

SUMMARY

The issue of the criminalization of prostitution raises all kinds of legal questions, especially in South African law. Governments have adopted different positions regarding prostitution. South Africa has tried, by means of law, to crack down on prostitution.

This dissertation discusses the question of prostitution as provided by s 20 (1)(aA) of the Sexual Offences Act 23 of 1957. Whether criminalization is the indicated way to lessen or eliminate prostitution determines the focus of the discussion.

It seemed necessary to understand the topic, to present the most important systems for addressing prostitution, the South African model and its evaluation. A legal comparison is presented. The discussion looks also at international instruments, which place the emphasis on forced prostitution. There is, in South African law, a pressing need to enact laws in accordance with the Bill of Rights, and with the international norms to which South Africa is party.

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ABBREVIATIONS

SACJ: South African Journal of Criminal Justice

SAJHR: South African Journal on Human Rights

SALC: South African Law Commission

SALJ: South African Law Journal

STD/ STDs: Sexually Transmissible Diseases

THRHR: Tydskrif vir Hedendaagse Romeins-Hollandse Reg

UN: United Nations

VD/VI: Venereal Diseases/Venereal Infections

1. INTRODUCTION

The criminalization of prostitution in South African criminal law is the topic of this short dissertation. The issue of the criminalization of prostitution raises all kinds of legal questions, especially in South African law. It has also been argued that ‘criminalization should have been held unconstitutional.’¹

Different governments or states have adopted different positions regarding prostitution. Some have come to realize the ubiquitous character of the conduct throughout time and have decided to legalize or regulate it rather than to suffer the ill effects of driving it underground by criminalizing prostitution.² In effect, prostitution has proved itself difficult to suppress. Contrary to the stance of regulating prostitution, South Africa is still trying, by means of law, to crack down on prostitution. Therefore the question arises as to whether criminalization is the indicated way of lessening or eliminating the existence of prostitution.

Prostitution is criminalized by s 20 (1)(aA) of the Sexual Offences Act 23 of 1957 (hereafter the Act). Before the introduction of the above-mentioned section in 1988, prostitution *per se* was not an offence in South African criminal law. The problem with criminalizing prostitution lies in the fact that the act of prostitution is performed by consenting persons in private, which makes it very difficult to prove that the crime has been committed. The debate upon the abolition of the prostitution-criminalizing laws received new impetus when the matter came before the Constitutional Court in the case of *S v Jordan and Others*.³

By introducing section 20(1)(aA) in the then called Immorality Act 23 of 1957, South African law rendered prostitution itself an offence.⁴ The law criminalizes primarily the conduct of the prostitute, and not that of her customer. As it will be

¹ N Fritz ‘Crossing Jordan: Constitutional Space for (Un) Civil Sex?’ (2004) 20 *SAJHR* 230.

² My opinion gleaned from different readings: there is a lack of unanimity among countries. The following idea of one author on Caribbean law supports my view: ‘From whatever perspective we regard prostitution, it remains a social fact which has resisted all attempts to eradicate it through the intervention of the criminal law’. CG Hall ‘The Minor Offences Act and Prostitution in Barbados: New Cloth on an Old garment’ (1998) 8:1 *Caribbean Law Review* 37-74, available at: [http://vnweb.hwwilsonweb.com/hww/results/results_single_fulltext.jhtml?_DARGS=\[accessed 18 August 2005\]](http://vnweb.hwwilsonweb.com/hww/results/results_single_fulltext.jhtml?_DARGS=[accessed 18 August 2005])

³ 2002 (2) SACR 499 (CC)

⁴ The Immorality Act as amended in 1988 will be referred to as the Sexual Offences Act 23 of 1957.

shown, the customer's actions are neither criminalized nor regulated in any manner by the section. In the *Jordan* case,⁵ the Constitutional Court was divided on the question of whether or not such a situation was consistent with the Constitution. Six Justices of the Constitutional Court of South Africa upheld the constitutionality of the section, while five other Justices held that the section was inconsistent with the values purported by the Constitution. Such diverging opinions of the Court tell us that the last word on the issue of prostitution has not yet been said.⁶

'The selling of sex has been widely practised, and roundly condemned, throughout history.'⁷ There is no panacea for the evil. Every country tries to cope with prostitution in different ways. Although none have succeeded in suppressing it, at least they all strive to reduce the impact of the ravages of prostitution in corrupting public or social morals.⁸ This dissertation deals with the position in South Africa and it is argued that some change is needed in addressing prostitution: prostitution should either be criminalized in such a way that both participants in the conduct are penalized or prostitution should be regulated in order to have better control over it. Whichever orientation is preferred, the legal approach to adopt has to be consistent with the Constitution, and not contrary to the international instruments regarding human rights, and especially women's rights. The current approach in South African law does not seem to comply with the latter.

In this dissertation, prostitution is addressed within the boundaries set up by s 20 (1)(aA) of the Sexual Offences Act (hereafter referred to as the Act). Issues of prostitution related offences are addressed as ancillary matters. The question of child prostitution is not addressed here. The focus is on adult prostitution.

After presenting the concept of criminalization and that of prostitution, the different approaches to control prostitution will be discussed and the decision of the

⁵ 2002 (2) SACR 499 (CC).

⁶ It is hoped that the question will find resolution: 'when the criminal prosecution of sex workers in South Africa under s 20(1)(aA) is challenged in future ...the outcome might well be different'. See Wessel Le Roux 'Sex Wrk, the Right to Occupational Freedom and the Constitutional Politics or Recognition' 120 *SALJ* 452-465.

⁷ J Saville 'Sex for sale, legally' (2003) *The Economist Global Agenda* available at http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=1919372 [accessed 29 June 2005].

⁸ This view is dictated by the lack of unanimity in addressing prostitution. See AA Sion *Prostitution and the law* (1977) 13; M McIntosh 'Who Needs Prostitutes? The Ideology of Male Sexual Needs' in R Matthews and M O'Neill (eds) *Prostitution* (2003) 125-143.

Constitutional Court in *Jordan* evaluated. A legal comparison on the treatment of prostitution is also included. A discussion on how the matter is addressed in international human rights law will also be presented and a recommendation for the way forward will be suggested.

2. CONCEPTUAL APPROACH

2.1. Criminalization

Criminalization is a noun derived from the verb ‘to criminalize.’ According to the *Oxford Advanced Learner’s Dictionary*,⁹ to criminalize means to ‘make something illegal by passing a new law.’ To my understanding, and from a legal standpoint, criminalization is the process of attaching a penal sanction to a given conduct. By doing so, the conduct enters the realm of criminal law. A conduct which was not regarded hitherto as an offence, is now held as such, since its incorporation into the domain of criminal law.¹⁰ According to Burchell and Milton,¹¹ ‘the function of criminal law is to coerce members of society, through threat of pain and suffering, to abstain from criminalized conducts, for they are harmful to various interests of the society.’

The creation of new crimes, other than common law crimes, rests with Parliament. Therefore, criminalization is a power attached to the Legislature and it exerts this power by way of statutes. However, before considering a conduct criminal, the Parliament has to make sure that it is harmful to the interests of society,¹² that it does not conflict with the Bill of Rights¹³ and must ensure that such criminalization aims to protect avowed interests. The question one might ask is whether prostitution deserves criminalization and to what extent does it fail to comply with the rights entrenched in the Constitution. What are the functions that criminalizing prostitution can play in the society?

2.1.1 General deterrence: Why?

There can be little doubt that the illegality of prostitution has served, although not always intentionally, as a general deterrence to many women who may have otherwise turned to prostitution.¹⁴ Prostitution itself does not threaten the ‘morality’ of the political economy, and traditional liberal regulationism has generally refrained from

⁹ *Oxford Advanced Learner’s Dictionary* (2000) (5th impression 2003).

¹⁰ My own formulation.

¹¹ J Burchell and J Milton *Principles of Criminal Law* 2 ed revised (2002) 2.

¹² D Levinson (ed) *Encyclopedia of Crime and Punishment* (2002) 418.

¹³ Compare CR Snyman *Criminal Law* (2002) 8.

¹⁴ R Matthews ‘Beyond Wolfenden? Prostitution, politics and the law’ in R Matthews and M O’Neill *Prostitution* (2003) 491-531.

considering the prostitute relationship itself or from explicitly attempting to reduce the incidence of prostitution. Instead it has remained content to focus legal sanctions almost exclusively on the female prostitute,¹⁵ but any significant attempt to reduce the incidence of prostitution must involve the ‘demand’ as well as the ‘supply’ and broaden the base of illegality. Broadening the base of illegality means to include the punishment of clients through the type of sanctions that are currently exclusively directed towards the female prostitute, and that would be more effective and more appropriate.¹⁶

2.1.2 Disturbance, nuisance and harassment

The continuing problem of nuisance and the annoyance associated with soliciting¹⁷ by female prostitutes, as well as by male clients is a real one. Legislation is already enacted to deter the client who creates annoyance and harasses women. Unfortunately, such legislation is sometimes invoked only against the female prostitute who, in South Africa, is considered as the main focus of intervention. The client is often employed by the police to gain a conviction,¹⁸ and such an attitude encourages hypocrisy.¹⁹

2.2. Prostitution

The *Oxford Advanced Learner’s Dictionary* defines ‘prostitution’ as the work of a prostitute and ‘prostitute’ as a person who has sex for money.²⁰ *Webster’s Dictionary* defines a prostitute as “ a woman who offers herself indiscriminately for sexual intercourse for hire” and prostitution as “common and venal lewdness among a class of women”. Flexner stated ‘...any person is a prostitute who habitually or intermittently has sexual relations more or less promiscuously for money or other mercenary

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Section 19 of the Sexual Offences Act 23 of 1957 addresses the offence of soliciting.

