

The Decriminalisation of Sex Work as a Human Rights Issue in South Africa

by

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Abstract

This research report argues that sex work be decriminalised in South Africa to avoid further human rights violations against sex workers, with a particular focus on the human rights violations perpetuated against sex workers during the COVID19 pandemic. To make these arguments the report sets out the background of sex work and the origins of the various laws that have emerged over the years to regulate sex work in South Africa. Further, it investigates how sex work is governed in various countries around the world and uses New Zealand and other African countries as examples of the different approaches to legislating sex work. The report focuses on the effect of the COVID19 pandemic on female sex workers who make up the majority of sex workers. This research report grounds its assertions in the various human rights considerations found in international legal instruments as well as the Constitution of the Republic of South Africa, 1996 (**Constitution**) as they relate to sex work. The conclusion is that sex work should be decriminalised in South Africa as the current laws that seek to prohibit sex work in South Africa are both unconstitutional and not compliant with international human rights standards.

DECLARATION

I, _____Thandoluhle Khumalo_____ (, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws Human Rights Advocacy and Litigation (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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I wish to thank God who continually shows me that he alone knows the plans he has for me, which are always to prosper me and not to harm me. In all the times where all hope was lost, he carried me through and showed me that his plans are greater than my own and that I should rely on his strength and wisdom always.

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To my daughter who was born in the process of me completing this research report I say thank you for being my light. Lilitha Zobuhle Khumalo you are everything to me and I hope this inspires you to be a woman who goes after your dreams. Thank you for choosing me as your mother.

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THE DECRIMINALISATION OF SEX WORK AS A HUMAN RIGHTS ISSUE IN SOUTH AFRICA

I. INTRODUCTION

Thusi writes that subjective cultural and moral views influence the way in which sex workers are perceived and further, the way in which sex workers are treated in criminal law.¹ Drawing on the work of Wendy McElroy, Boloso expands on this school of thinking by stating that sex work went from being viewed as liberating, to being viewed as something that objectified and enslaved women.² She argues that the shift from one view to the other is based on ideological arguments as opposed to objective factors.³ Thusi relies on Anderson's work to make the point that the act of prohibiting sex work essentially denies sex workers an opportunity to escape a bad economic situation by making their own choice on what work they wish to partake in.⁴ She further argues that we cannot reduce sex workers to the views of radical feminists, such as Mackinnon who view sex workers as having no agency, but must rather understand that sex is not a singular experience, and rather view sex work through that lens.⁵ Sullivan makes an important observation on the manner in which the law views sex work by stating that when courts adjudicate on issues of discrimination on the basis of sex, they only require a minimal standard of rationality to justify such discrimination.⁶ This can lead to the legitimisation of laws that criminalise sex work and thus perpetuate sexual discrimination. The views of Sullivan, Thusi and Beloso lay the foundation on which this research report advances its arguments. Although Beloso and Sullivan's views are rooted in the American context, their arguments translate into the South African context as will be shown in this research report. Thusi's arguments are interestingly rooted in the South African context.

¹I. India Thusi 'Radical Feminist Harms on Sex Workers' (2018) 22 *Lewis & Clark LR* 185 at 190.

²Brooke Meredith Beloso 'Sex, Work, and the Feminist Erasure of Class' (2012) 38(1) *Signs: Journal of Women in Culture and Society* 47 at 49.

³*Ibid.*

⁴Thusi *op cit* note 1 at 190.

⁵Thusi *op cit* note 1 at 196-7.

⁶Kathleen M Sullivan 'Constitutionalizing Women's Equality' (2002) 90(3) *California LR* 735 at 745.

This research report will argue that some laws which are seemingly objective and neutral are, in fact, as MacKinnon has stated in some of her work, designed through the lens of men and therefore oppressive towards women.⁷ While this research report does not agree with MacKinnon's radical feminist school of thinking for the reasons stated above, the point is important insofar as it relates to the way in which the law is generally designed. MacKinnon's view is apparent in the manner in which sex work is regulated in South Africa as will be expanded on further below. This research report will then advance arguments that support the cause to decriminalise sex work in South Africa and build on the views of Beloso, Thusi and Sullivan through a South African lens and context. Although there is a plethora of scholarly pieces on decriminalising sex work, it is particularly important now to raise more awareness on the issue of decriminalising sex work given the COVID19 pandemic and the many human rights violations relating to sex workers that it has exposed. This renders the question of decriminalisation even more urgent. Further, the recent decision of Parliament to publish the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 on the decriminalisation of sex work for public comment⁸ has made the issue particularly topical.

The term 'sex work' emerged in the 1970s to provide an alternative term to the derogatory terms that were used prior to the term 'sex work'.⁹ It was also used to emphasise that the commercialisation of sex was in fact work.¹⁰ Sex work can therefore be defined for the purposes of this research report as the voluntary engagement of all parties involved in commercial sex.¹¹ It does not by its definition include any form of coerced sexual activity.¹² Sex workers are made up of men, women, transgender and non-binary persons.¹³ However, the majority of sex workers are

⁷Kate Sutherland 'Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade' (2004) 42(1) *Osgoode Hall LJ* 139 at 142-4.

⁸Minister Ronald Lamola 'Speaking Notes – Media Briefing on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 re the decriminalisation of sex work' available at <https://www.gov.za/speeches/speaking-notes-%E2%80%93-media-briefing-criminal-law-sexual-offences-and-related-matters-amendment>, accessed on 28 February 2023.

⁹Rachel Marshall 'Sex Workers and Human Rights: A Critical Analysis of Laws regarding Sex Work' (2016) 23(1) *William & Mary Journal of Women and the Law* 47 at 49-50.

¹⁰*Ibid.*

¹¹Marshall op cit note 9 at 50.

¹²*Ibid.*

¹³*Ibid.*

women.¹⁴ Thus the focus and scope of this research report will be limited to women who are at and above the legal age of 18 in South Africa.

This research report argues that sex work should be decriminalised in South Africa, particularly in light of the COVID19 pandemic, as the continued prohibition of sex work is in violation of various international and constitutional human rights standards and laws. This is done by outlining the history of sex work in South Africa in the next section to provide context on how the criminalisation of sex work came about. Section three examines the effect of COVID19 on sex workers and also outlines the effects of crises and epidemics on women in general. The fourth section then sets out the various international instruments and sections of the Constitution that have been impacted by the violation of sex workers human rights during the COVID19 pandemic. The fifth section examines the history of law reform on sex work in South Africa in order to identify why it continues to be criminalised in South Africa. The sixth and final section then looks at arguments for and against the decriminalisation of sex work from an international perspective. The research report concludes that, in light of all the arguments presented, sex work should be decriminalised in South Africa on an urgent basis, due to the many human rights violations suffered by sex workers during the COVID19 pandemic.

