruption',[381] or 'the obstruction or defeat of justice'[382] by physical force, threat, intimidation, deceit, or corruption. The promoters of sex work (pimps) or those who live on the proceeds of sex work are all deemed organised groups partaking of organised crimes and they are therefore liable.[383] If a person makes mere arrangements to move from one country to another for the purpose of performing sex work, the person's conduct does not amount to

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377 The Sexual Offences Act 1957; the Prevention of Organised Crime Act 121 of 1998; the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (hereinafter the Trafficking in Persons Act 2013).

378 General Assembly Resolution 55/25 of 15 November 2000. Canada signed the Convention and ratified on 14 December 2000 and 13 May 2002 respectively, India signed the Convention on 12 December 2002, South Africa signed the Convention and ratified on 14 December 2000 and 20 February 2004 respectively; the UK signed the Convention on 14 December 2000 and ratified it on 9 February 2006. See UNODC Special treaty event April 3,4,5.

379 Articles 17,18 and 21 of the Convention Against Transnational Organised Crime.

380 Convention Against Transnational Organised Crime art 5. In *Pramod Bhagwan Nayak v State of Gujarat* (2007) GLR 796 para 28, the court stated that there was some evidence that women got into the flesh trade via organised gangsters who coerce women and girls by offering them rosy futures in order to entrap them.

381 Convention Against Transnational Organised Crime art 8.

382 Convention Against Transnational Organised Crime art 23.

383 Prevention of Organised Crime Act ss 5, 6, 9, including the 'pattern of criminal gang activity' in Schedule 1.

trafficking in persons. The Convention does not recognise sex work or prostitution as a crime.

3.4.4 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The fraudulent trafficking of persons (especially females) for sexual exploitation has always been viewed as a heinous capital offence, even during the classical period or the Roman Imperial era. Trafficking in persons, especially for sexual exploitation, is indeed a crime against humanity.[384] In the classical period, Emperor Justinian of the Eastern Roman empire stated that panders deceived young girls by promising them food and clothing, but delivered them up to others for the purpose of sex work, and they (panders) took the entire profit of the wretched trade obtained by selling the bodies of their victims.[385] It was, therefore, decreed that if any person who removed a girl against her will, and forced her to remain with him, without providing her with sufficient food or received for himself the wages of her prostitution, then the pimp or procurer was to be put to death.[386]

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol)[387] was introduced in order to supplement the International Convention against Transnational Organised Crime of 2000. Traditionally, women and children have been considered to be most vulnerable victims of organised crimes such as human trafficking. The Protocol defines, at an international plane, the trafficking in persons as an activity by intermediaries that involves the recruitment, transportation, transfer, harbouring, or receipt of persons

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384 See art 7(1)(c), (g) and art 7(2)(c) of the Rome Statute of the International Criminal Court.

385 Scott *The civil law* 268.

386 Scott *The civil law* 268.See also NRSV Bible Committee *Holy Bible* Exodus 21: 16.

387 Doc A/55/383 3. The UK signed the Protocol on 14 December 2000 and ratified it on 3 November 2006; Canada signed the Protocol on 14 December 2000 and ratified it on13 May 2002, further, the Canadian section 279.01 of the Criminal Code RS, c C-34 punishes any person who commits the offence of 'trafficking in persons'; s 279.011 (1) of the Criminal Code RS, c C-34 punishes every person who commits the offence of 'trafficking in persons' aged below eighteen; s 279.02 of the Criminal Code RS, c C-34 punishes everyone who receives material benefits derived from 'trafficking in persons' whether the person is eighteen years old or above or aged below eighteen. India signed the Protocol on 12 December 2002; South Africa signed the Protocol on 14 December 2000 and ratified it on 20 February 2004 (with reservation to Article 15(2) of the Protocol which provides for compulsory jurisdiction of international court of justice in differences arising from interpretation or application of the Protocol). South Africa, subsequently, enacted the Trafficking in Persons Act 2013.

(including a child)[388] by means force or misrepresentation for the purpose of exploitation of prostitution or other forms of sexual exploitation or the forced labour of another person.[389] In trafficking in persons, the victim remains imprisoned by the traffickers and thus never freed. The victim is just but a 'property' under sale and at the disposal of the handlers of the business.

Sexual exploitation by a third party (traffickers) is a situation whereby the traffickers confine and transfer persons from one place to another in order to acquire a material or financial advantage from the sexual acts of these persons, by selling their services to clients.[390] Sex work and trafficking in persons for sexual exploitation are two different undertakings. Sex work is effected on a free and voluntary basis for the person's own benefit, and the provider (seller) and demander (buyer) are on an equal footing, whereas trafficking in persons for sexual exploitation is a vertical relationship where a power imbalance between the trafficker, the trafficked persons and the client exists.

As per the Palermo Protocol, it is the trafficking in persons for the purpose of prostitution that is prohibited but not the act of prostitution of a free and consenting adult. The self-devised and self-willed cross-border acts of looking for greener pastures by exploiting the prostitution of oneself is not proscribed. The intent of the Protocol is also very clear in that the perpetrators who benefited from the forced prostitution of others must be punished. Under the Protocol, each member state was called upon to criminalise the trafficking in persons even if a person so trafficked consented. In acknowledging that prostitution is an inevitable social phenomenon, the Protocol calls upon member states to repeal all existing laws, regulations or administrative provisions that require those engaged or those suspected of engaging in prostitution to either register, to possess special documents, or to perform any special undertaking for supervision or notification.[391]

According to the Southern Africa Counter Trafficking Assistance (SACTA), the Republic of South Africa is regarded as one of the main destinations for trafficked

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388 Any person aged below 18 years.

389 Palermo Protocol art 3(a). See also Balfour and Allen *A review of the literature on sex workers and social exclusion* 9.

390 Mollema *Combating human trafficking in South Africa: A comparative legal study* 63, 64.

391 Article 6.

persons who are lured with promises of jobs, education, or marriage but end up being sold into prostitution.[392] In response to the vice, South Africa has enacted the Trafficking in Persons Act 2013.[393] The law punishes any person who deceitfully or by threat recruits, delivers, receives, harbours, exchanges a person within or across the border of the Republic and receives payments for such trades so that the person exchanged may be exploited.[394]

3.4.5 The International Covenant on Civil and Political Rights

The essence of civil and political rights under the public international law[395] is to protect individuals' physical and mental integrity against unreasonable or unlawful interference from the state or any group of persons.[396] Under the ICCPR, states or any group of persons are barred from engaging in any activity aimed at the destruction of any rights or freedoms established and in case of any of their limitations, by law, the limitation may not do so to a greater extent that is provided and must respect the essence of the rights.[397] Among the inviolable human rights under the ICCPR are the rights to privacy,[398] and opinion or expression.[399]

Under the ICCPR, all people – including sex workers – have a right to freely determine and to freely pursue their economic development.[400] Sex workers must earn a living in order to put food on the table. They do so from the earnings they generate from their sexual activities on a willing seller-willing buyer basis. Sex workers have the right to equality before the law, and they should not be unfairly discriminated against on the grounds of sex or other statuses.[401] As guaranteed by the ICCPR, workers in the sex work industry have the right to advertise for the purpose of promoting their business. Those advertising such sexual services may do this orally, in writing, in print, in the form of art or exhibitions, or through any other

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392 Najemy 2010 *Washington University Global Studies LR* 176.
393 See footnote 377 above.
394 Palermo Protocol s 4(1).
395 The Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966).
396 Thielbörger 2019 *German LJ* 926.
397 Article 5(1) of the International Covenant on Civil and Political Rights. See art 52(1) of the European Charter of Fundamental Rights and Freedoms.
398 International Covenant on Civil and Political Rights art 17.
399 International Covenant on Civil and Political Rights art 19.
400 International Covenant on Civil and Political Rights art 1.
401 International Covenant on Civil and Political Rights art 26.

type of media.[402] This right could be limited by law in an open democratic society for the purpose of preserving national security, public order, as well as public health and morals. Sex workers, like everyone else in the labour industry, furthermore have the right, subject to the limitations of the law in an open democratic society, to form and join trade unions for the protection of their interests.[403] Similar to other persons, they may have the need to be protected against abuse by private and public persons, or by the state.[404] The privacy of sex workers, similar to the privacies of non-sex workers, should equally be recognised and protected. Whereas states have tended to place restrictions on prostitution, the UNHRC has always advised that at no given time should the restrictions be applied in a manner which is likely to impair the essence of the rights in the ICCPR.[405]

South Africa is not a signatory to the ICCPR,[406] but the Constitution[407] has incorporated the civil political rights as they appear in the Covenant as well as in the UDHR. In South Africa, despite the entrenchment of the civil and political rights as envisaged in international law, prostitution remains a crime. The privacy of prostitutes while performing their work is violated. Sex work is also not seen as 'work' or honest labour in order to earn a living from such type of employment. The South African Human Rights Commission in its report of 2016/2017 on civil and political rights found excessive force during protests; threats to media freedom; hate crimes against lesbian, gay, bisexual, transgender, and intersex as well as privacy violations.[408] All these violations are common features in the prostitution industry.

402 International Covenant on Civil and Political Rights art 19(2).
403 International Covenant on Civil and Political Rights art 22(1).
404 International Covenant on Civil and Political Rights arts 6, 7, 8.
405 UNHRC *The nature of the general legal obligation imposed on States Parties to the Covenant paras* 6, 8; *Yoon and Choi v Republic of Korea* UN Doc A/HRC/27/37 (8 Apr 1988); Thielbörger 2019 *German LJ* 931.
406 India became a party on 19 May 1976; Canada became party on 25 November 2005.
407 Section 9 of the right to equality; s 11: the right to life; s 12: right to freedom and security; s 13: right not to be subjected to slavery, servitude or forced labour; s 14: right to privacy; section 16: right to freedom of expression; s 18: right to freedom of association; s 22: freedom of trade, occupation or profession.
408 Tissington *Civil and political rights: Report 2016/2017* 17.

3.4.6 The International Covenant on Economic, Social and Cultural Rights

The human rights under the ICESCR include the right to food, good health and housing.[409] The rights under the Covenant impose obligations on the state parties to take steps to the maximum of their available resources to ensure the achievements of the rights as recognised and guaranteed without any discrimination as regards gender or other statuses.[410] In short, the obligations are progressive but resource-dependent.[411] The rights may be limited by a prescribed law only if the law is compatible with the nature of the right, and for the sole purpose of promoting the right.[412]

Under the ICESCR, state parties are required to recognise individuals' right to work which includes the right of everyone, including sex workers, to have the opportunity to earn their living by means of work they freely choose or accept.[413] The ICESCR grants people the right to self-determination, that is, being the master and shaper of their own destiny and to freely pursue their own economic development.[414] South Africa became a party to the ICESCR in 1995.[415] In line with the Covenant, the Constitution grants every South African citizen (which includes South African sex workers) the freedom to choose a trade, an occupation or a profession for the purpose of supporting themselves.[416] Furthermore, the practise of a trade, an occupation or a profession may be regulated by law. The ordinary meaning of the term 'regulate' implies to control something or an occurring event or an activity by the use of rules.[417] Popularly, the term does not mean to bring an event or occurrence to an end but to ensure that it happens within given confines. The limitation or regulation of the rights should not be to destroy individuals' rights but to promote their rights.[418]

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409 Thielbörger 2019 *German LJ* 935.
410 ICESCR art 2.
411 Thielbörger 2019 *German LJ* 935.
412 ICESCR art 4.
413 ICESCR art 6(1).
414 ICESCR art1.
415 India became party to the ICESCR on 10 April 1979; Canada became party in 1976.
416 Section 22 of the Constitution.
417 Hornby *Oxford Advanced learner's dictionary* 1219.
418 See arts 4, 5 of the ICESCR.

As argued in previous case law, sex work is an income-generating activity.[419] South Africa's Labour Relations Act, and the Basic Conditions of Employment Act 75 of 1997 define what an employee or a worker is, and the definitions are wide enough to include sex workers. The South African criminal justice system criminalises all prostitution activities and role players, whether the actual providers of sex, the consumers, and other third parties reasonably closely linked to the aiding of the prostitution network.[420] As evidenced from previous case law, there have been double standards as regards the activities of commercialised sex work. In the case of *DG Department of Home Affairs v Mavericks Revue CC*,[421] the respondents lawfully[422] employed foreign or 'exotic' dancers to work or perform in their club, at a fee, to lap- or table dance naked or only wearing G-strings in the presence of clients. The acts performed in Mavericks could represent indoor sex work under the guise of exotic dancing – activities that the state benefited from through revenues as a result of the acquisition of permits by the operators of the business as well as by the dancers' labour.

3.4.7 The Convention on the Elimination of All Forms of Discrimination against Women

South Africa became a party to the CEDAW in 1995.[423] The Convention calls upon member states to do away with all the forms of discrimination against women, especially the right to a free choice of employment.[424] The Constitution guarantees every citizen the right to choose their trade, occupation or profession without any hindrances but subject to regulation by law.[425] Unfortunately, the sex workers in South Africa, especially females, have been targets of discrimination and harassment by the criminal justice system or by private persons because of the nature of their work. In South Africa, in most of the reported cases on prostitution, women have ended being the victims.

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419 See the cases of *Kylie* (footnote 47 in Chapter 1; *Jordan* (footnote 23 in Chapter 1).
420 The Sexual Offences Act 1957.
421 *DG Department of Home Affairs v Mavericks Revue CC* [2007] SCA 149 (RSA). See also the discussion of the case in 4.3.5 below.
422 Via the Immigration Act 13 of 2002.
423 India became a signatory on 30 July 1980; and ratified on 9 July 1993.
424 CEDAW art 11(c).
425 Constitution s 22.

3.4.8 The Declaration on the Elimination of Violence against Women

Under the DEVAW, violence against women, especially female sex workers, includes physical or sexual violation by private or public figures.[426] Women may be sexually violated and moved from one place to another being promised fortunes but then end up being forcibly enslaved or sexually exploited by third parties with little or no recourse to the law.[427] Research by South African bodies such as the Human Sciences Research Council (HSRC), and the Sexual Offences and Community Affairs (SOCA), a unit of the National Prosecuting Authority (NPA), has established that South Africa has become a destiny for illegally trafficked women as well as South African-based foreign traffickers who recruit women to work as waitresses, strippers and hostesses.[428] Violence is frequently used in order to keep these abducted women in control.

3.4.9 The ILO and sex work

The ILO, a UN agency which advocates for workers' rights by drawing international standards and guidelines, called upon states to ensure the elimination of unfair discrimination in respect of employment and occupation as well as the elimination of all forms of forced labour (for example, sexual exploitation for the purpose of prostitution), and freedom to form or join workers' associations for workers' interests.[429] Recommendation 200[430] applies to all workers working in all types of employment or occupation in all the sectors of economic activities – whether these may be in the public or private sectors, or in the formal and informal economic

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426 DEVAW art 2(b).

427 Coomaraswamy *Report of the Special Rapporteur on violence against women, its causes and consequences* paras 35, 36.

428 Allais (ed) *Tsireledzani* 119.

429 ILO *ILO declaration on fundamental principles and rights at work* 1. Also see Huria *A handbook on international human rights conventions* 23. India ratified the following conventions: The Forced Labour Convention 29 of 1930 on 30 November 1954; the Abolition of Forced Labour Convention 105 of 1957 on 18 May 2000; and the Discrimination (Employment and Occupation) 111 of 1958 on 3 June 1960. See International Commission of Jurists https://www.icj.org/south-africa-icj-submission-to-the-committee-on-economic-social-and-cultural-rights/ (Date of use: 10 January 2021). South Africa has ratified the Forced Labour Convention 29 of 1930, the Discrimination (Employment and Occupation) 111 of 1958; the Minimum Age Convention 138 of 1973; the Worst Forms of Child Labour Convention 182 of 1999; the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; and the Right to Organise and Collective Bargaining Convention 98 of 1949.

430 ILO *HIV/AIDS and the world of work* para 13.

sectors.[431] The ILO's 'decent work agenda'[432] includes work that is productive and provides a fair income. Sex work produces a high income for the workers. For example, in 2015, Thailand's sex industry earned the 10% of the GDP.[433] The ILO holds that anything done to impair the lives, health, freedom, dignity and security of sex workers is an affront to the fundamental principles and rights at work.[434] The ILO views sex work as work and advocates that sex workers not be regarded as "criminals, victims, vectors of disease, or sinners but as workers".[435]

3.5.10 The Maputo Protocol

The Maputo Protocol is a regional instrument which calls upon member states to pass and enforce laws that prohibit all forms of violence against women, and in particular against forced sex – whether violence is evident or not.[436] Article 13 guarantees women the freedom to choose the kind of economic activities or occupation they want to engage in, and it requires member states to ensure the protection of women against exploitation while in pursuit of their freely chosen occupations.[437] These provisions do not single out sex work as among the occupations that a person may not undertake. South Africa is party to the Maputo Protocol. Despite the South African Constitution having provided for what the Maputo Protocol calls for, the jurisdiction's statute law, especially the Sexual Offences Act, 1957, and the common law blatantly violates the Protocol, and consequently also international law. Prostitutes cannot freely choose to perform their work for fear of being arrested, prosecuted, and convicted.

3.5.11 International and regional sex workers' forums

There has been a growing international consensus that sex workers' rights must be acknowledged as human rights.[438] The advocates of sex work have always argued

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431 ILO *HIV/AIDS and the world of work* paras 192-204.
432 ILO https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (Date of use: 10 January 2021). See also ILO Decent work country profile South Africa 1-59.
433 See Havocscope https://havocscope.com/prostitution-statistics/ (Date of use: 10 January 2021).
434 Fudge and McCann *Unacceptable forms of work* 41.
435 NSWP *Sex work as work* 1.
436 Maputo Protocol art 4(2).
437 Maputo Protocol art 13.
438 Mgbako 2020 *Harvard Journal of Law and Gender* 92.

that sex work constitutes proper work.[439] The global Network of Sex Work Projects (NSWP) proclaims that sex workers are entitled to, as a matter of fundamental human rights, the right to work, and to make a free choice as to the kind of work they would like to perform in order to earn a livelihood, without harming another.[440] The Network argues that sex work, as any other work, must be consistent with the fundamental ILO principles in that sex work must be compensated, the workers treated with respect, and that they should not be unfairly dismissed from employment.[441] The Asian Pacific Network of Sex Workers (APNSW), formed in 1994, embraces health and human rights approaches for sex workers.[442] The African Sex Workers Alliance (ASWA), formed in 2009, advocates for the "rights, not rescue"[443] of sex workers.

The Sex-Worker Forum of Vienna endorses the promotion and protection of the human rights of adult persons carrying out voluntary sex work.[444] The Sex-Worker Forum correctly maintains that there is international consensus that the criminalisation of sex workers is incompatible with laws on the protection of human rights. To substantiate their supposition, the Forum provides statistics (as from 2012) of adult female sex workers in Europe (1.4%); in Russia (1.5%); in Asia (2.6%); in Sub-Saharan Africa (4.3%); and in Latin America (7.3%).[445]

In 2005, the International Committee on the Rights of Sex Workers in Europe (ICRSE) issued a declaration to the effect that sex workers were entitled to, among others, the right to life, liberty and security; the right to privacy; the right to freedom of movement and residence; the right to equality before the law, the right to work, to free choice of employment and favourable working conditions; and the right to

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439 NSWP *Annual report 2013* 1, 3; UNHRC *Report on women's human rights in the changing world of work* 1, 5 These bodies urge for the decriminalisation of sex work in order to provide a safe environment for the sex workers to do their work.

440 UNHRC *Report on women's human rights in the changing world of work* 1 asserts that sex workers are excluded from labour standards such as minimum wages, the right to collective bargaining, safe work conditions, and restrictive immigration laws, among others, which have increased their suffering.

441 NSWP *Annual report 2013* 1, 3.

442 Mgbako 2020 *Harvard Journal of Law and Gender* 102.

443 Mgbako 2020 *Harvard Journal of Law and Gender* 103.

444 Sex-Worker Forum of Vienna *Persistent and systematic violations of Article 6 CEDAW by Austria* 10.

445 Sex-Worker *Forum of Vienna Persistent and systematic violations of Article 6 CEDAW by Austria* 12.

peaceful assembly and associations.[446] ICRSE[447] examines the German Prostitution Act[448] and the Prostitutes Protection Act,[449] and concludes that the Prostitutes Protection Act violates to a larger extent the human rights of a sex worker. Under the 2002 Prostitution Act, sex workers could demand their fee from clients, and in failure thereof, they could sue for payment against the service offered.[450] Employment contracts between prostitutes and brothel operators, escort agencies, or pimps were lawfully regulated.[451] Before the 2017 Act came into force, there were already forewarnings against the mandatory registration of sex workers.[452] Under this Act, prostitution is defined as "the provision of sexual services, i.e. sexual acts performed for money when at least one other person is present".[453] The minimum legal age to be able to work as a sex worker is 18 years.[454] The new 2017 Act infringes the human rights of sex workers in that it prescribes a disclosure to the public of the sex worker's personal data for the purpose of registration; i.e. names, photographs, contact and physical addresses, and dates and places of birth.[455] Further, sex workers are required to renew their registration every two years,[456] and undergo mandatory health checks and counselling.[457] To minimise venereal infections, the law requires that sex workers wear condoms during oral, anal or vaginal sex.[458] The UN has already on several occasions raised concerns as regards invasions on the privacy and human dignity of sex workers,

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446 ICRSE *The Declaration of the Rights of Sex Workers in Europe* 7.

447 ICRSE https://www.sexworkeurope.org/sites/default/files/userfiles/files/ICRSE%20letter%20and%20briefing%20note%20to%20AI%20ICM%20Dublin%20August%202015.pdf (Date of use: 13 July 2021).

448 Prostitution Act (*Prostitutionsgesetz*) 2002.

449 Prostitutes Protection Act (*Prostituiertenschutzgesetz*) 2017.

450 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 3.

451 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 4.

452 ICRSE *Professed protection, pointless provisions – overview of the German Prostitutes Protection Act* 19

453 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 3.

454 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 3.

455 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 4.

456 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 5.

457 Sections 7 to 9 of the Prostitute Protection Act, 2017.

458 Bundesministerium für Familie, Senioren, Frauen und Jugend *The New Prostitute Protection Act* 6.

such as the forced medical screening of sex workers.[459] A sex worker who fails to acquire the necessary registration as per the 2017 Act is, if found guilty, heavily fined. In short, sex workers and related businesses (brothels and the like) have to be registered.[460]

The International Committee of Prostitute' Rights (ICPR) adopted in 1985 the World Charter of Prostitutes' Rights that endorses the recognition of prostitution as a legitimate work. The Committee demands that prostitutes and ex-prostitutes regardless of the work, colour, class, sexuality, history of abuse, or marital status be granted equal human rights or entitlements similar to any other citizen.[461] The ICPR further insists that prostitutes are open to the invasion of their right to security of person, liberty, privacy and family life, and the denial of fair administration of justice, and the freedom of expression or movement. The Committee is troubled by the fact that states are using the advancement of public order, health, morality, and reputation to suppress sex work and sex workers as if this was the only vice that produces the abovementioned concerns.[462]

In an effort to decriminalise sex work and sex workers, the European Parliament of the European Union adopted a resolution[463] which calls for its member states to, amongst others, decriminalise the sex work profession and to guarantee sex workers the rights enjoyed by other citizens, to protect sex workers' independency as well their health and safety. The resolution compels states to punish those who violate the rights of sex workers, and also to support sex workers by establishing self-help groups and provided protection to sex workers in the criminal justice systems. It is submitted that this resolution represents the best approach to prostitution which the South African government could certainly explore.

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459 UN CAT *Consideration of Reports submitted by States Parties under Article 19 of the Convention* para 22; CEDAW Committee *Concluding observations on the seventh and eighth periodic reports of Austria* para 28; Sex Worker Forum of Vienna *Austria: No rights for loose women?* 1.

460 Sections 3 to 6 of the Prostitute Protection Act, 2017.

461 ICPR https://www.geschichte-menschenrechte.de/fileadmin/editorial/download/statement_on_prostitution.pdf (Date of use: 20 January 2021); Mgbako 2020 *Harvard Journal of Law and Gender* 98.

462 ICPR https://www.geschichte-menschenrechte.de/fileadmin/editorial/download/statement_on_prostitution.pdf (Date of use: 20 January 2021).

463 ICPR https://www.geschichte-menschenrechte.de/fileadmin/editorial/download/statement_on_prostitution.pdf (Date of use: 20 January 2021); European Parliament Resolution on violence against women Doc A2-44/86 86.

3.5 Conclusion

From this exposition, it has emerged that from the three foreign countries studied, the selling of sexual services by the principal actors is not an offence. Indeed, in the UK, India, and Canada, sex work is not criminalised, but the conduct of sex workers is highly regulated. In all these jurisdictions, activities that seem to promote or abet prostitution are criminalised. The running of brothels, pimping, procuration, or the living on the earnings derived from prostitution of others are all criminal offences. While the act of sexual services for hire has been legal for most of Canada's history, the prohibition of the activities surrounding the sex trade has made it difficult to practise prostitution without breaking any law. The new 2014 law on the protection of exploited persons outlaws the purchasing of sex work, which has deteriorated the predicament sex workers find themselves in.

South Africa, as a member of civilised nations, has a constitution which borrows a great deal from international law. The Constitution gives effect to international law. As explained in this chapter, international law recognises sex work as an economic activity, and envisages the right of every worker to freely engage in their chosen economic activity. South Africa is a signatory to some of these international conventions which recognise the right to gain a living from the work freely chosen and accepted.

Seemingly, the South African legal system has not adhered to the gist of these conventions advocating sex work as a legitimate labour market activity. The jurisdiction also ostensibly disregards the spirit of the Constitution, especially the preamble and the Bill of Rights as regards the criminalisation of sex work. Similar to India and Canada, South Africa has inherited its sexual offences law from the UK, save that in South Africa, the law was later amended to criminalise the selling and buying of sexual services. These issues will be further elaborated on in the next chapter.

CHAPTER FOUR

A CRITICAL PERSPECTIVE ON THE LEGAL FRAMEWORK OF PROSTITUTION IN SOUTH AFRICA

4.1 Introduction

> Sexuality[1] creates a form of identity that defines a person … an individual's future and fortunes are tied … to the manner in which the individual chooses to make use of his or her own sexuality.[2]

In this fourth chapter, the concept of sex work vis-à-vis legal developments in South Africa will be critically examined. This examination will extend from before Europeans[3] inhabited the country, to the arrival of Western settlers and the establishing of a colony, through to the apartheid (the white minority rule) era, and the constitutional democratic period. South Africa's legal system has developed from a fragmented customary system to a disfranchised system, and, lastly, a constitutional democratic system with universal suffrage.[4]

In South Africa, sex work is currently regulated by criminal law, law on tort (contract), common law and case law. However, as will be discussed in this chapter, prior to the arrival of the Europeans, sexual acts with others for reward were not penalised, and certain sexual conduct in fact formed part of a society's cultural traditions. The present South African prostitution laws were inherited from English law during the colonisation period. By means of the Immorality Act 5 of 1927, the government of the Union of South Africa outlawed procuration[5] and the keeping, owning, or managing of brothels[6] for the commission of illicit carnal knowledge. In an unequivocal way to try to prohibit the commoditisation of sexual acts, the law was

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1 According to Okechi 2018 *Glob J Reprod Med* 2, sexuality encompasses sexual intercourse and sexual contacts in all its forms; the WHO www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/ (Date of use: 20 November 2021) describes sexuality to encompass sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacies et cetera, and it is experienced and expressed in thought, fantasies, values, behaviours, practices, roles and relationships.