¹⁸ The absence of reference to the client in the *Jordan* case might be interpreted to indicate that the person who received the pelvic massage was employed as a trap.

¹⁹ V Bullough and B Bullough *Women and Prostitution: A Social History* (1987) 286.

²⁰ *Oxford Advanced Learner’s Dictionary* (2000).

consideration.’²¹ Quoting from Neville Rolf,²² James writes: “The legal and social definition of the prostitute and the colloquial content of the word is a ‘woman or girl who for purposes of financial gain, without emotional sanction or selection, supplies the male demand for physiological sex gratification’.” Therefore, the essential factors in professional prostitution are that it is commercial and non-selective. The definition from the Oxford dictionary seems the best for being gender neutral, but it does not include other elements such as indiscrimination regarding partners or the absence of emotion. McGinn draws our attention to the observation that prostitution must be distinguished from other forms of non-marital sexual intercourse such as adultery and concubinage; and that a definition of prostitution that includes the three criteria of promiscuity, payment and emotional indifference between the partners may be considered suited to the distinction.²³

Judicially, prostitution is defined as ‘the practice of offering the body for promiscuous or indiscriminate sexual intercourse with men, and this for the purposes of hire or payment.’²⁴ Generally ‘the definition of “prostitution” and “prostitute” refer to females.’²⁵ Prostitution refers only to woman, even in South African law.²⁶ Geffen writes ‘a prostitute is a woman who indiscriminately consorts with men for gain.’²⁷ It is in that understanding that the concept is taken in the society. It is conceivable, nowadays, to see prostitution as gender neutral since men can engage in homosexual prostitution.

²¹ T E James *Prostitution and the Law* (1951) 1 citing A Flexner *Prostitution in Europe* (1919) 15-19. In South African law, reference is made specifically to ‘woman’: “A prostitute is a woman who indiscriminately consorts with men for gain”. See I A Geffen *The Laws of South Africa Affecting Women and Children* (1928) 282.

²² S Neville Rolf *Biological Aspects of Prostitution: A Social Problem* (1937) 96 cited by James *op cit* (n 21).

²³ T A J McGinn *Prostitution, Sexuality and Law in Ancient Rome* (1998) 18.

²⁴ *R v Ngandelau* 1 N.R.L.R 139; *R v Munck* (1918) 1 K.B. 635 cited by JJR Collingwood *Criminal law of East and Central Africa* (1967) 129.

²⁵ *R v Patterson* (1972) 19 C.R.N.S.28 (Ont.Co.Ct) cited by GP Rodrigues (Gen. Ed.) *Crankshaw’s Criminal Code of Canada* (1985) RSC 1993 7-157.

²⁶ In *R v Kam Cham* [1921] E.D.L. 327, the court expressly defined ‘prostitute’ as a woman or girl who indiscriminately consorts with men for hire or admits a common and indiscriminate sexual intercourse for gain. The court applied the definition set out in *R v Munck* (1918) 1 K.B. 635.

²⁷ I A Geffen *op cit* (n 21) 282.

3. LEGAL MODELS FOR ADDRESSING ADULT PROSTITUTION

Different countries hold different positions on prostitution. In countries such as Costa Rica, the Netherlands, Norway, and Singapore certain forms of prostitution are legally sanctioned, while others are simply regulated, licensed with the objective of preventing the spread of diseases such as AIDS.²⁸ In other countries, it is an offence to be a prostitute, but not to be the client of the prostitute. Other countries yet consider prostitution as a kind of violence by men against women.

Depending on each jurisdiction, 'the crime of prostitution can be one of at least three nonmarital acts:

1. Engaging in sexual relations with another person for a fee or something of value
2. Offering (or soliciting) to engage in sexual relations with another person for a fee or something of value
3. Requesting (or agreeing) to pay a fee or something of value to another person for sexual services and acts.²⁹

The 'fee or something of value' is most often money. Members of either sex may now be convicted of prostitution, as distinguished from the past, when only women could be convicted. Most (if not all) of state prostitution statutes forbid prostitution by males selling sexual services to other males. In some countries males who offer to pay a woman to engage in sex acts may also be charged with the crime.³⁰ In South Africa, however,³¹ the law (and the society) has adopted an ambivalent attitude towards prostitution. On the one hand, prostitution is universally condemned as a social evil, and the prostitute is condemned and penalized for the manner in which he or she carries on their profession. On the other hand, prostitution is tolerated to the extent that it is not forbidden to be a prostitute and the prostitute's customers are allowed to enjoy the

²⁸ A J Johnston 'Commercial Sex Industry' in David Levinson (ed) *Encyclopedia of Crime and Punishment* (2002) 254-257.

²⁹ T J Gardner and TM Anderson *Criminal Law: Principles and Cases* 7 ed (2000) 454.

³⁰ *Ibid.*

³¹ South African Law Commission (2002) *Project 108: Sexual Offences against Children*, 38. South African Law Commission further referred to as SALC.

prostitute's services with impunity.³² Also, as writes Abraham A. Sion,³³ one can ask the question whether the law can rightfully control the conduct of consenting adults in private, or whether a distinction can rightfully be made in penal terms between a prostitute and her client. States have adopted different approaches to deal with prostitution. The dominant approach distinguishes three legal frameworks– prohibition or criminalization, decriminalization or abolition, and legalisation or regulation.³⁴ None of these models has successfully eliminated even one of the disadvantages of prostitution, even if each attempts to the best of its ability to restrict or reduce them.³⁵

3.1. Criminalization or prohibition

The criminalization of prostitution is also called the system of suppression. Within it prostitution and all kindred offences, as well as other acts that promote, organise or facilitate prostitution are prohibited.³⁶ This system makes prostitution *per se* a criminal offence, and it punishes the conduct even when both consenting parties are adults and the act is committed in private.³⁷ A person charged with and convicted of the offence will face punishment in the form of a fine and /or imprisonment.³⁸

The rationale for criminalization is that restrictive laws will deter individuals from taking part in the activity, or failing that, they will at least be punished for the action.³⁹ However, it is difficult to ascertain whether penal measures have indeed reduced the volume of prostitution. As Freed wrote, nearly fifty years ago, 'the penal measures operated by the law in respect of both adult and juvenile prostitutes have not reduced the volume of prostitution in the progress of time, nor have they, in the majority of instances, served as a deterrent to prostitutes with previous convictions.'⁴⁰ A decision to criminalize prostitution is generally motivated by two major concerns: the moral agenda

³² *Ibid.* It is curious to learn that the male partner in the prostitutional act should enjoy the services of a prostitute freely. In the case none should be held criminally liable. See for comment Elsje Bonthuys 'Sex for Sale: The Prostitute as a Businesswoman' (2004) 212 *SALJ* 659.

³³ Sion *op cit* (n 8) 11.

³⁴ J West 'Prostitution: Collectives and the Politics of Regulation' in R. Matthews and M. O'Neill (eds) *Prostitution* (2003) 533-545.

³⁵ Sion *op cit* (n 8) 33.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ SALC Issue Paper 19 Project 107: *Sexual Offences – Adult Prostitution* (2002) 186.

³⁹ *Ibid.*

⁴⁰ LF Freed *The Problem of European Prostitution in Johannesburg: A sociological Survey* (1949) 372.

(that prostitution sanctions immorality and promotes crime and drug use) and health considerations (to curb sexually transmissible diseases –STDs).⁴¹ It is said that the basic reason for the public, and the law, to show interest in the suppression, or at least the control, of prostitution is the close connection between it and the spread of the so-called venereal infections (VI)⁴² or venereal diseases (VD). This seems to be a very plausible and cogent reason for the criminalization of prostitution. However the concern is not simply with sexual intercourse (that might contribute to the spread of STD or VD),⁴³ but with the fact that it involves financial profit, money. Sexual intercourse *per se*, between consenting adults, even unmarried adults can also transmit venereal diseases. It is yet not criminalized! The argument that criminalization prevents the spread of VD therefore fails.

Criminalization can be partial or total. It is partial where the law criminalizes or penalises the activities of those persons exploiting or coercing prostitution – prostitution related activities such as procurement and soliciting – while leaving the prostitutes themselves – and certainly their customers – free from criminal prosecution.⁴⁴ Total criminalization is the system that penalises all acts related to prostitution. It prohibits prostitution itself as well as the conduct of the customer. It will be argued that where the system fails to penalise the client of the prostitute, it becomes discriminatory on the grounds of gender.⁴⁵

As mentioned above, no system has succeeded in suppressing prostitution. Criminalization only succeeds in driving prostitutes underground; they disappear from the scene and resort to new, less visible methods. Most of the time prostitutes tend, by losing their social status as a result of being made criminals, to associate more readily with other criminals.⁴⁶ Sion's views regarding the efficacy of the system of suppression or criminalization are noteworthy:

The system of suppression contributes to the corruption of public officials whose responsibility is to enforce it... It is not possible to obtain evidence against an offender without committing despicable acts, which may give rise to a public outcry;

⁴¹ SALC *op cit* (n 38) 187.

⁴² W C Waterman *Prostitution and its Repression in New York City 1900-1931* (1968) 35.

⁴³ Today the main concern should be the spreading of AIDS.

⁴⁴ SALC *op cit* (n 38) 187.

⁴⁵ See *infra* the discussion of the *Jordan* case.

⁴⁶ Sion *op cit* (n 8) 47.

No one seems seriously to contend that fear of punishment will prevent a woman from becoming a prostitute or that a fine or period of imprisonment as such will reform her. Clients who habitually resort to prostitutes are also not likely to be deterred by the application of penal sanctions.

Finally, there is the question of whether there is any normal justification for forbidding and punishing consenting adults for acts of prostitution committed by them in private.⁴⁷

In opposition to the system outlined above is the approach of decriminalizing all acts of, or related to, prostitution.