II. HISTORY OF SEX WORK IN SOUTH AFRICA

This section outlines the history of sex work in South Africa. It does not aim to provide a holistic outline of the history of sex work in South Africa but rather aims to focus on historical moments that are important in the context of this research report.

In 1652, the Dutch East India Company established a refreshment station at the Cape of Good Hope.¹⁵ This initiated the process of colonising South Africa, as Europeans began to set roots in the Cape Colony by either choosing to lease land and/or settle.¹⁶ The passing seamen would seek entertainment on their temporary visits, resulting in the need for and the introduction of sex workers.¹⁷ The sex industry grew over time to be a profession that not only serviced the seamen

¹⁴Ibid.

¹⁵I India Geronimo Thusi 'Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa' (2015) 38(1) *Fordham International LJ* 205 at 208.

¹⁶Ibid.

¹⁷Thusi op cit note 15 at 208.

but also the locals who inhabited the Colony.¹⁸ Thousands of the men who came through the Colony were single and/or travelling alone and as a result the sex industry increased in size.¹⁹ The sex workers were largely mixed-race women, however, several European white women and slaves also engaged in sex work.²⁰ The government viewed sex work as an inevitable industry and recognised that it assisted in calming the seamen who, after long voyages, were looking for sexual companions.²¹ Sex work was therefore viewed as a necessary evil and allowed to continue on that basis.²²

Sex work became an offence, somewhere in the period between 1795 and 1834, although it was rarely prosecuted.²³ As the sex trade grew, the discomfort around it also grew, particularly during the Victorian Era between 1837 until 1901.²⁴ The views that characterised Victorian society were oppressive in that women were expected to remain ‘pure’ while their male counterparts were not subject to the same expectation.²⁵ Sex workers were viewed as lower class women because the nature of their work was diametrically opposed to Victorian societal values that deemed a woman of value to be ‘pure’.²⁶ In order to address the problem of ‘prostitution’, women’s groups during the Victorian Era chose to position sex workers as victims of circumstance without agency and advocated for the abolition of sex work.²⁷ Despite their efforts, sex work was not abolished, but remained an offence.²⁸ However, there are very few accounts of sex workers being prosecuted by police in the Victorian Era.²⁹ Instead, sex workers were subjected to societal prosecution due to the morals of Victorian society.³⁰

An interesting dynamic is that women’s groups in the Victorian Era were largely complicit in advocating for sex work to be criminalised through positioning sex workers as victims.³¹ While MacKinnon’s school of thinking would agree with the women’s groups in the Victorian Era,

¹⁸Ibid at 208-9.

¹⁹Ibid.

²⁰Ibid at 210.

²¹Ibid at 209.

²²Ibid.

²³Ibid at 210.

²⁴Ibid at 211-4.

²⁵Ibid at 211-2.

²⁶Ibid at 211-3.

²⁷Ibid at 213-4.

²⁸Ibid at 213-5.

²⁹Ibid.

³⁰Ibid at 214.

³¹Ibid at 213-4.

contradictorily in her own work she writes that patriarchy first subjects women to oppression and then makes women complicit in their own oppression.³² While MacKinnon may not recognise that stripping sex workers of their agency and positioning them as victims, is oppressive, Beloso suggests that radical feminists such as MacKinnon only view sex work through a gender and sexuality construct, and thus often miss the relationship between the sex worker as an individual, her labour and her position under capitalism.³³ Beloso argues that failing to see the sex worker as a worker results in writers such as MacKinnon being complicit in the economic oppression of sex workers. In essence, they position the thinking of privileged women, whose views are based on their privilege and their particular cultural values, over the need of the sex worker to work and be able to survive under capitalism.³⁴

The negative societal stigma towards sex workers continued when a syphilis outbreak occurred in South Africa in the late 1800s.³⁵ Sex workers were viewed as the primary carriers of syphilis while men were not blamed nor held to account for being carriers of syphilis, despite their involvement.³⁶ The Contagious Diseases Act³⁷ was enacted in England in 1864 and passed down to all the British colonies including South Africa in 1868.³⁸ Harsh regulations relating to sex workers were passed under this Act to curb the spread of gonorrhea and syphilis.³⁹ This enabled the authorities to take sex workers infected with syphilis or gonorrhea to certain hospitals in South Africa against their will and subject them to tests, inspections, and treatments without their consent.⁴⁰ During this time sex workers were described as ‘common prostitutes’ who were ‘maladjusted, an unbalanced personality and a menace to society’.⁴¹ As a result of these violations to their bodies, sex workers protested against the Contagious Diseases Act,⁴² The Cape Argus reported at the time that the police often engaged in illegal and violent action towards sex workers in an effort to enforce the Contagious Diseases Act.⁴³ Despite this, sex workers continued to riot and attempt to put pressure

³²Sutherland op cit note 7 at 142.

³³Beloso op cit note 2 at 49-50.

³⁴Ibid.

³⁵University of Cape Town ‘Origins; labour, race and gender’ available at <http://www.pathologylearningcentre.uct.ac.za/syphilis-origins>, accessed on 28 February 2023.

³⁶ Thusi op cit note 15 at 215.

³⁷The Contagious Diseases Acts 1864.

³⁸Thusi op cit note 15 at 216-7.

³⁹Ibid at 216.

⁴⁰Ibid at 216-7.

⁴¹Ibid at 217.

⁴²Ibid at 218.

⁴³Ibid.

on the government to repeal the Contagious Diseases Act.⁴⁴ It was repealed in 1886 in England and only in 1919 in the Cape Colony.⁴⁵ This means that South Africa repealed this Act 33 years after England did.

While previously sex work was just an offence with little enforcement as aforementioned, the regulation of sex work began to grow. In 1902 a Cape law prohibiting sex work between a white woman and a black man was introduced and was adopted in the Transvaal, Orange Free State and Natal by 1903 (**Cape Law**).⁴⁶ The Cape Law was the first law in a wider body of regulations that would limit sex across color lines in South Africa.⁴⁷ The Immorality Act of 1950⁴⁸ criminalised all forms of sex between whites and blacks, sex work and the existence of brothels.⁴⁹ In relation to sex work, section 20(1) of the Immorality Act, read as follows:

‘(1) Any person who knowingly lives wholly or in part on the earnings of prostitution; or in public commits any act of indecency with another person; or in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence.’

The broad legacy of the Immorality Act was so traumatic that the Truth and Reconciliation Commission had this to say about it:

‘The Immorality Act was energetically implemented for some two to three decades, resulting in untold suffering in the form of harassment, public humiliation and the destruction of marriages and family bonds. Suicide by those caught in the web of the provisions of this Act was not unknown.’⁵⁰

Although, the apartheid laws regulating intimate relations have generally been repealed in recognition of this traumatic legacy, section 20(1) of the Immorality Act lives on in section 20(1A)(a) of the Sexual Offences Act⁵¹ and remains the law in South Africa, reading almost identically as follows:

⁴⁴Ibid at 218-9.