2 Baker 2012 *UCL Journal of Law and Jurisprudence* 98.

3 The Dutch and the British.

4 Article 1(d) of the Constitution.

5 Section 3 of the Immorality Act 5 of 1927 (hereafter the Immorality Act of 1927).

6 Section 4 of the Immorality Act of 1927. Inchoate offences of sexual acts in making are also criminalised by means of s 18(2) of the Riotous Assemblies Act 1957.

expanded to criminalise persons living on the proceeds or avails of prostitution, or being in receipt of considerations for the commission of indecent acts of sexual nature.[7] The Sexual Offences Act 23 of 1957 further amended the law on prostitution by the criminalisation of any person who, for remuneration, intentionally or negligently assists (in communicating) any persons aged 18 years or above in the commission of sexual acts for payment.[8] The law was expanded even more by prosecuting a person ("A") who unlawfully and intentionally engages the sexual services of a major ("B") for financial gains or other favours or compensation to the persons of B or ("C").[9] This law also outlawed trafficking in persons for the purposes of sexual exploitation.[10] These various legislation and any case law challenging these laws will be discussed in this chapter in separate two sections – the legal and policy framework on prostitution before the constitutional era and during the constitution period.

The racial regime based on parliamentary supremacy ended with the democratic and constitutional timelines of 1993 and finally of 1996. South Africa gained a greater participatory field in the international community. The international legal system became an enhanced source of law in the Republic of South Africa after democratisation,[11] as well as foreign law.[12] The South Africa's Bill of Rights has borrowed substantially from international law.[13] Customary international law became a law in South Africa unless it was inconsistent with the Constitution or a statute.[14] When interpreting the Bill of Rights, courts or tribunals in South Africa were

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7 Section 20(1) of the Immorality Act of 1957.

8 Section 12A.

9 Section 11 of the Sexual Offences Act 2007.

10 Section 4(1)(j) of the Trafficking in Persons Act 2013. The word 'exploitation' as used in the Trafficking in Persons Act 2013 includes the exploitation of the prostitution of others, or other forms of sexual exploitation. This description has been adopted from the definition of trafficking in persons used in the Palermo Protocol art 3(a). See also Mollema 2014 *J Cont Roman-Dutch L* 247. Sexual exploitation is explained in the Trafficking in Persons Act 2013 s 1 as meaning: "(a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or (b) any offence of a sexual nature in any other law". The term 'prostitution' is not defined in both the Palermo Protocol and the Trafficking in Persons Act 2013.

11 See, e.g., the UDHR, the ICESCR, the ILO, the Palermo Protocol, the Covenant Against the Transnational Organised Crime, the Maputo Protocol, and the CEDAW.

12 See, in this regard, the Canadian Constitution, and para 3.3.3 above.

13 Chapter 2 of Constitution.

14 Section 232 of the Constitution. Section 232 should be contrasted with s 231 where international covenants entered into by National Executives and requiring no accession or ratification, or approved by National Assembly and National Council of Provinces, bind South Africa;

obliged to consider international law;[15] and possibly align themselves with any reasonable interpretation of the statute that was consistent with the international-law[16] over any alternative that is not. This chapter (and especially the second section) will investigate whether the legislation criminalising sex work as well as the case law on the subject matter conforms to international prescriptions on prostitution.

The chapter will commence with a historical perspective on prostitution and sex laws in South Africa pre-1994, where after a discussion on the legal and policy framework on prostitution during the constitution era will follow.

4.2 A historical perspective on prostitution pre-1993

It forms part of some cultural traditions to trade females for monetary or kind, or any exchange in the form of pleasantries, labour, gifts, dowry, or other favours to perform sexual acts. For example, the exchange of gifts or kind preceded a sexual union when a man from family "A" would unite or marry with a female from family "B".[17] The essentials of such arrangements are on the basis of *quid pro quo* (something in return for something).[18] In South Africa, the community-approved culture of *lobolo*[19] (property in cash or kind given by the prospective husband to the prospective wife's family pending marriage) can be paralleled to this ancient dowry

international law becomes law in South Africa when domesticated or if it was binding before the coming into force of the Constitution.

15 Section 39(3) of the Constitution.

16 Customary international law, covenants, or case law.

17 See Itani *The Quran* (English translation) Quran 4:4 – "Give women their dowries graciously. But if they willingly forego some of it, then consume it with enjoyment and pleasure". Also see NRSV Bible Committee *Holy Bible* Genesis 29:18 – "Jacob was in love with Rachel and said, "I'll work for you seven years in return for your younger daughter Rachel", 29:20 – "So Jacob served seven years to get Rachel, but they seemed like only a few days to him because of his love for her", 29:23 – "But when evening came, he took his daughter Leah and brought her to Jacob, and Jacob made love to her" 29:30 – "Jacob made love to Rachel also, and his love for Rachel was greater than his love for Leah. And he worked for Laban another seven years"; and Exodus 2:21 – "Moses agreed to stay with the man, who gave his daughter Zipporah to Moses in marriage".

18 See *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A) – this is the basis of sexual acts for payment or reward. In *Driskel v Peninsular Business Services Ltd* [2000] IRLR 151, Driskel claimed that her boss told her to wear short skirt and a see-through blouse showing plenty of cleavage in an interview to earn her promotion.

19 Epprecht *Hungochani: The history of a dissident sexuality in southern Africa* 28-29.

tradition. These pre-marital arrangements are patriarchal in most cases.[20]

Except for customary marriages, South African law recognise two other forms of fully legally recognised unions, namely marriages and civil unions. However, domestic partnerships or life partnerships, which are a cohabitation relationship without any legal formalities, are also becoming more common in modern South African society. As evidenced in previous chapters, accepting money or kind for sexual encounters beyond the union of marriage became labelled as prostitution (the exchange of sexual services or goods for equivalent value worth). In the subsequent sub-sections, the concept of prostitution and the possible prosecution thereof will be examined during the following periods: the pre-colonial period, the establishment of the Dutch East India Company in the Cape, under British occupation, and from 1910 to 1993.

4.2.1 Concept of prostitution in pre-colonial South Africa

Pre-colonial South Africa was inhabited by indigenous identifiable communities such as, amongst others, the Khoi-Khoi, the San, and the majority of the Bantu-speaking population.[21] These pre-colonial African societies were mostly highly patriarchal[22] and open to multi-faceted sexual relationships.[23] Promiscuity as well as concubinage were common phenomenon among the indigenous societies.[24] Women were not severely restricted though their manners were modest.[25] Some

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20 *B v P* 1991 4 SA 113 (T); *Van Erk v Holmer* 1992 2 SA 636 (W); *S v S* 1993 2 SA 200 (W); *B v S* 1995 3 SA 571 (A).

21 Thompson *A history of South Africa* 3. These include the current-day peoples of the Ndebele, Swazi, Basotho, Batswana, Pondo, Nguni, Xhosa, Zulu, and Tsonga.

22 As in Ndulo *Indiana J of Global Legal Studies* 89, men were favourably place politically and economically, and women were seen as adjuncts or auxiliary and dependents. According to Pagel *#AmInext: The link between European colonization and gender-based violation in contemporary South Africa* 33, the institution of patriarchy in matters of gender and sexual relationships was a key factor to the economic exploitation of women. In Van Heyningen *Public health and society in Cape Town 1800-1910* 354, it is argued that prostitution was a prominent feature of economic revolution in most patriarchal societies; that women's role was purely sexual, and that women were seen incomplete in themselves and existing primarily for the sake of men.

23 Delius and Glaser 2005 *African J of AIDS Research* 29; Thompson *A history of South Africa* 23. Okechi 2018 *Glob J Reprod Med* 3 states that in the indigenous African traditions, especially in South Africa, sex and human sexuality and all sexual pleasures were seen as indisputably part of human nature and that the rights of individuals and social groups, matters of sexuality were highly respected. See Ngubane *Gender roles in the African culture* 23.

24 Delius and Glaser 2005 *African J of AIDS Research* 29, 30.

25 Thompson *A history of South Africa* 6.

free women, mostly the widows, runaways or unmarried mothers in the Xhosa and in the Pondo communities engaged in extra-marital sexual relationships.[26] Amongst the Zulu, promiscuous or extra-marital sexual relationships signalled manhood, or '*isoka'*.[27] Still in the Zulu tradition, married women's secret paramours or lovers were called '*isidikiselo'*, meaning the top of the pot, where the pot was the husband referred to as '*ibodwe'*.[28] The terms '*nyatsi'* in Sesotho and '*khwapheni'* in Xhosa also described secret extra-marital relations.[29] Accordingly, fornication for favours existed in the earliest South African societies alongside the societies themselves.

In the pre-colonial African societies, there used to be no currency, but people traded in or bartered gifts in return of services. Iron and copper were precious metals of trade used by metal miners, blacksmiths, and mongers.[30] The products of iron and copper, meat or agricultural products were coinage, which may have been exchanged for sexual favours from women. Unfortunately, little is known about patterns of non-marital or commercial sex in many pre-colonial societies, as these peoples were predominantly illiterate or because records were not preserved.

Heterosexuality was certainly the dominant form of sexuality in pre-colonial Africa. Sexual relations between males, and especially fornication for favours between men, is a highly taboo subject in this day and age as well as in the period prior to colonialism in Southern Africa. As an extreme rarity, hardly any sources are available on the topic. Yet evidence of early same-sex copulation does exist and proof may be found in San cave paintings, the oldest of colonial jurisprudence, press reports, health documents, and government enquiries of the time.[31] Many San and

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26 Delius and Glaser 2005 *African J of AIDS Research* 31.

27 Arnfred *Re-thinking sexualities in Africa* 17; Oppenheimer *Prostitution as the exploitation of women and violation of women's rights* 68. Ngubane *Gender roles in the African culture* 23.

28 Arnfred *Re-thinking sexualities in Africa* 16.

29 Coovadia et al 2009 *Lancet* 822.

30 Thompson *A history of South Africa* 17, 20. Hoes for digging or ploughing were made from iron. From copper, ornaments such as earrings, necklaces, pendants, girdles, cache-sexes, bracelets, crowns could be manufactured. These were all highly-popular objects used for trade in these societies.

31 Epprecht *Hungochani: The history of a dissident sexuality in southern Africa* 25-49. Mehra, Lemieux and Stophel 2019 *Open Information Science* 6 record a Portuguese soldier writing in 1681: "There is among the Angolan pagan much sodomy, sharing one with the other their dirtiness and filth, dressing as women. And they call them by the name of the land, *quimbandas*... And some of these are fine fetishers... And all of the pagans respect them and they are not offended by them and these sodomites happen to live together in bands, meeting most often to provide burial services".

Khoi-Khoi drawings confirm that same-sex sexual practices occurred in the pre-modern African milieu, and "were common enough to be socially acceptable".[32] Consequently, it could be stated that:

> Colonialism and Western decadence did not introduce same-sex practices to southern Africa but rather the concept of homophobia, the active loathing or fear of same-sex practices and desires.[33]

The Europeans presence, especially religion such as Christianity in South Africa, impeded Africans sexual mores and norms.[34] Christianity brought to Africans the concept of 'shame' as well as punishable 'sin' upon transgression of established and permitted sexual norms.[35] The Europeans treated polygyny, pre-marital or extra-marital sex amongst the black Africans as forms of sexual transgression. Europeans placed much emphasis on female chastity against the Africans' permissiveness to sex.[36] As will be additionally explained in the sub-paragraphs to follow, Western domination and colonial power relations affected sexual freedoms and sex work on multiple levels.

4.2.2 The Dutch East India Company and regulation of early sex work in the Cape

The European ways of living infiltrated in South Africa via the Cape sea port, and contact between indigenous peoples and Europeans dates way back to the 15th century when a Portuguese mariner, Bartholomew Dias, anchored at the Cape peninsula in 1487. In 1497, Vasco da Gama, another Portuguese seafarer, anchored at the Cape on route to Asia Minor.[37] It was, however, in the 16th century that the Dutch, British, French, and Scandinavian merchant seafarers would sporadically anchor at Table Bay for refreshments, and it was the Dutch (under Jan

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32 Epprecht *Hungochani: The history of a dissident sexuality in southern Africa* 26.

33 Miescher 2009 *Journal of the History of Sexuality* 335. The author disputes the statement made by Robert Mugabe that same-sex relations are "un-African", "an abomination, a rottenness of culture" imposed on his country by Britain's "gay government". Mugabe also referred to homosexuals "as worse than pigs and dogs". See Miescher 2009 *Journal of the History of Sexuality* 335.

34 As stated in Ndulo *Indiana J of Global Legal Studies* 95, African customary law and practices, especially in the sexuality, were acceptable if not in conflict with the European concept of good sexual morality, especially their restraint from multiple sexual partners.

35 Delius and Glaser 2005 *African J of AIDS Research* 31; Okechi 2018 *Glob J Reprod Med* 3.

36 Arnfred *Re-thinking sexualities in Africa* 67.

37 Thompson *A history of South Africa* 31.

van Riebeeck) who first establish a settlement in the Cape of Good Hope in 1652.[38]

The Western concept of prostitution also found its way first into South Africa via the seafaring Dutch East India Company (Vereenigde Oost-Indische Compagnie – VOC)[39] whose sailors anchored their ships in the Cape of Good Hope to refresh their food and water, and to seek sexual pleasures. In the 17th century, in nearly in all of the cities of the Republic of Holland, prostitution was rife. As in Medieval times, during the 16th, 17th and 18th centuries, prostitutes were viewed as a:

> ...necessary evil and an outlet for male passions which if not properly discharged would disrupt the social order.[40]

It was argued that prostitutes were a requisite in order to guard the chastity of good women. That prostitutes were essential safety guards on the 'good women', it was argued that if courtesans and strumpets were to be arrested and prosecuted, ravishing would become a common crime against women and young girls, and there would be no sufficient locks and bars for rapists.[41]

The Dutch East India Company administration permitted slavery at the Cape at that time which resulted in some local Khoi-Khoi and white slaves (house helps) engaging in commercial sex with the settlers, if they so wished, in order to supplement their incomes.[42] Slaves were also shipped in from the Dutch's other outposts to work on the infrastructure.[43] These slaves came from among other places Indonesia, Malaysia, Sri Lanka, Mozambique, Madagascar, India, and from the Muslim world.[44] A woman who became a slave was considered a common woman in that she became sexually available to any man who could exert some physical control upon her.[45] The common clients of the prostitutes were sailors and

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38 Thompson *A history of South Africa* 32.

39 Trotter 2008 *History Compass* 673. The Dutch East India Company was established in 1602 as a conglomerate of six companies that traded with the East Indies since 1596. The Company traded in tea as well as cloves, mace, nutmeg or cinnamon from East Indies. The VOC's headquarters was in Amsterdam. See Danvers *Transcripts of Dutch East India Company records, 1600-1700* 2; Goodman 2010 *Emory Endeavours in History* 60-61.

40 Jensen Adams *Money and the regulation of desire* 233. Van Heyningen *Public health and society in Cape Town 1800-1910* 357.

41 Jensen Adams *Money and the regulation of desire* 233. The early Dutch settlers in the Cape of Good Hope applied Roman-Dutch law. See footnote 83 in Chapter 1.

42 Van Heyningen 1984 *JSAS* 170.

43 Thompson *A history of South Africa* 33.

44 Thompson *A history of South Africa* 36.

45 Andaya 2001 *Antropologi Indonesia* 63.

the unmarried soldiers.[46] Prostitution was also linked to shipping in this regard:[47]

> Where she (shipping) comes into fashion, or sticks out her bosom, every village becomes a city.[48]

The settlers and tradesmen at the Cape established commercial enterprises, taverns, and brothels.[49] Brothels in the Cape settlement were first mentioned in 1681.[50] However, by the 18th century, brothels were already firmly established in the colony, and the Slave Lodge[51] became Cape Town's leading brothel.[52] Female slaves' jobs were domestic chores, for example, washing, selling and cleaning, which were poorly paid, and, therefore, prostitution also became one way of supplementing their inadequate incomes, as previously mentioned.[53] Destitute Khoi-Khoi (Hottentots) women also became indispensable prostitutes.[54] Female slaves were always ready to prostitute themselves with the soldiers and sailors in the Lodge without any deterrence from the Company.[55] Sex workers developed a slogan stating 'No cash, No sex'.[56] The sex business was booming at the Company Slave Lodge as reported:

> Female slaves are always ready to offer their bodies for a trifle; and towards evening, one can see a string of soldiers and sailors entering the Lodge where they misspend their time until the clock strikes 9. After that hour no strangers are allowed to remain in the Lodge. The Company does nothing to prevent this promiscuous intercourse, since, for one thing, it tends to multiply the slave population, and does away with the necessity of importing slaves.[57]

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46 Van de Pol *The burgher and the whore* 85; Hokkanen 2009 *Asclepio* 255.
47 Grobbelaar-Lenoble *The lived experiences of street-based sex workers in Woodstock* 20.
48 Jensen Adams *Money and the regulation of desire* 239.
49 Thusi 2015 *Fordham Int LJ* 209.
50 Van Heyningen 1984 *JSAS* 170.
51 Thusi 2015 *Fordham Int LJ* 209. The Slave Lodge was established in 1681 in the Cape as prostitution had become a slave's habit of augmenting their hardly sufficient income. See Elphick and Giliomee *The shaping of Southern Africa society, 1652-1820* 126, 127; Boeseken *Slaves and free Blacks at the Cape, 1658-1700* 45; Van Heyningen 1984 *JSAS* 170.
52 Elphick and Giliomee *The shaping of Southern Africa society, 1652-1820* 126-127; Boeseken *Slaves and free Blacks at the Cape, 1658-1700* 45.
53 Van Heyningen 1984 *JSAS* 170; Andaya *Antropologi Indonesia* 64; Thompson *A history of South Africa* 43.
54 Van Niekerk 2005 *Fundamina* 136.
55 Thusi 2015 *Fordham Int LJ* 210.
56 I.e. '*Lammene kas, kammene kunnte*': See Thusi 2015 *Fordham Int LJ* 210; Trotter 2008 *History Compass* 676.
57 As per Company employee Otto Mentzel, quoted in Thusi 2015 *Fordham Int LJ* 209-210.

The early Dutch settlers in the Cape followed the same law as in Holland during the 17th century.[58] This law consisted of the Dutch-Roman law, that is, the legislations (*artyclebrief* or *placaeten*), customary law, and, more importantly, the canon law or the *decretum* (the *ius commune*). In the 16th century in Holland, prostitution resonated between regulative Catholicism and prohibitive Protestantism. For Catholicism, whoring, which was treated as sex outside marriage or adultery, and which took place in brothels or taverns was highly punished.[59] The city of Hague passed an Ordinance in 1595 that decreed that any person found keeping a brothel would be publicly flogged.[60] Due to urbanisation, and a seafaring and wealthy adulterous community, prostitution in Holland became hard to suppress.[61] The Dutch *artyclebrief*, a legal document of 1634, regulated the conduct of the Dutch settlers as well as the voyagers.[62] The article letter does not make reference to prostitution nor brothel keeping as an offence.[63]

The contract of letting and hiring of personal services, usually, referred to as '*dienstcontract*' or '*huur en verhuur van diensten*' was grounded on consensus between the employer and employee for the purposes of rendering services in return of remuneration.[64] This could form the basis of prostitution. The *placaeten* of 29 November 1659 applied to '*dienstboden*', that is, servants who were, among other things, involved in intimate relationships with their lords.[65] The *placaeten* between 1652 to 1850 did not explicitly prohibit prostitution, but prohibited men from illicit sex such as fornicating with slave women or keeping concubines.[66] Indeed, the first *placaeten* prohibiting the Company employees in the Cape from performing sexual intercourse with the slaves was enacted between 1671 and 1681.[67] Men contravening these sexual regulations were prosecuted and punished under 'immoral' acts such as drinking, gambling or disorderly conduct, but the women

58 I.e. Roman-Dutch common law. See footnote 83 in Chapter 1.
59 Van de Pol 2010 *Journal of Historians of Netherlandish Art* 4. Sex with another person's wife was considered an even more serious crime than having sex with a prostitute.
60 Jensen Adams *Money and the regulation of desire* 236.
61 Van de Pol *The burgher and the whore* 6.
62 Gaum 2003 *Stellenbosch LR* 322.
63 Grobbelaar-Lenoble *The lived experiences of street-based sex workers in Woodstock* 23.
64 Conradie 2016 *Fundamina* 171.
65 Conradie 2016 *Fundamina* 170.
66 Gaum 2003 *Stellenbosch LR* 320; *Jordan* para 799H.
67 Van Niekerk 2005 *Fundamina* 137.

were not punished for they were deemed to have been coerced into sex.[68] Hendrik Coerts van Deventer, for example, was twice on different occasions, on 24 August 1666 and 07 November 1668, convicted of and received corporal punished for sleeping with slave women.[69] Sex between white men and black women seem to have been unlawful.[70] In this regard, racial and class interactions were controlled by the Dutch East India Company administration so as to keep 'respectable' persons separate from any vice.

The venereal pandemic, especially syphilis, was another issue that caused any unregulated sexual conduct at the Cape to become regulated. During 1716, fires were lit outside the proximities of the Slave Lodge in order to expose and fight vagrancy by slaves loitering around the Lodge, and, therefore, frustrating their sexual indulgences with the Dockers or those accommodated in the Lodge whenever ships docked.[71] General Janssens issued a proclamation was to punish accordingly those women responsible for the spread of the contagion.[72] All these were attempts to regulate promiscuity.

The Dutch Colony administration in South Africa sought to control sexual immorality or 'promiscuity' by punishing only the clients of sexual transgression. This could be the inception of the Nordic model of regulating prostitution. Selling of sexual services was not a crime but it was a crime for the customers (men) to purchase such services.[73] Effectively, the Dutch rule came to an end in 1795 when England first occupied the Cape of Good Hope.

4.2.3 Sex work vis-à-vis the law under the British occupation

One hundred and fifty years after the Dutch inhabited South Africa, the British imperialists seized the Cape of Good Hope from the then bankrupt Dutch East India

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68 Di Palma https://chasingtheories.wordpress.com/2013/07/22/the-history-of-the-offence-of-prostitution-in-south-africa-and-its-racist-origins/ (Date of use: 20 March 2021).

69 Di Palma http://www.chasingtheories.wordpress.com (Date of use: 2 May 2021); Van Niekerk 2005 *Fundamina* 136.

70 As in Van Niekerk 2005 *Fundamina* 137; Hans Christoffel received corporal punished for having sexual intercourse with a black woman.

71 Beukes *"It is not only the guilty who suffer"* 66.

72 Beukes *"It is not only the guilty who suffer"* 67.

73 *Jordan* para 799H.

Company in order to utilise the region as a halfway station to the East.[74] This first British occupation of South Africa began in 1795 and ended in 1803 when the Britons returned the colony to the Dutch government.[75] However, in 1806, the Cape was annexed again by Britain so as to "protect the sea route to their Asian empire".[76] The second occupation by the British rule lasted until 1961 as the Union of South Africa.

When Britain colonised the Cape, they embedded English law into the already-functioning Roman-Dutch law, which resulted in conflicts.[77] These conflicts led to the Afrikaner (Dutch) Boers moving to the provinces of Natal, Orange Free State and Transvaal, where they established their own independent states in which Roman-Dutch law was applied.[78] At that time, South Africa existed as a federation of four states or provinces, namely, Cape, Natal, Orange Free State and Transvaal.[79] Each of these provinces had their own separate regulations that dealt with sex work. In the midst of 1800, the Britons annexed the independent Boer states, and English law again became appended into the Roman-Dutch law systems.[80] The British imperialists regulated sexual conduct, and in particular illicit carnal knowledge in the colonies. The British colonial policies in regulating and policing prostitution focussed especially on sustaining the "well-kept distinctions between colonizers and colonized".[81]

During early British occupation, prostitution became an offence for the first time in the South African territories, but it was rarely prosecuted.[82] Though regulated, sex work remained a casual profession, and was practised in bushes, parks, on beaches or in brothels. Prostitutes had to be registered, and from these records, it is known

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74 This occurred after Britain established their own 'British East India Company'. See Oliver and Oliver 2017 *Theological Studies* 5.

75 Oliver and Oliver 2017 *Theological Studies* 5.

76 Oliver and Oliver 2017 *Theological Studies* 5.

77 Dugard et al *Dugard's international law* 7.

78 Thompson *A history of South Africa* 88-92.

79 Thompson *A history of South Africa* 72.

80 Thompson *A history of South Africa* 141-144.

81 Kozma *Prostitution and colonial relations* 732. The British created policies at the end of the 18th century already that outlawed interracial relations and marriage. See Kozma *Prostitution and colonial relations* 733. Still, colonial authorities encouraged prostitution "for example by operating indigenous brothels to cater to the "needs" of occupying armies or colonial administrations". See Kozma *Prostitution and colonial relations* 733.

82 Trotter 2008 *History Compass* 677; Thusi 2015 *Fordham Int LJ* 210.

that the sex workers of the time consisted of "local women who were mixed race, although there were also some English, Dutch, Irish, Scottish, and German women".[83]

The discovery of diamonds in Kimberley and gold in Johannesburg in 19th century saw more influx of explorers, miners, farmers and labourers, and brought about urbanisation.[84] Men migrated permanently as well as temporary to these cities, and brought along with them a demand for sexual services.[85] The white colonisers wielded both political and economic powers in the Colony whereas the 'Coloureds' or 'Blacks', that is the slaves and the natives, provided the labour force. The labourers were poorly remunerated, had poor social amenities, and were prone to abuses.[86] These workers would alleviate their poverty by prostituting themselves besides doing other farm or domestic chores. Prostitution, mostly by black or mixed-race sex workers and white customers, became an urban phenomenon.[87]

Sex work was viewed by the colonisers as inevitable and necessary as a controlled outlet for the sexual desires of especially British males.[88] For example, on 11 June 1868, the *Cape Argus*, a newspaper circulating in the Cape colony, published the following regarding the inescapability of prostitution:

> Harlotry, as an institution, with all its fearful evils in the mind and body, is of so ancient origin, that we can hardly now hope to put it down entirely … it is not quite desirable, while society is constituted as it is that it should be driven into secret places; for experience teaches us that even when it is not openly allowed by law … its effects are aggravated. In a measure it must perhaps be regarded almost as an institution necessarily attendant on the present state of society.[89]

By the late 18th century, British authorities became increasingly concerned about venereal diseases contracted by British soldiers and officers. The War Office in the Cape Colony claimed that British troops were dying of the venereal disease

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83 Van Heyningen 1984 *JSAS* 173-174; Thusi 2015 *Fordham Int LJ* 210.
84 Thusi 2015 *Fordham Int LJ* 223; Thompson *A history of South Africa* 112.
85 Kozma *Prostitution and colonial relations* 730.
86 Thompson *A history of South Africa* 113; Thusi 2015 *Fordham Int LJ* 223.
87 Thusi 2015 *Fordham Int LJ* 235.
88 Bryder 1998 *The Int History Review* 814 remarks in this regard: "The dangers of a homosexual European rank and file were implicitly weighed against the medical hazards of rampant heterosexual prostitution: both were condemned as morally pernicious and a direct threat to racial survival".
89 Van Heyningen 1984 *JSAS* 173-174.

contracted from the common prostitutes.[90] These common women, for that matter, were considered "conduits of infection to respectable men".[91] As such, sex workers were singled out as the transmitters of venereal diseases.[92] The clients or customers were treated as the unfortunate victims of the disease from the promiscuous, loose women.[93] Unlike the sex workers, their clients were not subjected to sexual medical screening either as sources of the infection neither were they detained for treatment.