3.2. Decriminalization or abolition

According to most feminist theorists, the objective of decriminalization is to ‘decriminalize prostitution in those places where it is still a crime to be or to visit a whore.’⁴⁸ One can freely infer that there is still room for criminalization of other conduct relating to prostitution that does not consist of being, or visiting, a prostitute. From this point of view, decriminalization is partial.

Decriminalization is defined as the complete abolition of laws that criminalize prostitution and all prostitution related offences.⁴⁹ None of the activities related to consensual adult prostitution would be regarded as a criminal offence. Child prostitution and forced participation in prostitution would remain criminalized. The effect of such a system would therefore be to erase, at least the *legal* distinction between adult prostitutes and the rest of society,⁵⁰ to suppress any differentiation between members of society working as prostitutes and others. According to the SALC, decriminalization implies legitimization of prostitution as one form of work.⁵¹ However, it is conceivable to see it as consisting only of the removal of penal sanctions, without taking any further measures to regulate prostitution. To consider decriminalization as a kind of legitimating prostitution as a form of work would be to confuse the distinction between decriminalization and regulation. There may be no confusion if the Legislature contemplates partial decriminalization, which only would mean that only laws

⁴⁷ *Sion op cit* (n 8) 48-49.

⁴⁸ L O Ericsson ‘Charges Against Prostitution: An Attempt at a Philosophical Assessment’ in D Kelly Weisberg (ed) *Application of Feminist Legal Theories to Women’s Lives: Sex, Violence, Work and Reproduction* (1996) 208-216.

⁴⁹ John Howard Society of Alberta *Prostitution* (2001) 7.

⁵⁰ SALC *op cit* (n 38) 201.

⁵¹ *Ibid.*

criminalizing prostitution itself will be abolished, but that prostitution related offences would remain criminal offences.

The advocates of abolition, writes Sion, are aware that prostitution is undesirable in principle and should be eradicated, but they admit that such eradication is impossible at present.⁵² They would promote a system whereby prostitution *per se* is ignored, but its public manifestations and its harmful effects are dealt with.⁵³ The mere act of prostitution is therefore treated as a private vice or a contravention of moral law in the same manner as drunkenness or gluttony. Neither the prostitute nor her customer should be punished for participating in acts of prostitution in private, but streetwalking, soliciting in a public place, brothelkeeping, living on or off the earnings of prostitution and the procurement of prostitutes are acts punishable by the law.⁵⁴ Quoting from Flexner, Sion writes⁵⁵ that the law intervenes conditionally, when prostitution is more than an affair involving two participants. The conditions will be, for example, where ‘decency is violated, disorder is created, neighbours are scandalized, disease is communicated’ and society considers itself warranted in interfering just as it interferes in other circumstances to preserve or to promote the peace and health of the community.

As Richard Card puts it,⁵⁶ decriminalizing is not regulating or legalizing. It only considers prostitution itself not criminal. The law will still proscribe behaviour related to it. Therefore, the new law has an important role in ensuring that those who introduce people into prostitution and thereafter exploit them in it are dealt with appropriately. Partial decriminalization is advocated since prostitution is to a certain extent harmful to the society.⁵⁷ In fact, prostitution itself was not regarded as an offence in either English or American Common Law, and it came into conflict with the law only when it was associated with street soliciting or the operation of a bawdy house in such a way as to be annoying to the passer-by. In other words, the test of the offence was the fact of annoyance.⁵⁸

⁵² Sion *op cit* (n 8) 50

⁵³ *Ibid.*

⁵⁴ Sion *op cit* (n 8) 50-51.

⁵⁵ Sion *op cit* (n 8) 51 citing Flexner *Prostitution in Europe* (1914) 288.

⁵⁶ R Card *Sexual Offences: The New Law* (2004) 131.

⁵⁷ In a country such as New Zealand, where prostitution is no longer an offence, the lawmaker notes that it is still morally a bad conduct. See *The Statutes of New Zealand* Volume 2(2003) 859.

⁵⁸ W C Waterman *op cit* (n 42)12.

Lars O. Ericsson⁵⁹ specifies three positive effects pertaining to decriminalization. They are: (1) to greatly reduce the crude economic exploitation of harlots, such as having to pay usury rents; (2) to reduce occupational hazards, notably those related to the feeling of insecurity caused by being secluded, and deprived of the rights of ordinary citizens; and (3) to weaken the association between prostitution and organized crime. He also points out that the major negative effect of decriminalization is that certain respectable citizens would find that their feelings of decency were upset by having to live in the same house or neighbourhood with prostitutes, but that is outweighed by the fact that the customers will not have to go to far to visit one.⁶⁰

3.3. Legalisation or regulation

Regulation involves legalizing and regulating prostitution related activities.⁶¹ Legalisation or regulation is therefore rightly described as the tolerance of prostitution provided that it complies with certain narrow circumstances aimed at state control of the industry.⁶² These conditions include zoning requirements, mandatory health testing requirements, the registration of prostitutes and the licensing of brothels and escort agencies. The penalty for working outside this controlled legal system is usually of a criminal nature.⁶³ Although legalization can also imply a decriminalized, autonomous system of prostitution, in most legalized systems the police have to enforce the measures enacted in a criminal code or statute. Such laws tell prostitutes where they may or may not reside, prescribe fulltime employment for selling sex, prescribe health checks and registration of health status (enforced by police and, often corrupt, medical agencies).⁶⁴

Thomas A.J. McGinn writes that modern states have tended to prefer the registration of prostitutes.⁶⁵ The most overt and urgent reason⁶⁵ for adopting this approach was concern with the spread of STDs, especially syphilis. It may even be

⁵⁹ Ericsson *op cit* (n 48) at 213.

⁶⁰ *Ibid.*

⁶¹ John Howard Society of Alberta *op cit* (n 43) 7.

⁶² SALC *op cit* (n 38) 191.

⁶³ *Ibid.*

⁶⁴ www.bayswan.org/defining.html [accessed 23 June 2005].

⁶⁵ T A J McGinn *op cit* (n 23) 211.

argued that the purpose nowadays would be to combat the pandemic of AIDS, the most lethal STD.⁶⁶ This policy attempts to serve the interests of public health: an unwillingness and/or inability to address the causes of the extraordinary growth of prostitution and a desire instead to grapple with the effects of this development, namely, a threat to the established social and sexual order.⁶⁷ Registration has got numerous negative effects. McGinn mentions the following:⁶⁸

- Negative stereotyping of prostitutes as women of a thoroughly degraded group,
- Failure to distinguish between professionals, part-timers, clandestine workers and amateurs,
- Difficulty for the women to have their names removed from the register once they have been registered as prostitutes,
- Stigmatisation of women and therefore their ineligibility for respectable work,
- Isolation of prostitutes within the context of a lower class.

For these reasons, a woman of any status might well fear official classification as a prostitute.⁶⁹ Registration is a variant of legalisation. Where this approach is taken as the policy to address prostitution, as it was in most of countries of the nineteenth century, women are registered and controlled by the means of rules. The avowed object of this is to safeguard public order and decency on the one hand and public health on the other.⁷⁰ In order to clear the streets and the surroundings from nuisance and from acts which are offensive to public decency, the state therefore creates prostitute business quarters (zoning); in order to diminish the spread of venereal disease, an obligatory medical test is imposed on prostitutes (registered only); and the zoning approach should also protect children and young people from the adverse influence of prostitution. The attainment of these objects, experience shows, is very difficult, if not impossible.⁷¹

The existence of regulation, writes Abraham Flexner,⁷² amounts to a concession by the state that a vast volume of promiscuous intercourse is accepted as a fact, and that for this purpose professional prostitution is recognized and, despite verbal quibbles, authorized. One wonders whether legalisation is even marginally effective. One will favour an affirmative answer for the sake of the issue of health. However, as Sion

⁶⁶ My emphasis.

⁶⁷ A Corbin *Women for hire: Prostitution and Sexuality in France After 1950* (1990) 210-211 cited by TA J McGinn *op cit* (n 23) 211.

⁶⁸ McGinn *op cit* (n 23) 212.

⁶⁹ MS Goldman *Gold Diggers and Silver Miners: Prostitution and Social Life on the Comstock Lode* 1981 cited by McGinn *op cit* (n 23) 212.

⁷⁰ Sion *op cit* (n 8) 34.

⁷¹ *Ibid.*

⁷² Flexner 218-219 cited by Sion *op cit* (n 8) 41.

writes, the utility of this system is open to serious doubts, even in respect of its sanitary control. He gives the following reasons:⁷³

1. Prostitutes under medical observation are those registered and are negligible in number, only a fraction of prostitutes; they never exceed 12%. Non-registered prostitutes are not under compulsory medical control. Those who conduct their business with discretion are never inspected.
2. Visits for medical inspection are often missed (average rate of 50%). The tendency to disappear is obviously the strongest among women who, knowing themselves diseased, face the possibility of detection.
3. By omitting men (clients) from compulsory medical inspection, the system of sanitary control is further defeated, because infected clients produce new sources of infection unhindered. The isolation of a few diseased prostitutes in many circumstances is of a little importance.
4. Regulation may contribute to the increase in venereal diseases by promoting a false sense of security in the minds of clients as to the hygienic condition of registered prostitutes. By having medical cards, and regular check-ups, registered prostitutes are not necessarily free from disease, yet the public is fooled into believing that they are.