⁴⁵Ibid.

⁴⁶Julius Lewin ‘Sex Color and the Law’ (1963) 10(6) *Africa Today* 9 at 9.

⁴⁷Ibid.

⁴⁸The Immorality Act 5 of 1927.

⁴⁹Thusi op cit note 15 at 233.

⁵⁰Chesa Boudin & Marlise Richter ‘Adult, Consensual Sex Work in South Africa - The Cautionary Message of Criminal Law and Sexual Morality’ (2009) 25(2) *SAJHR* 179 at 182-3.

⁵¹Sexual Offences Act 23 of 1957.

‘20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. (1A) Any person 18 years or older who - (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward ... shall be guilty of an offence.’

For clarity, unlawful carnal intercourse is defined as carnal intercourse that is not between husband and wife.⁵² Although admittedly section 20(1A)(a) of the Sexual Offences Act can be broadly interpreted to include people who do not engage in formal commercial sex work but are lovers who accept a reward for intercourse,⁵³ in practice it is only commercial sex workers who are prosecuted under this section.⁵⁴

It is clear that South Africa has a long history of criminalising sex work based on moral, cultural and public health reasoning. Thusi argues that during the Victorian Era, public health discourse rather than moral discourse led to harsher legislative changes in relation to how sex work was governed and prosecuted.⁵⁵ If legislative changes in South Africa are influenced by public health discourse, then the next section of this research report which investigates the effects of COVID19 on sex workers, should be a strong motivator for the decriminalisation of sex work in South Africa.

III. THE EFFECT OF COVID19 ON SEX WORKERS

This section of the research report provides a general overview of the COVID19 pandemic and discusses the various issues experienced by sex workers during the pandemic, including poor access to healthcare, deepened economic vulnerability, increased HIV infection rates, mental health issues, reliance on NGO interventions and decreased ability to support dependents. The section concludes with a synopsis of the ways in which epidemics and crises often lead to increases in gender-based violence, and its effect on sex workers.

(a) COVID19: a general overview

The COVID19 virus outbreak has severely affected the whole world.⁵⁶ As a result of the COVID19 pandemic many countries, including those on the African continent, had to introduce new public healthcare and precautionary measures such as social distancing and the wearing of face masks in

⁵²Supra note 51 at s1.

⁵³Boudin & Richter op cit note 50 at 186.

⁵⁴Ibid at 189.

⁵⁵Thusi op cit note 15 at 214-5.

⁵⁶UNPFA ESARO *A Rapid Scoping Assessment of the Impact of Covid-19 On Sex Worker Programmes in East and Southern Africa* (2020) 7.

order to effectively curb the spread of COVID19.⁵⁷ However, these measures have not been effective for everyone, as there are vulnerable groups of people whose lack of access to healthcare during the COVID19 pandemic has left them in a precarious and vulnerable position.⁵⁸ Among these vulnerable groups of people are sex workers in South Africa who unfortunately, due to continued marginalisation, have faced poor access to healthcare,⁵⁹ among other issues.

(b) Poor access to healthcare

South Africa has a long history of marginalising, oppressing and violating sex workers during health pandemics as evidenced by the discussion of the syphilis outbreak outlined above. Sex workers across the African continent continue to be subject to oppression, marginalisation, and criminalisation for their choice of work, and therefore have to operate in hiding for fear of being victimised and/or arrested or harassed by police.⁶⁰ Unfortunately, this means that healthcare interventions by the government are not able to reach them and, in general, result in them having poor access to healthcare.⁶¹ Sex workers healthcare concerns have worsened during the COVID19 pandemic as it was impossible to exercise precautionary measures put into place by the government to limit the spread of COVID19 when engaging in sex work.⁶²

(c) Deepened economic vulnerability

Governments across the African continent are complicit in the economic oppression of sex workers because they did not include sex workers in any of their relief measures.⁶³ Some of the unemployment benefits awarded to other citizens during the COVID19 period, such as rent relief and unemployment insurance, were neither provided nor available to sex workers.⁶⁴ Further, due to the stigma associated with sex work, sex workers do not in general receive adequate social assistance from the government.⁶⁵ In South Africa, the government launched an initiative at the height of the COVID19 pandemic to provide relief packages to its citizens, however, sex workers

⁵⁷Yusuff Adebayo Adebisi, Aishat Jumoke Alaran & Rafiat Tolulope et al 'Sex Workers Should not be Forgotten in Africa's COVID-19 Response' (2020) 103(5) *American Journal of Tropical Medicine and Hygiene* 1780 at 1780.

⁵⁸*Ibid.*

⁵⁹*Ibid* at 1780.

⁶⁰*Ibid.*

⁶¹*Ibid.*

⁶²*Ibid.*

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵*Ibid.*

were excluded from these relief measures.⁶⁶ This led to organisations outside of the government having to provide relief packages to sex workers.⁶⁷ During the height of the COVID19 pandemic female sex workers became more susceptible to violence and abuse in their quest to seek shelter and income.⁶⁸ Those who still had a small number of clients were subjected to lower pay for their services and were further exposed to COVID19.⁶⁹ Further, as the police in African countries continued to crack down on sex workers due to COVID19 regulations, many sex workers were left without a way to work and therefore without any economic means.⁷⁰

(d) Increased HIV infection rates

HIV prevention services by the government that were available prior to the COVID19 pandemic were now halted due to the COVID19 pandemic.⁷¹ The concern is that due to the setback in HIV prevention services during the COVID19 pandemic, many sex workers remain untreated and open to infection which sets back the HIV/AIDs prevention agenda and exposes these sex workers to infection.⁷² In general, the infection rate amongst sex workers is already ten to twenty times higher than that of other citizens prior to the COVID19 pandemic.⁷³ The increased HIV infection rate among sex workers and the lack of HIV prevention and treatment measures possibly affects the immunity of sex workers, making them more susceptible to and their bodies less able to fight the COVID19 virus due to a compromised immune system.⁷⁴ Sex workers were dying during the COVID19 pandemic as their health became less and less of a priority to African governments.⁷⁵ African governments need to ensure that all citizens are protected and provided for regardless of their profession, especially if they belong to a vulnerable group of the population. Winnie Byanyima, the executive director of The Joint United Nations Programme on HIV/AIDS (UNAIDS), stated the following:

‘Human rights law mandates that human rights are inalienable, universal, interdependent, and indivisible, therefore ensuring that this is a reality for all—especially the most vulnerable among us—

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid at 1781.