Prostitution or any promiscuity was consequently regulated by the Victorians especially for the safety of health of their military personnel.[94] To protect the safety of the Colony against sexually transmitted infections, the Victorian authority in the Cape Colony enacted the Contagious Diseases Act 1 of 1857, and the Contagious Diseases Act 25 of 1868.[95] These Contagious Diseases Acts required the compulsory registration of prostitutes and their regular vaginal screening to ascertain health compliance in order not to infect the Colonial personnel.[96] Under the regulations, prostitutes suspected of suffering from venereal disease could be forcibly medically examined of their vaginal health and treated in the designated lock hospital before they could be let free to ply their trade again.[97] The contagion in the Colony also took a racial trajectory with the non-Whites depicted as the sources of disease, and the Whites as the victims.

Prostitutes were considered the deviants and a menace to society; maladjusted, psychopathic, unbalanced, unnatural, and a threat to the security of state.[98]

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90 Van Heyningen 1984 *JSAS* 173.

91 Hiersche *Prostitution and the Contagious Diseases Acts* 8; Baker 2012 *UCL Journal of Law and Jurisprudence* 92.

92 Kozma *Prostitution and colonial relations* 735-736.

93 Thusi 2015 *Fordham Int LJ* 217.

94 Thusi 2015 *Fordham Int LJ* 216. The enactment of the Contagious Diseases Act of 1864 in England was necessitated by the need to protect the health of British soldiers from venereal diseases contracted as a result of 'necessary but evil' sexual encounters with common women. See Van Heyningen *Public health and society in Cape Town 1800-1910* 357 where, on 15 February 1867, the Secretary to the colonial Medical Committee to the Secretary held that prostitution was a necessity and a safeguard to the public morals, and that if by law it was suppressed, seduction and greater crimes would follow.

95 See discussions on the Contagious Diseases Acts in paras 2.3.4, 3.3.2, and 3.3.3 above.

96 See para 3.3.3 footnotes 227, 228 above.

97 Hiersche *Prostitution and the Contagious Diseases Acts* 2.

98 Baker 2012 *UCL Journal of Law and Jurisprudence* 92, 94; Thompson *A history of South Africa* 217. Prostitutes were seen as fallen woman with wanton display of sexuality who represented

Opposition to the Contagious Disease Acts arose in the Colony when Dr Laing, a surgeon at the New Somerset Hospital queried the rationale of providing the military personnel with prostitutes free from diseases.[99] Furthermore, Saul Solomon's movement on the repeal of the Contagious Diseases Acts advocated for a non-racial, open market economy, and the protection of individual liberty against the state's intrusion.[100] The Women's Christian Temperance Union – which was established in Wellington in South Africa in 1889 – expressed its disheartenment on the indignity perpetuated on prostitutes as to the requirement of registration, compulsory sexual screening, and their detention at the lock hospital pending treatment and recuperation before any future sexual engagements.[101] Because of this uproar, the Contagious Diseases Act was amended in 1885.[102] The new Act called for the registration and regulation of prostitution but no medical examinations, and also that the police could not conduct searches or summon prostitutes. However, under the Act, surgeons at the district level still had the authority to detain victims of venereal diseases compulsorily and treat them. This Act was not assented to until 1888.

It seems that the legislation regulating commercialised sex at this time did not consider the practice an offence so long as it happened in private. For example, in the Cape, the Vagrancy Act of 1879 was meant to supress vagrancy and idleness. It was an offence to being found idle and disorderly or being found loitering without giving convincing reasons.[103] This could apply to street walkers if they solicited for the purposes of prostitution. The same offences were also punishable in other provinces.[104] Nuisance (conduct against public decency and morals) was also punished as an offence.[105] Prostitutes could be punished for offending public decency and moral especially when they dressed suggestively or attempted to lure for prostitution. In the Cape, soliciting a white woman or cohabiting with 'aboriginal

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a threat to 'moral' women (signifying the desexualised maternal body). See Baker 2012 *UCL Journal of Law and Jurisprudence* 99, 100.

99 Van Heyningen 1984 *JSAS* 174.

100 Van Heyningen 1984 *JSAS* 176.

101 Van Heyningen 1984 *JSAS* 188.

102 The Contagious Diseases Act 39 of 1885.

103 Sections 2, 4 of the Vagrancy Act, 1879.

104 Sections 1, 2 of Act 15 of 1869 in Natal; s 26(3) of the Police Offences Ordinance in Orange State; and s 8(3) of the Police Offences Act 27 of 1882 in Cape.

105 Section 181 of Ordinance 19 of 1924.

native' for gain was considered unlawful.[106]

During the second period of British occupation, the Republic of Transvaal was notorious for prostitution.[107] Keeping brothels,[108] soliciting[109] for prostitution, or pimping and procuration especially by men were all criminalised.[110] Section 21(1)(a) of the Immorality Ordinance 46 of 1903 was interpreted as referring to punish anyone who was paid money by prostitutes, to aid and abet, or to help the prostitutes to carry out their trade, lived on the earnings of prostitution. [111] The selling of sexual services was criminalised[112] though this was later repealed.[113] The Immorality Ordinance 46 of 1903 outlawed sexual intercourse on racial grounds.[114]

Prostitution in the British territories seemed not to have been an offence as long it transpired in private and did not occur between the races. The Immorality Ordinance of Transvaal,[115] and the Criminal Law Amendment Act in Natal,[116] in a racial undertone, outlawed copulation between a white woman and a 'native' man. The act of soliciting was similarly outlawed in the Cape.[117] In the Orange-State,[118] it was also a crime for a white person to prostitute herself with a native. The Police Offences Act 27 of 1882 punished, by either a payment of fine or incarceration, any prostitute who solicited in public. Such offenders were liable on conviction to pay a fine of £2 or alternatively suffer 30 days' imprisonment with hard labour, but then the amended Police Offences Act 22 of 1898 increased the penalty to £5.[119]

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106 Police Offences Amendment Act 44 of 1898; s 34 of the Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902. See also the Morality Act 36 of 1902 which criminalised relationships between black males and white female prostitutes.

107 Thusi 2015 *Fordham Int LJ* 223.

108 Section 2 of Law 11 of 1899.

109 Sections 1, 9 of Law 11 of 1899.

110 Section 3(a) of the Police Offences Amendment Act 44 of 1898 and s 2(g) of Law 11 of 1899. Section 21(1)(a) of Ordinance 46 of 1903 specifically stated: "Every *male* person who (a) knowingly lives wholly or in part on the earnings of prostitution ... shall be guilty of an offence" (my emphasis).

111 *Seligman v R* 1908 TS 390 393. Similar conclusions were drawn in *Lawrence v R* 1908 TS 716; *Lindestein v R* 1908 TS 430; *R v Roothman* 1921 AD 298; and *R v Scholtz* 1942 CPD 119.

112 Section 4 of Law 11 of 1899.

113 Immorality Ordinance 46 of 1903.

114 Sections 19(1) and (2) of Immorality Ordinance 46 of 1903.

115 Sections 19(1) and (2) of Immorality Ordinance 46 of 1903.

116 Section 1631 of 1903.

117 The Police Offences Amendment Act 44 of 1898.

118 Section 14 of the Suppression of Brothels and Immorality Ordinance 11 of 1903.

119 Thusi 2015 *Fordham Int LJ* 222-223.

Under British occupation, deviant sexual behaviour was tolerated, and only the activities of males (pimps, procurers) involved in prostitution were criminalised. Sex work was, however, still regulated along racial lines. In the following sub-paragraph, it will be investigated whether British policies concerning prostitution continued along similar lines in the period post-1910.

4.2.4 Prostitution and prostitution laws as from 1910

In 1910, South Africa became a British colony[120] when the Union of South Africa was formed, comprising of the above-mentioned fragmented four provinces in South Africa.[121] The legislative authority in the Union became a full subordinate of the Westminster Parliament.[122] Henceforth, the law of the Union was enacted in the name of Regina (the Queen) or Rex (the King) of England.

As a moral vice, sex work in the Union continued to be regulated alongside racial lines. Sexual transgressions were either founded on extra-marital sex, miscegenation (inter-racial sexual relations), rape, procuration as well as promiscuity, and individual acts which tended to promote vagrancy or solicitation in public for sexual favours to the disruption of peace of the public.[123] Sex workers were seen as problematic as they posed a public nuisance.

Common prostitutes who engaged in vagrancy as well as wandering in open public places or night walking in order to solicit for sexual favours were a nuisance to people's peace and, therefore, committed an offence.[124] The former provinces' laws[125] which were carried over into the Union also punished those who facilitated acts of prostitution like pimping or managing a brothel.[126] Brothel keepers who

120 Dugard et al *Dugard's international law* 15.
121 Dugard et al *Dugard's international law: A South African perspective* 17.
122 Colonial Laws Validity Act 1865 (28 & 29 Vict C 63).
123 Christiansen 2000 *NYU J of Int Law and Politics* 7.
124 Act 2 of 1911 of the Union: "Any common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers". See also Thusi 2015 *Fordham Int LJ* 229-230.
125 E.g., the Cape Betting Houses, Gaming and Brothels Suppression Act 36 of 1902; the Lotteries Prohibition Act 9 of 1889. See Monnye *Towards the regulation of interactive gambling* 38.
126 Van Heyningen *Public health and society in Cape Town 1800-1910* 400 states that "prostitutes were never seen as contaminating agents, they were passive; more sinned against tan sinning; it was men who profited from their trade. The pimps, procurers and the landlords of the brothels were seen as responsible for the fall of the women and therefore ought to be punished by the Betting laws".

knowingly permitted pimps or prostitutes to frequent such houses of disorder for prostitution purposes or knowingly allowed prostitution or procuration to be carried on in such premises, could be found guilty of an offence.[127] During the early periods of the Union, prostitution law was so skewed against female sex workers such that courts could not convict a man on charges related to prostitution unless the prostitute corroborated the evidence.[128]

Statutory sexual immorality, which was punishable, still lay in the sexual intercourse other than between the same races.[129] In this regard, black males who fraternised with white female sex workers presented a threat to society:

> What turned their worries into panic, however, was the knowledge that some of these white women slept with African men. In response, the legislature quickly passed a series of bills to curb prostitution, even organizing a special 'Morality Police' to fight the scourge.[130]

This "black peril"[131] resulted in 19 associations being brought together "first of all as a Black Peril Committee"[132] in early 1911. The Colonisers were so outraged by these morally repugnant interracial sexual relationships, that these encounters were criminalised:

> The arrival from the late 1890s in South Africa's urban centres of large numbers of European prostitutes, who, it was feared, were very indiscriminate in the disposal of their favours. After the South African War, a spate of laws was introduced criminalising their entertaining black clients. In the Cape, the law was limited to punishing white prostitutes who accepted 'aboriginal natives' as clients, leaving the clients themselves unscathed. In the Transvaal, Natal and Rhodesia, however, legislation was much more stringent, prohibiting all sexual contact between black men (including 'coloureds') and white women, whether for gain or not, and imposing heavy penalties on both black men and white women in such relationships.[133]

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127 Act 41 of 1911: "Any person who, being the keeper or having the management of any place of public resort, shall (1) knowingly permit pimps or prostitutes to frequent such place; or (2) knowingly suffer prostitution, or procuration for the purposes of prostitution, to be carried on, in or about such place ... shall be liable on conviction..."; Thusi 2015 *Fordham Int LJ* 230.

128 *R v Weinberg* 1916 OPD 653; *R v Christo* 1917 OPD 420. From these case law, it is evidenced that prostitutes' testimonies were not accepted if not corroborated, as they were perceived as unreliable and untrustworthy. See also Thusi 2015 *Fordham Int LJ* 230.

129 Sections 1, 2 of the Immorality Act, 1927; s 16 of the Immorality Act, 1957. Also see Torres *Imagining intimacy beyond boundaries* 9.

130 Trotter 2008 *History Compass* 679.

131 Thusi 2015 *Fordham Int LJ* 226-227.

132 Shear 1996 *Gender and History* 396.

133 Keegan 2001 *J of South African Studies* 465-466.

Several laws were introduced to address such non-discriminate sex work, and the immigration of European prostitutes to South Africa was prohibited by the Union Regulation Act 22 of 1913 (Admission of Persons to the Union Regulation Act), which outlawed the entry of "any prostitute, or any person, male or female, who lives or has lived on ... any part of the earnings of prostitution or who procures or has procured women for immoral purposes".[134]

The sexual fitness of persons, especially active common prostitutes, to the good of the public security also continued to be racially governed by the consolidated Union Public Health Act.[135] Any person, particularly a common prostitute, who while knowing that they suffer from venereal disease, and intentionally or negligently infected another person, and would be guilty of an offence.[136] The minister in charge of public health or the chief health officer who reasonably believed that venereal disease was prevalent amongst the inhabitants of a certain locality or premises, presumably brothels; such a public official could issue an order of sexual screening by medical practitioners.[137] Those who were reasonably believed to suffer from venereal diseases would be required to undergo treatment at designated hospitals until cured so as to ensure the health and safety of their sexual intimates; the failure to comply was an offence punishable by incarceration in hospitals.[138] Under the Public Health Act of 1919, individuals selling or purchasing sexual services never broke the law as long as they observed the health guidelines. The Union legislature, following English law, repealed the humiliating and degrading Contagious Diseases Act in 1919, and enacted legislation that regulated carnal knowledge or any lewd behaviour with the potential of inciting or arousing sexual drive and temptation.[139]

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134 Union Regulation Act 22 of 1913 (Admission of Persons to the Union Regulation Act). Also known as the Immigration Regulation Act of 1913.

135 Act 39 of 1919. This Act came in to force on 1 January 1920, and was repealed by s 63(1)(a) of the Health Act 63 of 1977. See Coovadia et al 2009 *Lancet* 825.

136 Section 59 of the Public Health Act 39 of 1919.

137 Section 61 of the Public Health Act 39 of 1919.

138 Sections 54, 58, 60 of the Public Health Act 39 of 1919.

139 The Girls' and Mentally Defective Women Protection Act 3 of 1916; the Immorality Act 23 of 1927. See also the Immorality Amendment Act 21 of 1950; the General Amendment Act 62 of 1955; the Immorality Act 23 of 1957 (renamed the Sexual Offences Act 23 of 1957). The Republic of South Africa's current Sexual Offences Act is still premised on this Act, which is a further amendment of the Immorality Act.

In 1921, South Africa had become party to the Convention on the Suppression of the Traffic in Women and Children[140] which prohibited the trade in prostitution as well as any types of forced labour. The Convention called upon members states to investigate and punish people involved in the procuration or trafficking of children for sexual immorality.[141] As a member state to the Convention, the jurisdiction legislated laws prohibiting persons to trade in the prostitution of other persons. The Immorality Act of 1927,[142] the Immorality Act 23 of 1957,[143] and the Sexual Offences Act of 1957 all outlawed illicit carnal knowledge, procuration for the purpose of illicit carnal knowledge, and knowingly permitting one's premises to be used for the purposes of illicit carnal knowledge.[144] It was an offence to procure a woman or permit one's own house to be used for purposes of committing illicit carnal intercourse.[145] Further developments of the law on sexually related matters led to the criminalisation of knowingly living on the earnings of prostitution.[146]

Criminalisation illicit carnal intercourse was in keeping with the English common law in that lawful sex was upon a voluntary union between one man and one woman in the exclusion of others.[147] Within the English-law jurisdictions where polygamy was practised as a norm, such a marriage was not considered to be one as understood in Christendom.[148] Marriage called for chastity before nuptials and conjugal fidelity.[149] Opponents of prostitution argued the conduct to be a threat to the family unit whereas proponents argued it was a therapy to the marriage.[150]

In 1928, solicitation in public for the purposes of prostitution of others became a crime.[151] The South African Act of 1928 provided in section 27 that "loitering or being

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140 Convention for the Suppression of the Traffic in Women and Children, 1921.

141 Article 2 of the Convention for the Suppression of the Traffic in Women and Children, 1921. The Union of South Africa, as a colony of the UK, was bound by the Convention of Suppression of White Slave Traffic, 1904 where Art 1 called upon each state to act against the procuration of women or girls for debauchery in foreign countries.

142 That is sex other than between a husband and a wife; see s 7 of the Immorality Act, 1927. This Act completely prohibited any relationships between blacks and whites, whether for reward or not.

143 The Immorality Act 23 of 1957 (hereinafter Immorality Act 1957).

144 See above footnotes 7-20.

145 Sections 3, 4 of the Immorality Act, 1927.

146 Section 20(1)(a) of the Immorality Act 1957.

147 *Hyde v Hyde* [1866] LR 1 P & D 130.

148 Izunwa 2015 *Int J of Humanities Social Sciences and Education* 38.

149 Izunwa 2015 *Int J of Humanities Social Sciences and Education* 41.

150 Baker 2012 *UCL Journal of Law and Jurisprudence* 94, 100.

151 South African Act 31 of 1928.

in any street or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers" constituted an offence and was punishable by fine (civil penalties).[152] It is apparent that during this period, prostitution was still only policed as a public nuisance. However, the running of a brothel was subject to six months' hard labour.[153]

The Union (before the entrenchment of apartheid) did not *per se* prohibit prostitution as a free choice made by an individual but regulated prostitution. These laws concerned controlling sex workers not being public nuisances or hosts for contagions, and specifically restricting any inter-racial relationships. The apartheid-produced legislation on prostitution will be addressed hereafter.

4.2.5 The apartheid regime and prostitution

When National Party came to power in 1948, the political exclusion, economic marginalisation, social distancing, and racial inequities from the previous decades were heightened.[154] Following the example set by the British occupiers, the institutionalised racial system hierarchized Europeans at the top, then Indians and Coloureds, and at the bottom the Blacks. This racial stratification determined where a person could live or work, receive education, as well as to whom government resources are allocated to.

The National Party parliamentary governance system made repressive laws, for example, exacerbating the morality laws from the previous era which placed non-whites in harsh economic positions. Sexual relations and sex work across racial lines was still an important moral priority in this period,[155] and by the 1950s, courts started interrogating the inconsistency in the enforcement of prostitution laws in that white clients were dealt with more severely than sex workers.[156] For example, in *R v*,[157] the lower court convicted an accused for soliciting a coloured sex worker. The

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152 South African Act 31 of 1928 s 27.
153 Thusi 2015 *Fordham Int LJ* 231.
154 Coovadia et al 2009 *Lancet* 819.
155 This can already be seen in that the first Immorality Act (1927) outlawed any sexual relations between white and black persons, while the amended Immorality Act 21 of 1950 prohibited all interracial intercourse between Whites (Europeans) and all non-whites (non-Europeans).
156 Thusi 2015 *Fordham Int LJ* 232.
157 *R v V* 1951 (2) SA 178 (EPD.

appellate court reversed the conviction and held that the law was intended to punish pimps or touts who, for gain, facilitated the sale and purchase of sexual services. However, the court opined that the conduct of a prostitute who solicited in public (even when the soliciting occurred in a street where no person was publicly annoyed) was not less immoral than that a pimp, though the prostitute is fined only five pounds for soliciting, and the client is held liable.[158]

It was also during this period of white minority rule that the Westminster-styled legislature criminalised the conduct of those who traded in their own sexuality[159] with the enactment of the Immorality Act, 1957 (later renamed the Sexual Offences Act of 1957).[160] The Immorality Act, 1957 repealed some provincial and union laws that dealt with sexual immorality.[161] Sexual relations remained determinatively demarcated between whites as against non-whites, unless and until the contrary was proved.[162] The Immorality Act, 1957, in particular, punished those persons who ran or benefited financially or materially from the use of brothels or inmates of the brothels.[163] Procurers for the purposes of unlawful sex or prostitution;[164] those who publicly solicited, enticed, or importuned for sexual immorality;[165] or any person residing in a brothel or habitually lived in the company of prostitutes and had no visible means of livelihood, or received any consideration for the commission of sexual indecency by a person with another were also penalised.[166] The most severe

158 *R v V* 1951 (2) SA 178 (EPD).

159 See section 20(1A)*(a)* of the Sexual Offences Act that came to force in 1988.

160 The Sexual Offences Act, 1957 is based on the Immorality Act 23 of 1957.

161 As per the schedule of the Immorality Act, 1957. Repealed statutes were: The Immorality Act of 1927; the Immorality Amendment Act 21 of 1950; the Criminal Law Amendment Act 25 of 1893 of the Cape Province; the Betting Houses, the Gaming Houses, and the Brothels Suppression Act 46 of 1903 of Cape Province; the Immorality Ordinance 46 of 1903 of Transvaal; the Suppression of Brothels and Immorality Ordinance 11 of 1903 of Orange Free State; the Suppression of Brothels and Immorality Amendment Act 19 of Orange Free State; and the Criminal Law Amendment Act 11 of 1903 of Natal Province. The Union laws repealed were: The Girls' and Mentality Defective Women Protection Act 3 of 1906; the Immorality Act 5 of 1927; the Immorality Amendment Act 21 of 1950; and s 15 of the General Law Amendment Act 62 of 1955.

162 Section 21(2) of the Immorality Act, 1957.

163 Sections 2, 3 of the Immorality Act, 1957. This crime was subject to imprisonment with compulsory labour for a period not exceeding three years (as per s 22 of the Immorality Act, 1957).

164 Section 10 of the Immorality Act, 1957. Section 22 of the Immorality Act, 1957 prescribes compulsory labour for a period not exceeding two years, as well as a whipping not exceeding ten strokes for procurers.

165 Section 19(a) of the Immorality Act, 1957.

166 Sections 20(1), 21(3) of the Immorality Act, 1957.

penalty in this Act was reserved for brothel keepers who allowed unlawful carnal intercourse to take place between "a white female and a coloured male or between a coloured female and a white male".[167] A period not exceeding seven years was prescribed for such a transgression.

The selling and buying of sexual services between the principal or primary actors were not policed so long as it occurred discreetly in private, that is, not in the view of the public. Yet again, sex work and sex workers were viewed as infamy, and anyone who sexually abused sex workers were not severely punished. So unfairly discriminated against and dishonoured were prostitutes that the raping of a prostitute, though a heinous act, would receive a less severe punishment than the raping of a woman of good moral character.[168] Prostitutes were thus still regarded as disreputable and untrustworthy members of the society.

Notwithstanding this attitude, it seems that there has always been opposition to the prostitution legislation, and courts have also questioned some of the provisions in these laws. For example, in 1975, the Transvaal Provincial Division (as per Trengove J and IWB De Villiers AJ) had to determine whether prostitutes who had traded their services in a brothel knowingly received money taken from a brothel, contrary to the Immorality Act of 1957.[169] The court stated that:

> The prostitute who earns money from the man with whom she has had intercourse in the brothel, or the woman who accepts money from the man upon whom she has performed some lewd or indecent act, such as pelvic massage, does not receive 'moneys taken in a brothel' in the sense contemplated in section 3*(c)*. These moneys only become tainted and acquire the quality of being 'moneys taken in a brothel' after the prostitute or the other woman has taken the moneys from her client. But if these moneys are or any share thereof were to be paid over to some third party, the latter would be a person receiving 'moneys taken in a brothel' within the meaning of section 3*(c)*.[170]

As the law only prohibited the hiring out of rooms and receiving the proceeds thereof for the purposes of prostitution of others, the prostitutes were not running

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167 Sections 16, 22 of the Immorality Act, 1957. According to s 1 of this Act, a "coloured person" means any person other than a white person.

168 *R v Sibande* 1958 (3) SA 1 (A) para B; *R v Dikant* 1948 (1) SA 693 (OPD); Thusi 2015 *Fordham Int LJ* 235.

169 The Immorality Act of 1957 s 3(c).

170 *S v F* 1975 (3) SA 167 (TBD) 167 C-E.

the brothel and receiving monies as a result of the business, they merely utilised the brothel for their own prostitution.[171]

Supporters of the decriminalisation of sex work has always argued that prostitution is here to stay, and it would be better if the conduct was legalised. For example, in 1977, a Cape medical officer opined that in legalising prostitution authorities would be enabled to more effectively combat venereal diseases, as well as evils such as pimping.[172] It was further contended by others, which views are highly supported, that no advanced society had ever managed to eradicate prostitution.[173]

In the 1980s, the offence of living on the earnings of prostitution was once again considered in the courts. On 16 August 1985, three undercover members of the South African Police Force visited 'Hennops Pride', an escort agency in the Pretoria district, and engaged the sexual services for pay of three female members for a night's entertainment.[174] The three women were then arrested and later charged in a Pretoria Magistrate's Court in contravention of section 20(1)(a) of the Immorality Act, 1957, which outlawed earning a living from the proceeds of prostitution.[175] The accused pleaded not guilty. The defence's case was that section 20(1)(a) was not directed at the prostitutes themselves but directed to persons (pimps) who parasitically lived on the earnings derived from prostitution. The Magistrate's Court found the trio guilty as charged and convicted them.

On appeal, the Transvaal Provincial Division of the High Court (as per Spoelstra J and Roux J) set aside the appellant's conviction and the sentence.[176] A further appeal by the state to the Supreme Court was lodged to determine whether the sale of sexual services by a prostitute constituted a recognised offence.[177] The Supreme

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171 *S v F* 1975 (3) SA 167 (TBD) 172 A-C. See also *R v Richards* 1906 TS 700 702; *R v Meczyk and Rosenberg* 1910 TPD 1179; and *R v Tisman* 1935 TPD 103 104. As stated by Curlewis J in *R v Louw and Woolf* 1920 TPD 48 51: "I doubt very much whether that section refers to the woman herself who uses the room and sells her body for the money she receives from the man who has connection with her".

172 Thusi 2015 *Fordham Int LJ* 236.

173 As per Professor Hilton Watts in 1977, as quoted in Thusi 2015 *Fordham Int LJ* 236.

174 Section 20(1)(a) of the Immorality Act, 1957; *S v Horn* 1988 SA 46 (AD) para 1.

175 *S v Horn* 1988 SA 46 (AD) para 2. The other two accused's convictions and sentences were also set aside in terms of s 304(4) of the Criminal Procedure Act 51 of 1977.

176 *S v Horn* 1988 SA 46 (AD) para 3.

177 *S v Horn* 1988 SA 46 (AD) paras 3-4. The state appealed in terms of s 311(1) of the Criminal Procedure Act 55 of 1977.

Court held that the proper interpretation of section 20(1)(a) absolved a prostitute, the provider of sexual services, from criminal liability.[178] The court held that: "The words 'living on the earnings of prostitution' [in the section] aptly describe someone, other than the prostitute, who derives a livelihood from her trade".[179] A prostitute, though paid for rendering sexual services, was not found to live on the incomes of prostitution since section 20(1)(a) was intended to punish those who created an enabling environment for prostitution to take place, and those who were paid for creating a favourable environment for prostitution to take place, for example, procurers, or those who enable communication or provide rooms. From this case, it can be concluded that prostitution *per se* was not an offence in 1988, as the conduct was not explicitly criminalised. The law only sought to punish third parties who, in return of rewards, enabled commercial sex to be actualised.