A complete regulation should take into consideration the fact that clients are higher in number than prostitutes. This explains why the business flourishes. In Birmingham, a British city of about one million people, writes Carole Pateman,⁷⁴ 800 women work either as street prostitutes, or from their homes or hotels, from “sauna”, “massage parlours”, or escort agencies. Nearly 14,000 men each week buy their services, i.e. 17 men for each prostitute. In the United States, the number was estimated at 1,500,000 men a week across the country in 1976, and that roundly 40 million of dollars are spent on prostitution per day.⁷⁵

Most of the time, the approach of regulation, where adopted, is justified further with regard to protecting sex-workers against exploitation, but also as to securing tax liability. Patsy Sorensen, a Belgian member of the European Parliament, who founded a shelter for prostitutes, reckons her country’s legalisation of brothels could raise more than euro50m a year in revenues.⁷⁶ As to prostitutes themselves, legalisation enables them to invoke labour law provisions to assert their rights before courts; their rights are protected interests. Regarding the question of securing tax liability, only licensed businesses and brothels are liable or can be liable to income tax. It may be difficult to

⁷³ *Sion op cit* (n 8) 41.

⁷⁴ C Pateman ‘What’s Wrong with Prostitution?’ in R Matthews and M O’Neill *Prostitution* (2003) 405-439.

⁷⁵ *Ibid.*

⁷⁶ J Saville ‘Sex for Sale, Legally’ (2003) *The Economist Global Agenda* available at: http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=1919372 [accessed 29 June 2005].

assess what a street prostitute, clandestine prostitutes and part-timers will be charged for tax liability or to expect them to declare their income.

Whatever might be the advantages of legalisation, the control of the negative effects of prostitution such as trafficking in human beings and child prostitution, among others, will still be recurrent and harmful to the welfare of society and the family. My view is that the preferable approach should be partial decriminalization, or decriminalization of the prostitution itself, while punishing by imprisonment and/or fine any interference of a third party to exploit someone else's prostitution.

3.4. The legal model in South African law

Before 1988, prior to the introduction of s 20(1)(aA) into the Sexual Offences Act 23 of 1957, the then so-called Immorality Act, partial criminalization was the approach adopted in South African law. This explains why Milton wrote that prostitution 'is a form of sexual immorality which is partially prohibited.'⁷⁷ Acts such as soliciting in public,⁷⁸ keeping a brothel⁷⁹ and living on the proceeds of prostitution⁸⁰ were criminal offences. The difference is that prostitution *per se* was not a crime. In *R v Kam Cham*,⁸¹ the court, after defining a prostitute as 'one who habitually hires her body out to sexual intercourse for gain,' added that 'the isolated instances of intercourse for gain do not establish that the girl before the court was a prostitute. She did not stipulate for hire, but merely received presents of money'.⁸² The present (reward) as such was not capable of turning the conduct into a criminal offence. By introducing s 20(1)(aA) into the Sexual Offences Act, the legal approach in South African law concerning prostitution became that of total criminalization. This legal dispensation does not appear to have had any inhibiting effect on prostitution.⁸³ The existing criminal law needs to be adapted. If the purpose remains to curb prostitution by criminalizing the conduct, then the law needs to be strengthened. This is attainable by focussing on the conduct of the prostitute

⁷⁷ JRL Milton assisted NM Fuller *South African Criminal Law and Procedure Volume III Statutory Offences* (1971) 343.

⁷⁸ Section 19 (a) of the Act.

⁷⁹ Sections 2 and 3 of the Act.

⁸⁰ Section 20 of the Act.

⁸¹ [1921] E.D.L. 327 at 328.

⁸² *Ibid.*

⁸³ Convictions of, and even cases on, prostitution are scanty.

as well as of the client.⁸⁴ Yet by doing so, the legislature has to look at the protection of human rights and to implement international norms and conventions to which South Africa is party. To conclude to the necessity of adaptation of the law relating to prostitution in South Africa, it is important to evaluate it.

⁸⁴ SALC *Op cit* (n 38) 188-189.

4. SOUTH AFRICAN LAW REGARDING PROSTITUTION: AN EVALUATION

As mentioned earlier, the current approach regarding the issue of prostitution in South Africa is that of total criminalization. To evaluate its effectiveness or not, it is important to discuss its history, its enforcement through the interpretation given to s 20(1)(aA) of the Sexual Offences Act 23 of 1957.

4.1. History of prostitution in South African law

The current approach to prostitution in South African law since the amendment is different to the former position whereby prostitution *per se* was not regarded as an offence. Under the Immorality Act 23 of 1957, prostitution itself was not an offence. However, aspects of prostitution such as keeping a brothel, the procurement of women as prostitutes and living off the earnings of prostitution⁸⁵ were prohibited.

In 1988, the Immorality Act was amended, and section 20(1)(aA) was introduced. The legal position changed. This provision criminalizes engaging in sexual intercourse or performing indecent acts for reward. This happened after the Appellate Division held in *S v H*⁸⁶ that the conduct of a prostitute in plying her trade does not constitute an offence by her in terms of s 20(1)(a) of the Immorality Act. A prostitute could not be convicted of living off the earnings of her own prostitution. The disposition criminalizes the conduct of a third party, for example a pimp or a madam. As a result of this finding, the Legislature decided to criminalize sexual services for reward and to penalize prostitution as such. This resulted in the enactment of the section that sets out the law as it is today. The penalty attached to the contravention of the provision is: a maximum of three years imprisonment, with or without a fine that may not exceed R6000. It is important to note that only sexual intercourse, or sexual indecent acts, for reward have been criminalized.⁸⁷ As Elsje Bonthuys and Carla Monteiro put it, ‘sexual services

⁸⁵ SALC *op cit* (n 38) 76.

⁸⁶ 1988 (3) SA 545 AD.

⁸⁷ Section 20 (1)(aA).

should be given freely'⁸⁸ to remain out of the sphere of criminal law. The question is to know who commits the offence in terms of s 20(1)(aA) of the Act. The answer will be found in an analysis of the application of the section in practice.

4.2 Section 20 (1)(aA) of the Sexual Offences Act 23 of 1957 in practice: the *Jordan* case

The *Jordan* case⁸⁹ debated the constitutionality of the section that criminalized prostitution. Two judgments resulted from the debate. The majority judgment of 6/11 upheld the constitutionality of the section, while the minority judgment on the other side, 5/11, held that s 20(1)(aA) of the Act was inconsistent with the Constitution. The Interim Constitution applied to the case. The arguments are critically discussed and the question of the interpretation of the section regarding the customer's conduct in the transaction is analysed.

4.2.1 The majority judgment

Ngcobo J, with whom Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurred, wrote this judgment. Their conclusion was that the proscription of prostitution and the proscription of keeping a brothel are constitutional. In the discussion, we focus only on the criminalization of prostitution.

It was contended that by prohibiting prostitution, mainly by aiming principally at the prostitute, s 20(1)(aA) of the Sexual Offences Act 23 of 1957 establishes discrimination on the ground of gender and therefore violates the right to equality.

To that contention, the majority of the Court held that s 20(1)(aA) applies to male prostitutes as well as to female prostitutes. The section is thus gender neutral [para 9].

Does this argument hold water? Although a person may assume from the expression "any person" used by s 20(1)(aA) that the criminalization is gender neutral, this assumption would be correct, considering that homosexual prostitution does exist.

⁸⁸ E Bonthuys and C Monteiro 'Sex for Sale: The Prostitute as Businesswoman' (2004) 121 *SALJ* 659-676.

⁸⁹ *S v Jordan* 2002(2) SACR 499 (CC). The case was canvassed under the Interim Constitution Act 200 of 1993, although the Final Constitution Act 108 of 1996 was already in force.

Putting aside the question that the prostitute is most of time female,⁹⁰ the issue with the expression ‘any person’ in the section under analysis is whether the parties to the same conduct are or are not equally penalized. In prostitution, males are traditionally the clients, not the providers of sexual services. Males are purchasers and do not, most of time, engage in prostitution for reward. If a male sells his sexual favours for money, he becomes in reality a *male* prostitute. His partner or his client, from whom he gets remuneration, will be, mostly another man.⁹¹ This would be the position in the case of men who engage in homosexual prostitution.⁹² In that case the crime of prostitution is committed, and in this regard the section is gender neutral.⁹³ As far as it could be ascertained, no reported cases could be found of male prostitution where females are clients and pay for a male prostitute [para 42].⁹⁴ Even so, only the person who engaged in prostitution for reward (recipient) will be prosecuted. ‘The prohibition is not limited to unlawful carnal intercourse and indecency between people of the opposite sex.’⁹⁵

To the argument that this might be a form of indirect discrimination, Ngcobo J said that s 20(1)(aA) targets the prostitute for she or he is a repeat offender [para 10]. He also stated that the distinction between dealers and purchasers is made in other statutes [para 12].

To repeat is not the conduct that is targeted, but the fact of ‘selling’ sexual favours. The section does not limit its offenders to professional prostitutes... the novice as well as the hardened streetwalker are concerned [para 47]. Even ‘a girl who is *virgo*

⁹⁰ In *R v Patterson* (1972) 19 C.R.N.S 28 (Ont. Co. Ct), a Canadian court in Ontario convicted a man of soliciting in a public place for the purpose of prostitution. On appeal, the conviction was set aside. The court held that a male could not be convicted of soliciting for the purpose of prostitution because the definition of ‘prostitution’ and ‘prostitute’ refer to females. According to Carole Pateman – ‘What’s Wrong with Prostitution?’ in Roger Matthews and Maggie O’Neill (eds) *Prostitution* 2003 at 408 – ‘The prostitute is conventionally pictured as a woman, and, in fact, the majority of prostitutes are women.’

⁹¹ Though male prostitutes have existed in many societies, they have primarily served other males whose sexual preference was males or who turned to fellow males in special circumstances where there was a lack of contact with women. See V Bullough and B Bullough *Women and prostitution: A Social History* (1987) 291-292.

⁹² C E Torcia *Wharton’s Criminal Law* 15 ed (1994) 634.