⁷⁵ Ibid.

is not only essential during this pandemic but will also build the resilient communities we need to emerge from it.’⁷⁶

(e) Mental health issues

The mental health issues among sex workers also increased during the COVID19 pandemic.⁷⁷ Sex workers reported experiencing increased anxiety over how they would provide for their families as well as anxiety over how they could better take care of their health.⁷⁸

(f) Reliance on NGO intervention

The lack of government intervention for sex workers during the COVID19 pandemic has placed the burden of implementing interventions on non-government organisations.⁷⁹ These organisations report disturbing experiences including the fact that some sex workers cannot even take their ARVs because of the hunger they are experiencing due to not being employed during the COVID19 period.⁸⁰ The challenge for most of these organisations is that they are trying to ensure that they maintain the level of aid they provided prior to the COVID19 pandemic, while also trying to ensure that they meet the new growing demand for resources arising from the COVID19 pandemic.⁸¹ As a result, they took on multiple initiatives in an effort to help sex workers during this period, including ‘assisting sex workers to apply for emergency grants where these existed, partnering with humanitarian relief organizations, distributing food and hygiene hampers, advocating with landlords to prevent evictions, and sourcing emergency accommodation.’⁸² Among these needs is HIV treatment and prevention resources.⁸³ These organisations have delivered PrEP, condoms and ARVs.⁸⁴ They also stay in contact with the sex workers they assist in order to ensure that they adequately understand their needs and keep the channel of communication open.⁸⁵

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Ibid.

⁷⁹UNPFA ESARO op cit note 56 at 10.

⁸⁰Ibid.

⁸¹Ibid.

⁸²Ibid.

⁸³Ibid

⁸⁴Ibid.

⁸⁵Ibid.

Despite these efforts, there is still a huge gap between the number of resources available and the needs of sex workers.⁸⁶ However, these non-governmental organisations are continuously trying to meet as many needs as they can.⁸⁷

(g) Decreased ability to support dependents

The government's actions against sex workers not only affect the sex workers themselves but the families of the sex workers.⁸⁸ In South Africa it is recorded that, on average, each sex worker supports four dependents.⁸⁹ Therefore, the inability of sex workers to provide for themselves during the COVID19 pandemic affected their dependents, and still affects their dependents for as long as COVID19 and its effects last.⁹⁰ Further, despite the South African government implementing State of Disaster regulations which forbade all evictions, in reality many sex workers were subjected to evictions and one sex worker was reported to have died on the street due to pneumonia after spending winter on the streets of South Africa.⁹¹

(h) The increase of gender-based violence during epidemics and crises, and its effect on sex workers

We do not often consider the effects that an epidemic and/or crisis has on gender-based violence and yet there is global evidence that, during a crisis, there is an increase of gender-based violence towards vulnerable groups in society, including women and members of the LGBTQ+ community.⁹² This subsection of the research report will examine the effect of the COVID19 pandemic on violence towards sex workers in particular.

The COVID19 pandemic resulted in various restrictions including being forced to quarantine, socially distance and isolate.⁹³ These restrictions in movement raised concern among human rights groups.⁹⁴ Experts have stated that when being forced to isolate and socially distance, those who

⁸⁶Ibid.

⁸⁷Ibid.

⁸⁸ UNPFA ESARO op cit note 56 at 25.

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹Ibid.

⁹² Jodie G Roure 'The Reemergence of Barriers during Crises & Natural Disasters: Gender-Based Violence Spikes among Women & LGBTQ+ Persons during Confinement' (2020) 21(2) *Seton Hall Journal of Diplomacy and International Relations* 23 at 23.

⁹³Ibid at 27.

⁹⁴Ibid.

were already prone to violence in their intimate space were more likely to experience increased violence.⁹⁵ Generally, when a crisis or disaster strikes globally, gender-based violence increases as well as the duration of that violence.⁹⁶ This is because often women who are victims of gender-based violence are unable to get the aid they need to be independent of their abuser, even if for a short period of time, therefore exposing them to their abusers for a longer period time.⁹⁷ The COVID19 pandemic further aggravated abuse in the form of gender-based violence by introducing multiple unfavourable circumstances that resulted in increased frustration and stress for many people globally, such as job losses which resulted in financial strain, food insecurity and various mental stressors including anxiety.⁹⁸

Global crises often test our commitment to human rights.⁹⁹ The UN has stressed the importance of protecting vulnerable groups, as well as introducing medical and economic measures that protect all people during the COVID19 period.¹⁰⁰ It is important that measures introduced in order to regulate health concerns during COVID19 not be used as a tool to repress various vulnerable groups of people.¹⁰¹ The measures introduced by governments must genuinely protect the citizens of that country.¹⁰² Despite this, a report which investigated the effect of COVID19 on sex workers in Eastern and Southern Africa exposed that sex workers reported almost a 12 percent increase in lack of social protection.¹⁰³ Sex workers in the Eastern and Southern Africa region reported an almost 50 percent increase in violence from police, a 7 percent increase in violence from clients and unfortunately an almost 16 percent increase in domestic and/or intimate partner violence.¹⁰⁴ The community, police and clients of sex workers became increasingly violent towards sex workers during the height of the COVID19 period.¹⁰⁵ Further, some communities blamed sex workers for spreading the COVID19 virus and therefore became violent towards sex workers.¹⁰⁶ This means that the measures introduced in these regions resulted in sex workers, who are a

⁹⁵Ibid.

⁹⁶Ibid.

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹Ibid at 31.

¹⁰⁰Ibid.

¹⁰¹Ibid.

¹⁰²Ibid.

¹⁰³UNPFA ESARO op cit note 56 at 22.

¹⁰⁴Ibid.

¹⁰⁵Adebisi et al op cit note 57 at 1780.

¹⁰⁶Ibid.

vulnerable group in society, being more prone to all kinds of violence during the COVID19 pandemic.

One of the South African organisations who assists sex workers reported the following in respect of conditions during the COVID19 pandemic,

‘The lockdown gave the police and army wide-ranging powers to police the curfew and other issues like social distancing etc... they used this to full effect and at times seemed to consider themselves beyond any oversight. We had multiple cases of police harassments, unlawful arrest and of course the tragic death of Robyn Montsumi in the Mowbray police station.’¹⁰⁷

Based on the information provided in this section of the research report, it is clear that South Africa failed to protect sex workers during the COVID19 period and, instead, left them more susceptible to harm and violence which was not in the interest of their human rights. The next section of this research report will identify the specific human rights of sex workers that were affected as a result of this.

IV. HOW THE CONTINUED CRIMINALISATION OF SEX WORK DURING COVID19 CONTRIBUTED TO THE VIOLATION OF SEX WORKERS’ INTERNATIONAL AND CONSTITUTIONAL HUMAN RIGHTS

Unfortunately, not much has been written about the effect of health crises on sex workers,¹⁰⁸ despite the fact that, as aforementioned, crises often test our commitment to human rights. This section will examine the various human rights protected by international instruments and the Constitution that have been impacted by the continued criminalisation of sex work during the COVID19 pandemic.