As a response to this decision, the Immorality Amendment Act 2 of 1988 was introduced in order to unequivocally outlaw the sale and purchase of sexual services by the inclusion of section 20(1A)*(a)*.[180] This Act still considered it a crime for third parties to earn their gains by exploiting the prostitution of others.[181] Any other person who ought to have foreseen that lewdness or unlawful carnal intercourse for reward may take place, and went ahead to direct clients to communicate with, or reach or locate prostitutes, and was paid for the assistance asked for, such a person would be criminally liable.[182] *Dolus eventualis*[183] was accepted as sufficient culpability in such cases.

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178 *S v Horn* [1988] ZASCA 46.

179 *S v Horn* 1988 SA 46 (AD) para 4. The court relied on the judgment in *Seligman v R* 1908 TS 390 393 where Wessels J held that s 21(1)(a) of the Immorality Ordinance 46 of 1903 (which was identically worded to the current section): "The section refers to anybody who takes money from a prostitute for the purpose of furthering prostitution. That, after all, is the test of the whole question – was the money paid by the prostitute for the purpose of furthering her trade, and purpose of aiding and abetting her in her trade and helping her to carry it on? If he receives money from a prostitute for that purpose, he must be said to live on the proceeds of prostitution".

180 Section 20(1A)*(a)* of the Sexual Offences Act, 1957 criminalises the act of any person 18 years or older who committed unlawful carnal intercourse or committed any act of indecency with any other person for a reward. This section will be discussed in depth in paras 4.3.1 and 4.3.3 below.

181 Sections 2, 3, 20(1)(a) and 20(1)(c) of Sexual Offences Act, 1957.

182 Section 12A of the Sexual Offences Act, 1957.

183 Snyman *Criminal law* 178; Awa *The interpretation and application of dolus eventualis in South African criminal law* 18; Reddy *Understanding the legal principles of dolus eventualis* 11.

Section 20(1A)*(a)* had one anomaly, namely the words "any person".[184] Technically, this meant even a minor would be criminally liable who contravenes the legislation, even though the common law presumes such a child not to be guilty. The controversy of the words "any person" in section 20(1A)*(a)* was cured by an amendment[185] so as to limit "any person" to "any person 18 years or older".[186] A further amendment to the sexual offences law in 2007 explicitly criminalised the client in commercialised sexual acts.[187] This Act proscribed sexual acts which included either sexual penetration or sexual violation, which does not involve penetration but any contact of sexual organs of a person with any other part of a body of another person.[188]

From the above analysis, prostitution in South Africa has progressed from a non-regulatory regime during the pre-colonial period, to health-based regulation, where prostitutes free from infection could still perform sex work subject to the law, and lastly, to the criminalisation regime where of all prostitution-related activities were legally banned. South Africa's criminalisation of prostitution of others by others was founded in international law,[189] and intends to criminalise third parties from capitalising on an opportunistic weakness of a person, and to make a gain by merchandising that person to prostitution. The following paragraphs will consider the legislation, policy framework and jurisprudence on prostitution after the enactment and implementation of the Interim Constitution[190] and the current

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184 See footnote 180 above.

185 Section 68 of the Sexual Offences Act 2007.

186 s (1A): "Any person 18 years or older who – *(a)* has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or *(b)* in public commits any act of indecency with another person, shall be guilty of an offence". Compare to footnote 180 above.

187 Section 11 of the Sexual Offences Act 2007 criminalises a client who intentionally and unlawfully engages the sexual services of a person aged 18 years or more for pay to that person or a third party, irrespective of whether the sexual act took place or not. However, as the court in *Jordan* also points out: "...a man or woman who pays for sex is guilty of criminal conduct and liable to the same punishment as the prostitute. At common law, the customer is a *socius criminis* and also commits an offence under section 18 of the Riotous Assemblies Act. In terms of the Riotous Assemblies Act, the customer is liable to the same punishment to which the prostitute is liable". See *Jordan* para [11].

188 Section 1 of the Sexual Offences Act 2007 defines sexual acts to include sexual penetration or sexual violation (where there is no penetration but that sexual organs of person are put into contact with another part of a body of another person).

189 Articles 1-4 of the Convention for the Suppression of the Traffic in Persons and Prostitution of Others, which South Africa ratified in 1951. See Najemy 2010 *Washington Univ Global Studies LR* 179.

190 Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter the Interim Constitution).

Constitution.

4.3 The legal and policy framework on prostitution during the constitution era

From 1993 onwards, the South African political landscape has changed considerably. Democracy made the Constitution[191] the supreme law of the land and brought to an end parliamentary supremacy. Under the parliamentary system, a parliament can enact any law as it thinks fit; courts must merely read and apply a statute; case law can be overruled; and the validity of a statute cannot be challenged.[192] This was the case in the pre-democracy parliament era in South Africa.[193] In the post-parliamentary constitutional era,[194] a Bill of Rights was entrenched and became the cornerstone of democracy in South Africa. The Bill of Rights applies to all law, and binds the legislature, the executive, judiciary, organs of state as well as natural persons. Courts have now acquired the power to test the validity of any law or conduct having any force of law against the Constitution. Courts could declare unconstitutional any such law which is inconsistent with Bill of Rights to that extent.

With the introduction of the Interim Constitution on 27 April 1994, all South Africans attained equality before the law,[195] as well as the right to life;[196] human dignity;[197] the right to security of person from violence;[198] the right not to be subjected to servitude and forced labour;[199] the right to privacy;[200] the right to freedom of expression;[201] the freedom to engage in economic activity;[202] and the right to fair

191 The Interim Constitution; the Constitution, 1996.
192 Abbot, Pendlebury and Wardman *Business law* 644.
193 Currie and De Waal *The Bill of Rights handbook* 3.
194 Sections 7-35 of the Interim Constitution; ss 7-39 of the Constitution.
195 Section 8 of the Interim Constitution. Everyone in the country is entitled to equal treatment under the law regardless of race, gender, culture, ethnicity, religion, disability, or other characteristics, without privilege, discrimination or bias.
196 Section 9 of the Interim Constitution.
197 Section 10 of the Interim Constitution.
198 Section 11 of the Interim Constitution.
199 Section 12 of the Interim Constitution.
200 Section 13 of the Interim Constitution.
201 Section 15 of the Interim Constitution.
202 Section 26 of the Interim Constitution.

labour practices.[203] A sex worker, who was regarded as a tarnished *persona non grata* by the previous regimes, became a dignified bearer of fundamental human rights similar to every other person, and became equal before the law and equally protected by the law.[204] Key to these fundamental rights on the part of the sex work industry were the entrenched freedoms of privacy, expression, and the right to freely engage in any economic activity and pursue personally chosen livelihoods. Courts could test the validity of any conduct that would be a threat or infringement to any of the protected rights and possibly give appropriate relief, including a declaration.[205] However, it seems that individuals pursuing sex work remained law breakers.

The final Constitution[206] came into force in February 1997.[207] This transformative[208] Constitution was premised on the recognition of past injustices, peoples' diversity, the healing of past divisions, and establishing a society based on democratic values, social justice, and fundamental human rights.[209] The preamble of the Constitution further envisioned the improvement of citizens' lives by freeing individual potentials. Courts retained the power to test the validity of any established public policies or personal mores, having the force of the law.[210] The final Constitution established a democratic and open society founded on entrenched human rights and freedoms, non-racialism, non-sexism and the supremacy of the Constitution and the rule of law.[211] The Republic became founded on universal adult suffrage, multi-parties, responsiveness, and openness.[212]

The peoples ('everyone') of the Republic of South Africans acquired the sovereign power and authority that was exercised on their behalf by the elected representatives in National Assembly to ensure government by the people.[213]

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203 Section 27 of the Interim Constitution.
204 In *S v Makwanyane* (3) SA 391 (CC), it was held that dignity vested in everyone.
205 Section 7(4) of the Interim Constitution.
206 The supreme law of the Republic, see s 1(c) of the Constitution.
207 Hassen and Miller *Creating the birth certificate of a new South Africa* 142.
208 Kibet and Fombad 2017 *AHRLJ* 340.
209 See s 1(b) of the Constitution where non-racialism and non-sexism were hindrances in the expression of human sexuality.
210 Section 172(1)(a): Courts must declare any law that is inconsistent with Constitution invalid to the extent of its inconsistency.
211 Section 1 of the Constitution.
212 Section 1(d) of the Constitution.
213 Vide s 42(3) of the Constitution, the elected representatives in the National Assembly can create a national forum for public participation on matters of governance, pass legislation, choose the president and check on the executive.

'Everyone',[214] including the sex workers, became equally protected by the law; for example, no one could unfairly discriminate against another on the basis of sex or sexual orientation.[215] Sex workers were equally entitled to dignity;[216] the right to life;[217] the right to freedom from physical and psychological violations; the right to security in and control over their own bodies;[218] protection against enslavement, servitude or forced labour;[219] protection of one's privacy of communication from intrusion;[220] the right to the freedom of expression which includes the right to artistic creativity;[221] the right to choose one's own trade, occupation or profession which could only be restricted by a law;[222] and the right to fair labour practices.[223] The state became bound to respect, protect, promote, and fulfil the rights in the Bill of Rights.[224]

It could be argued that sex work as a form of trade, occupation or profession became entrenched in the Constitution, and could only be limited by law.[225] Any regulation or restriction of a right as entrenched in the Constitution must pass the test of being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[226] In *S v Makwanyane*, it was correctly stated that a limitation of a right must not destroy the essentials of a protected right.[227] In curtailing a right, the nature of the right, the importance of the purpose of the limitation, the nature and extent of limitation, the relation between the limitation and purpose, and a less restrictive means to achieve the purposes must be weighed.[228] In this regard, it is submitted that a law such as the Sexual Offences Act, 1957 which prohibits self-determining, free adults to trade in their own sexuality is intrusive, and denies those

214 In *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 11, it held that 'everyone' was a term of general import and of unrestricted meaning.
215 Section 9 of the Constitution.
216 Section 10 of the Constitution.
217 Section 11 of the Constitution.
218 Section 12(2)(b) of the Constitution.
219 Section 13 of the Constitution.
220 Section 14 of the Constitution.
221 Section 16(1)(c) of the Constitution.
222 Section 22 of the Constitution.
223 Section 23 of the Constitution.
224 Section 7(2), (3) of the Constitution.
225 Section 22 of the Constitution.
226 Section 36 of the Constitution.
227 *S v Makwanyane* (1995) 3 SA 39 (CC).
228 Section 36(1) of the Constitution.

individuals the right to engage in economic activities of their choice, and is unfairly discriminative against them.

The current legal framework prohibiting sex work in South Africa includes municipal by-laws in the form of general and prostitution-specific provisions. These by-laws ban behaviour such as soliciting which is regarded as a nuisance in public places. For example, in Kwa-Zulu Natal, the Nuisances and Behaviour in Public Places By-law, 2015[229] for eThekwini provides for "measures for preventing, minimising or managing public nuisances; to prohibit certain activities or conduct in public places".[230] This by-law, similarly to other provinces' municipal by-laws, also apply to prohibiting the provision of sexual acts for reward where the provision of these acts is conducted from the street.[231] In Cape Town, the by-law relating to streets, public places and the prevention of nuisances currently specifically prohibits the performing of sexual acts in a public place;[232] appearing in the nude or exposing one's genitalia[233] in certain circumstances, and soliciting or importuning any person for the purpose of exchanging sexual acts for reward or immorality.[234] In the Gauteng Province, the City of Johannesburg Metropolitan Municipality has

229 Kwa-Zulu Natal Provincial Government "Nuisances and Behaviour in Public Places By-law, 2015" GN 1490 (11 September 2015).

230 Kwa-Zulu Natal Provincial Government "Nuisances and Behaviour in Public Places By-law, 2015" GN 1490 (11 September 2015) s 3(a). A nuisance is broadly defined in s 1 as any conduct or behaviour by any person which causes "annoyance, inconvenience or discomfort to the public or to any person".

231 Kwa-Zulu Natal Provincial Government "Nuisances and Behaviour in Public Places By-law, 2015" GN 1490 (11 September 2015) s 5(2)(k) specifically forbids a person to "solicit or importune any person for the purpose of prostitution, human trafficking or other illegal business". Under s 22, contravention of any sections of this by-law will result in a fine of an amount not exceeding R40 000 or imprisonment for a period not exceeding 2 years, or to both such fine and imprisonment. In terms of the Western Cape Provincial Government "Standard By-Law relating to Streets" GN 562 (2 October 1987), s 26 provides as follows: "(2) No person shall - . . .(f) solicit or importune any person for the purpose of prostitution or immorality; . . . in a street or public place." Smaller municipalities, such as the Drakenstein Municipality, furthermore have similar embargos; e.g. s 26(i) of the Drakenstein Municipality by-law no 15/2007 "Streets" proscribes any person who solicits or importunes any person for the purpose of prostitution or immorality in any street or in public.

232 Western Cape Provincial Government "Standard By-Law relating to Streets" GN 562 (2 October 1987), s 2(3)(f). See also Kwa-Zulu Natal Provincial Government "Nuisances and Behaviour in Public Places By-law, 2015" GN 1490 (11 September 2015) s 5(2)(g).

233 Western Cape Provincial Government "Standard By-Law relating to Streets" GN 562 (2 October 1987), s 2(3)(g). See also Kwa-Zulu Natal Provincial Government "Nuisances and Behaviour in Public Places By-law, 2015" GN 1490 (11 September 2015) s 5(2)(h).

234 Western Cape Provincial Government "Standard By-Law relating to Streets" GN 562 (2 October 1987), s 2(3)(j). See also Kwa-Zulu Natal Provincial Government "Nuisances and Behaviour in Public Places By-law, 2015" GN 1490 (11 September 2015) s 5(2)(k).

legislated the Public Road and Miscellaneous By-law, 2004, which fundamentally contains similar provisions to the above-mentioned regulations in Cape Town and eThekwini.[235] Another reference to prostitution in the Gauteng by-laws is found in section 88 of the Gauteng Gambling Act 4 of 1995 which provides that any offence committed on or near gambling premises which includes acts of prostitution or solicitation, will be regarded as being committed under aggravating circumstances.[236] Certain adult entertainment facilities, such as escort services, exotic dancing, and masseuses/masseurs, are required by law[237] to obtain business trading licences to operate, and also to comply with certain health and safety regulations. All these bylaws in the form of measures relating to causing nuisances and business licenses – which are very reminiscent of colonial and apartheid-era legislation – are discriminatory in nature, open to abuse by state structures, and serve only as a form of control of those persons perceived as a threat to society: sex workers.

In the South African context, the sex work industry consists of a broad category of people which includes adult entertainers, patrons of revue bars and brothels, pimps, actual merchants, and clients of commercialised sexual services. The sexual services provided may consist of penetrative or non-penetrative sex acts.[238] A prostitute in the South African perspective is generally confined to being the seller of sexual services, while managers or procurers are delineated as persons who make opportunistic or advantageous gains out of the prostitution of prostitutes.[239]

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235 Gauteng Provincial Government "Public Road and Miscellaneous By-law, 2004" GN 179 (21 May 2004) s 13 proscribes any loitering on public roads; s 15 addresses public decency and outlaws in s 15(1) any person who is "unclothed or indecently clothed on any public road"; s 15(2) criminalises any person who solicits another person in a public road to commit an indecent act.

236 Gauteng Gambling Act 4 of 1995 88(2)(b): "An offence shall be deemed to have been committed under aggravating circumstances if it is proved that, at the time the offence was committed – ... (iii) prostitution, or the solicitation of clients for the purposes of prostitution took place or lewd or indecent acts were permitted on such premises; or (iv) the premises were within a distance of 500 metres of other premises where persons were available for prostitution or the commission of lewd or indecent acts against payment".

237 Schedule 1 of the Business Act 71 of 1991; and various municipal bylaws.

238 Some clients merely want to talk to prostitutes. See Woods https://thoughtcatalog.com/lisa-woods/2017/05/14-sex-workers-share-their-stories-of-the-clients-who-just-wanted-to-talk/ (Date of use: 20 October 2021). From the interviews, it is clear that such men merely require a good listener who will validate their hopes, aspirations and heartaches. One person remarked that this service is cheaper than that of a psychologist.

239 *Jordan* para 15.

Prostitution-related activities have remained statutorily criminalised up to date despite numerous outcries in public as well as in courts to decriminalise prostitution.[240] As will be demonstrated in the *Kylie*-case, sex workers have met the minimum labour-law threshold of the definition of employees to deserve remuneration upon offering services to their customers.

Below, the constitutional validity of the law criminalising prostitution will be critically examined by way of legislation, case law and jurisprudence. This analysis will include a discussion of sex workers' violated human rights in the criminalisation of prostitution, the labour-law implications of denying sex workers free trade, and others forms of (legitimate) sex work.

4.3.1 The first challenge to the prostitution law: The Jordan case

The crime of selling and purchasing sexual services by the principal players never faced a challenge until the case of *S v Jordan.*[241] On 20 August 1996, Ms Jacob Jordan performed a pelvic massage on an undercover police agent at the cost of R250 in a brothel called 'La Chique' massage parlour in Pretoria. She was charged with contravening section 20(1A)*(a)* of the Sexual Offences Act, 1957, and arraigned in the Magistrate's Court on 11 December 1998. She admitted on all counts but pleaded not guilty stating that section 20(1A)*(a)* was unconstitutional.

In the appeal of *S v Jordan,*[242] the High Court contended that section 20(1A)*(a)* was unconstitutional for it penalised only the merchant (seller) of sexual services but not the customer (buyer).[243] The court further supported the position of Van Dijkhorst J in *S v C*[244] as regards section 20(1A)*(a)* where the assertion that this section only refers to professional prostitutes' acts is rejected. The Constitutional Court[245] declined to confirm the findings in *S v Jordan.*[246] The Constitutional Court stated

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240 See, e.g., the discussions in paras 4.3.1-4.3.5 below.
241 *Jordan* paras [1]-[129]. Also see footnote 23 in Chapter 1.
242 *Jordan* 2002 (1) SA 797 (TPD).
243 *Jordan* para [41]; Burchell and Milton *Principles of criminal law* 630.
244 *S v C* 1992 (1) SACR 174 (W) paras 176F-G held, correctly, that the wording of section 20(1A)*(a)* included not only professional prostitutes, but everyone who engage in sexual relations or commit acts of indecency for reward. This may comprise both the novice as well as the hardened streetwalker.
245 *Jordan* para [129].
246 *Jordan* 2002 (1) SA 797 (TPD).

that section 20(1A)*(a)* of the Sexual Offences Act, 1957 did not unfairly discriminate between a female prostitute and a male prostitute.[247] Ngcobo J, writing for the majority court, held that the Sexual Offences Act, 1957 pursued an important and legitimate constitutional purpose of prohibiting commercial sex.[248] The Interim Constitution has, however, never implicitly or explicitly outlawed prostitution.

When determining whether section 20(1A)*(a)* infringed the right to freely engage in economic activity,[249] it is submitted that the majority court replicated the beliefs held by the previous parliamentary supremacy era. It does not seem from the judgment that the Court critically examined any other available legislative choices.[250] The Court equated prostitution to drug abuse, violence, and child trafficking. In fact, the Court did not consider the economic significance of their judgment to the livelihood of prostitutes. The Court did not think that section 20(1A)*(a)* limits the right to freely engage in any meaningful economic activity. Indeed, the proceeds of prostitution would improve prostitutes' quality of life, pay for food, medical care, or for the education of their children, as well as personal development. It is submitted that section 20(1A)*(a)* of the Sexual Offences Act, 1957 unfairly discriminates against prostitutes on the basis of their vocation.[251]

On whether section 20(1A)*(a)* impaired the human dignity of prostitutes, the majority of the Court held the indignity attached to prostitutes (both male and female) arose from the unlawful conduct (the sale of sex) they engaged in.[252] Human dignity, a concept which has its origin in the Roman legal system (*dignitas hominis*) originally meant 'status', that is rank, or position, honour or respect in society.[253] However, later on, *dignitas* referred to the inherent intrinsic worthiness of a human being,

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247 In *Jordan* para [14], a man who pays for sex and a female who receives the payments are equally guilty of an offence. Section 20(1A)*(a)* did not offend s 8(2) of the Interim Constitution.

248 *Jordan* para [5].

249 Section 26 of the Interim Constitution granted an individual the right to freely engage in economic activities but subject to reasonable and justifiable regulations designed to promote and protect a right in an open and democratic society based on freedom and equality. Section 8(2) of the Interim Constitution provided that no one, including sex workers, shall be unfairly discriminated directly or indirectly on such grounds as sexual orientation.

250 *Jordan* para [25].

251 Section 8 of the Interim Constitution.

252 *Jordan* para [16].

253 Rao 2011 *Notre Dame LR* 187; McCrudden 2008 *EJIL* 657.

which was not dependent on status.[254] Dignity has never meant intelligence, achievement, capability or morality.[255]

As an inherent quality in all human beings, human dignity entails the prohibition of all types of inhumane treatment including humiliation or degradation of a person by another. Human dignity requires an assurance of individual choices and conditions for each individual's self-fulfilment, autonomy, self-realisation, and the creation of enabling provisions for each individual to have their essential needs satisfied.[256] The international community has also declared that all human beings, inclusive sex workers, are born free and equal in dignity.[257]

This concept of dignity has also become institutionalised in the democratic South Africa's Constitution.[258] In *Dawood v Minister of Home Affairs*, it was held that human dignity was an aggregate of other rights such as the right to equality, the right not to be punished in a cruel, inhumane or degrading manner, or the right to life, or the right not to be subjected to servitude or forced labour.[259] The Constitutional Court went further to state that the prohibition of unfair discrimination was intended to establish a society in which human beings (including sex workers) would be accorded equal dignity and respect regardless of their membership in a particular group.[260] These rights were again confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Justice,*[261] where it was stated that a law which punished forms of sexual expression degraded and devalued human beings; such

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254 McCrudden 2008 *EJIL* 656, 657; Rao 2011 *Notre Dame LR* 187. Dignity was treated as a right of personality such that the law availed criminal or civil remedies (*actio iniuriarum*) whenever dignity was infringed.

255 Rao 2011 *Notre Dame LR* 196. In *Law v Canada (Minister of Employment and Immigration)* 1 SCR 497 para 51, it is explained that human dignity requires that an individual or a group of persons feel self-respected and have self-worth; and that human dignity is impaired when an individual or groups of persons are marginalised, ignored, or devalued; and that human dignity is enhanced when people receive equal recognition by the law.

256 McCrudden 2008 *EJIL* 686.

257 Article 1 of the UDHR.

258 Section 10 of the Constitution provides that everyone, inclusive of a sex worker, has inherent inalienable dignity and have their dignity respected and protected.

259 *Dawood v Minister of Home Affairs* [2000] 3 SA 936 (CC) para [34]. In *Government of Republic of South Africa v Grootboom and Others* 2000 (10) BHRC 84 (CC) para [23], it is stated that human dignity, freedom and equality are fundamental values in society, and that these values are denied to those who have no food, clothing, shelter; and affording social economic rights to all enable them to enjoy other rights founded in Bill of Rights.

260 *President of Republic of South Africa v Hugo* [1997] (4) SA 1 (CC) paras [41], [91].

261 See footnote 5 in Chapter 1 above.

laws were an invasion to dignity, prevented fair distribution of social goods and services, and the awarding of equal social opportunities.[262]

Indignity may only come in a vertical relationship where power or authority imbalance is misused. Prostitution, like any other free market economy, consists of a horizontal relationship between a supplier and a purchaser. Prostitution is just but an exchange of 'equivalent' valuables. It is clear that section 20(1A)*(a)* infringes the dignity of prostitutes. Prostitutes' social standing or public outlook may diminish when they engage in prostitution but not their dignity. It is, therefore, argued here that a prostitute remains a dignified human being, and engaging in sexual relations for reward does not change this fact:

> …that sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationships namely with their employers, the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but their employers, section 23 of the constitution, which, at its core, protects the dignity of those employment relationship, should also be of application.[263]

However, in the *Jordan*-case, the minority court concurred with the majority court, and held that the dignity of a prostitute was already diminished by her engaging in commercial sex and, therefore, the intent of section 20(1A)*(a)* to incarcerate a prostitute for engaging in sex work did not devalue the dignity of a prostitute.[264] As indicated above, this court erroneously interpreted status and dignity synonymously. Whereas status is a social perception and placement of a person, dignity is not. The status of a person may have some ranking depending on what she does in society, but still dignity is inherent to all persons regardless of their social ranking. Engaging in sex work is not an indignity in itself; one still remains a human being worth of respect as a human being.

The Court further held that section 20(1A)*(a)* did not limit the right to freedom of a person and security.[265] Section 20(1A)*(a)* only punishes persons upon them electing to freely engage in commercial sex, but not if such persons choose to freely engage in indiscriminate non-commercial sexual acts. In such instances, the law does not

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262 *National Coalition* para [28].
263 *Kylie* para [26].
264 *Jordan* para [74].
265 *Jordan* para [75].

provide the person any protection (or security). It may be submitted that the law promotes promiscuity, albeit not at a cost. It is argued that section 20(1A)*(a)* limits the right to freedom of person and security.

The minority court held though that section 20(1A)*(a)* limits the privacy of a prostitute. The right to privacy restricts public interference so long as the discreet private conduct is not physically injurious to any individual in public.[266] Privacy recognises a right to a sphere of exclusion and without interference from outside community.[267] The Court acknowledged that section 20(1A)*(a)* outlawing commercial sex interfered with the personal or private sphere of sexual intercourse.

Lastly, the minority court considered section 20(1A)*(a)* in the light of the right to freely engage in economic activity. Every South African citizen has a right to freely choose their trade, occupation or profession subject only to the regulation by law.[268] The right to work, as Conradie puts it correctly, is to provide labour or services for remuneration, and it has its origin in the person's right of existence and survival.[269] A person's right of existence is arguably the most important of all human rights, and anything that interferes with their means of survival would bring the existence of human beings to an end. Work and its fruits are the means of survival and the safeguard of existence of human beings. South African law defines 'work' as a business, commercial or remunerative activities.[270] The 'economic capacity test'[271] or the 'economic reality test,'[272] has been used to define an employee as a person who is economically depended upon the business to which she renders services to or to whom she dedicates her sole income earning capacity to.[273] The question to

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266 As stated in *National Coalition* para [12]: "in expressing our sexuality, we act consensually and without harming one another".

267 *National Coalition* paras [12], [32].

268 Section 22 of the Constitution.

269 Conradie 2016 *Fundamina* 164.

270 Section 1 of the Immigration Act 13 of 2002.

271 *Niselow v Liberty Life* (1996) 17 ILJ 673 (LAC) 753 F-I.

272 Benson Fischer 1996 *Minnesota J of Law and Inequality* 539.

273 *Bartels v Birmingham* 322 US 126 130 (1947), *United States v Silk* 331 US 704 (1947), *Rutherford Food Corp v McComb* 331 US 772 (1947). See McGregor and Dekker (eds) *Labour Law Rules!* 17, 18. In *Reich v Circle C Inc* 998 F2d 324 (5th Cr 1983), the dancers earned their income from customers' tips for performing table or couch dances; the court applied economic test to determine that the dancers were employees of the customers. In *Jeffcoat v State Department of Labour* 732 P2d 1073 (Alaska 1987), the club required dancers to work eight hour shifts and perform three dances, the last topless. Dancers earned all their incomes from table dances and tips. The court relied on the economic realities test to (erroneously) find that the dancer was an employee of the club. In *Byrne v Stern* 431 NE 2d 1073 (Ill App Ct 1981), the

be asked thus is: is sex work a business or remunerative activity? Do sex workers make their living wholly or partly on the monies obtained from their customers? South Africa has recognised lawful agency engagements. Lawful activities of escort services (as agents for both sex workers and their clients) are recognised under the temporary employment services.[274] In this regard, the South African labour law system has aligned itself with the international law.[275] It has ratified some ILO's related conventions considered as fundamental principles and rights at work for all workers including sex workers.[276] The concepts of employee[277] and remuneration[278] are wide enough to include a sex worker, and the wages they receive as held by the ILO. An adult sex worker employed by an agent consequently qualifies to be considered as an employee.[279]

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court found that a sex dancer was an employee of a club. In *Manchester Music Co v United States* 733 F Supp 473 482 (NH 1990), the court held that payment occurred with the transfer of possession, dominion, or control over money or its equivalent from a person having such prerogatives over the same to another person.