⁹³ To cite just one case, in Louisiana *State v Broussard* (1988, La App 3d Cir) 527 So 2d 577, a man was convicted of soliciting a homosexual prostitute. Cited by Torcia *op cit* (n 92) 634.

⁹⁴ Bullough and B Bullough *op cit* (n 19) write that occasionally cases of a male prostitute servicing female clientele may be mentioned in literature. To document the existence of such individuals on any scale has been, unfortunately impossible.

⁹⁵ *National Director of Public Prosecution v Phillips and Others* 2001(2) SACR 542 (WLD) 592.

intacta may be a common prostitute.’⁹⁶ Also, there is no sale performed without a purchaser. In other statutory offences, the purveyor and the purchaser are both targeted. This is normally clear from the provision prohibiting the conduct.

The argument by Ngcobo J that the customer is targeted as *socius criminis* under s18 of the Riotous Assemblies Act merits consideration. Consulting the judgment of the High Court⁹⁷ and the decision under analysis here, I do not find any reference to the client in the *Jordan* case being sued as *socius criminis* in the trial.⁹⁸ Therefore, the stance held by Ngcobo J is not convincing.

The majority judgment stated that the Act pursues an important and legitimate constitutional purpose: to outlaw commercial sex. Therefore, any discrimination is justified by the fact that the only effective way of curbing prostitution is to strike at the supply [para 15].

Such an argument does not resist the opinion that the Act could achieve this purpose by striking at both partners in the conduct. There can be no commercial sex without a purchaser. The majority of the court hardly realized that prostitution is more the fruit of the demand rather than of the supply.⁹⁹ This is not what the Act does, for by criminalizing only the purveyor, the Act created discrimination. The discrimination does not pass the test of justifiability.¹⁰⁰

Another challenge was based on the right to dignity in s 10 of the Interim Constitution. The majority judgment stated that the stigma attached to prostitutes is by

⁹⁶ *R v de Munck* (1918) 1 K.B. 635 cited by Hamilton and Addison *Criminal law and procedure* 6ed (1956) 100; *R v Kam Cham* [1921] E.D.L. 327.

⁹⁷ *S v Jordan and Others* 2002 (1) SACR 17 (T)

⁹⁸ If one considers that the client in the *Jordan* case was employed as a trap, it may be understandable why reference is not made to him. However he could not go so far as to bring the offence about. See also *McDonald v Samoilenko* (1989) 51 SASR 119 (in Banco) South Australia. The police officer who used entrapment did not go so far as to let the prostitute entering into acts of prostitution. When it comes to using entrapment, the person who is undercover must let the individual being entrapped be arrested before accomplishing the act. Compare *S v C* 1992 (1) SACR 174 (W). The court held in *S v Nortje* 1996 (2) SACR 308 (C) that a police trap that entices a person to commit an offence was fundamentally unfair and constitutes a violation of the Bill of Rights, privacy and dignity particularly.

⁹⁹ See W K Rutasitara ‘Mombasa Bar Girls’ in Erasto Muga (ed) *Studies in Prostitution: East, West and South Africa, Zaire and Nevada* (1980) 172. The market can be curtailed both on the supply side and on the demand side. Sexual and sociological initiatives may be found more suitable than legislation. See Liv Finstad and Cecilie Høigård ‘Prostitution Norway’ in N J Davis (ed) *Prostitution: An International Handbook on Trends, Problems and Policies* (1993) 207-224.

¹⁰⁰ As it will be shown, that is the conclusion of the position held by the minority [para 96].

virtue of the conduct in which they engage. Prostitutes are lowering themselves by engaging in commercial sex. That is not by virtue of law [para 16-17].

I do not agree, but support the majority view in this regard. One may point out that the same court previously held a contrary position¹⁰¹ when it stated that ‘dignity’ is a complex concept, and that ‘the constitutional protection of dignity requires acknowledging the value on worth of all individuals as members of society...’ The stigma was considered to originate from the legal system, not from the individual conduct itself.¹⁰² I do not think the situation is different for prostitutes as members of society. That is why I support the view held by O’Regan and Sachs JJ that the stigma begets inequalities in regard to the parties involved in the conduct:

In the present case, the stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance, that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it ... Such discrimination, therefore, has the potential to impair the fundamental dignity and personhood of women.¹⁰³

As to the challenges based on privacy, Ngcobo J held that prostitution is a crime that can only be committed in private. A person who commits a crime in private cannot claim the protection of the privacy clause [para 28]. If the right to privacy is implicated in prostitution, it lies at the periphery and not at its core [para 29].

The right to privacy is implicated and it is not fair to consider it peripheral. Section 20(1)(aA) offended that right. I agree that the prostitute cannot seek the protection offered by the constitution unless the section impugned is declared inconsistent with the Bill of Rights, which is what they sought by appealing against the decision of the Magistrate Court. Sexuality itself implies intimacy. The payment does not deprive the conduct of that character. To really establish that X and Y had unlawful

¹⁰¹ See the discussion of this case by Ronald Louw in 2002 *South African Journal of Criminal Justice* 376-380.

¹⁰² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (2) SACR 556(CC) [para 28]. Does the fact of being prostitute really deprive the person of the inherent dignity recognised to every human being? (See s 10 final Constitution, Act 108 of 1996).

¹⁰³ Paragraph 65 in the case under discussion.

intercourse, the State (prosecution) must prove that X engaged in it for reward and that Y gave that reward. That constitutes a deep inroad into private intimacy.

4.2.2 The minority judgment

This judgment was written by O'Regan J and Sachs J (with whom Lange DCJ, Ackermann J and Goldstone J concurred). The decision reached in their judgment was that section 20(1)(aA) of the Sexual Offences Act 23 of 1957 be declared inconsistent with the Constitution and therefore invalid.

Treating the question of whether s 20(1)(aA) discriminates on the ground of gender, these judges sought first a proper interpretation of the section. O'Regan J and Sachs J found that the section criminalizes only the conduct of the prostitute and not that of the client [para 46]. They added also that the definition of the section could not be extended in order to avoid unfair this discrimination [para 45]. According to them, the section does not encompass the client. Extending it to the customer would contravene the principle of legality in criminal law, particularly the sub-principle of the certainty of the definition of crimes. The extension of the definition constitutes an intrusion into the legislative sphere [para 46]. "A person living on the earnings of prostitution" means the section criminalizes the conduct of the prostitute, not of the customer [para 49 - 50]. They concluded that s 20(1)(aA) is not in accordance with South African constitutional values [para 46].

I agree with the above minority arguments considering the history of section 20(1)(aA). It sought to fill the gap left by the Immorality Act.¹⁰⁴ It would be better to state the matter clearly and precisely, as in the Connecticut statute regarding patronizing a prostitute, that

A person is guilty of patronizing a prostitute when –

- (1) ... he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or
- (2) he pays or agrees to pay a fee ...engage in sexual conduct with him; or
- (3) he solicits or requests another person to engage in sexual conduct with him in return for a fee.¹⁰⁵

¹⁰⁴ *S v H* (1988) 3 SA 545 AD. The Headnote of the decision is in English, and the rest of the case is reported in Afrikaans.

¹⁰⁵ *Torcia op cit* (n 92) 636-637.

Such a wording avoids any speculation as to the persons criminally liable. Discrimination in s 20(1)(aA) of the Sexual Offences Act 23 of 1957 resides in criminalizing only one of the participants in an offence. The section as it is now worded creates an instance of discrimination that violates the South African constitutional principle of equality.¹⁰⁶

The analysis of s18 (2) of the Riotous Assemblies Act 17 of 1956 reveals that even if its provisions render the patron of s 20(1)(aA) of the Sexual Offences Act punishable as a conspirator, no authority exists where it has been, even once, applied in such a case. Section 20(1)(aA) is still discriminatory. The purchaser is not the supplier of sexual services for reward. The section is clear: the female prostitute is an outcast, and her client is accepted or simply ignored by the law! There is discrimination on the ground of gender [para 63-64] and this is unfair [para 66-71].

The question is: will deleting s 20(1)(aA) from the Act avail the prostitute any interest? The answer is affirmative in the sense that she will not fear for eventual prosecution. Trial for sexual conduct casts even more opprobrium on women who engage in prostitution.

To the argument that the prostitute's dignity¹⁰⁷ is diminished by her conduct, not by law [para 74], one can respond that the prosecution against her casts more public shame upon her, and more disgrace than the conduct itself. Thus, the criminalization of the conduct impairs the prostitute's dignity, one of the most important rights of all human rights.¹⁰⁸ But that does not matter here if s 20(1)(aA) of the Sexual Offences Act 23 of 1957 remains constitutionally valid.

Does s 20(1)(aA) infringe the right to security of the person? The answer to the question is mainly negative. Section 20(1)(aA) does not infringe the right to freedom and personal security. However, security is not always a notion of physical integrity only. It also relates to stigmatisation, loss of privacy, anxiety, threat of prosecution,

¹⁰⁶ Compare Burchell and Milton *op cit* (n 11) 630.

¹⁰⁷ The fact of standing trial in itself has serious implications for an accused. It may cause damage to the dignity and reputation of the accused. See *S v Zuma and Others* 1995 (1) SACR568 (CC) 582 h-j; *S v Zuma and Others* 1995 (2) SACR 642 (CC) 655B-C

¹⁰⁸ The rights to life and dignity are the most important rights of all human rights, and the source of all other personal rights in Chapter 3 of the Interim Constitution. See F Viljoen 'The Law of Criminal Procedure and the Bill of Rights' *Bill of Rights Compendium* (1998) 5B-23. The Constitution, Act 108 of 1996 makes it clear that 'everyone has inherent dignity' (s 10).

etc.¹⁰⁹ In that sense, prostitutes are not comfortable in engaging freely in their trade. They may suffer from feelings of insecurity.