A report on the effects of COVID19 on sex workers in Eastern and Southern Africa revealed that the following human rights of sex workers had been violated during the pandemic:

‘The right to life; the right to liberty and security of person; the right to freedom from discrimination; the right to freedom from gender-based violence; the right to social security; the

¹⁰⁷UNPFA ESARO op cit note 56 at 30.

¹⁰⁸Ibid at 17.

right to an adequate standard of living, including adequate food, clothing and housing; and, the right to the enjoyment of the highest attainable standard of physical and mental health.’¹⁰⁹

These are internationally protected rights which African countries, including South Africa, have committed to upholding.¹¹⁰ This section provides some detail on the specific articles of international instruments and sections of the Constitution that encompass these rights.

Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women¹¹¹ (CEDAW) reads as follows: ‘States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’ South Africa violated article 6 of CEDAW because, as evidenced in section three of this research report, it failed to protect sex workers from exploitation and did not make use of any legislative measures to suppress exploitation of sex workers during the COVID19 period.

Article 9(1) of the International Covenant on Civil and Political Rights¹¹² (ICCPR) states that: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ This article is supported by section 12 of the Constitution which states that everyone has the right to freedom and security of the person which includes the right to be free from all forms of violence, amongst others. South Africa violated article 9(1) of the ICCPR and section 12 of the Constitution. For example, the report on COVID19 and sex workers in Eastern and Southern Africa (report on COVID19 and sex workers) indicated that sex workers reported an increase in arrests of up to 36 percent including unlawful and arbitrary arrests.¹¹³ Further, as discussed in section three of this research report, sex workers were subject to increased violence, including gender-based violence, during the COVID19 pandemic.

Article 6(1) of the ICCPR reads as follows: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ This is supported

¹⁰⁹UNPFA ESARO op cit note 56 at 9.

¹¹⁰Ibid.

¹¹¹Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW) art 6.

¹¹²International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹¹³UNPFA ESARO op cit note 56 at 9.

by section 11 of the Constitution which states that everyone has the right to life. South Africa violated article 6(1) of the ICCPR and section 11 of the Constitution. In *S v Makwanyane* the court held that the right to life is the most fundamental of all human rights and that no one shall be arbitrarily deprived of this right.¹¹⁴ In section three of this research report, it was noted that a sex worker died from the cold due to being evicted during the COVID19 period as she could not pay rent. In addition, the report on COVID19 and sex workers indicates that sex workers died due to the containment measures introduced as a result of COVID19.¹¹⁵

Article 26 of the ICCPR states that:

‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

This is supported by section 9 of the Constitution which states that everyone is equal before and the law and deserves equal protection of the law. Unfair discrimination is also prohibited. South Africa violated both provisions. In section two of this research, it was shown that, historically, female sex workers are often discriminated against during health epidemics and seen as the carriers of diseases. The COVID19 pandemic is no different. The report on COVID19 and sex workers indicates that sex workers were used as scapegoats during the COVID19 pandemic.¹¹⁶ They were accused by their communities of spreading the virus and thus unfairly discriminated against and not treated equally.¹¹⁷ It has been reported that even on social media some people including government officials blamed sex workers for spreading COVID19.¹¹⁸

Article 12(1) of the ICCPR states that: ‘States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.’ This is supported by section 27 of the Constitution which states that everyone has the

¹¹⁴*S v Makwanyane and Another* 1995 (3) SA 391 para 83.

¹¹⁵UNPFA ESARO op cit note 56 at 29.

¹¹⁶*Ibid* at 31.

¹¹⁷*Ibid*.

¹¹⁸*Ibid*.

right to have access to healthcare, food, water, and social security. South Africa violated both provisions. In section three, this research report identifies how the South African government denied sex workers access to healthcare services during the pandemic by reducing HIV prevention measures as well as reducing their access to healthcare measures. It further noted that sex workers were excluded from relief packages, meaning that sex workers were excluded from obtaining food and water in violation of their section 27 constitutional right.

Finally, the Constitution protects the right to dignity of all people in section 10. During the COVID19 epidemic sex workers were not treated with dignity as evidenced in section three of this research report.

This section of the report makes it clear that despite the numerous human rights protections available both in international instruments and the Constitution, sex workers rights were violated without consequence in South Africa during the COVID19 pandemic. This cannot be permitted in a democratic South Africa. Spies argues that decriminalising sex work would give effect to various constitutional rights because the police and criminal justice system which often perpetuate the violation of sex workers' human rights, would no longer have the authority to do so.¹¹⁹ While decriminalisation is no panacea, it is a pathway to reducing human rights violations against sex workers and/or to empowering them to act to protect themselves against such violations. The next section of this research report will investigate why sex work continues to be criminalised in a democratic South Africa.

V. HISTORY OF LAW REFORM AND LITIGATION IN DEMOCRATIC SOUTH AFRICA AS IT RELATES TO SEX WORKERS

The long history of the prohibition of sex work in South Africa survived the advent of democracy.¹²⁰ This led to civil society organisations such as the Sex Workers Education and Advocacy Task Force (SWEAT) actively engaging the legislature and the South African Law Reform Commission (SALRC) on the issue of decriminalising sex work.¹²¹ In 1996, the Gauteng Cabinet Committee on Safety and Security and Quality of Life recommended that sex work be

¹¹⁹Amanda Spies 'The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform' (2021) 65(3) *Journal of African Law* 327 at 347.

¹²⁰ Amanda Spies 'Better late than never: Lessons from *S v Jordan* in strengthening women's participation in litigation' (2015) 30(2) *Southern African Public Law* 505 at 508.

¹²¹*Ibid.*

decriminalised in order to allow the police to use their resources for other more pressing matters.¹²² In response, the Department of Justice and Constitutional Development released a statement indicating that, in order to be compliant with CEDAW, the decriminalisation of sex work was an option that needed to be considered by the South African government.¹²³

The various aforementioned efforts led to the SALRC embarking on a lengthy project to investigate whether adult sex work should be decriminalised.¹²⁴ In 2002 the SALRC completed a thorough investigation on sex work and published their first issue paper.¹²⁵ The issue paper investigated various views on sex work, the manner in which sex workers' rights were viewed and governed in different countries and the different models for governing sex work, among others.¹²⁶ Ultimately, the SALRC concluded that, due to pending litigation, it could not reach a conclusion on the best option to govern sex work.¹²⁷

In 2002, the Constitutional Court handed down judgment in a case on the decriminalisation of sex work. *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*¹²⁸ (Jordan) concerned two women (a brothel owner and a sex worker) who had been arrested for contravening different sections of the Sexual Offences Act.¹²⁹ The High Court, had concluded that section 20(1A)(a) of the Sexual Offences Act was unconstitutional.¹³⁰ The Constitutional Court (Court), found that penalising the 'prostitute' who engaged in commercial sex does not amount to direct or indirect discrimination.¹³¹ The Court reached this finding because section 20(1A)(a) of the Sexual Offences Act uses the word 'any', which the court perceived to be gender neutral, and the distinction between a dealer and a customer was a differentiation that was made in many statutes.¹³² The Court further stressed that section 20(1A)(a) of the Sexual Offences Act was aimed at prohibiting the commercialisation of sex as opposed to protecting the customer

¹²²Spies op cit note 119 at 335.