274 Section 198 of the Labour Relations Act defines temporary employment services as any person who for reward, procures for or provides to a client other person who performs work for the client and who are remunerated by the temporary employment services.

275 Section 1(b) of the Labour Relations Act and s 2 of the Basic Conditions of Employment Act 75 of 1997 puts it clearly that statutes' purpose is to advance economic development and social justice, labour peace, democratisation of the work place … and give effect to the obligations upon South Africa as a member state of the ILO.

276 On 30 March 2000, South Africa ratified the ILO Discrimination (Employment and Occupation) Convention 111 of 1958 for promoting equality of opportunity or treatment in employment or occupation. On 7 June 2000, South Africa ratified the ILO Worst Forms of Child Labour Convention 182 of 1999, which calls upon member states to eliminate the worst forms of child labour, including all forms of slavery, the sale and trafficking of children, debt bondage and serfdom, and child prostitution. On 30 March 2000, South Africa ratified the ILO Minimum Age Convention 138 of 1973. This Convention sets the minimum age for the hazardous work at 18 years (or 16 years under certain strict conditions). On 5 March 1997, South Africa ratified the ILO Forced Labour Convention 29 of 1930 which prohibits all forms of forced or compulsory labour, i.e. all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. On 19 June 1996, South Africa ratified the ILO Freedom of Association and Protection of the Right to Organise Convention, that would provide for workers as well as employers to establish and join federations and confederations to champion for their rights in the sectors. On 19 February 1996, South Africa ratified the ILO Right to Organise and Collective Bargaining Convention 98 of 1949 which provides workers with sufficient protection against acts of anti-union discrimination.

277 See footnote 60 in Chapter 1 for the definition of an employee. See same definition in the ss 200A(1) and 213 of the Labour Relations Act, 1995.

278 Section 1 of the Basic Conditions of Employment Act 75 of 1997 defines remuneration as any payment in money or in kind, or both in money and in kind made or owing to any person in return for that person working for any other person.

279 In s 200A of the Labour Relations Act, any person who works for, or renders services to any other person is presumed, regardless of the form of the contract, to be an employee if, e.g., the person is economically depended on the other person for whom he or she works or renders service. Under s 213 of the Labour Relations Act, an employee is any person … who works for another person … and is entitled or receives remuneration. Regardless of the form of the

In *Jordan*, the Court rightly stated that whether prostitution was to be tolerated, regulated or prohibited, had an impact on the quality of life of sex workers; and, therefore, the legislature should take appropriate steps to regulate prostitution in terms of sections 26(2) of the Interim Constitution without limiting other fundamental entitlements in the Bill.[280] Indeed, the right to freely engage in economic activity and earn a livelihood did not imply the right to do so without restrictions whatsoever, save that all restrictions, constraints or limitations on an economic activity and the earning of the livelihood which fell outside the regulative requirements of section 26(2) of the Interim Constitution were in breach of this section. Section 20(1A)*(a)* consequently limited the right freely to engage in economic activity.

The minority court considered section 20(1A)*(a)* in the light of right to equality; human dignity; freedom and security of a person; privacy; and economic activity. The minority court, it is submitted, erroneously held that section 20(1A)*(a)* was unconstitutional for it unfairly punished the female prostitutes as receivers of payments in return of sex but not the buyer.[281] Section 20(1A)*(a)* is all inclusive; it punishes both merchant and customer. It is submitted though that section 20(1A)*(a)* is not only intrusive to the constitutional right to privacy, but also to the right to engage in one's chosen trade.

A final point of controversy in the *Jordan*-case concerns the applicability of the Interim Constitution by the Constitutional Court. The Constitution was in force during the start of the trial, however, the interim Constitution was applied as "that Constitution was in force when the acts that gave rise to these proceedings were committed".[282] Schedule 6, Article 17 of the Constitution provides a transitional clause, in that:

> All proceedings, which were pending before a court when the new Constitution took effect, must be disposed as if the new Constitution had not been enacted, unless the interest of justice require otherwise.[283]

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contract, a sex worker is an employee and economically depends on payments from the client (or employer) or the consumer of the services.

280 *Jordan* para [56].

281 *Jordan* para [71].

282 *Jordan* para [4].

283 Constitution Schedule 6 art 17.

In *Jordan*, the accused were arraigned[284] on 11 December 1998, but the Constitutional Court erroneously took arraignment to have taken place in 1996 when the Interim Constitution was in force. The plea was entered in 1998 when formal trial begun. As an improvement on the Interim Constitution, the current Constitution is richer in content and more lenient to suspects in the event of a punishment prescribed by a law has changed between the time the offence was committed and the sentence was passed, the suspect would benefit from the least severe penalty.[285] The choice of the Constitution to apply when determining the constitutionality of the law outlawing prostitution should also have been premised on the interest of justice. This 'interest of justice' was reiterated in *Sanderson v Attorney General, Eastern Cape* when it held:

> …the interest of justice denotes equitable evaluation of all the circumstances of the case. In that evaluation and important test is whether the individual's position is substantially better or worse under the final constitution than under the interim constitution.[286]

A critical examination of Article 26[287] in the Interim Constitution and Article 22[288] in the Constitution shows a generosity of the later to the former. Section 20(1A)*(a)* of the Sexual Offences Act, 1957 that outlaws commercialised sexual acts between principal players would have been adjudicated better using the Constitution rather than the Interim Constitution. The preference in the later law was strengthened when the court stated that South Africa had come from the history of repression in the choices of trade, occupation or profession.[289]

4.3.2 The second challenge to laws restricting prostitution: The Kylie case

The law as regards prostitution in South Africa was tested again in the case of *Kylie*.[290] In this particular case, the applicant, Kylie, performed sexual services for

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284 Joubert (ed) *Criminal procedure handbook* 21 defines arraignment as an act where the accused appears in court; the court reads the charges against the accused and the accused pleads guilty or not guilty where after the court makes the records of the plea.

285 Section 35(3)(n) of the Constitution.

286 *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC) para 17.

287 Art 26(1): "every person shall have the right to freely engage in economic activity".

288 Art 22(1): "every person has the right to choose their trade, occupation or profession freely". The practice of trade, occupation or profession may be regulated by law.

289 *JR 1013 Investments CC v Minister of Safety and Security* 1997 (7) BCLR 925 (E).

290 *Kylie* para [1]. See also footnote 47 in Chapter 1.

pay in 'Brigitte's Massage Parlour'.[291] On 27 April 2006, her duties were terminated by her employer without notice. On 14 August 2006, Kylie took the matter for arbitration before the CCMA against unfair dismissal. A question of jurisdiction was raised on the part of the CCMA, as Kylie had been employed as a sex worker and accordingly her employment was unlawful.[292] On this evidence, the CCMA ruled that it did not have the jurisdiction to arbitrate on the matter, and the case did not continue.[293]

Kylie took the dispute for review before the Labour Court. This court considered section 213[294] of the Labour Relations Act, and stated that under the section it was sufficient to include any person whose contract of employment was unenforceable; however, a sex worker was not entitled to protection against unfair dismissal in terms of section 185 of the Labour Relations Act.[295] The court cited the Sexual Offences Act, 1957 which criminalises the running of brothels,[296] and also engaging in unlawful carnal intercourse for pay.[297] It also held that commercial sex was immoral and turpitude.[298]

On further appeal, the Labour Appeal Court determined that Kylie's rights to relief or the enforceability of her rights in terms of the Labour Relations Act were not acknowledged by the Labour Court simply because as a sex worker, she was not entitled to protection against unfair dismissal.[299] In presenting her case, Kylie argued that the approach the Labour Court adopted was incorrect: instead of first considering the supreme law of the land – the Constitution[300] – the court

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291 Rautenbach 2013 *J of Civil & Legal Sciences* 1; Selala 2011 *PELJ* 207-209.

292 *Kylie* para [2].

293 *Kylie* para [2].

294 For the contents of s 213 of the Labour Relations Act, see footnote 59 in Chapter 1.

295 *Kylie* para [3]. Accordingly, Kylie was also not entitled to the benefits in the Basic Conditions of Employment Act 75 of 1997, such as occupational health allowances, workers' compensation or unemployment insurance. See Selala 2011 *PELJ* 209.

296 See *Kylie* para [6]. See also s 3(a), (c) of the Sexual Offences Act, 1957. In 2008, the criminalisation of brothel keeping and prostitution was again confirmed in the case of *NDPP v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008) para 25 where Howie P held: "And there can be little doubt, to my mind, that brothel-keeping would be seen by a majority in society, if not society as a whole, as morally more reprehensible than operating unregistered gaming machines. Brothel-keepers, as mentioned, commit their own offence and aid in the commission of the prostitutes' offence. In doing so, they themselves earn an income from prostitution".

297 See s 20(1A)*(a)* of the Sexual Offences Act, 1957; *Kylie* para [6].

298 *Kylie* para [7].

299 *Kylie* para [4]; Selala 2011 *PELJ* 210.

300 And by implication s 23(1) which provides that everyone has the right to fair labour practices.

commenced with a discussion on applicable policy as discerned from the law of contract.[301] The court should first have answered the question of the application of the Constitution, and, if found to be in favour of the employee, the court should have continued to conclude on the issues of remedy.[302] It should only have been in this final stage where the query as to policy would feature.[303] The Labour Appeal Court agreed that this approach should have been followed.[304]

The Labour Appeal Court held that even though sex work was criminalised, it did not deny sex workers the right to fair labour practices as provided for in section 23(1) of the Constitution and section 185(1) of the Labour Relations Act.[305] The court concluded as follows:

> In summary, as sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationship namely with their employers, the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but by their employers, section 23 of the Constitution, which, at its core, protects the dignity of those in an employment relationship should also be of application.[306]

Having determined that the appellant met the threshold requirement for constitutional protection, the court's enquiry turned to whether Kylie was entitled to any legal relief.[307] The court decided that when a sex worker has been unfairly dismissed, courts should be slow to order the reinstatement or re-employment of the employee, but other means could be found to protect such employee and "reduce her vulnerability, exploitation and the erosion of her dignity".[308] The court further noted that although "compensation would be inappropriate in a case where the nature of the services rendered by the dismissed employee are illegal",[309]

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301 *Kylie* para [14]; Selala 2011 *PELJ* 210.
302 *Kylie* para [14].
303 *Kylie* para [14].
304 *Kylie* para [15].
305 In support of this conclusion, reference was made to *Nehawu v UCT* 2003 24 ILJ 95 (CC); *SANDU v Minister of Defence* 1999 (4) SA 482 (CC); *State Information Technology Agency (Pty) Ltd v CCMA* 2008 29 ILJ 2234 (LAC); and *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC). These cases focused on the fact that the relationship between the employee and the employer must be fair to both, and even if a person is not employed under a contract of employment, that does not deny the employee all constitutional protection. See *Kylie* paras [21], [40]; Selala 2011 *PELJ* 211-212.
306 *Kylie* para [26].
307 *Kylie* paras [28]-[46].
308 *Kylie* para [52].
309 *Kylie* para [53].

compensation in the form of a *solatium*[310] for the loss by an employee of her right to a fair procedure would be appropriate.[311]

According to the court's reasoning, the overriding objects of the Labour Relations Act were to promote economic development, social justice, labour peace, and democratisation at the work place by way of giving effect to and regulating the fundamental rights in section 23 of the Constitution; and discharging the obligations incurred by South Africa as a member of ILO.[312] The court held that section 23(1) of the Constitution afforded every one (including sex workers) the right to fair labour practises,[313] thus rightly recognising sex-work as a form of labour, and a sex worker as an employee.[314] However, the court stated that sex workers could form and join trade unions but they could not assert any right to participate in any unlawful activities through such a trade union nor make use of the unions as a means to further the commission of a crime.[315] Davis JA declared that sex workers were in this regard unprotected workers since engaging in commercialised sexual services was criminalised.[316] It is submitted that this statement by the Labour Appeal Court is not only double-speak but consists of double standards.

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310 A *solatium* is explained in *Amy Senkhane v Emfuleni Local Municipality and Others* 2016 14 ILJ 1871 (LC) para [23] as: "Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put, differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee who's constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer. It is not however a token amount hence the need for it to be 'just and equitable' and to this end salary is used as one of the tools to determine what is 'just and equitable'".

311 *Kylie* para [53].

312 See s 1 of the Labour Relations Act; *Kylie* para [40].

313 *Kylie* para [40].

314 *Kylie* paras [59], [60]. Section 213(a) of the Labour Relations Act defines an employee as any person who works or provides services for another person and who receives or is entitled to receive any remuneration. Section 200A(1) of Labour Relations Act provides that a person who works for or renders service to another is presumed, regardless of the form of contract, to be an employee if she or he is economically dependent on the other person for whom she or he renders service.

315 *Kylie* para [58]. As such, collective agreements that may be concluded between sex worker employers and sex worker unions would not be enforceable under the Labour Relations Act.

316 *Kylie* para [60]. Sex workers would not be able to participate in any trade union activities, e.g., collective bargaining and the right to strike, amongst other union undertakings, as this would amount to the furthering of the commission of crime.

The court upheld the appeal against unfair dismissal of the sex worker and quashed the High Court decision and found that the CCMA had the jurisdiction to determine the dispute between Kylie and her employer.[317] The CCMA is yet to conclude on the matter. Again, it is put forward that this treatment of sex workers amounts to unfair discrimination contrary to sections 9(3)[318] and 23(2)[319] of the Constitution. Lastly, the Labour Appeal Court made it clear that the *Kylie* judgment cannot and does not sanction sex work, as this is a matter for the legislature.[320]

Critics of the judgment in the *Kylie* case have found the ruling "problematic and quite erroneous on various levels".[321] The main concern is that the court muddled the issue of jurisdiction with the question of the sex worker's entitlement to constitutional rights. It is put forward here that the Labour Appeal Court's handling of the issue of jurisdiction as well as its approach is correct, in that the rights of the person (as an employee and to be heard in court) supersedes that of jurisdiction. Constitutional rights cannot simply be an ancillary matter. Similar to any other person in the country, sex workers have a right to dignity, especially as in their particular occupation they are vulnerable to exploitation and abuse, and for that reason sex workers are entitled to the protection of their dignity by the Constitution, and by extension also the Labour Relations Act.[322] In this regard, the court held that any future adjudication of cases involving employment relationships which are in breach of legislation "should proceed through the constitutional threshold but not all will enjoy the defining weight of public policy, as set out, so as to justify the granting of a remedy".[323] The implication here is that such employees may rely directly on the Constitution in order to seek a remedy, even though not all applications will be successful, depending on public policy. In also directing that the CCMA has the necessary jurisdiction to resolve disputes such as this case, a further apprehension was disclosed by critics:

> It is not difficult to imagine how many cases would flow into the labour litigation mainstream following this judgment, the nature of the cases that the CCMA

317 *Kylie* para [61].
318 Equal protection by the law.
319 Workers' right to form a trade union.
320 *Kylie* para [54].
321 See, e.g., Selala 2011 *PELJ* 213.
322 *Kylie* paras [43]- [44].
323 *Kylie* para [57].

> Commissioners are likely to be confronted with on a daily basis, and the reaction of the Commissioners upon receipt of such cases.[324]

This alarm has not come to fruition, as no other such case as that of *Kylie* has yet been handled by the CCMA.

In the *Kylie* case, the court was nearly heading to recognising sex work as a lawful activity, however, it was limited by the decisions taken in the *Jordan* case that had made a final decision on the constitutionality of sex work. Precedents bide even if incongruent with the moving times.

4.3.3 The current prostitution debate and public discourse on prostitution

There has been a wide debate from the public, academics, legislators and legal professionals, on whether prostitution should be decriminalised or whether the status quo should remain.[325] The SALRC acknowledges the endemic nature of prostitution in South Africa.[326] It cites the prevalence of prostitution in strip clubs, massage parlours, escort services, exotic dance clubs, live shows, brothels, call-girls and street-walkers.[327] The SALRC further states that prostitution transpires as a result of socio-economic hardships, and the need to mitigate living standards or livelihood.[328]

The Sex Worker Education and Advocacy Taskforce (SWEAT) has carried out a mapping of active sex workers in South Africa in 2013. This group revealed that in

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[324] Selala 2011 *PELJ* 221. It is questioned thought whether the CCMA, even being granted the jurisdiction to settle such cases, would be able to render an effective award.

[325] In Christiansen 2000 *NYU J of Int Law and Politics* 1050, ex-President Robert Mugabe is quoted to have retorted: "if we accept sexual perverts, what moral fibre shall our society have?". As evidenced in Peters and Wasserman *Peer-reviewed academic evidence on decriminalisation of sex work* 1-2, President Cyril Ramaphosa, a one-time Chairperson of the South African National AIDS Council (SANAC), argued that the morality of a society could not be reclaimed by excluding the most vulnerable: "that whatever views about sex workers; whatever beliefs about sex workers; whatever statutes on law books about legality of sex work … the society could not deny the human and inalienable right of people who engage in sex work". Former President Kgalema Motlanthe recommended to Parliament that the Sexual Offences Acts should be amended to decriminalise prostitution so as to eradicate the abuses that arise from the criminalisation of the prosecutions of those who sell sex. See Peters and Wasserman *Peer-reviewed academic evidence on decriminalisation of sex work* 2.

[326] SALRC *Sexual Offences: Adult Prostitution* 2009 10; SALRC *Sexual Offences: Adult Prostitution* 2017 22.

[327] SALRC *Sexual Offences: Adult Prostitution* 2009 20; SALRC *Sexual Offences: Adult Prostitution* 2017 40.

[328] SALRC *Sexual Offences: Adult Prostitution* 2009 27.

Gauteng there were about 32,000 sex workers; in KwaZulu-Natal, there were about 20,000 sex workers; in Limpopo, there were about 12,000 sex workers; in Mpumalanga, there were about 12,000 sex workers and in Western Cape, there were about 15,000 sex workers.[329] These numbers speak volumes of the prolificacy of the 'vice' of prostitution despite the awareness of the prohibitive mechanisms or legislation put in place. The interviewees stated that they engaged in prostitution as a source of income (in order to secure a plate of food and take care of family), having mostly not been able to secure formal employment. Mostly, the sex workers cited harassment by the police in the forms of assault, rape, false imprisonment, or extortion.[330]

In order to stop such police harassment and brutality, the SWEAT brought an application in the Western Cape High Court seeking a relief (declaration) at preventing continued unlawful and wrongful arrests of sex workers by the police in the Cape Metropolitan city area.[331] It was shown from records at the Wynberg Police station, for example, that sex workers were repeatedly arrested between 2005 and 2006 on vagrancy charges – loitering with the intent to commit prostitution – though it was later indicated there was no crime. The applicants contended that the object of the arrests was not to prosecute but to harass, punish or intimidate the sex workers.[332] The respondents argued that they were obliged in terms of section 205(3)[333] of the Constitution to arrest sex workers as part their duties to prevent crime.[334] Upon considering what was stated in the founding and answering

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329 SWEAT https://docplayer.net/96855347-Mapping-sex-workers-in-gauteng.html (Date of use: 30 August 2021).

330 SWEAT https://docplayer.net/96855347-Mapping-sex-workers-in-gauteng.html (Date of use: 30 August 2021); see also Thusi 2015 *Fordham Int LJ* 241-242.

331 *SWEAT v the Minister of Safety and Security and 7 Others* Case No 3378/07 Western Cape High Court, Cape Town.

332 *SWEAT v the Minister of Safety and Security and 7 Others* Case No 3378/07 para 23. In *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A), the Appellate Division stated that if the object of the arrest is not to bring the arrested person in court but to frighten or harass the person, then such arrest is unlawful; in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A), the court declared that an arrest without a warrant is not unlawful if the arrestor intends to make further investigation before deciding whether to release or proceed with prosecution; in *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) para 50 the court reiterated that "the fundamental purpose of arrest … is to bring the suspect before the court of law, there to face due prosecution".

333 The functions of the police service are to prevent, combat, investigate crime, maintain public order, protect, and secure the inhabitants of the Republic.

334 *SWEAT v the Minister of Safety and Security and 7 Others* Case No 3378/07 para 25.

affidavits, the court stated that police officers were interdicted from arresting sex workers for purposes other than bringing them before a court of law for prosecution.[335] This instruction by the court has not been realised, and further studies would prove.

The SWEAT and Sonke Gender Justice carried out another study in 2018, a follow-up on the 2013 research.[336] The localities of the research were Gauteng and Mpumalanga. The aim of the investigation was to document the contemporary policy experiences of sex workers; to uncover human-rights violations; to discern the challenges of sex workers and their advocates in achieving effective strategic management with police to address violations; and to produce a tool to trigger positive solutions focusing on dialogue between the government, sex workers and advocacy organisations.[337] The findings of the research were that the criminal law as currently employed puts sex workers at a far greater risk of harm and abuse than previous laws; violations of sex workers' human rights are systemic and pervasive putting the health of these sex workers at risk, and that the police was not keen to investigate or process complaints of assault-related offences inflicted on prostitutes.[338] The researchers made some recommendations, but important to this study is the recommendation to decriminalise prostitution. Research completed by the SWEAT, Sonke Gender Justice, and the Women's Legal Centre in the cities of Cape Town, Johannesburg, Pretoria, Durban and Limpopo furthermore exposed human-rights violations on sex workers by both organs of state (police) and civilians.[339] The violations ranged from beatings, being pepper sprayed, sexual assaults, rape, extortions, or unlawful detentions. Again, one of the proposals of the research, which is of importance to this study, is to repeal laws criminalising prostitution.

In 2018, the Parliamentary Multi-party Women's Caucus[340] summit held a forum with other stakeholders to perform a post-mortem on the SALRC's report on adult

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335 *SWEAT v the Minister of Safety and Security and 7 Others* Case No 3378/07 para 60.
336 Evans and Walker *The policy of sex work in South Africa* (2017).
337 Evans and Walker *The policy of sex work in South Africa* 10.
338 Evans and Walker *The policy of sex work in South Africa* 46-49.
339 Manoek *"Stop harassing us! Tackle real crime"* 9.
340 Ngalo https://www.dailymaverick.co.za/article/2018-03-08-reflections-from-a-parliamentary-summit-sex-work-vs-prostitution-time-to-get-the-difference/ (Date of access: 11 June 2021).

prostitution which maintained the criminalisation of prostitution. The summit's objective was to support the legalisation of prostitution. The Cause for Justice NGO made a submission[341] to the Multi-Party Women's Caucus on the SALRC report, arguing that their core values give them a particular interest in the law applicable to adult prostitution. These values were presented as:

> (1) the responsible exercise of freedom, (2) protection of the family unit, (3) protection and promotion of human dignity/worth, and (4) protection of the vulnerable in society (social justice).[342]

This NGO argued that persons involved in prostitution were not treated truly as having intrinsic worth and were only used as objects for sexual gratification of others; and most importantly, prostitution was a violation of dignity.[343] The above submission should be critiqued in that it is much founded on social perception but not on the precepts of law, and again based on the perspective of 'third' party exploitation of prostitution of another person. Indeed, even the vilest criminal remains a human being worth of intrinsic value. When a person is prostituted (by a third party), such a person is being enslaved and exploited for forced labour. This process consists of brutal abuse and constitutes a violation of human dignity both in the national and international spheres.[344] The freedom to engage in prostitution and prostitution-related activities should be limited if this freedom is exploited by others – this would be reasonable and justifiable in the light of the Constitution[345] and according to the UN Convention for the Suppression in the Traffic in Persons and Exploitation of Others, 1951.[346]

The Commission for Gender Equality has emphatically stated that the criminalisation of sex work in South Africa has failed, and its implementation has led to violations by individuals and the police against the fundamental and

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341 Stander *Submissions on the SALRC Report on project 107 on adult prostitution* 1-26.
342 Stander *Submissions on the SALRC Report on project 107 on adult prostitution* para 4.
343 Stander *Submissions on the SALRC Report on project 107 on adult prostitution* para 11.
344 Section 13 of the Constitution prohibits the subjection of a person by another into slavery, servitude or forced labour. Sections 1, 2 of the Suppression of the Traffic in Persons and exploitation of the Prostitution of Others, 1951 and which South Africa ratified on 10 October 1951, calls upon member states to punish any person who to the gratification of another person procures, entices another person for prostitution with another or exploits the prostitution of another or manages, runs houses for the purposes of prostitution of others.
345 Constitution s 13 – the right not to be subjected to slavery, or servitude or forced labour.
346 Sections 1, 2 of the UN Convention for the Suppression in the Traffic in Persons and Exploitation of Others, 1951.

constitutional rights of sex workers as human beings.[347] The Commission has called for the decriminalisation of sex work in South Africa.[348] Former Constitutional Court Judge Zak Yacoob[349] has also opined that the Constitutional Court ought to rectify its judgment in the *Jordan* case, and decriminalise prostitution. Yacoob pronounced that criminalising sex work was wrong because it curtailed prostitutes' right to make free choices.[350] Cameron J supports this view and proclaims that "sex work is work and that laws that criminalise sex work are a profound evil".[351] The call for the decriminalisation of sex work as in these statements and debates[352] must be seen as giving a voice to unrepresented sex workers, and this discourse must also be slotted into the aims of the National Development Plan[353] and other key policy documents.[354]

In the last sub-section to follow, the conundrum of persons who engage in transactional sexual relationships[355] but who are not criminalised as sex workers will be focussed on. Although these individuals may meet all the legal requirements of performing sex work, they are not

4.3.4 Other forms of transactional sexual acts and prostitution

This sub-paragraph will focus on two separate aspects of sex work where sexual favours are performed for reward, yet these acts are considered lawful in South African society. The first group of social constructs based on transactional

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347 Commission for Gender Equality *Decriminalizing sex work in South Africa* 6.
348 Commission for Gender Equality *Decriminalizing sex work in South Africa* 9.
349 Shange https://www.timeslive.co.za/news/south-africa/2017-12-11-sex-work-must-be-legal/ (Date of access: 25 September 2021).
350 Peters and Wasserman *Peer-reviewed academic evidence on decriminalisation of sex work* 2.
351 Peters and Wasserman *Peer-reviewed academic evidence on decriminalisation of sex work* 3.
352 E.g., see afore-mentioned statements made by the Commission for Gender Equality *Decriminalising sex work in South Africa* (2013) and the Multi-Party Women's Caucus *Report of the Women's Roundtable Discussion* (2015).
353 National Planning Commission *National Development Plan (NDP) 2030 Our future – make it work Executive Summary* (2011).
354 The Department of Economic Development *New growth path: Framework* (2011); the Republic of South Africa *Medium Term Strategic Framework (MTSF) 2014-2019* (2014); SANAC *National Strategic Plan for HIV, STIs and TB 2017-2022* (2018); SANAC *The South African National Sex Worker HIV Plan 2016/2019* (2016).
355 Transactional sex is defined by Thobejane, Mulaudzi and Zitha 2017 *Gender and Behaviour* 8725 as "any sexual relationships where gifts have been given and sexual relations have occurred". Mampane 2018 *Sage* 2 describes transactional sex as "the exchange of sex for money, favours, and/or material goods". These may also constitute the legal definition of prostitution.

relationships consists of dalliances where rich, married men (often wielding political power) have sexual liaisons with much younger women; the so-called blesser-blessee relationships.[356] Other such interactions include *ukuphanda*[357] and '*mavusos*'.[358] These concepts will be further elaborated on below. The second group of transactional sexual acts to be discussed comprises non-penetrative, erotic performances, such as stripping, erotic massages, and erotic dances.[359]

The blesser-blessee phenomenon originates from "social media when girls would post pictures on Instagram of themselves sipping cocktails on the beach, popping bottles in the club or getting their nails done, using the hashtag #blessed".[360] These young, often very pretty girls were being blessed financially by more seasoned, wealthy men who expected something back in return for their blessings.[361] Similar to sex workers' motives for performing sex work, these girls enter into these types of age-disparate sexual relationships as a survival strategy. They offer sex in exchange for financial gain so they are able to meet basic needs such as food, shelter, clothing, protection, affection, a job and livelihood opportunities.[362] According to Thobejane, Mulaudzi and Zitha, this South African phenomenon of

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356 Thobejane, Mulaudzi and Zitha 2017 *Gender and Behaviour* 8725. Singata *An ethical assessment of the structural agency of the blessee in the 'blesser-blessee' phenomenon* xv. Young men could also function as a blessee, but where a young male is involved in a sexual relationship with older women, this is often referred to as 'Ben-10' relationships. See Basson *Exploration of the blesser-blessee phenomenon among young people in Gauteng* 11.