O'Regan J and Sachs J recognised that s 20(1)(aA) limited the prostitute's right to privacy, but not fully because by prostituting herself the sex act is emptied of its private and intimate character. The prostitute is not nurturing relationships or making life-affirming decisions about birth, marriage or family [para 76-83]. The breach is justifiable [para 84, 86].

I do not agree with the statement in paragraph 83 that availability in the marketplace empties the sexual act of its intimate character as it is still performed in private and out of the public eye. "Laws based upon a political concern to protect neighbourhoods and 'respectable women' from harassment envisage that prostitution must be hidden from public view, and then target only the visible manifestations of prostitution."¹¹⁰ The intrusion is fully by the prosecution of the offence. It is also untenable that women's sexuality should be limited to nurturing relationships or making life-affirming decisions about birth, marriage or family: one might decide to engage in such a common practice. They might legally have sex for purposes other than those mentioned above.¹¹¹ The law does not prohibit sexual intercourse *per se*, except when money intervenes. It is the financial or economic side that renders the conduct criminal.

Wessel Le Roux's comments on the prostitute's right to economic activity are interesting.¹¹² His assumption is that 'the Court judgment cannot be regarded as an authoritative statement of the right to occupational freedom... The *Jordan* case is largely of historical interest and does not reflect the legal position of sex workers in South Africa as it presently stands. When the criminal prosecution of a sex worker under s 20(1)(aA) is challenged in future under s 22 of the final Constitution, the outcome might be different.'¹¹³

¹⁰⁹ Compare D Singh 'The Constitutional Right to a Fair Trial: Understanding Section 85(3)(d) Through the Cases' (2000) 63 *THRHR* 125.

¹¹⁰ I Bacik 'Women and the Criminal System' in Paul O'Mahony (ed) *Criminal Justice in Ireland* (2002) 134-1354

¹¹¹ N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex?' (2004) 20 *SAJHR* 230.

¹¹² W Le Roux 'Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition' (2003) 120 *SALJ* 453-465.

¹¹³ *Ibid.*

It was held in this judgment that women prostitute themselves because of their dire financial situation [para 68]. I agree that some of the women have no other source of income, but some employed women who receive monthly salaries engage at some time in prostitution. The sole difference between them and their sisters is that carnal intercourse for reward is not their sole source of earnings. During daytime they work normally; at night they can be found in streets supplementing their income by offering their sexual favours to purchasers for financial reward, or using their premises and not going out on the streets. The financial situation might explain why some women enter into prostitution. It does not constitute a cogent reason for every prostitute. Anyway, if such was even the explanation, then attempts to withdraw her from the trade should be aimed at that situation, i.e. to find her a good job, to create condition that provide a living to her, not to criminalize her! As Barbara Sullivan¹¹⁴ comments, it seems that there is nothing wrong where two adults voluntarily consent to an economic arrangement concerning sexual activity if the activity takes place in private. Maybe one should look at how to focus on improving the working conditions of those who gain their living in prostitution, particularly poor and marginalized women.¹¹⁵ This is so if one focuses on the supply. Yet what about the purchaser of sexual services?

4.2.3 The counterpart of the prostitute: interpretation of s 20(1)(aA)

There is some debate as to the ambit of s 20(1)(aA) of the Act. Is it only the person who accepts the reward (the prostitute) who commits an offence or also the person who gives it?¹¹⁶ It was once recommended that the section be repealed.¹¹⁷ Unfortunately, the recommendation was not enforced. It is noteworthy to mention the following interpretation from the South African Law Commission in its Paper 85 of 1999:

A popular interpretation of this section is that the customers' actions are neither criminalized nor regulated in any manner... Although the section does not specifically mention prostitution, its gist and intent is, it is submitted, that persons who are prostitutes, commit the offence. The import of this is that the other partner in the sexual act – the customer – does not commit the offence. The

¹¹⁴ B Sullivan 'Prostitution and Consent: Beyond the Liberal Dichotomy of "Free or Force"' in Mark Cowling and Paul Reynolds (eds) *Making Sense of Sexual Consent* (2004) 129.

¹¹⁵ *Ibid.*

¹¹⁶ SALC *op cit* (n 38) 80.

¹¹⁷ SALC *Issue Paper 85: Sexual Offences – The Substantive Law* (1999).

subject is the person who has sexual relations for reward ‘with any other person’. It is thus the person who receives the reward who commits the offence and not the person who gives the reward.

In the event of this interpretation, being the correct interpretation of this section, the commission draws attention to the hypocrisy of a society which condemns and penalizes the actions of child prostitutes, while their customers, who are ultimately responsible for the prevalence of this phenomenon, have neither slur, nor stigma, nor prosecution to fear.¹¹⁸

In contrast to the above interpretation, the Commission drew the attention regarding the existence of another interpretation that assumes that the phrase ‘for reward’ includes both the receiving and giving of the reward.¹¹⁹ As mentioned above, s 20(1)(aA) was enacted after the case of *S v H*.¹²⁰ It thus was enacted to penalize the prostitute herself for only her conduct was at issue in the case. In fact, practice shows that very few people are prosecuted for either being a prostitute, or being the client of a prostitute.¹²¹ In the latter instance no case is reported.

As the Commission recommended, and considering the outcome of the *Jordan* case, it is suggested that the section should either be repealed or amended to enforce the prohibition seriously by stating expressly that the client of a prostitute as well as the prostitute are guilty of the offence of selling or buying sexual services. Stating clearly and precisely that the crime or the offence of prostitution is committed when one of the three following acts occurs:

- Engaging in sexual relations with another person for a fee or something of value;
- Offering (or soliciting) to engage in sexual relations with another person for a fee or something of value;
- Requesting (or agreeing) to pay a fee or something of value to another person for sexual services and acts.¹²²

It is my submission that the Legislature may do well to look at international norms and considerations regarding prostitution and human rights. Criminalizing prostitution should not be a way of violating human rights, even if only slightly, nor should it be creating discrimination on any ground.

¹¹⁸ *Ibid*, paragraphs 9.7.5.6-9.7.5.7.

¹¹⁹ *Ibid*, paragraph 9.7.5.8.

¹²⁰ 1988 (3) SA 545 AD.

¹²¹ SALC *op cit* (n 117) par. 9.7.5.11.

¹²² T J Gardner and T M Anderson *Criminal Law: Principles and Cases* 7 ed (2000) 454.

5. PROSTITUTION: LEGAL COMPARISON

5.1. Introduction

As South African criminal law faces something of a dilemma with prostitution, a legal system may borrow from another legal system which has developed a useful approach to an issue. In the present comparison, three models will be discussed with regard to the subject of how the partners in the conduct are treated in the different criminal systems.

In some legislation, prostitution and its related offences are considered as a form of violence against women.¹²³ It is even said that sex work is inherently exploitative.¹²⁴ Therefore, it is difficult to understand why a victim of violence is primarily penalized. It has been remarked that laws penalizing prostitution do not target customers so as to remain fair to both participants in the conduct. The male client is almost invisible and his desire even considered as natural and therefore not punishable.¹²⁵ If then, the act or conduct involves the exploitation of human weaknesses, the prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute. If the exploitation of human weaknesses is considered to create a special circumstance, there is virtually no field of morality which can exclude the law.¹²⁶ The question remains one of excluding the law vis-à-vis one exploiter and retaining criminal sanction vis-à-vis the other, the weaker part of the exploitation, it seems. It is in striving to express such reality that Donald Nicolson and Lois Bibbings wrote, correctly in my view, that:

Although male clients outnumber female prostitutes, conviction rates for prostitution related offences are far higher for women than for men. If the sale of sex 'simpliciter' were a crime, then the prostitute's standard transaction would involve two criminals – the prostitute and the client. But because the offences relate to the marketing and profit aspects of the trade, clients are able to buy the services of prostitute women without themselves committing any crime or participating directly in an offence.¹²⁷

¹²³ Swedish Ministry of Industry, Employment and Communication 'Prostitution and Trafficking in Women' REGERINSKANSLIET - *Fact Sheet October 2004* available at: www.sweden.gov.se/sb/d/2192 [accessed 23 June 2005].

¹²⁴ Prostitutes Education Network 'Prostitution Law Reform: Defining Terms', available at: www.bayswan.org/defining.html [accessed 23 June 2005].

¹²⁵ *Ibid.*

¹²⁶ J G Cook and P Marcus *Criminal Law* 2 ed (1988) 12.

¹²⁷ D Nicolson and L Bibbings *Feminist Perspectives on Criminal Law* (2000) 207.

One asks whether the criminalization of prostitution, in its objective of outlawing the evil, respects gender equality before the law. ‘Gender equality will remain unattainable as long as men buy, sell and exploit women and children by prostituting them.’¹²⁸

Towards the customer of the prostitute regarding the conduct itself, as well as regarding prostitution related offences, approaches differ from country to country. The controversial question is whether prospective clients should be dealt with in the same manner as the prostitutes themselves. The answer differs from jurisdiction to jurisdiction and from country to country.