¹²³Ibid at 335-6.

¹²⁴Ibid at 336.

¹²⁵South African Law Reform Commission Issue Paper 19 (Project 107) *Sexual Offences: Adult Prostitution* (2002).

¹²⁶Spies op cit note 119 at 336-7.

¹²⁷Ibid at 337.

¹²⁸*S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae 2002 (6) SA 642.*

¹²⁹Rosaan Kruger 'Sex Work from a Feminist Perspective: a Visit to the Jordan Case' (2004) 20 *SAJHR* 138 at 144.

¹³⁰Supra note 128 at para 4.

¹³¹Ibid at para 9-10.

¹³²Ibid.

who pays for sex work because the court argued that the customer can be held to the same account as the ‘prostitute’ if certain laws are considered.¹³³

The Court held that criminalising the supply of commercial sex served a legitimate constitutional purpose which was effective in curbing prostitution and did not amount to unfair discrimination.¹³⁴

The Court held that that prostitutes who engage in commercial sex are aware of the stigma attached to prostitution and proceed on this knowledge.¹³⁵ The Court held that the stigma attached to prostitution is not due to the fact that there are more female prostitutes than male prostitutes.¹³⁶

Further, the following was held:

‘If the public sees the recipient of reward as being “more to blame” than the “client”, and a conviction carries a greater stigma on the “prostitute” for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. In this regard I agree with the joint judgment that by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable.’¹³⁷

Finally, the court held that prostitution was associated with social ills such as violence, drug abuse and child trafficking which they accepted as a legitimate reason for the legislature introducing criminal sanctions in relation to sex work.¹³⁸ Overall, the court concluded that 20(1A)(a) of the Sexual Offences Act was not unconstitutional and dismissed the order of invalidity made by the High Court.¹³⁹ It is worth noting here that the Court deferred the decision about how to regulate sex work to Parliament.¹⁴⁰ Parliament could choose to decriminalise sex, but this was not constitutionally required.¹⁴¹ This meant that ongoing criminalisation was equally valid as a policy choice.

¹³³Supra note 128 at para 11-2.

¹³⁴Ibid at para 15.

¹³⁵Ibid at para 17.

¹³⁶Ibid at para 17.

¹³⁷Ibid at para 16.

¹³⁸Ibid at 24-5.

¹³⁹Ibid at para 31.

¹⁴⁰Spies op cit note 120 at 515.

¹⁴¹Ibid.

Indeed, the policy choice made after *Jordan* was also to criminalise the buying of sex through an amendment of the Sexual Offences Act.¹⁴² This means that both the selling and the buying of sex are now criminalised in South Africa.¹⁴³ The *Jordan* case thus set back the progress that civil society organisations, non-governmental organisations and certain government departments had made in lobbying for the decriminalisation of sex work with the legislature.¹⁴⁴ The decriminalisation of sex work was no longer a priority for the legislature, and this was the case for the next few years.¹⁴⁵ Spies states that, according to Albertyn, the use of the judiciary to advocate for the decriminalisation of sex work came as a surprise for civil society organisations who were pursuing the legislative route at the time that *Jordan* was brought before the court.¹⁴⁶ According to Albertyn, this was thought to be the most effective route.¹⁴⁷ Further, as Spies outlines, Albertyn suggested that the case was lacking in that it did not represent the average everyday sex worker, nor did it have the ideal set of facts to support the decriminalisation of sex work.¹⁴⁸ Despite their apprehension, civil society organisations decided to participate in the case as *amicus curiae* and bring forth the feminist arguments that were not missing in the Appellants' arguments.¹⁴⁹ However, as outlined above, their efforts proved futile as the court decided to not decriminalise sex work despite all the arguments advanced otherwise. Overall, *Jordan* compromised the work of these civil society organisations to build a relationship with the executive in the late nineties in order to bring about legislative reform in the sex industry.¹⁵⁰

The amendment to the Sexual Offences Act that made it a criminal act to be a client of a sex worker was introduced in 2007.¹⁵¹ In 2009, the SALRC published their second report on adult sex work.¹⁵² The discussion paper *inter alia* reflected on the *Jordan* judgement, and advanced four models of governing sex work which were continued criminalization, partial or full decriminalisation, and regulation.¹⁵³ The 2009 report took account of all submissions received in respect of these

¹⁴²Spies op cit note 119 at 335.

¹⁴³*Ibid.*

¹⁴⁴*Ibid* at 339.

¹⁴⁵*Ibid.*

¹⁴⁶Spies op cit note 120 at 508.

¹⁴⁷*Ibid.*

¹⁴⁸*Ibid.*

¹⁴⁹*Ibid.*

¹⁵⁰*Ibid* at 517.

¹⁵¹*Ibid.*

¹⁵²South African Law Reform Commission Discussion Paper 0001/2009 (Project 107) *Sexual Offences – Adult Prostitution* (2009).

¹⁵³ Spies op cit note 119 at 340.

legislative options and, while it did not explicitly support decriminalisation, it did state that decriminalisation exposes sex workers to vulnerabilities, exploitation and abuse.¹⁵⁴ The report concluded that the SALRC welcomed additional input in order to allow it to make its final recommendation.¹⁵⁵

The case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others*¹⁵⁶ (*Kylie*) was the next step after *Jordan* and the 2009 SALRC report in respect of law reform. *Kylie* concerned a sex worker who brought a case of unfair dismissal against the massage parlour which had employed her.¹⁵⁷ She had performed various sexual services at the massage parlour for reward.¹⁵⁸ On 27 April 2006 she was dismissed without a hearing and approached the Commission for Conciliation Mediation and Arbitration (CCMA) for her matter of unfair dismissal to be heard.¹⁵⁹ The presiding commissioner ruled that the CCMA did not have the requisite jurisdiction to hear the matter as the appellant had been unlawfully employed.¹⁶⁰ The appellant decided to appeal this ruling and approached the appeal court.¹⁶¹

The Labour Appeal Court (LAC) held that sex workers should be treated with dignity by both their employers and clients.¹⁶² The LAC held that section 23 of the Constitution protects the dignity of an employment relationship and applies to sex workers.¹⁶³

Further, The LAC held as follows:

‘When it comes to the question of remedy, each case will have to be decided in terms of the facts thereof. Manifestly, not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA. In so deciding, a tribunal or court is engaged with the weighing of principles; on the one hand the ex turpi causa rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion

¹⁵⁴Ibid at 339-340.