357 Wojcicki 2002 *Culture, Medicine and Psychiatry* 339-340. '*Ukuphanda*' (*ukuphanta*) is an isiZulu (Nguni) word basically meaning "to hustle" or "to try to get money". See Motsemme *Lived and embodied suffering and healing amongst mothers and daughters* 104.

358 Also known *mavuso stokvel*, 'sex *stokvels*' or 'no-panties sex gatherings'. See Tshipe https://www.iol.co.za/news/south-africa/gauteng/sex-stokvels-must-fall-2023618 (Date of use: 20 November 2021); Vaveki *The legalisation of prostitution in South Africa* 34. 'Mavuso' is township slang for "money given to a woman after she has spent the night with a man". See Tshipe https://www.iol.co.za/news/south-africa/gauteng/mavuso-stokvel-sex-death-2035532 (Date of use: 20 November 2021).

359 Nyembe et al *Sex workers and sex workers in South Africa* 5.

360 Thobejane, Mulaudzi and Zitha 2017 *Gender and Behaviour* 8725. See also Singata *An ethical assessment of the structural agency of the blessee in the 'blesser-blessee' phenomenon* 1-2.

361 See, e.g. Geldenhuys 2016 *Servamus* 11 who states that girls as young as 14 years old have been reported to be involved in relationships with blessers, and Basson *Exploration of the blesser-blessee phenomenon among young people in Gauteng* 14 claiming that girls as young as 12 are engaged in these age-disparate sexual relationships (a contravention of the Sexual Offences Act 2007 s 15). See also *S v Kleinhans* 2014 (2) SACR 575 (WCC) paras 581B–E where a wealthy, elderly man was convicted of sexually abusing young girls in exchange for the financial assistance of their families.

362 Singata *An ethical assessment of the structural agency of the blessee in the 'blesser-blessee' phenomenon* 28; Frieslaar and Masango 2021 *Theological Studies* 2. As will be evidenced later, some girls purely just want to 'make easy and fast bucks' for extra financial income.

blessing-giving (and receiving) has become a common occurrence, and could be regarded as an established practice nowadays,[363] similar to the cultural giving of bride wealth or lobolo.[364]

In her research, Singata observes that blessees (sometimes called 'slay queens')[365] do not see themselves as victims; many blessees are students, or educated and working, and some of them are very ambitious and will only 'date' wealthy men who will be able to take good care of them financially:[366]

> They see their position as blessees as a form of women empowerment and describe themselves as a 'new wave of sex-positive agents' who are disrupting the old norms and re-imagining power dynamics in what has historically been read as predatory relationships.[367]

As regards sex workers' perspectives, those who freely choose the profession also do not regard themselves as victims, and like blessees, many high-class prostitutes likewise only engage in sexual services for extra income to spend on luxuries. It seems that there is a fine line distinguishing transactional sex from prostitution, and it is very much blurred, especially as some researchers claim that:

> ...transactional sex and sex work are not synonymous because in transactional sex the exchange of valuables is undertaken within the context of a romantic relationship rather than in sex work where the exchange is rather casual and not romantically linked.[368]

It is furthermore argued that the young women engaging in transactional sex do not self-identify as prostitutes (and suffer the stigmatisation), and view their sex partners

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363 See, e.g. Geldenhuys 2016 *Servamus* 11 who states that nowadays blessees' services are advertised online, and they even have webpages such as 'BlesserInc.', 'Blesserfinder' and 'Blesserfinder Mzansi' that matches young women with rich benefactors. See also Vaveki *The legalisation of prostitution in South Africa* 36; Basson *Exploration of the blesser-blessee phenomenon among young people in Gauteng* 4.

364 Thobejane, Mulaudzi and Zitha 2017 *Gender and Behaviour* 8732. See also footnote 19 in para 4.2 above.

365 A slang term referring to "girls who do not have a wealthy background but appear as if they do. They use malicious acts to attain cash, drink expensive alcohol, procure expensive cellphones". See Singata *An ethical assessment of the structural agency of the blessee in the 'blesser-blessee' phenomenon* xv.

366 See Singata *An ethical assessment of the structural agency of the blessee in the 'blesser-blessee' phenomenon* 21.

367 See Singata *An ethical assessment of the structural agency of the blessee in the 'blesser-blessee' phenomenon* 21.

368 Mampane 2018 *Sage* 2.

as ‘boyfriends’ or ‘lovers’ rather than clients as it is in the case of sex workers.[369] However, blesser-blessee relationships have many similarities with prostitution, as for the phenomenon “involves non-marital sexual relationships, often with multiple partners, in exchange for financial or in-kind incentives”.[370] Certain researchers see the reliance on transactional sex as a stepping stone to engaging in future sex work.[371] It is submitted here that young and desperate girls involve in a blesser-blessee relationship will certainly put up a romantic charade in order to hold onto the blesser in the relationship, consequently also calling them their beaus. However, whatever the terminology used to describe the transactional relationship, according to the law in South Africa, if a person is receiving, or giving, or benefiting monetarily or in kind, in return for expected sexual acts, that person is performing sex work.

This may also apply to the practice of *ukuphanda*, which is described by Wojcicki as “sex-for-money exchanges that take place outside of commercial sex work”.[372] According to Motsemme, *ukuphanda* embodies a culture of survival practised in the township milieu by especially by mothers and daughters where “they will resort to socially acquired behaviour patterns to eke out a means of existence”.[373] It is a means to “‘finding a way in order to survive,’ ‘getting by’ and ‘making ends meet’”.[374] Getting by whatever means in this context means that young girls have sexual relations with older men (sugar-daddies) in order to contribute to the household income, and help their poor families. In some cases, mothers even encourage their

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369 Mampane 2018 *Sage* 2. See also Basson *Exploration of the blesser-blessee phenomenon among young people in Gauteng* 4 who states that in a blesser-blessee relationship, “the exchange of gifts for sex is part of a broader set of obligations that might not involve a predetermined payment”. The physical appearance of the females engaging in the two forms of sexual relationships are also important: “Women who wore revealing (and culturally undesirable) clothing, such as short skirts and shirts, and who engaged in sex for money were classified as prostitutes”. See Formson and Hilhorst *The many faces of transactional sex* 8.

370 Basson *Exploration of the blesser-blessee phenomenon among young people in Gauteng* 4.

371 Mampane 2018 *Sage* 2.

372 Wojcicki 2002 *Culture, Medicine and Psychiatry* 339. Although Wojcicki conducted her research in the Soweto and Hammanskraal areas; this practice is found in several communities in South Africa. See Motsemme *Lived and embodied suffering and healing amongst mothers and daughters* 104.

373 Motsemme *Lived and embodied suffering and healing amongst mothers and daughters* 102. One girl practising *ukuphanda* informed Mampane 2018 *Sage* 4: “I have been doing ‘*ukuphanda*’ (transactional sex) since I was young because I had to take care of my siblings because my parents are poor”.

374 Motsemme *Lived and embodied suffering and healing amongst mothers and daughters* 104.

daughters to take on older, wealthy sex partners.[375] The stance is that even if "the money is acquired legally or not, '*ukuphanta*' is an accepted way of surviving in townships".[376]

As a pragmatic survival skill, prostitution and *ukuphanda* seems similar concepts, yet commercial sex work is deemed socially unacceptable, while 'informal' transactional sex is seen as socially acceptable extramarital relationships.[377] Furthermore, the perception is that prostitutes do not operate within townships but in towns and cities, wearing revealing attire and "standing in a place which is reserved for them only".[378] Unfortunately, this opinion only regards street prostitutes, and as previously mentioned, there are many diverse categories of sex workers. It appears that this distinction is shared by the police who confirmed a lack of prostitution in areas where these sex-for-money exchanges actually occur.[379] Informal *ukuphanda* sex work is conducted in places such as taverns,[380] where it is considered to be more private (than the acts of street-walkers). As observed by Wojcicki, the sex-for-money exchange act may involve a single male partner, or multiple partners in a night, or even develop into a long-term relationship, and the sex act may take place in the tavern's toilet, in the bushes outside the tavern, or even at the man's residence.[381] These activities are very similar to that of commercial sex workers, and it is again argued here that the difference between the two sex-for-reward acts are merely terminological, and not legal.

The last form of transactional sexual exchange to be commented on in this group is the *mavusos,*[382] also known as *mavuso stokvel*. This type of transactional sex

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375 As such, "their families are aware of their activities; their work is viewed as functional and economically instrumental". See Wojcicki 2002 *Culture, Medicine and Psychiatry* 341.

376 Motsemme *Lived and embodied suffering and healing amongst mothers and daughters* 105.

377 Formson and Hilhorst *The many faces of transactional sex* 7. Different words are used to describe these two functions: "The term *ukuphanda* (loosely meaning to get money) was used in reference to informal transactional sex, while *marhosha* or *matekatse* were used to refer to commercial sex work".

378 Wojcicki 2002 *Culture, Medicine and Psychiatry* 348-349; Vaveki *The legalisation of prostitution in South Africa* 36.

379 Wojcicki 2002 *Culture, Medicine and Psychiatry* 349. Consequently, there was a lack of arrests for prostitution in the area as compared to the arrests of sex workers in Hillbrow (for the research period). See also Vaveki *The legalisation of prostitution in South Africa* 37.

380 Wojcicki 2002 *Culture, Medicine and Psychiatry* 350; Vaveki *The legalisation of prostitution in South Africa* 36.

381 Wojcicki 2002 *Culture, Medicine and Psychiatry* 350.

382 See footnote 358 above.

occurs at "modified taverns where members pay to drink, dance and find sexual partners".[383] Based on the traditional concept of a *stokvel*,[384] the phenomenon of *mavusos* have adapted this practice by giving it a new meaning: an organised event where patrons at taverns take young women home overnight at a price.[385] According to research, *mavuso stokvels* are held on a weekly basis in different locations across Tshwane's townships.[386] The *mavuso stokvel* custom is as follows: at the end of each meeting, an amount of money is announced which has to be paid by each member, and that is the amount that the women should be given in the sex-for-reward transaction.[387] If a member does have coital intercourse with a woman, but refuses to pay the amount, he will be reported to the *stokvel* organisers and fined.[388] Although some may view this new trend of speed dating with a 'happy ending' as a soft form of prostitution, yet again this practice conforms to the legal definition of prostitution as in the Sexual Offences Act, 1957.

There exists also another group of workers in the South African sex industry, who carry out, amongst other services, erotic performances.[389] These performers usually are employees of striptease businesses or may even be self-employed where they hire space in performance halls. The viewers of such shows ordinarily pay money to the performer or to the business manager or both. Such enterprises are regarded

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383 Basson *Exploration of the blesser-blessee phenomenon among young people in Gauteng* 11.

384 According to Sansom *Cash down for brides* 103, a *stokvel* is "a rotating credit association, puny in numbers but, as if to compensate, made up of men intensely dedicated to one another and dedicated to the accumulation of capital in the long term. ... The migrants' *stokfel*, however, supplies its major benefits or gains not by allowing one member to take more and another less, but by allowing all members to join forces against the world outside". Wojcicki 2002 *Culture, Medicine and Psychiatry* 340, 365-366 further adds that it is constitutes "a gathering place where women can meet men".

385 Tshipe https://www.iol.co.za/news/south-africa/gauteng/mavuso-stokvel-sex-death-2035532 (Date of use: 20 November 2021).

386 The phenomenon is so popular in Hammanskraal, that it has gained the reputation as being the "Mavuso capital". See Tshipe https://www.iol.co.za/news/south-africa/gauteng/mavuso-stokvel-sex-death-2035532 (Date of use: 20 November 2021).

387 Geldenhuys 2016 *Servamus* 12.

388 Geldenhuys 2016 *Servamus* 12.

389 The Ghetto and Burb Livin' are two such adult entertainment centres in Hillbrow where entertainers perform suggestive seductive dances and even completely undress as they dance. The dancers would sometimes offer penetrative sexual services if not a 'touch'. See Mahapa *Sex workers gendered subjectivities* 13, 14. Teazers Pty (Ltd) is another such adult entertainment establishment in Johannesburg and Pretoria. See "Teazers – the tease without sleaze" Available at https://teazerssa.com/.

in South Africa as legitimate,[390] and as such form part of the legal sex industry.[391] This type of business is thriving under the state's watch and sanction.

Exotic dancing, like sex work, is a shared economy in that dancers' sexual resources are traded for limited enjoyment or use by others for consideration.[392] The dances take place in strip clubs or 'gentlemen's clubs' which are guarded as exclusive 'private' or reserved entrepreneurships where dancers perform table dances or lap dance.[393] The dancers perform naked or semi-naked whereby they gyrate their pelvis at the eye level of the sexually aroused onlookers.[394]

Although a legitimate form of labour, exotic dancers in South Africa are seen as sexual deviants.[395] As such, this type of work has been strictly regulated by legislation such as the Liquor Act 27 of 1989 which statutorily limits obscenity, indecent exposure, offensive acts, naked- or semi-nude performances in licenced premises of adult entertainment.[396] These laws have been challenged as to their constitutionality, as will be seen in the case discussion which follows.

In the case of *Andrew Lionel Phillips and Others v DPP and Others*,[397] Mr Philips owned and operated a duly registered entertainment establishment called 'The Ranch' which provided a venue and facilities for paying male customers to observe

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390 As an authorised and legal business, it must be accordingly licensed. See footnote 237 above.

391 Benson Fischer 1996 *Minnesota J of Law and Inequality* 521 describes 'legal sex industry' to refer to commercial facilities, bars or clubs that feature strip shows, nude dancing and other live entertainments by female dancers for the sexual gratification of, mostly, male patrons or clients.

392 Leroy 2017 *Williams & Mary Journal of Women and Law* 249.

393 Lap dancing consists of gyrating while seated on the customer's lap. See Benson Fischer 1996 *Minnesota J of Law and Inequality* 521. In *R v Mara and East* (1994), the Ontario Court Division found lap dancing was not an indecent act under the Criminal Code of Canada. But the Supreme Court of Canada in *R v Mara and East* (1997) 2 SCR 630 stated that lap dancing was an indecent conduct pursuant to the Criminal Code. In *R v Pelletier* (1999) 3 SCR 863, the court held that touching a nude exotic dancer's breasts and buttocks in private 'cubicle' in a bar did not constitute an indecency. In South Africa, a lap dance could be seen as a form of sexual violation, as s 1 of the Sexual Offences Act 2007 defines sexual violation to include the direct or indirect contact between the genital organs or anus of one person or breasts of female with a body of another. (Also see footnote 188 above). However, it is not considered a crime if the consent of both parties are present.

394 Mahapa *Sex workers gendered subjectives* 8, 13, 14. By exposing their genital organs, or breasts to another person, these dancers could be guilty of flashing, as in s 9 of the Sexual Offences Act 2007. However, it is assumed that every person who enters such premises consent to the bodily exposition, and is over the age of 18 years.

395 Tillier *A naked truth: a glimpse into lives and the live experiences of exotic dancers* 1.

396 Section 160(c), (d) of the Liquor Act 27 of 1989. Section 160(d)(i), (ii) of the Liquor Act 27 of 1989 was struck down in *Andrew Lionel Phillips and Others v DPP and Others* CCT 20/02.

397 *Andrew Lionel Phillips and Others v DPP and Others* CCT 20/02.

striptease shows (and partake in additional sexual services).[398] Mr Philips was subsequently indicted on the offences of the keeping of brothels and living on the earnings of prostitution contrary to the Sexual Offences Act;[399] as well as unlawfully employing foreign females.[400] He was also indicted against contravening section 160(d) of the Liquor Act[401] by allowing striptease dancing on his premises – Viva Africa Investment CC.[402] Section 160(d) criminalised any holders of on-consumption licenses who allowed the licenced premises to be used as brothels or to be frequented by prostitutes; or allowed any person to perform an offensive, indecent or obscene act; or allowed any person not clothed or not properly clothed, to perform or appear in the premises of entertainment which the public had access to.[403] Philips[404] sought an order in the Witwatersrand High Court so as to declare section 160(d) of Liquor Act, 1989 to be unconstitutional and invalid. He argued that the section unjustifiably offended the freedom and security of a person as guaranteed.[405]

Exotic-dancing,[406] as a form of artistic expression of a sexual nature will arguably find support in section 16(1)[407] of the Constitution. As a result, Cloete J declared section 160(d) of Liquor Act to be unconstitutional for it unjustifiably limited the freedom of expression which included the freedom to receive or impart information or ideas; or the freedom for artistic creativity.[408] In defending strip shows, Cloete, J stated:

> Under the new constitutional dispensation, expressive activity is prima facie protected no matter or repulsive, degrading, offensive or unacceptable society, or the majority of society, might consider it to be.[409]

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398 *Andrew Lionel Phillips and Others v DPP and Others* CCT 55/04 para 6.
399 Sexual Offences Act, 1957.
400 In contravention of Aliens Control Act 96 of 1991.
401 Liquor Act 27 of 1989.
402 *NDP v Andrew Lionel Phillips and Others* (SCA) Case No 043/04 para 3.
403 Section 160(c), (d) of the Liquor Act 27 of 1989.
404 *Andrew Lionel Phillips and Others v DPP and Others* (WLD) Case No 02/6168 (14 June 2002, unreported).
405 Section 12 of the Constitution.
406 Paulsen and Kimball 2018 *PSU McNair Scholars Online* 2.
407 Everyone's right to freedom of expression which includes freedom to receive or impart information or ideas; or freedom of artistic creativity.
408 Section 16 of the Constitution; *Philips and Another v DPP and Others* CCT 20/02 para 16.
409 *Andrew Lionel Phillips and Others v DPP and Others* (WLD) Case No 02/6168 para 14.

The Court went further to state that any such seemingly insulting or shameful expression could only be limited by a law that was justifiable in open and democratic society based on human dignity, equality and freedom.[410] The Constitutional Court confirmed by majority that section 160(d) limited the freedom of artistic creativity and the freedom to receive and impart information;[411] and therefore declared this section unconstitutional and of no force or effect.[412]

In the case of *Mavericks Revue CC and Others V Director General of the Department of Home Affairs and Another*,[413] a situation of human trafficking was investigated whereby a foreign dancer was withheld from leaving the country by her employers until her travelling debt to them was repaid. Mavericks Revue CC (Mavericks) is an exotic dance club (which has been incorporated since 1 November 2001) with its principal place of business in Cape Town.[414] The business has been described as 'gentlemen's revue bar' (and South Africa's most distinguished strip club)[415] which engaged the services of foreign exotic dancers.[416] For this purpose, Mavericks obtained a corporate-permit in terms of the Immigration Act, 2002 which entitled them to employ 200 foreign nationals as exotic dancers.[417]

In a subsequent South African Human Rights Commission (SAHRC) report on Mavericks, it was found that all the employees were women who would dance and strip, and most of the clients were men.[418] The Commission found that the dancers charged R120 for a neck massage; R200 for lap dances for six minutes; R1000 for a dance when touching erotic zones; and R1750 for a dance in the 'Library'.[419] Indeed, the 'Library' had a special menu[420] for the rich and influential patrons. It

410 *Philips and Another v DPP and Others* CCT 20/02 para 16.
411 *Philips and Another v DPP and Others* CCT 20/02 para 15.
412 *Philips and Another v DPP and Others* CCT 20/02 para 33.
413 *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC 5 para 2, Mavericks appears to be a "strip club".
414 SAHRC Report *Mavericks Revue CC* 2, 3.
415 SAHRC Report *Mavericks Revue CC* 49.
416 *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC 5.
417 *DG Department of Home Affairs v Mavericks Revue CC* [2007] SCA 149 (RSA). The business held two corporate permits issued on 20 July 2005 and on 29 November 2009.
418 SAHRC Report *Mavericks Revue CC* 49.
419 SAHRC Report *Mavericks Revue CC* 18, 19.
420 A card which gives prices for various dances available upon payment of requisite fee.

could rightly be contended that many of these services qualify as sex work, according to the legal definition in the Sexual Offences Act, 1957.

Mavericks earned its revenues via the dancers' rental fee of R2000 per week;[421] fees paid at the entrance by those who visited the club; and from an imposed 'booking out' fee by those dancers who chose to leave earlier before the closing time.[422] Dancers accommodated in the club would pay an additional R850 per week.[423] Mavericks also had to pay R650 to the recruiters of dancers out of the dancers' weekly rental fee of R2000. It could be argued that both Mavericks and the recruiters acted as procurers, by wholly or partly surviving on the earnings of prostitution of dancers. The dancers were not entitled to any payment (salary or wages) or any benefits from Mavericks.[424] Mavericks considered the dancers as independent contractors.

The SAHRC furthermore found that the dancers in Mavericks worked as independent contractors,[425] and not as employees as the law required. While acknowledging the lawful economic relationships, the SAHRC recommended that:

> Mavericks review its policies to ensure compliance with relevant labour legislation and the constitutional provisions … particularly the contractual relationship with the women who dance and strip … women who work at the club be in possession of relevant documents; … the Department of Labour investigate the working conditions of the dancers at Mavericks and other strip clubs to ensure compliance with the regulations.[426]

In another case involving a foreign exotic dancer, Tatiana Malachi was recruited from Moldova to work as a dancer for the Cape Dance Academy International (Pty) Ltd.[427] On her arrival in South Africa, her employers demanded that she surrender

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421 *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC paras 43, 44.

422 SAHRC Report *Mavericks Revue CC* 17.

423 SAHRC Report *Mavericks Revue CC* 52.

424 *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC paras 43, 44.

425 According to the South African Labour Guide https://www.labourguide.co.za/contracts-of-employments/300-employee-or-contractor (Date of use: 8 July 2021), independent contractors work on their own hours, run their own businesses, are free to carry out work for more than one employer at the same time, invoice for their services and are paid accordingly.

426 SAHRC Report *Mavericks Revue CC* 72, 73.

427 *Malachi v Cape Dance International (Pty) and Others* 2010 (7) BCLR 678 (WCC) para 3; *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para 5.

her passport to them pending its registration in the police station.[428] After working for some time, Malachi expressed dissatisfaction with conditions of employment, and sought to leave.[429] When she asked for her passport, the employers refused to return her passport unless Malachi reimbursed $2000 for her ticket and R20 000, or a total of R100 000 her employers spent on her to secure employment in the exotic dance industry.[430] Malachi could not raise the bondages from her earnings. Malachi sought to leave South Africa, but her employers successfully made an application in a Magistrate's Court to have her arrested and detained in Pollsmoor Prison until she paid what she owed to her employers. Upon her release, Malachi successfully challenged the impugned provisions in section 30(1) and (3) of the Magistrate's Courts Act 32 of 1944 as well as the common law which authorises arrests *tanquam suspectus de fuga*[431] on the basis that they violated her rights to freedom and security of the person. These provisions were declared to be inconsistent with the Constitution and invalid.[432] Although this case concerned criminal procedural issues, what is of importance to the current study is that the court acknowledged that the applicant's constitutional rights in terms of section 12(1)(a) were infringed.[433] As explained by Mogoeng J, the right to freedom of the person is protected in that the deprivation of liberty cannot take place arbitrarily or without just cause, and it may only take place in terms of a fair procedure.[434] Freedom is an important right, and detaining any persons "without just cause is a severe and egregious limitation of that right".[435] As discussed beforehand, many sex workers are arrested and detained (thus limiting their freedom) purely to harass such persons.[436] If this deprivation of freedom is done arbitrarily, or without just cause, the right to freedom of the person is limited, and not justifiable in terms of section 36 of the Constitution.

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428 *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para [6].
429 *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para [7].
430 *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 paras [6], [8].
431 *Tanquam suspectus de fuga* is a procedure which allows for the arrest and detention of a debtor in circumstances where a creditor reasonably believes that a debtor is about to flee the country with the purpose of avoiding the repayment of a debt. See *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para [2].
432 *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para [12].
433 The right to freedom and security of the person.
434 *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para [25].
435 *Malachi v Cape Dance International (Pty) and Others* [2010] ZACC 13 para [40]. Mogoeng J further states that: "It is difficult to imagine the circumstances in which a law that allows detention without just cause could ever be justifiable".
436 See above para 3.4.1 (footnote 355); para 3.4.7, para 4.3.3.

Prostitutes should also be provided access to such procedural measures in order to protect this right, as accomplished in *Malachi*, and these processes will be made available to them if, first and foremost, prostitution is decriminalised.

As evidenced in the discussion above, the activities of strippers or exotic dancers are legally protected as lawful employment, and these individuals are protected under the right to control one's own body;[437] the right to privacy of communication;[438] freedom of expression;[439] and the freedom to choose own trade, occupation or profession,[440] subject to limitations or regulation by a law.[441] An additional protective limitation is that such type of entertainment is reserved exclusively for adults. However, it is submitted that many types of legal adult entertainment masquerade as fronts for prostitution. If sex work were to be decriminalised, these businesses would be able to perform their services in the open, and sex workers themselves would be legally protected.