5.2. The Swedish model

In Sweden, prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem that is harmful not only to the individual prostitute or the child, but also to society at large.¹²⁹

In the legislation on gross violation of a woman’s integrity, the Swedish Government and Parliament defined prostitution as a kind of violence inflicted against women. Since January 1, 1999, purchasing – or attempting to purchase- sexual services has constituted a criminal offence punishable by fines or up to six months imprisonment. The victims of trafficking and prostitution do not risk any legal repercussions. Prostituted persons are considered as the weaker party, exploited by both procurers and buyers.¹³⁰ Punishment cannot help persons in prostitution to exit from the trade. Government has the duty to motivate prostitutes to leave the business of prostitution. It is doing so by considering them as victims, not as criminals to punish.¹³¹

Under the Act prohibiting the purchase of sexual services, a person who obtains casual sexual relations in exchange for payment shall be sentenced to a fine or imprisonment for at most six months. The attempt to purchase sexual services is punishable under Chapter 23 of the Swedish Penal Code. The offence comprises all

¹²⁸ Swedish Ministry *op cit* (n 123).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

forms of sexual services, wherever they are purchased: on the street, in brothels, in so-called massage parlours, from escort services or in other similar circumstances.¹³²

According to Chapter 6, section 8 of the Swedish Penal Code, any one who promotes or encourages or improperly exploits for a commercial purpose casual sexual relations entered into by another person in exchange for payment is guilty of a criminal offence and shall be sentenced to imprisonment for at most four years for the crime of procuring. If the crime is aggravated, the imprisonment for at least two and at most six years shall be imposed. Attempt, preparation and conspiracy to commit procuring or gross procuring, as well as failure to reveal such crimes, are also criminalized.¹³³

Legislation that imposed criminal liability for trafficking in human beings for sexual purposes came into force in Sweden on July 1, 2002. On July 1, 2004, in order to implement the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, amendments were made to the Swedish legislation that extends the criminalization of all forms of trafficking in persons, including trafficking within national borders. In terms of these amendments, any person who, through the use of unlawful coercion or deception, by exploiting a victim's vulnerability or by any other similar improper means, recruits, transports, harbours, receives or takes other similar actions towards a person and thereby gains control over that person, ... whatsoever the exploitation, sexual or forced labour to which he/she wanted to place the victim, will incur criminal liability. The sentence is imprisonment of at least two years and at most ten years. The attempt, preparation and conspiracy to traffick in human beings or the failure to report such crimes are also punishable.¹³⁴

It is noteworthy to underline the fact that although all activities relating to prostitution including those of the customer are criminalized, the prostituted person is seen as a victim deserving protection, not punishment. Society has the responsibility to educate the public, prostitutes and clients about the increased risks of disease and violence associated with prostitution. Although prostitution often appears to be a career choice for those involved, it is essential to understand the overwhelming coercion and desperation behind that 'choice'. Further initiatives should continue to acknowledge

¹³² Swedish Ministry *op cit* (n 123).

¹³³ *Ibid.*

¹³⁴ *Ibid.*

prostitutes as victims, and realize that the punitive nature of the criminal laws¹³⁵ jeopardise them.

The Swedish response to prostitution targets clients, pimps and other persons profiting from prostitution. It provides measures to assist victims. The law must continue to outlaw aspects surrounding prostitution; the implication being that prostitutes should not be ‘penalized’.¹³⁶

5.3. The Democratic Republic of Congo

Prostitution in itself is not an offence in Congolese criminal law. Neither the prostitute nor her customer is criminally liable. The law does not criminalize even soliciting in public for that purpose. However, an activity such as living on the proceeds of someone else’s prostitution¹³⁷ constitutes, in principle, an offence. Briefly, exploiting another’s prostitution is an offence. Even so, no authority as to any prosecution against a third party exploiting prostitution is ascertainable. Any observer would say Congolese law ignores prostitution. Acts of recruiting prostitutes and brothel keeping, whatever the age of the prostitute,¹³⁸ are criminalized. The emphasis is on the intervention of a third party to get profit from somebody else’s prostitution, not the partners to the sexual intercourse for reward.

5.4. New Zealand

New Zealand has repealed some provisions from diverse acts with provisions that dealt with prostitution related offences. It has adopted an approach that abolishes all laws related to adult prostitution and offences related to prostitution.¹³⁹ The repealing Act indicates that -

The purpose of the Act is to decriminalize prostitution (while endorsing or morally sanctioning prostitution or its use) and to create a framework that –

- (a) Safeguards the human rights of sex workers and protects them from exploitation;
- (b) Promotes the welfare and occupational health and safety of sex workers;

¹³⁵ John Howard Society of Alberta *Prostitution* 2001.

¹³⁶ SSM Edwards ‘Sex and Gender in Legal Process’ in *Blackstone* (1996)168-173 cited by Cook and Marcus *op cit* (n 126) 227.

¹³⁷ Article 174 bis of the Congolese Criminal Code. See P Piron et J Devos *Codes et Lois du Congo Belge* Tome 1 (1960).

¹³⁸ *Ibid.*

¹³⁹ Prostitution Reform Act 2003 in *The Statutes of New Zealand* Volume 2 (2003) 859.

- (c) Is conducive to public health;
- (d) Implements certain other related reforms.¹⁴⁰

- Compelling a person to enter or remain in prostitution is a criminal offence.

Any forced prostitution continues to constitute a crime punishable up to 14 years' imprisonment against the offender.¹⁴¹ The objective is to avoid the exploitation of people or the enslavement of people. The recruitment or use of persons who are younger than 18 years of age in prostitution constitutes an offence punishable up to 7 years imprisonment.¹⁴²

By enacting the Prostitution Reform Act, New Zealand organized the sex industry completely. The Act distinguishes between the operators of businesses of prostitution and the existence of the so-called 'small owner-operated brothel.'¹⁴³ Whereas the former exploit the prostitution of others- engaged as employees- the latter constitute a kind of congregate partnership between prostitution to operate and manage their trade themselves. Each prostitute retains control over his or her individual earnings from the prostitution carried out at the brothel.¹⁴⁴

Regarding the question of health and safety, the act provides that sex business operators, prostitutes and clients divide up the responsibilities of ensuring safe sex. It is said that operators of businesses of prostitution must adopt and promote safer sex practices. The same obligation rests upon prostitutes and clients. Failure to do so amounts to committing an offence punishable, upon conviction on summary proceeding, of a fine not exceeding \$10,000 for the business operator (brothel keeper); \$ 2,000 for the prostitute or the client. A medical examination is not a guarantee that the prostitute is safe or can offer safer sex. She or he may be infected or she may infect the client. That is why the NZ Prostitution Reform Act does not prescribe compulsory regular health check-ups, and does it neither prescribe registration as a sex worker.¹⁴⁵

Since this legislation regulate the industry: operators of the businesses of prostitution have to hold certificates before beginning their trade¹⁴⁶ (a permit to exploit the prostitution of others), it would seem that it does not encounter the spirit of the

¹⁴⁰ *Ibid.*

¹⁴¹ Section 22 of the NZ Prostitution Reform.

¹⁴² Section 23 of the NZ Prostitution Reform Act.

¹⁴³ Section 4 of the NZ Prostitution Reform Act.

¹⁴⁴ *Ibid.*

¹⁴⁵ Sections 8 and 9 of NZ Prostitution Reform Act.

¹⁴⁶ Section 34 of the NZ Prostitution Reform Act. Congregate prostitutes, not more than 4 individuals, are not concerned by the requirement of certificates. They exploit their own prostitution.

convention for the suppression of the traffic in persons and the exploitation of the prostitution of others. It is not in conflict with the Convention: there are no compulsory health check-ups, no compulsory registration for prostitution, a person may refuse to provide commercial sexual services at any time, or continue to do so to any person. The business owner may only recover damages from the employee (prostitute) if he or she can prove the existence of a contract and of a prejudice to his or her business.¹⁴⁷ No work permit may be granted to a person immigrating to New Zealand with the intention of providing commercial sexual services or of investing in the business of prostitution. Any immigrant has to comply with the requirements of the Immigration Act of 1987.¹⁴⁸

5.5. Conclusion

From the three criminal systems presented, it follows that prostitution is approached differently. Every jurisdiction, however, tends to address the issue considering the prostitute herself as not criminally liable. It is important to underline the particularity of the Swedish approach that considers the client as someone fostering persons into prostitution. It therefore criminalizes the conduct of the customer but not that of the prostitute. The policing system of Sweden did not merely abolish laws against prostitution, but it strengthened the laws and considers prostitution as an act of violence by men against women. Prostitutes are victims that cannot be penalized further. The Congolese approach is that of de-penalizing the prostitute and her customer, but criminalizing the third party exploitation of the prostitution of others. The New Zealand approach is that of legalization, open only to New Zealanders living in the country at the time of enforcement.

Feminists consider that, where prostitution or prostitution related acts are criminal offences, legal systems are discriminatory on the ground of gender. Wendy McElroy writes, for example, that ‘all laws against prostitution are laws against women, therefore

¹⁴⁷ Section 17 of the NZ Prostitution Reform Act.

¹⁴⁸ Section 19 of the NZ Prostitution Reform Act.

they should be abolished, including laws against pimping.’¹⁴⁹ She argues that those laws violate civil liberties, such as the freedom of association.¹⁵⁰

Regarding South African law, no case could be found where the customer has been prosecuted. That is why the South African Law Commission recommended that s 20 (1)(aA) be abolished as to adult prostitution.¹⁵¹ The commission realised that the section renders criminal the conduct of the prostitute but not that of the client. It was also noted that there was no reason to criminalize primarily the conduct of the prostitute and not that of the client.¹⁵²

¹⁴⁹ W McElroy “An Overview of ‘Solution’ to Prostitution”, available at: www.zeltics.com/mac/articles/postsol.html [accessed 23 June 2005].

¹⁵⁰ *Ibid.* Her reasons are that:

Laws against prostitution have historically been used to harass and oppress women in the sex industry, not the men who are customers. This means that laws against prostitution almost amount to de facto laws against women.

Even laws against pimps (assumed to be men) are further persecution of prostitutes. This is because pimping is defined in economic terms; a pimp is merely an associate of a prostitute who receives any of her earnings. Roommates, lovers, male adult children and friends are treated as pimps.

Anti-pimping laws interfere with the prostitute’s right to marry. Since pimps are defined as those habitually in the company of prostitutes, a husband would automatically open himself up to the charges of pimping.