¹⁵⁵Ibid at 340.

¹⁵⁶*Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC).

¹⁵⁷Spies op cit note 120 at 517.

¹⁵⁸Supra note 156 at para 1-2.

¹⁵⁹Ibid.

¹⁶⁰Ibid.

¹⁶¹Ibid at para 2.

¹⁶²Ibid at para 26.

¹⁶³Ibid.

and respect for all members of the community. The *ex turpi causa* rule is, as is evident from its implementation by the courts, a principle of law for it guides rather than dictates a single result.¹⁶⁴

The court upheld the appeal and ruled that the commissioner's ruling was to be set aside as the CCMA did have the requisite jurisdiction to hear the matter.¹⁶⁵ Spies argues that the arguments presented in the minority judgement and by SWEAT in their arguments as *amicus curiae* in *Jordan* laid the foundation for *Kylie* and brought about what felt like a small victory in the aim to decriminalise sex work.¹⁶⁶

Following *Kylie*, the SALRC published its third and final report on 'adult prostitution' in 2017 (SALRC Report).¹⁶⁷ As stated in the SALRC Report 'The Report on Sexual Offences: Adult Prostitution published by the South African Law Reform Commission (the Commission) has sought to explore the need for law reform in relation to adult prostitution against the backdrop of some of the complex realities South Africans face'.¹⁶⁸ The SALRC Report was the third leg in the SALRC's project on adult sex work,¹⁶⁹ and again listed the different models used to govern sex work in various jurisdictions, namely, total criminalisation, partial criminalisation, regulation and non-criminalisation'.¹⁷⁰ The SALRC Report acknowledged that the issue of adult prostitution in South Africa has been complicated by issues such as a poor economy globally, violence and targeted exploitation against women who engage in prostitution, and the HIV/AIDs epidemic,¹⁷¹ among others. It recognised that it had to take into account the State's duties to recognise the rights and freedoms of all its citizens.¹⁷² The SALRC Report identified poverty, unemployment and inequality as the key drivers of prostitution in South Africa and acknowledged that the Constitution requires social justice to be achieved through the law.¹⁷³ Despite these considerations, the SALRC concluded that 'changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women.

¹⁶⁴Ibid at para 56.

¹⁶⁵Ibid at para 61.

¹⁶⁶Spies op cit note 120 at 517.

¹⁶⁷South African Law Reform Commission (Project 107) *Report on Sexual Offences: Adult Prostitution* (2017) 1.

¹⁶⁸Ibid at vii.

¹⁶⁹Ibid.

¹⁷⁰Ibid at viii.

¹⁷¹Ibid at vii.

¹⁷²Ibid at viii – ix.

¹⁷³Ibid at ix.

Women would be considered even more expendable than at present'.¹⁷⁴ Accordingly, the SALRC Report recommended that the Sexual Offences Act be repealed and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 be amended to include sections which criminalise prostitution and its related activities.¹⁷⁵ Further, it was suggested that there should be an option and resources available for people who engage in prostitution to be able to divert out of prostitution.¹⁷⁶ Despite all the efforts of civil society organisations to engage the SALRC, sex work continues to be criminalised, as endorsed by the SALRC Report.

In 2019 the Declaration Against Gender-based Violence and Femicide was launched. President Ramaphosa stated at the launch that policies needed to be developed in respect of the decriminalisation of sex work.¹⁷⁷ However, after this there was little to no movement in respect of decriminalising sex work.¹⁷⁸

In a surprising turn of events on 09 December 2022, Minister of Justice, Ronald Lamola, addressed the media about the Criminal Law Amendment Bill of 2022 - decriminalisation of sex work.¹⁷⁹ The Minister indicated that, on 30 November 2022, Cabinet had approved the publishing of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 (the Bill) regarding the decriminalisation of sex work for public comment.¹⁸⁰ The Minister indicated that the Bill would repeal both the Sexual Offences Act and section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in order to decriminalise sex work.¹⁸¹ He acknowledged that the issue of decriminalising sex work had been a highly debated issue which is complex due to the various social and economic factors that drive the need to partake in sex work.¹⁸² The Minister indicated that the Bill was in response to the 'list of interventions proposed in Pillar 3 (Protection, Safety and Justice) of the National Strategic Plan on Gender-Based Violence

¹⁷⁴Ibid at ix.

¹⁷⁵Ibid at x.

¹⁷⁶Ibid.

¹⁷⁷Spies op cit note 119 at 344-5.

¹⁷⁸Ibid.

¹⁷⁹Lamola op cit note 8.

¹⁸⁰Ibid.

¹⁸¹Ibid.

¹⁸²Ibid.

and Femicide, which enjoin the criminal justice system to provide protection, safety and justice for survivors of GBV, and to effectively hold perpetrators accountable for their actions.¹⁸³

Pillar 3 of the National Strategic Plan on Gender-Based Violence and Femicide proposed the fast-tracking of the decriminalisation of sex work due to the fact that criminalising sex work leaves sex workers vulnerable and more prone to gender based violence.¹⁸⁴ The Minister's statement acknowledged that the SALRC Report recommended that sex work continue to be criminalised and that Cabinet had then decided to debate the matter further.¹⁸⁵ The Minister further acknowledged that despite the continued criminalisation of sex work, sex workers continue to work which has led to mostly female sex workers being confronted by law enforcement and suffering high levels of violence.¹⁸⁶ He indicated that the hope is that decriminalisation will lead to less human rights violations against sex workers in order to ensure that South Africa complies with its obligations under various international legal instruments.¹⁸⁷ Accordingly, the Bill will follow a two-step approach: decriminalisation followed by regulation.¹⁸⁸ The Bill was open for public comment until 31 January 2023.¹⁸⁹

This section has discussed the various legislative and judicial efforts made by different parties, including civil society organisations, to decriminalise sex work in a democratic South Africa. The Minister's statement and the Bill are a culmination of these efforts and hopefully a recognition of the human rights abuses suffered by sex workers under the COVID19 pandemic. The next section of the research report will provide case studies of how various countries govern sex work to demonstrate that decriminalisation is the best model.

VI. AN INTERNATIONAL CASE STUDY: ARGUMENTS FOR AND AGAINST THE DECRIMINALISATION OF SEX WORK

The SALRC investigated the various models of governance of sex work in different western countries in their 2002 issue paper.¹⁹⁰ In their 2009 discussion paper, they extended their

¹⁸³Ibid.