4.4 Conclusion

As recognised in this chapter, in both the modern and post-modern era in South Africa, the profession of commercial sex work has thrived despite legal or customary restrictions. That being the case, the law, and the discourse of sex work, either by way of selling or buying of sexual services, or by providing an enabling environment for sex work to thrive, has for long been a predicament in South Africa. Before the criminalisation of sex work in South Africa, adult sex work was considered lawful so long as there was no exploitation of prostitutes by third persons. The criminalisation of sex work materialised during the parliamentary system when parliament was supreme when it came to law making. No court could declare the invalidity of

437 Section 12 of the Constitution.
438 Section 14 of the Constitution.
439 Section 16 of the Constitution. Compare to *Barnes v Glen Theatre* 501 US 560, 565 (1991) where the majority court held that nude dancing was a form of speech protected by the First Amendment which provided that Congress cannot make a law to destroy the freedom of speech but subject to reasonable limitations on the time and place. In *Barnes*, the Indiana statutory requiring night club dancers to wear panties and G-strings did not violate the First Amendment. Similarly, in *California v LaRue* 409 US 109 (1972), it was held that the state's prohibition of nude dancing in places licensed to sell liquor was reasonable under the Twenty-First Amendment.
440 Section 22 of the Constitution.
441 Sections 22, 36 of the Constitution.

parliament's powers and jurisdictions. With the promulgation of the democratic constitutionalism and an entrenched Bill of Rights, citizens have been afforded the freedom to practice a trade, an occupation or profession which may be regulated by law. Courts have also been given the power to test the validity of a law or conduct against the Constitution, and where necessary, make a declaration of invalidity of a law or conduct. The South African labour laws (which came into effect after promulgation of democratic Constitution) recognise sex workers as employees in employment relationships. For example, in certain sex work-related professions, such as exotic dancers' and striptease performances in 'gentlemen-clubs', the performers are recognised to be in lawful employment relationships. The Sexual Offences Act, 1957 (which came into force before the Constitution) does not consider sex work as employment but as a criminal activity. The criminalisation of sex work and the enforcement of the law have seen inconsistency, arbitrariness, and constitutional violations by the state agents as well as private persons. The above-mentioned laws are incongruent, and section 20(1A)*(a)* of the Sexual Offences Act should be critically reviewed in light of the sections 9, 10, 1, 13, 14, 16, 22 and 23 of the Constitution.

The criminalisation of sex work has not reduced or halted the sale and purchase of sexual services. Rather, criminalisation has led to prostitution being practised underground in insecure environments that endanger the lives of workers. The clandestineness of the work has also enticed crimes of bribery or rape committed by police officers against sex workers. Sex workers have had no recourse to law even when they have been physically abused.

Criminalising sex work has also led to new trends of transactional sex appearing. Although it is alleged that there are differences between transactional sex and prostitution, it has been submitted that, despite the many grey areas bordering the activities, according to the legal definition of prostitution as found in the Sexual Offences Act, both conducts qualify as sex work. The only difference is maintained in local vocabularies where the distinction serves to justify transactional sex as socially relevant and acceptable. It is submitted that similarly to informal sex work, the attitude towards sex work should change, and the stigma associated with the practice removed.

In the last chapter to follow, the final summary, recommendations and conclusions of the thesis will be offered.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Summary

This final chapter will draw some conclusions and attempt to put forward some answers to the research questions of this study. The research critically reviewed the criminalisation of sex work in South Africa by means of a legal comparative study.

Chapter 1 laid the foundation for the intended research by introducing the research problem, research issues, providing the justification for the research, presenting the relevant definitions of terms employed in the research, and briefly describing and validating the methodology used. In paragraph 1.1, essential background information as regards prostitution and the criminalisation thereof were provided. The concept of human sexuality as expressed by different individuals was explained, and reasons for the existence of prostitution concisely offered. It was disclosed that ancient generations before and after Christ have already practised sex work. Sexual intimacy and intercourse, whether from a marital union or adulterous relationship, or whether the union leads to possible reproduction or not, has been existing since the beginning of time. The demand for sex work to satisfy sexual needs is a personal choice, which sex workers supply while mandating a reward. This 'oldest profession in the world' has survived through generations, cultures, and political systems, and is bound to stay. Different governments around the globe have tried to regulate adult persons' personal choices as regards paid sex work, but most laws have been found arbitrary, over-broad, invasive and elusive, even in South Africa.

The brief introductory remarks were followed by the research problem, research questions and purpose of the study. In paragraph 1.2, the research problem was explained. A brief summary of the four legal models pertaining to the regulation of sex work, namely, decriminalisation; legalisation; total criminalisation; and regulation, was articulated. Sex work is criminalised in South Africa. The criminalisation of sex workplaces individuals who offer or receive sexual services for payment or other favours in a vulnerable situation. Other civilized nations with

similar legal foundations such as that of South Africa have come to realise that eradicating sex work between free and consenting adults by means of criminalisation is an exercise in futility. Even in those states where sex work is outlawed, the 'vice' thrives in very inhumane and insecure environments. The criminalisation of sex work as in the Sexual Offences Act, 1957 infringes on sex workers' rights of equality, human dignity, freedom, privacy and fair labour practises as guaranteed by the Constitution. In the new South African constitutional dispensation, the validity of any law must be tested against the Constitution. In this regard, South African courts have already dealt with the constitutionality of the criminalisation of sex work in the jurisdiction. As decided in the *Jordan* case, both the giver and receiver or any beneficiaries of the sexual services are guilty of an offence. The Labour Appeal Court in *Kylie* recognised sex workers as being protected under section 23 of the Constitution, and it also found that sex workers were workers in terms of Labour Relations Act. These decisions as well as other case law was examined in order to test the impact of the criminalisation of sex work in South Africa. It was indicated that this study will also evaluate other comparable countries' legislative approaches to the purchasing of sex, and their various models of prostitution as possible contributions to this study.

In paragraph 1.3, the research questions and hypotheses of this comparative study which critically examines the criminalisation of sex work in South Africa were clearly stated. These research questions will be answered, and the hypotheses commented on in paragraph 5.3 below. The research questions and the hypotheses were developed to showcase this specific study's contribution to the current body of knowledge by identifying, addressing, or solving specific gaps and inconsistencies or controversies in the literature on the criminalisation of sex work in the jurisdiction, as indicated in paragraph 1.5. The research methodology is explained in paragraph 1.4 as a qualitative and comparative literature-based study. Various methods were employed for critical analysis on relevant case law and legislation. A detailed literature review of research completed on the topic was provided in paragraph 1.6. In this sub-paragraph, all previous post-graduate research focussing specifically on the legal aspects of prostitution were cited, and the contributions each study has made to the discipline discussed. The impact other publications have made on the

subject matter, such as journal articles, reports, online- and newspaper articles, as well as various case law, were also briefly summarised. The outline of study was clarified in paragraph 1.6, and the chapter concluded with a summary in paragraph 1.7.

In the second chapter, a conceptual and historical analysis of sex work and the law was provided. This entailed examining the origin and development of the concepts of prostitution and prostitute (in paragraph 2.2) and presenting the historical development of prostitution and the law in selected ancient jurisdictions from the earliest records available (paragraph 2.3). The last country that was investigated as to its treatment and legislation of prostitution was England from the period of 1600 to the 1950s. It was again emphasised in paragraph 2.2 that sex work, that is, sex motivated by economic exchange, is a phenomenon found as old as the existence of civilization of human race. The word 'prostitute' has its origin from a Latin word *prostituere* (meaning to publicly expose). In paragraph 2.3.1 of this chapter, the origin of prostitution was traced back to the Near East as from 3100 before Christ, which consisted of the Mesopotamian (Babylonian, Assyrian, and Sumerian) and biblical Old Testament societies. Biblical literature generally depicted women as a source of sexual immorality, wickedness, sexual deviants, seductresses, and the flatterer of men. In Mesopotamia, free women, or common women, that is, women not bonded in marriage, who indulged in indiscriminate sexual acts were called *Kar-kid harimtu, samhatu* or *kezertu*. The profession of prostitution was provided protection to by certain divinities. The goddesses *Inanna* (in Sumeria), *Ishtar* (in Mesopotamia) and *Astarte* governed over human sexuality, especially the erogenous use of one's body. Sexual acts involved penetrative acts as well as nude performances in ale houses and dancing theatres. The modes of payments for sexual services included food stuffs, animals, silver, or shekels. Pimping was also apparent during this period. The law, especially the Law of Hammurabi and the Middle Assyrian laws, protected prostitutes from physical abuse by clients. Clients would be held accountable for injuring a prostitute. A prostitute could also enter into a cohabitation relationship with a man for the purposes of bearing him a child, especially if the man's wife was barren. Though the societies of this era regarded prostitution as despicable and that prostitutes were dishonourable, sex work was

considered an ‘evil-necessity’.

In paragraph 2.3.2, it was explained that the Mediterranean Sea served as a major route for commerce and cultural transmission, and that Phoenician maritime traders most likely brought prostitution to Greece via slavery, temple dancers or beer makers. The Phoenicians had an influential naked goddess of lust called Astarte. As a result, Greeks invented their own goddess of love called Aphrodite, similar to Astarte. Greek prostitutes worshiped and made offerings to Aphrodite who in turn would aid them to lure wealthy clients. Greek prostitutes went by many names: *pornéia* or *pornê* (derived from *pernemi*; meaning a woman who sells), *misete* (lewd woman)*, leophoros* (much trafficked woman), *hetaira, pornoi* or a *catamie*, amongst others. Prostitution was considered a means of earning a livelihood. It was an offence to procure a woman to perform prostitution unless that the one procured was already a prostitute. Prostitutes paid tax out of their proceeds in order to fund state’s development like putting up cheap brothels. In the Roman cities, the Roman goddess of eroticism, *Venus*, played a role in encouraging prostitution. Most prostitutes were traded slaves or ex-slaves of non-Roman blood or women sold into prostitution by their husbands. Prostitutes went by monikers such as *meretrix* (woman who earns), and any woman who had indiscriminate sex with men was called a ‘common prostitute’ or *meretrix publica* or *muliere publice*. Public places where prostitution took place were called ‘public houses’ or *maison publique.* Prostitution was regulated by the law. The *lex Iulia et papia* prohibited prostitutes and pimps from marrying outside the *infames.* The *lex Iulia de adulteriis coercendis*, exempted sex workers from the punishments meted against other citizens for the offences of unlawful sexual relationships. Prostitutes, pimps, and brothel owners were taxed from the amounts they collected from prostitution. The state officials maintained registers containing sex workers’ personal information and ensured compliance of payment of revenues from sex work businesses. During this period in ancient Rome and Pompeii, prostitutes were dishonoured but deemed inevitable.

In Medieval Europe, prostitution operated against the influential backgrounds of religion and secular political systems, as explicated in paragraph 2.3.3. The *Corpus iulis civilis* and *Corpus iulis canonis* became *Ius commune* (common law). The Canon law regarded prostitution as a great evil that causes damage but necessary

especially for travelling and unmarried men in order to protect married women and virgins from the temptations of lechery or rape by the lustful men. Protestant Reformers, on the other hand, regarded sex outside marriage, including prostitution, as an unacceptable immorality that ought to be repressed. Medieval political systems tolerated prostitution but though a contagion. In many municipalities where prostitution was present, laws were enacted to limit the areas in which prostitutes may operate. In 1285, France officially recognised red-light districts. In the Netherlands, prostitution was lawful but prostitutes were to be healthy so as to avoid infecting clients – more so soldiers – with venereal diseases. In medieval England, the keeping of brothels in the urban centres or prostitutes residing in these areas was unlawful, yet outside the city centres prostitution may be practised. Sex work was tolerated but regulated. Despite these regulations, prostitution flourished mainly because of urbanisation and an upsurge in trade.

In post-Medieval England (as elucidated in para 2.3.4), sex work continued to be tolerated but restricted by laws concerning vagrancy, disorderly houses and contagions which limited the freedom of sex workers to accomplish their business. In 17th century England, the legislative authority was still vested in both the church and the state. Consequently, allegations of sexual immorality were heard in ecclesiastical courts, while charges of contagious diseases were heard in the common-law courts. Females could be accused of having an infectious disease, but only if such females were the proprietors of inns where the guests have been infected by such disease. If the women were falsely accused of keeping a bawdy house, they could bring a case for defamation. Prostitution in England became rampant during the Medieval period, and sex work develop into a truly commercialised profession. In the 18th century, the state attempted to control these indulgences of the population in the cities. Prostitution was regulated via the Vagrancy Act and the Disorderly Houses Act. Under these Acts, bawdy houses and other disorderly places, and disorderly practises like soliciting were heavily prosecuted and punished. Being a prostitute *per se* was not a crime during this century. Up until the 19th century, sex work was tolerated in England, and the conduct only became a punishable offence if it took place in public or outside of certain designated localities and times. The Victorian Vagrancy Act of 1824 was the first law to criminalise certain unwelcome behaviour in

prostitution, and it also brought the term ‘common prostitute’ into British law. It is mainly this regulation of prostitution which was transplanted in England’s colonies, such as Australia, and which also shaped the law on prostitution in South Africa.

In section 39(1)(b) of the Constitution, South African courts are compelled to consider and give effect to international law. According to section 39(1)(c) of the Constitution, the South African legal system may consider foreign law when interpreting the Bill of Rights. As such, Chapter 3 investigated international instruments applicable to prostitution, as well as selected foreign legislation on prostitution for possible application in South Africa. The chapter commenced by providing a background to the different national legal approaches regulating sex work in paragraph 3.2. This consisted of explaining the different models that governments have come up with in order to control sex work, such as the abolition model, the prohibition (or criminalisation) model, regulation (legalisation) of prostitution, or the decriminalisation regimes. These various systems were consequently discussed in the following sub-paragraphs, and the differences and similarities between the various systems were pointed out. In brief, the abolition model punishes the customers and not the providers of sex for money. This unfairly discriminates between the partakers involved in the same act, by punishing only one participant. Criminalisation regimes unreasonably limit everyone’s freedom to trade on one’s sexuality by declaring sex work a crime. The legislation model is akin to the statutes regulating health (or contagious diseases) seen in paragraph 2.3.4. Prostitutes can operate their businesses in zoned, demarcated places, and must undergo regular health tests. They are furthermore obligated to pay taxes to the state from their earnings. Lastly, the decriminalisation regime recognises the right of an individual to freely choose sex work as a profession and earn a legitimate income from this preferred work. However, the law still protects children or persons coerced to perform sex work.

In paragraph 3.3, prostitution in a foreign law perspective was introduced. Jurisdictions of comparable jurisprudence to that of South Africa were selected. The considered countries were the UK as well as jurisdictions that have been influenced by English law such as India and Canada. As explained in paragraph 3.3.1, turning to the UK law and current viewpoints on commercial sex work will perhaps assist

South Africa in deciding how to handle the problem of prostitution. In the UK, the selling and buying of sexual acts is not an offence. It is however illegal to buy sex from a minor (a person younger than 18). Activities related to prostitution (e.g., seeking clients in public places, being an owner or manager of a brothel, or a pimp) are crimes. Prostitution has always been punished under the common law, and by means of statutes. The provisions in the current UK's Sexual Offences Act 1956 (carried over from the Victorian Vagrancy Act of 1824) criminalised not only living on the avails of prostitution (sections 30 and 31); but also causing (creating a conducive environment); prostitution (section 20); solicitation for immoral purposes (section 32); and keeping or running brothels (section 33). These sections have been duplicated in India (see paragraph 3.3.2), Canada (see paragraph 3.3.3) and in South Africa (see paragraph 4.2.3) with minimal changes. Under the Contagious Diseases Act of 1864, any women suspected of being common prostitutes with a contagious disease could be charged, prosecuted, and convicted. They had the burden of proof that they did not have such disease, else they would be forced to undergo vaginal screening by the army surgeon. The amendment to the Contagious Diseases Acts in 1866 and 1869 extended the frequency and geographical jurisdictions of screening of sex workers' health. The current provisions in the Sexual Offences Act 1956 have been challenged on many occasions. For example, in *Shaw v Director of Public Prosecutions,* the House of Lords had to consider indictments of knowingly living wholly or in part on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act 1956; of solicitation of prostitution contrary to section 1 of the Street Offences Act 1959; and also, of corrupting public morals by publishing obscene articles, contrary to sections 1(1) and 2(1) of Obscene Publications Act 1959. As regards the question of what exactly is meant by living in whole or in part on the earnings or avails of prostitution, the court, as per Lord Viscount Simonds, held that persons may be said to be living wholly or in part of the avails of prostitution if they are paid by the prostitutes for goods or services supplied by them for the purpose of prostitution which they would not supply but for the fact that they were prostitutes. The conclusion, therefore, was that payments made by prostitutes for advertising their availability to prostitute amounted to the receiver (or advertiser) knowingly living on that avails of prostitution. The argument can however be made that any other person (even the government which accepts court fines paid

by prostitutes) who knowingly or reasonably ought to have known that a person is a prostitute, and receives monies from such prostitute, may be said to be living on the avails from earnings of prostitution.

Even after the UK ended its membership of the EU, Britain is still bounded by European Union court decisions, such as in the *Jany* case (see footnote 44 in paragraph 3.3.1) where the European Court of Justice held that prostitution is manifestly a commercial activity in which a provider satisfies a request by a client in return for consideration without producing or transferring material goods. That being the case, it is submitted that prostitution is an economic activity pursued by both self-employed persons as well as those in labour relationships, for instance, those working in massage parlours.

In paragraph 3.3.2, the legal framework as regard prostitution in India was elucidated. In this jurisdiction, to offer, ask for or to pay for any sexual services provided is not necessarily an offence. Indian laws do not regard sex in exchange for money as prostitution. As such, prostitution in India is not *per se* illegal. There are, however, activities integral to the profession itself that are prohibited. The SITA of 1956 determined that sex workers may ply their trade in private but are not allowed to perform their profession in public. They may also not carry out their business within 183 metres of a public place. The prohibitions contained in the SITA were duplicated the Immoral Traffic (Prevention) Act 1986, along with new additions. These regulations include public soliciting, seducing or soliciting kerb crawling (i.e. soliciting sex workers by slowly driving by), keeping a brothel (either as owner or as manager), performing sex work in a hotel, child prostitution, and living on the earnings of prostitution (pimping). These stipulations are very similar to the South African clauses proscribing prostitution (see paragraph 4.3), but unlike in South Africa, the various Indian states and provinces may create their own acts to counter prostitution as per the requirement of the region. In fact, the state government may gazette some areas in which prostitution may not be plied. The Constitution of India contains similar, though arguably better-stated clauses which protect those involved in prostitution. Equal protection before the law; the prohibition against unfair discrimination especially on sexuality; equality of opportunities in the public employment regardless of one's sexuality; the right to practise any occupation;

protection of personal liberty; the prohibition and unlawfulness of traffic in humans; and the prohibition of employment of children below the age of 14 years in any hazardous employment – are all entrenched in the Indian Constitution.

Prostitution as a chosen profession is lawfully protected in terms of section 19(1)(g) of the Constitution of India, as confirmed in the case of *Smt Shama Bai and Others* (see para 3.3.2 footnote 184). In *Chintaman Rao and Others,* it was furthermore determined that any law that unreasonably limited citizens to carry out their trade, business or profession, such a law was null and void (see para 3.3.2 footnote 192).

Prostitution laws in Canada, as a former colony of the UK, was discussed in paragraph 3.3.3. In Canada, unlike in South Africa, sex for sale is not a crime. The Canadian Charter Rights and Freedoms (the Constitutional Act, 1982) moreover accords every citizen the right to the freedom of expression and communication, pursuance of the gain of livelihood, and liberty and security. The Canadian Criminal Code, however, places certain legal restrictions on the modus of plying sexual acts for money. The Criminal Code criminalised specified supporting activities relating to the commercial sexual act, such as public soliciting, or making use of public communication or advertising for the purposes of prostitution, operating a brothel, or living off of the profits of prostitution. These restrictions (which are very similar to those currently in use in South African law – see paragraph 4.3) have been lengthily and heavily contested, appealed, and cross-appealed up to the level of the Supreme Court of Canada. The *Bedford* case presents a dividing line as regards prostitution laws in Canada as the Supreme Court of Canada specifically stated in this case that prostitution was not an offence in Canada. In *Bedford*, the legislation restricting the sex trade was challenged as these provisions were intrusive on the liberty and security of the person as they forced sex workers to work clandestinely, resulting in them being more prone to abuse. The Canadian Supreme declared the intrusive law overbroad, arbitrary, and disproportionate, and therefore, unconstitutional. In the *Reference* case, the Supreme Court of Canada held that criminalising communicative acts of a person engaged in lawful activity which did not cause any injury or harm to anyone, was an infringement to section 2(b) of the Charter which guaranteed the freedom of expression. The *Reference* case can be likened to *Phillips* case in South Africa (see paragraph 4.3.3) where it was reasoned that section 160(d)

of the Liquor Act, 1989 infringed on section 16 of the South African Constitution as regards the freedom of expression and communication.

International law has rightly influenced the making of many modern national laws. Consequently, paragraph 3.4 addressed the perspective and instruments of international and the regional law (to a lesser extend) on prostitution. The South African Bill of Rights has borrowed much from the UDHR as well as ICESCR (paragraph 3.4.5). The UDHR was discussed in paragraph 3.4.1. The International Bill of Rights was drafted by the UNHRC, and many jurisdictions have adopted these basic, fundamental rights into their constitutions. For example, Article 12 of the UDHR shields a person from being subjected by another to an arbitrary interference with privacy, honour, and reputation. Article 19 of the UDHR grants everyone the right to freedom of expression regardless of all frontiers, while Article 30 denies a state or any group of persons any authority or right to engage in any activity aimed at destroying any of the rights and freedoms conferred to a person. As such, the UDHR has declared that all human beings, including sex workers, have been born free and equal in dignity and have a right to protection of their physical and psychological bodily integrity, as well as right to privacy. The rights are not absolute and can be limited by a prescribed law only if the law is compatible with the nature of the right, and for the sole purpose of promoting the right. The exploitation of prostitution by third parties have internationally been focused on in the Convention for the Traffic in Persons and Exploitation of the Prostitution of Others (paragraph 3.4.2), the Convention Against Transnational Organised Crime (paragraph 3.4.3), and the Palermo Protocol (paragraph 3.4.4). All of these instruments aim at prohibiting third parties and organised crime syndicates, that is, traffickers and procurers, from making gains by trafficking females for their exploitation or from being (forcibly) prostituted, and not to end prostitution *per se.* Under the ICCPR (as discussed in paragraph 3.4.5), all people – including sex workers – have a right to freely determine and to freely pursue their economic development. This Covenant bars any states or group of persons from engaging in any activity aimed at the destruction of any rights or freedoms established, and any limitation may not do so to a greater extent that is provided and must respect the essence of the rights. Similarly, the ICESCR (in Article 6(1)) as addressed in

paragraph 3.4.6, call upon member states to recognise an individual's right to gain living by *any* work which he or she freely chooses and accepts, and the ILO (paragraph 3.4.9) requires states to ensure the elimination of unfair discrimination in respect of employment and occupation as well as the elimination of all forms of forced labour. The CEDAW (see paragraph 3.4.7) and the DEVAW (paragraph 3.4.8) demand that state parties eliminate all the forms of discrimination and violence against women. In this regard, the criminalisation of sex work is seen a barrier to the health services as well as an avenue of harassment by law enforcers. Analogous to the UDHR, the Maputo Protocol (paragraph 3.5.10) also secures everyone's, including a sex worker, a right to choose the kind of economic activities or occupation or in other words to freely make a choice of employment one wants to engage in. Lastly, in paragraph 3.5.11, the views of several international sex workers' advocacy groups in support of prostitution were considered. These groups have called for states' recognition of prostitution as a legitimate work and to repeal laws criminalising prostitution. It was clear in this chapter that the many international instruments promoting the acknowledgement of sex work as a profession and the protection for sex workers must be adhered to by all state parties, including South Africa.

In chapter 4, a critical perspective on the legal framework of prostitution was presented. This chapter depicted the historical background to the evolution of prostitution in paragraph 4.2. It was shown that the sex-for-reward culture existed in South Africa between indigenous inhabitants before and after Westerners settled in the country. Pre-colonial South African indigenous societies, as seen in paragraph 4.2.1, secretively practised promiscuity as well as concubinage without any impediments. Men, in most cases, paid for the extramarital or premarital sex in kind, for example, an exchange of foods or farm implements. The arrival of Europeans in South Africa, especially the importation of Christianity, interfered with Africans' sexual mores and norms. Christianity brought the concept of shame, sin, and punishment for committing any African form of polygyny, pre-marital or extra-marital sex. These were seen as sexual transgressions and a crime. 'Christianised' Western authorities prohibited any sexual intercourse other than between a husband and a wife, or sex between different races.

As explained in paragraph 4.2.2, when the first European settlers came to South Africa, some arrived as journeying voyagers or military personnel without their wives (see paragraph 4.2.2). They could quench their sexual urges from available free women or slaves who were poorly paid. Although brothels were first mentioned in the Cape settlement in 1681, by the 18th century, these institutions were firmly established with the Slave Lodge as Cape Town's leading brothel. Prostitutes comprised of slaves and domestic workers who performed sex work to supplement their inadequate incomes. Under Dutch authorities, the letting and hiring of personal services could have formed the foundation of prostitution in South Africa. Laws (*placaeten*) between 1652 to 1850 did not explicitly prohibit prostitution but prohibited men from illicit sex such as fornicating with slave women or keeping concubines. The first *placaeten* from 1671 prohibited the Company employees from performing sexual intercourse with slaves. Prostitution, a sexual immorality, during Dutch occupation was regulated by punishing the clients or the sex workers responsible for the spread of sexually transmitted diseases.

During the British occupation, English law was embedded into the already-functioning Roman-Dutch law. The British policies as regards prostitution-related activities were introduced into the Colony, and prostitution was policed and regulated, especially cross-racial illicit sexual conduct. It was consequently during this period that prostitution became an offence for the first time in the South African territories, but it was rarely prosecuted. Prostitutes had to be registered. With the increase in urbanisation, the demand for sex workers escalated, and white, black or mixed-race sex workers (with white customers) became an urban phenomenon. Prostitution was described by the British empire as an evil but necessary institution of ancient origin that could hardly be eradicated lest worst happens. By the late 18th century, British authorities claimed that British military personnel contracted venereal diseases from the common prostitutes. The Victorian authorities in the Cape Colony enacted the Contagious Diseases Act 1 of 1857 and the Contagious Diseases Act 25 of 1868 which required the compulsory registration of prostitutes and their regular vaginal screening to ascertain their health compliance. In this manner, prostitution was still permissible but only if the women were not infected by sexually transmitted diseases. Infected women were forcibly treated and retained in

designated hospitals until they were healed of the contagion. In 1885, the Contagious Diseases Act was amended to discard the forcible medical examinations of females, and to limit the police's power to conduct searches or to summon prostitutes. Sex workers were further restricted by regulations in the Vagrancy Act of 1879 (prohibiting public solicitation for the purposes of prostitution) and the Immorality Ordinance 46 of 1903 (punishing person who assisted prostitutes in furthering their prostitution). It seems that under British occupation, sex work was basically still tolerated, and only the activities of procurers involved in prostitution were criminalised. Laws on prostitution did, however, have a racial undertone, and sexual services were regulated along racial lines.

During the Union era, as elaborated in paragraph 4.2.4, prostitution was not outlawed. Sex work in the Union continued to be regulated by means of vagrancy laws and public health Acts, alongside racial lines. The former provinces' laws were amalgamated and carried over into the Union. These legislations punished those who facilitated acts of prostitution like pimping or managing a brothel or benefitted from prostitution of others. Near the beginning of Union, courts could not convict a man on charges related to prostitution unless the prostitute corroborated the evidence (i.e., incriminating herself). Statutory sexual immorality, which was punishable, still lay in the sexual intercourse other than between the same races. In order to address such non-discriminate sex work between White female immigrants and Black males, the Union Regulation Act 22 of 1913 (Admission of Persons to the Union Regulation Act) outlawed the immigration of European prostitutes to South Africa. Still, it was apparent that individuals selling or purchasing sexual services never broke the law as long as they observed the rules as regards racial segregation and the health guidelines as under the Public Health Act of 1919. However, as beginning from 1927, specific legislation was enacted that outlawed illicit carnal knowledge, procuration for the purpose of illicit carnal knowledge, and knowingly permitting one's premises to be used for the purposes of illicit carnal knowledge. The Immorality Act of 1927 created the offence of procuring a woman or knowingly permitting one's own house to be used for purposes of committing illicit carnal intercourse.