Laws against running a brothel are laws against women. Even the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others does not protect prostitutes as it intended to do. This for article 2 makes it difficult for women to band together for safety because those who work in tandem could be charged with running a brothel.

Anti-prostitution laws ensure that prostitutes will be unable to report violence committed against them to the police. Because the complaints come from criminals, they are next to never taken seriously or pursued. Even prostitutes who complain to the police are likely to be further abused.

Criminalizing prostitution has driven the profession underground and resulted in horrible working conditions for the women involved. Moreover, its black market nature attracts other illegal activities to the trade. This, in turn, creates a vicious cycle. For example, the stigma and awful working conditions of prostitution drive women toward drugs, which are then cited as a reason to strengthen laws against prostitution. Yet drug addiction is a problem that can be linked to many professions, not the least of all the medical profession itself.

Anti-prostitution laws function as a form censorship against women, because they keep prostitutes from speaking up for fear of being targeted by police. In Europe, for example, many countries stamp the passports of prostitutes to identify them as such. Other countries may refuse to admit them. This serves to restrict the prostitute’s travel and activities. In some countries, everything a prostitute owns can be taken away from her as the proceeds of illegal activity. Such repression also hinders the ability of prostitutes to organize politically.

¹⁵¹ SALC (1999) paragraph 9.7.5.12.

¹⁵² *S v Jordan* 2002(2) SACR 499(CC) at 95.

6. PROSTITUTION AND INTERNATIONAL HUMAN RIGHTS LAW.

The purpose here is to show how the issue of prostitution is addressed on the international level by international instruments regarding women's rights.

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

'Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community...'¹⁵³

The States party to the Convention agree to punish any person who, 'to gratify the passions of another' procures, entices or leads away another person, for purposes of prostitution, even with the consent of that person.¹⁵⁴ Persons who exploit 'the prostitution of another person', even with the consent of the exploited person are punishable.¹⁵⁵ The Convention does not require that these acts be punished if accomplished to gratify the passions of the person performing them, i.e. the client.

In terms of article 6, parties to the Convention agree to take measures to repeal or abolish any existing laws or policies by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.

The criticism levelled against this Convention lies in the fact that it adopts an abolitionist approach to laws criminalizing prostitution. And this is defensible when one bears in mind that trafficking in human beings is undertaken for many purposes, and prostitution is just one of these purposes.¹⁵⁶ None contemplates the victim of say enslavement that needs liberation to be held criminally liable for having been in that

¹⁵³ Preamble to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Approved by General Assembly Resolution 817 (IV) of 2 December 1949; in force since 25 July 1951, available at www.unhcr.ch/html/menu3/b/33.htm [accessed 23 June 2005]: Hereafter referred to as the Convention.

¹⁵⁴ Article 1(1) of the Convention.

¹⁵⁵ Article 1(2) of the Convention.

¹⁵⁶ SALC *op cit* (n 117) par 7.9, 7.15.

situation. It seems understandable that women in prostitution are victims to protect and not to penalize. This may explain why the approach the Convention takes is abolitionist in respect of penalizing prostitutes themselves. The Convention does not require total abolition, aspects of prostitution such as recruiting into prostitution, exploiting the prostitution of others, etc., remain criminally punishable. In my view nothing is wrong with such a position!

6.2 Other human rights instruments

Article 6 of the Convention on the Elimination of all Forms of Discrimination against Women provides that ‘states parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’¹⁵⁷ It should be noted that the above article does not require the suppression of prostitution *per se*, but rather of the exploitation of prostitution by a third party. This supports a reading that article 6 does not regard all instances of prostitution as inherently coercive.¹⁵⁸ In this regard, it is significant to note that when the text of the Convention calls for the protection of women engaging in prostitution or subject to trafficking and other forms of sexual exploitation.¹⁵⁹ It does not call for enacting laws aimed at penalizing prostitution *per se* as a means of suppressing it. Even where legislation seeks to curb commercial sex, discrimination has to be avoided.¹⁶⁰

The Beijing Declaration and Platform for Action includes Forced Prostitution and Trafficking in its definition of practices against women.¹⁶¹ Doezema recounts that the 1995 UN Fourth World Conference on Women in Beijing, activists from the Network on Sex Work Projects and the Global Alliance on Trafficking in Women lobbied to ensure that all mention of prostitution as a form of violence against women in the final

¹⁵⁷ Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women. Adopted by the General Assembly resolution 34/180 of 18 December 1979. Entry into force 3 September 1981, in accordance with its article 27 (1).

¹⁵⁸ J Doezema ‘Forced to Choose Beyond the Voluntary v Forced Prostitution Dichotomy’ in K Kempadoo and J Doezema (eds) *Global Sex Workers* (1998) 34-50.

¹⁵⁹ SALC *op cit* (n 117) paragraph 7.18-7.24

¹⁶⁰ Articles 2 (f) and 2 (g) of the Convention on the Elimination of All Forms of Discrimination against Women urge States party to make legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; to repeal all national penal provisions which discriminate against women.

¹⁶¹ SALC *op cit* (n 117) par 7.26.

Conference document should be prefaced by the word ‘forced’.¹⁶² The insistence is thus made upon the kind of conduct to be punished; and is not the victim who will be targeted, but the person who forced another into prostitution. The customer of a prostitute is not considered as a third party exploiting someone else’s prostitution. Thus, laws targeting forced prostitution do not concern the partners in the prostitutional conduct.

6.3 UN responses to prostitution

At present, there appears to be no integrated and co-ordinated UN policy regarding prostitution. Different UN instruments and bodies have taken different ideological stances, and contradictory positions are encountered even within the same body or agreement, writes Doezema.¹⁶³ Certain UN organizations, such as UNESCO and the Working Group on Contemporary Forms of Slavery, argue that prostitution itself is a human rights violation.¹⁶⁴ On the other hand, the UN Special Rapporteur on Violence Against Women has indirectly dealt with the issue of prostitution in her reports of trafficking in women. In its 1997 report, it was observed that some women become prostitutes through rational choice; others become prostitutes as a result of coercion, deception or economic enslavement! Ms Radhika Coomaraswamy noted with concern the impact of repressive legal measures on the rights of women working in prostitution. She wrote, “Where prostitution is legal, women are unprotected by labour laws. This means that they have no guarantee of being able to work in a safe environment and they have no right to reject clients and if they experience abuse, they have no means to take action against the abusers. It may be not possible for the women to decide on the use of condoms and thus they may be exposed to sexually transmitted diseases.”¹⁶⁵

To criminalize prostitution *per se* seems to add to the yoke under which women (prostitutes) already find themselves. In such a way legislative measures are not aiding them to withdraw from this way of life, nor to feel protected by the law. In spite of criminalizing the conduct of the prostitute, one may suggest policies aimed at protecting

¹⁶² Doezema *op cit* (n 158) 34.

¹⁶³ Doezema *op cit* (n 158) 41.

¹⁶⁴ SALC *op cit* (n 117) par 7.29.

¹⁶⁵ SALC *op cit* (n 117) par 7.30-7.31.

her against brutality, violence, robbery, rape, abuse, etc. which usually go unprosecuted because of the activity (prostitution) she engages in. To realise that criminalization of prostitution itself did not show any advancement towards suppressing the 'evil', decriminalization seems to be the only way to eliminating 'discriminatory enforcement and, at the same time, requiring the police to prosecute crimes perpetrated on prostitutes.'¹⁶⁶ Any kind of legalization that protects prostitution as a form of work may also achieve the protection prostitutes need and force society to treat them with the dignity that every human being deserves. The prostitute will thus make a choice to remain in or withdraw from the profession, considering the opportunities available to her.

¹⁶⁶ P Padrino "“Bad” Women Deserve Equal Protection: a Look at the Constitutionality of the Florida Prostitution Statute' 14 *St. Thomas Law Review* 3 (2002) 64, available at: http://vnweb.hwwilsonweb.com/hww/results/results_single_fulltext.jhtml? DARGS= [accessed 18 August 2005].

7. CONCLUSION

The dissertation discussed the question of prostitution in South African criminal law. In the course of doing so, it seemed necessary to understand the topic, to present the most important legal systems for addressing prostitution, the model adopted in South Africa, to evaluate its practice, and finally to look at international norms concerning the regulation of prostitution. In the last analysis, it was discovered that the law's emphasis has to be on forced prostitution and the exploitation of prostitution by a third party.

The conclusion is that there is, in South African law, a pressing need to enact laws that are in accordance with the Bill of Rights, and with international norms to which South Africa is party.¹⁶⁷ Whatever approach the legislature may adopt, discrimination has to be avoided, however slight it might be.¹⁶⁸ The existing legislation in South Africa creates discrimination; and as most of the persons engaged in the sex industry are women, the discrimination is on the ground of gender. This does not meet the values purported by the Bill of Rights nor does it comply with international human rights law.

It is noteworthy to mention the idea that 'no solution to prostitution and its causes can be found in the law alone. Until women have social and economic equality, prostitution of one kind or another will continue to provide an obvious economic alternative for many women.'¹⁶⁹ It is submitted that no law should criminalize prostitution *per se*. The exploitation of the prostitution by others, as well as to oblige someone to enter or remain in prostitution should remain criminal offences. To consider prostitutes as victims rather than as persons willing to engage in lewdness, may help lawmakers to decide which aspect of the conduct to criminalize and thereby arrive at a more enlightened treatment of this social problem.

¹⁶⁷ South Africa is party to the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949. It signed it on 16 October 1950 and ratified it on 10 October 1951. Its law concerning prostitution is yet defective for it criminalizes prostitution itself.

¹⁶⁸ Discrimination has to be avoided in all fields: political, economic, social, cultural, civil or any other field. See article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁶⁹ I Bacik 'Women and the Criminal System' in P. O'Mahony (ed) *Criminal Justice in Ireland* (2002) 134-154.

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