As pronounced in paragraph 4.2.5, during the apartheid era which commenced in 1948, the National Party regime passed repressive laws which exacerbating the morality laws from the previous era and placed especially non-whites in harsh conditions. This political regime still regarded sexual relations and sex work across racial lines as an important moral priority. It was also during this period of white minority rule that the conduct of those who traded in their own sexuality was criminalised with the enactment of the Immorality Act, 1957 (later renamed the Sexual Offences Act of 1957). The Immorality Act of 1957 punished those persons who ran or benefited financially or materially from the use of brothels or inmates of the brothels, and the Sexual Offences Act, 1957 further criminalised the act of knowingly living on the earnings of prostitution. Courts have challenged certain provisions in these sexual offences laws, as in the decisions in *S v F* (as the law prohibits the hiring out of rooms and receiving the proceeds thereof for the purposes of prostitution of others, prostitutes receiving monies for sexual services do not receive monies as a result of this business, and are, therefore, not culpable), and *S v Horn* (where the court held that a proper interpretation of section 20(1)(a) of the Sexual Offences Act, 1957 absolves a prostitute from criminal liability). As a result of the decision in *Horn*, the Immorality Amendment Act 2 of 1988 was introduced in order to unambiguously proscribe the selling and buying of sexual services by including section 20(1A)*(a).* Not only does this Act continue to regard it a crime for third parties to earn their gains by exploiting the prostitution of others, intent in the form of *dolus eventualis* was merely required to hold any person criminally liable who ought to have foreseen that unlawful carnal intercourse for reward may take place and continued to assist the prostitute in performing their business.

As perceived from the previous paragraph on prostitution legislation in the pre-constitutional era, the sale and purchasing of sexual services are specifically criminalised in South Africa (unlike in the UK, India, and Canada). In paragraph 4.3, the legal and policy framework on prostitution during the constitution era were discussed. This included a brief explanation of municipal by-laws that contained general and prostitution-specific provisions on prohibiting any type of prostitution-related behaviour. South Africa shifted from a parliamentary system to a constitutional democratic system as from 1994. The Constitution is one founded in

international law as well as foreign law, emulating especially the Canadian Constitution. Under the dispensation of the Constitution, sex workers acquired certain rights which could only be regulated by law: the right to dignity, the right to life, the right to freedom from physical and psychological violations, the right to security in and control over one's own body, protection against enslavement, servitude or forced labour, protection of one's privacy of communication from intrusion, the right to the freedom of expression which includes the right to artistic creativity, and the right to choose one's own trade, occupation or profession.

Sex work in South Africa is mainly criminalised via the Sexual Offences Act, 1957 and the Sexual Offences Act, 2007. Some of the other proscribed sexual conducts that the South African law has outlawed are the keeping of brothels, trafficking for sexual purposes, paid carnal intercourse, living on the proceeds of sex work, solicitation, sexual violation, and other acts of sexual indecency. The law punishes any persons who unlawfully and knowingly live on the avails of, or earnings from prostitution, especially those involved in the trafficking in persons for the purposes of sexual exploitation. In the constitutional era, certain sections in the Sexual Offences Act, 1957 have been challenged, as elucidated in paragraph 4.3.1. In the *Jordan* case, the majority court declared sections 3 and 20(1) of Sexual Offences Act, 1957 that criminalised prostitution-related activities to be valid, and, as such, constitutional. In particular, the court held that section 20(1A)*(a)* (as inserted in the 1988 amendment) did not impair a prostitute's right to dignity; security of person, privacy, and freedom to engage in economic activity. The judgment in the *Jordan* case has elicited heated legal debate as to the proper interpretation of the Constitution. The court further concluded that the profession of prostitution was not protected by the constitutional provision of right to economic activity. It was submitted that the *Jordan* case should not have been decided using the Interim Constitution, at a stage when a substantively better final Constitution was already in force.

The second challenge to the laws prohibiting prostitution (as elaborated on in paragraph 4.3.2) concerned the *Kylie* case. In this case, the Labour Appeal Court considered sections 20(1) of Sexual Offences Act, 1957; 200A(1) and 231 of the Labour Relations Act in the light of section 23(1) of the Constitution. Sections

200A(1) and 231 of the Labour Relations Act describes a worker as being an employee if that person works for, or renders services to any other person, and is economically dependent on the other person for whom he or she renders service, and receives, or is entitled to receive any remuneration for the service deliver (regardless of the form of the contract). Section 23(1) of the Constitution protects everyone's right to fair labour practises. The Labour Appeal Court found that sex workers were regarded as workers in terms of Labour Relations Act. This decision rightly recognises sex-work as a form of labour, and a sex worker as an employee. Still, although the court confirmed that sex workers could form and join trade unions, they could not assert any right to participate through such a trade union nor make use of the unions, as this would mean furthering the commission of a crime.

In order to provide a broader perspective on the current prostitution debate on whether prostitution should be decriminalised, paragraph 4.3.3 presented the most important standpoints available. The SALRC acknowledged the endemic nature of prostitution in South Africa, and cited the prevalence of prostitution in strip clubs, massage parlours, escort services, exotic dance clubs, live shows, brothels, call-girls and street-walkers. The Commission affirmed that prostitution was as founded on socio-economic hardships, and the need for better living standards or livelihoods. The current president of South Africa, Cyril Ramaphosa, has at one time stated that sex work was an inalienable human right, whereas Kgalema Motlanthe (ex-deputy president of South Africa), SWEAT, Sonke Gender Justice, Women's Legal Centre and Asijiki all called for the decriminalisation of sex work to minimise abuses and violence met by sex workers, especially female prostitutes. Former Constitutional Court Judge Zak Yacoob has argued that criminalising sex work curtails prostitutes' right to make free choices. Proponents of decriminalisation of sex work have declared that the illegalisation of sex work has led to an increase in the HIV/Aids pandemic among prostitutes; the rape, assault and even murder of prostitutes; corruption by state officials as regards sex workers, especially by police officers; performing petty crime and drug use by prostitutes, and poverty.

In the last sub-section of this chapter (in paragraph 4.3.4), other forms of transactional sexual acts which may qualify as sex work, but not prosecuted as such, were explored. The sexual relationship in such partnerships (which could

temporary or of an extended duration) is transactional in nature where the female provides for sexual services to the male in return of material or monetary gain. Sexual relationships of these types consist of unlawful carnal intercourse founded on the *quid pro quo* principle, although the relationships are not criminalised, and are deemed socially acceptable. The relationships that were briefly explained in this paragraph were the blesser-blessee phenomenon, *ukuphanda* and '*mavusos*'. It was revealed that although it is claimed that these sex-for-money exchanges take place outside of commercial sex work, the practices conform to the definition of prostitution as in the Sexual Offences Act. The only difference is the terminology used to describe the transactional relationship, and this distinction is arbitrary and discriminatory in nature. In the second part of this section, the activities of the legal sex industry are presented. These acts involve indecent exposure; naked- or semi-nude performances in the premises of adult entertainment at a cost. 'Legal sex industry' activities are artistic expression protected by Article 16(1) of the Constitution. The case of *Phillips* was evaluated where the court declared section 160(d) of Liquor Act, 1989 unconstitutional, as it limited section 16(1) of the Constitution (protecting the right to artistic expression). Section 160(d) of Liquor Act criminalised licensed individuals who allowed their premises to be used as brothels, or to be frequented by prostitutes to ply their businesses or allowed the premises to be used for the performance of perform erotic acts. The court stated that subject to the limitation clause, any expressive activity was prime facie protected no matter how repulsive, degrading, offensive or immoral the majority of the society may consider it to be. In another case discussion, that of *Mavericks Revue CC and Others*, it was again revealed that the activities of strippers or exotic dancers in South Africa are legally protected as lawful employment, and these individuals are safeguarded by the provisions of the Constitution. The dancers in Mavericks entertained clients while naked, massaged clients, lap danced, and provided additional, private services in the 'Library'. All these sexual acts were directly or indirectly paid for. It was contended that many of these services qualify as sex work, according to the legal definition in the Sexual Offences Act, 1957. The final case discussion of *Malachi* served to illustrate again the rights that the legal sex industry workers have access to; rights which the common prostitutes lack. Although there

is a price tag for all these different sexual activities in South Africa's multi-sex industry, only sex workers are criminalised.

5.2 Recommendations

After researching the diverse discourses on prostitution, both historical and contemporary, and examining the jurisprudence, legislation, and case law on sex work in South Africa, the UK, India and Canada, the following recommendations can be made:

- Decriminalise the sale and purchase of sexual services between consenting adults

This research has shown that in the jurisdictions of Canada and India, whose legal foundations, especially of their sexual offences' statutes, are founded on English law, sex work is not an offence. South Africa's Sexual Offences Act, 1957 mirrors the UK's Sexual Offences Act, 1956. However, the UK legislation on prostitution has been amended to legalise sex work. Based on these laws, it is recommended that sections 19 and 20(1A) in the Sexual Offences Act, 1957 which criminalise soliciting should be repealed so that acts of sex workers are no longer criminalised. The criminal sanctions for brothels should likewise be repealed, but the prohibitions on human trafficking and child prostitution should be retained.

The decriminalisation of sex work in South Africa is advocated for here mainly in order to protect the human rights of sex workers. It has been argued in this thesis that if sex work was to be decriminalisation, the state's constitutional obligation towards the protection of these persons' human rights such as the right to human dignity, security of a person, a free choice of work, and access to health will be realised. Prostitutes are a very vulnerable category of workers who are exposed to violence from clients, pimps, and the police. Law enforcement officers harass sex workers by unlawfully arresting, bribing, and even robbing them. Unlawful arrests and detentions are completely contradictory to the constitutional protection afforded to prevent any unjustified, arbitrary arrests and the unauthorized appropriation of sex workers' property. As held in *Malachi*, arrests *tanquam suspectus de fuga* are

unconstitutional as these types of detentions violate a person's rights to freedom and security of the person. The outcomes of this judgment should also be made applicable to sex workers. With the decriminalisation of the sex work profession, prostitutes would have access to the criminal-justice system through regulated frameworks. They would be able to report any abuse to the police without harbouring fear that they will be arrested or harassed. They would also be able to open cases against the offenders, as they will have full access to the protective services provided for in the Constitution. If access to justice is denied to them (in breach of the Constitution section 34), legal steps may furthermore be taken to rectify such injustice.

Section 22 of the Constitution has granted every citizen the right to freely choose their trade, occupation, or profession, that is, without any state interference. This right may, however, be regulated or overseen by law. Sex workers often suffer at the hands of their employers as victims of unfair labour practices (infringing section 23(1) of the Constitution), as seen in the *Kylie* case. In this regard, labour courts have recognised sex work as a form of labour, and acknowledged sex workers as employees, but they are still regarded as criminals since sex work statutorily remains a crime. Due to their continued criminal status, it is not anticipated that sex workers will assert their labour rights against employer abuse. If sex work is decriminalised, sex workers would be able to truly assert these labour rights, and lawfully organise and participate in trade unions, e.g., unionize for better working conditions. It was shown in this study that sex work comprises a wide spectrum of participants. Beside sex workers themselves, there are other service providers such as brothel owners, bouncers, and escorts who try to keep sex workers out of harm's way. If sex work were to be decriminalised, these persons would also be able to access their rights in terms of section 22 of the Constitution.

The decriminalisation of sex work will furthermore oblige brothel owners to abide by health and safety standards in their operations. As prostitution is currently still regarded as a crime (but occurring clandestinely), general or specific health regulations are not applicable to sex workers; there are also no standard operating procedures brothel owners must adhere to. The decriminalisation of sex work will result in sex workers receiving preventative healthcare and necessary medical

consumables, such as prophylaxis and condoms. The right to access of healthcare as enshrined in section 27 of the Constitution will only then become meaningful to them.

Sex work, like any other activity, should always take place in secure environments. Prohibiting brothels pushes prostitution to bushes or any unsafe places where prostitutes would be exposed to possible harm or violence. If decriminalised, sex work will not occur covertly but in a controlled environment which will reduce the risk of these persons becoming victims of crime. The risks associated with sex work will be better contended with if the working conditions of prostitutes are improved by means of decriminalisation.

As seen in chapter 4, the definition of sex work may be precise but sometimes impossible to apply in the current socio-cultural context in South Africa. The distinction between legitimate transactional sex work and illegal sexual transactions is ambiguous and discriminatory. One clear difference between these two types of sex work (other than legality) is that prostitutes are being harassed and arrested by law enforcement, while legal transactional sex workers go scot-free. There should be no unfair discrimination between the different sex workers in the sex industry. Not only is this criminal law unclear and applied arbitrarily, but prostitutes are stigmatised and marginalised by this outdated and invasive legal regime.

Decriminalisation is furthermore deemed necessary in order to achieve South Africa's obligations under international law. For example, South Africa is a party to ICESCR, and Article 6(1) of ICESCR requires member states to recognise an individual's right to gain a living from *any* work which he or she freely chooses and accepts. In this regard, South Africa should remove all legal barriers to adult sex workers so that they may perform their profession without any restrictions. As evidenced in paragraph 4.3.3, there are many international and national voices in favour of the decriminalisation of sex work; quoting positive experiences in countries where this has already been accomplished.

Lastly, it is necessary to be emphasise that the new South Africa is a democratic dispensation founded on fundamental values and social justice, and the government takes pride in the fact that there has been a transition from the old apartheid regime

to a new representative democracy. It is consequently perplexing as to why the democratic government still clings to the apartheid government's laws in order to control and regulate adult consensual sex. These morality laws are nothing else than the state interfering in individuals' private lives by invading their personal privacy and bodily autonomy.

- Establish a coherent strategy in dealing with sex work by the state and law enforcement

With decriminalisation, the state and law enforcement should employ a legal strategy to deal with sex work and sex workers. The first goal to be accomplished should be changing the entire mind-set as regards prostitution. This will entail a focus shift by law enforcement agencies from pursuing and prosecuting prostitutes, to protecting them and safeguarding their interests. The protection of prostitutes will only be possible if there is awareness as to their plight; as such, the police force should organise capacity- and awareness-building training. Government should likewise create public awareness campaigns so that the general South African society be educated and sensitised about sex work. It is important that societal perceptions change as regards sex workers in order to eliminate or reduce the stigma attached to the profession. To this end, it is recommended that guidelines are formulated to deal with vulnerable groups such as prostitutes. Law enforcement need to establish guidelines as to standardising responses and dealing with sex workers. It should be underscored that police may not interfere with health- or outreach group services provided to sex workers. Furthermore, it should be stipulated that police members may not target or harass these workers, and that any such discriminative misconduct will result in disciplinary action, and even dealt with in equality courts. Sex workers should also be able to partake in such labour processes. Consequently, the current labour legislation should be reviewed to ensure that sex workers are able to participate and make the most of their labour rights. Instead of harassing prostitutes by means of municipal bylaws, these local government instructions could specify the sites sex workers are able to trade, as well as how and where they may advertise their services. It is lastly suggested that government create a review committee that is able to monitor the functioning of the decriminalisation of sex work, and to provide regular feedback to parliament as

regards problems experienced in this regard, e.g. any chronic abuse by law enforcement agencies against sex workers. Serious political commitment and adequate resource allocation are essential elements to alleviate the harsh realities of sex workers' economic circumstances.

- Alleviate the plight of sex workers

As evidenced in this study, many (especially street-based) sex workers have been arrested and incarcerated for contravening section 20(1A)*(a)* of the Sexual Offences Act, 1957, or any crime related to sex work, such as drug abuse or vagrancy. These criminal records make it harder for them to find work (if alternative employment is desired), or even to qualify for financial aid, housing, and social benefits, amongst others. It is submitted that previous arrest- and conviction records keep these persons in economic hardship and exacerbate the ongoing race and gender discrimination. It is, therefore, suggested that the government should consider granting sex workers relief in this regard in the form of expungement of criminal records.

Due to the historical inequality in South Africa along racial and gender lines, most sex workers are black women – the furthermost marginalised members of society – who perform voluntary sex work as a means of survival. These are poor and less skilled persons who eke out a livelihood by selling their physical labour, like other manual labourers such as gardeners or domestic workers. Such employment should not be legally prohibited, especially since transactional sex-for-reward activities are legitimate. It seems very inequitable that sex for undetermined cash payments or gifts is acceptable yet negotiated sex services are criminalised.

Resources should be allocated to sex workers in order to empower them to take their place in the new economy; their labour rights should be safeguarded and enforced, and more lucrative activities in- and outside of the informal economy should be offered to them. The inclusion of prostitution in the mainstream employment sector will recognise the profession as a reasonable means to secure a living. Instead of criminalising their livelihood, sex workers should be afforded their basic human rights and protection.

Awareness programmes should also be established for sex workers themselves so as to inform them of their rights, and to create cognizance as regards any new amendments to the legal system. Medical assistance, legal resources and other support services should form part of the sex-law reform process. As part of a regulated, precautionary set-up, programmes and health care should be made available to sex workers in order to adopt safer sex practises, and to manage and control the spread of STDs. To assure compliance with the law, provision should be made for inspection of the quarters where sex work is performed.

As previously stated, some persons are compelled to prostitute themselves because of the socio-economic positions they find themselves in. Even if sex work were to be decriminalised, such persons may choose to leave the profession. It is thus recommended that these sex workers be assisted with resources and support in order to exit prostitution. If sex workers freely choose to leave the profession, alternative employment opportunities should be made available to them. Prostitution diversion programs claim to deliver rehabilitative social services to ostensibly trafficked people or people who commit low-level offences. These programmes, however, consume much available resources, and are seen by many as merely gatekeeping by the police and courts, and not really addressing participants' needs, such as housing and other resources. It is thus further recommended that community-based, non-penal programs should be created for ex-sex workers.

5.3 Conclusion

This critical study on the causes and consequences of the criminalisation of sex work in South Africa by means of a comparative approach strived to answer pertinent research questions raised under Chapter one. In conclusion, it can be stated that the research questions of this thesis have been answered, and the hypotheses proved:

Research question 1: **What are the reasons behind endemic sex work in South Africa?**

It has been established in the study that there are a myriad of interrelated factors driving entrance into sex work in South Africa, such as poverty, low education, inequality, unemployment, addiction, and discrimination, amongst other reasons.

Research question 2: **Has the criminalisation of sex work in South Africa reasonably met the state's objective of eradicating the conduct?**

The criminalisation of sex work in South Africa has not reasonably met the state's objective of eradicating the conduct, and there are no signs that sex work is even being deterred, mainly because the causes of sex work have not been attended to by government. There is still abject poverty, and the demand for sex work remains. Sex work is thriving nowadays with new trends of cultural transactional sex-for-reward, and online advertisements. As law enforcement is not attending to the above sexual transgressions, it can be surmised that criminalisation has not done much to curb sex work.

Research question 3: **What are some of the challenges that have been faced in the criminalisation of sex work in South Arica?**

The criminalisation of sex work in South Africa has driven the illicit sex work industry further underground. This has impacted on the health and safety issues of the sex worker. Prostitutes are vulnerable to abuse from clients, pimps, brothel owners and the police. Criminalisation has led to increased levels of violence in the prostitution trade, and sex workers cannot lodge a complaint at police stations without fear of a reprisal, such as arrest, detainment or even facing police brutality. Certain 'lawful' sex-for-reward transactions have mushroomed and are performed openly without any fear of arrest.

Research question 4: **Are the legal doctrines *ex turpi causa non oritur actio* (from a disgraceful cause, no action arises) and *in pari delicto portio est conditio defendentis seu possidentis* (i.e., where the two are equally guilty, the possessor is in a stronger position) still sacrosanct with regard to sex work in South Africa?**

The legal doctrine of *ex turpi causa non oritur actio* (no action arises to enforce where the performance is immoral or against public policy), is still valid in South Africa, however the court in *Kylie* has decided that although any contracts between sex workers and their employers are illegal, sex workers are still regarded as employees and have access to certain labour-related rights. The *in pari delicto portio est conditio defendentis seu possidentis* doctrine, as a corollary to the *ex turpi causa* rule, eases the *ex turpi causa* rule but only to the extent that justice is taken account of between the individuals, and if public policy is not affected by the relief claimed. The court in *Kylie* held that persons engaged in illegal employment still enjoy the fair labour-practice benefits of the right as enshrined in section 23 of the Constitution.

Research question 5: **Does the criminalisation of sex work infringe on the sex worker's right to equality; dignity; freedom and security of a person; privacy; freedom to receive and pass information or ideas; freedom of trade, occupation and trade; and fair labour practises in the democratic Republic of South Africa?**

As illustrated throughout this thesis, the criminalisation of sex work infringes on the sex worker's right to equality; dignity; freedom and security of a person; privacy; freedom to receive and pass information or ideas; freedom of trade, occupation, and trade; and fair labour practises. The issue of prostitution should not be dealt with on a moral basis, but on a human-rights basis.

Research question 6: **Does the current model of criminalisation of sex work in South Africa find support in comparative foreign law and or international law?**

There are several countries around the world that criminalise sex work. Although these jurisdictions prohibit both the selling and buying of sexual services and certain related activities entirely, and authorise by law the policing, arrest, and conviction for these acts, the trade remains and even flourishes. Criminalising sex work does not deter the sale and purchase of sexual services, but it makes sex work more dangerous. There are no international instruments that support the criminalisation of sex work.

Research question 7: **What legal framework ideally suits sex work and sex workers in South Africa?**

It has been submitted in this study that no criminal sanctions should exist for consenting adults engaging in sexual activities for reward, which is performed in private without harming anyone. In declaring such sexual activities, a crime – thus legislating morality – the state is encroaching on individuals' private lives and matters. Sex work should be decriminalised so as to respect individuals' privacy, as well as the fundamental human rights of sex workers. In this manner, sex work may be regulated by means of administrative measures, and any adverse consequences that may arise from decriminalisation monitored and addressed.

Several hypotheses were formulated in the introductory part of this study. These hypotheses underlying the research in this study are:

- The criminalisation of adult sex work in the democratic, constitutional state of South Africa is untenable due to its arbitrariness, over-broadness, and disproportion. A prostitute is defined as a person aged 18 years or older who provides or offers sexual services for financial or other reward, favour, or compensation, irrespective of whether sexual acts occur or not. Sex work constitutes the physical labour of a prostitute in the sex business. Adult entertainment, which it is argued may constitute a form of sex work, is lawful. These dancers' sensual acts (and other services of reward) have been justified

in the *Phillips* case as their constitutional right to expression. Adult entertainment performers are not treated as prostitutes, and the owners of these businesses are not regarded as persons living on the earnings derived from the sales of other persons' sexuality. Yet, sex workers are punished for selling their services, or attempting to sell their services. In both the cases of *Jordan* and *Kylie*, it was held that performance of sensual massages in massage parlours was unlawful. Essentially, there seems to be no difference in the activities conducted in adult entertainment complexes and massage parlours. To this end, the criminalisation of sex work is arbitrary which means to be held liable may depend on how the court interprets the law. Furthermore, the sexual offences legislation not only criminalises sex workers, but also anyone who receives financial support from a sex worker. In this regard, the friends, families, roommates, partners, and peers of sex workers may themselves face criminal penalties for 'living off the proceeds' of sex work. These persons may be prosecuted under the overbroad sex laws that interpret their support as promoting sex work. It is especially the family members of sex workers who are financially dependent on the sex workers' income who may experience hardship when these persons are arrested and imprisoned, and consequently, unable to work. It seems that the law enforcement and the prosecution of an essentially moralistic crime not only constitutes a monetary waste of resources, but these acts also disrupt the lives of sex workers, their dependents, and their social support systems.

- The interpretations of the concepts of sex work in South Africa are based on judicial activism. The pre-constitutional society in South Africa was much inclined to a Christened society. The Christened society and the judges were raised in a legal environment where prostitution was socially and legally immoral. In the *Jordan* case, the judges regarded prostitution as socially immoral despite a constitutional guarantee of everyone's right to security in and control of their own body. The decision in *Jordan* was disputed in the cases of *Phillips* and *Kylie* where the spirit of the Constitution was judiciously applied to the relief of sex workers. The criminalisation of the sale and purchase of sexual services limits a person's constitutional right to security in and control

of their own body.

- The discretionary relaxations of the common-law doctrines of *ex turpi causa non oritur actio* and *in pari delicto portio est conditio defendentis seu possidentis* as established in *Jajbhay v Cassim* and the divergences thereof have added to confusion in the sex industry trade, as explained in research question 4 above.

- Comparative international- and foreign law interpretations about sex work will help the South African jurisprudence to either decriminalise or at least legalise sex work. Article 6(1) of the ICESCR obligates member states to recognise the right to work which includes the right of everyone to gain a living by work he or she freely chooses or accepts, and state parties must take appropriate steps to safeguard this right. As such, the state cannot determine any person's choice of work which he or she has freely chosen or accepted. The only exception is work that endangers or harms the life or physical integrity of a person or causes insecurity. Article 1(2) of European Social Charter and Article 15 of the Charter of Fundamental Rights of the European Union also compels every member state to accord every citizen the right to work or earn a living from an occupation freely chosen. The EU courts have also determined that prostitution qualifies as an economic activity, and that sex workers must be afforded protection to earn a living from their freely chosen profession. Article 19(1)(g) of the Constitution of India accords all citizens the right to practice any profession, or to carry on any occupation, trade, or business. Indian case law has confirmed that prostitution is a profession, occupation, or trade and, therefore, lawfully protected, and any law that unreasonably limited citizens to carry out their trade, business or profession was void. Similarly, South Africa has laws in place which provide for equal work opportunities, for example, section 22 of the Constitution states that: 'Every citizen has the right to choose their trade, occupation, or profession freely'; section 7(2) of the Constitution provides that the state must 'respect, protect, promote and fulfil' the rights which are contained in the Bill of Rights, including the right to work and employment. However, these rights are not fully realised in the case of sex work.

- Removing the criminal law and delictual law restrictions on sex work and sex workers in South Africa are compatible with the Constitution of the Republic of South Africa, as well with international law. Sex work is a contractual relationship. There is an offer, receipt of the offer, a performance and reward. Article 7 of the ICESCR calls upon member states to recognise the right of every worker's just and favourable conditions of work which includes fair remuneration for work of value without distinction of any kind. The same is echoed in section 23(1) of the Constitution of Republic of South Africa, which affords every worker the right to fair labour practices. In the *Kylie* case, the appellant was employed as sex worker whose employment was unlawful since sex work is considered a crime. The appellant was dismissed from her employment without notice. The court in Kylie held that the appellant had access to all applicable constitutional rights which protect her as an employee. Yet, it was still maintained in *Kylie* that the monetary compensation awarded to the appellant for a procedurally unfair dismissal was a *solatium* and was independent of the loss of illegal employment. Although the labour courts have recognised sex work as a form of labour, and acknowledged sex workers as employees, they are still regarded as criminals due to the fact that sex work statutorily remains a crime. It is time that these criminal- and delictual law restrictions on sex work and sex workers in South Africa be rescinded.

In conclusion, it can be stated that the research questions of this thesis have been answered, and the hypotheses proved.

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