¹⁸⁴Ibid.

¹⁸⁵Ibid.

¹⁸⁶Ibid.

¹⁸⁷Ibid.

¹⁸⁸Ibid.

¹⁸⁹Ibid.

¹⁹⁰Spies op cit note 119 at 336.

investigation to African countries.¹⁹¹ The differences in a country's approach to the governance of sex work is often linked to different ideologies.¹⁹² This section of the research report looks at the manner in which New Zealand governs sex work, juxtaposed against the manner in which various African countries govern sex work. This provides a context of different methods of governance from both western and African perspectives so as to provide an informed opinion on the manner in which sex work should be governed in South Africa.

(a) The governance of sex work: a case study of New Zealand

The SALRC Report considered partial criminalisation as an option and indicated that it would prefer the Swedish model which aligned with its views that 'prostitution should be viewed as a form of exploitation or coercion resulting from the economic marginalisation of women through educational deprivation and job discrimination, ultimately rendering them vulnerable to recruitment into prostitution.'¹⁹³ Despite this, Spies argues that New Zealand is viewed as having the most liberal method of governing sex work because sex work is recognised as work in New Zealand and the employment and legal rights of sex workers are recognised.¹⁹⁴ This research report suggests that New Zealand has the best model of governing sex work and presents a brief case study of New Zealand in this subsection to cement this proposal.

New Zealand has chosen to decriminalise sex work and to introduce basic legislation in the governance of sex work.¹⁹⁵ New Zealand is similar to South Africa in that it has a long history of criminalising sex work.¹⁹⁶ The introduction of the Prostitution Reform Act of 2003 (PRA) ended the criminalisation of sex work in New Zealand.¹⁹⁷ The PRA views sex work through a human rights framework that recognises that sexual activities which are not harmful in and of themselves should not be criminalised.¹⁹⁸ Further, the PRA respects the privacy that these private sexual acts demand.¹⁹⁹ New Zealand also promotes the safety and health of the sex worker.²⁰⁰ Brothels in New

¹⁹¹Ibid at 339.

¹⁹²Ibid at 328-9.

¹⁹³op cit note 167 at 225.

¹⁹⁴Spies op cit note 119 at 334.

¹⁹⁵Boudin & Richter op cit note 50 at 195.

¹⁹⁶Ibid.

¹⁹⁷Ibid.

¹⁹⁸Ibid.

¹⁹⁹Ibid.

²⁰⁰Ibid.

Zealand are required by law to ensure that they display health information in order to ensure that they are adhering to the obligation of health education so as avoid the continued spread of contagious diseases.²⁰¹

New Zealand requires sex workers only to participate in sex work if it is voluntary; forced sex work is criminalised in New Zealand.²⁰² Sex workers also enjoy a number of employment law rights and protections including the right to form their own trade unions; to claim unemployment benefits should they decide to no longer be a sex worker; to have enforceable and valid contracts; and to claim for any occupational health and safety incidences for which they are covered and/or allowed to claim by law.²⁰³ This approach towards decriminalisation of sex work has yielded many positive results including the decrease in the transmission of diseases and in particular HIV/AIDS.²⁰⁴ Further, sex workers are able to report any severe physical harm to police and have a better working environment.²⁰⁵ Sex workers feel safer under the new legal regime and are even able to negotiate safe sex with their clients.²⁰⁶

(b) Arguments against sex work: an African view and general views

Radical feminists such as MacKinnon argue that sex work is a system of violence and oppression in which women do not have autonomy because they are subject to a patriarchal system designed for them to be abused and oppressed by men.²⁰⁷ While these radical feminist views are not the basis for criminalising sex work on the African continent, they certainly share similar outcomes to the more conservative moral views that form the rationale for criminalising sex work in African countries.²⁰⁸ Across the African continent sex work continues to be largely criminalised, but largely for conservative moral reasons.²⁰⁹

Sex work is criminalised in Rwanda²¹⁰. In 2007, in a speech made on International Women's Day, the Rwandan president stated that sex work did not advance Rwanda's agenda to develop and was

²⁰¹Ibid.

²⁰²Ibid.

²⁰³Ibid.

²⁰⁴Ibid at 196.

²⁰⁵Ibid.

²⁰⁶Ibid.

²⁰⁷Thusi op cit note 1 at 196.

²⁰⁸Chi Mgbako & Laura A Smith 'Sex Work and Human Rights in Africa' (2010) 33(4) *Fordham International LJ* 1178 at 1189.

²⁰⁹Ibid.

²¹⁰Mgbako & Smith op cit note 208 at 1190.

reprehensible from a moral and cultural standpoint.²¹¹ The President's words reflected a general attitude towards sex workers.²¹² About 2 years prior to this speech, the police had begun an operation where sex workers were the target, and their aim was to try and expose those who were operating in hiding.²¹³ This approach towards sex work is not unique to Rwanda, but is prevalent in many African countries.²¹⁴ Countries such as The Republic of Gambia, Sierra Leone, Nigeria and Zimbabwe have all also adopted similar approaches in their laws, attitudes and law enforcement tactics.²¹⁵ Such approaches have left sex workers across the African continent in a vulnerable position where they are subjected to various stigmas, abusive behaviours and oppression.²¹⁶ In some of these African countries particularly in Nigeria, sex workers are viewed as carriers of contagious diseases, in particular HIV/AIDs.²¹⁷

Outside the African context, radical feminist views persist in opposing the decriminalisation of sex work. Echoing MacKinnon, Farley argues that the call to decriminalise sex work ignores the harms associated with sex work.²¹⁸ Further, Farley disagrees with the New Zealand legislature's decision to allow prostitutes to form unions and states that the women who form part of these unions are a 'union of battered women'.²¹⁹ She claims that prostitution is not a safe industry and that women are often left in vulnerable positions and subjected to various abuses including physical abuse which often leads to psychological issues.²²⁰ Farley further argues that men often want to engage in sexual intercourse even in strip clubs and that the line between different forms of sexual activities and prostitution have been blurred.²²¹ Moreover, the advocates of decriminalisation that focus on the sex worker's health often ignore the fact that sex workers need psychological care as well.²²²

In contrast, Beloso states the following in respect of arguments against decriminalisation:

²¹¹Ibid.

²¹²Ibid.

²¹³Ibid.

²¹⁴Ibid.

²¹⁵Ibid.

²¹⁶Ibid at 1191.

²¹⁷Ibid.

²¹⁸Melissa Farley 'Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized' (2004) 10(10) *Violence Against Women* 1087 at 1089.

²¹⁹Ibid.

²²⁰Ibid at 1102-4.

²²¹Ibid at 1102.

²²²Ibid at 1104.

‘The feminist who sees only victims everywhere she or he looks at prostitution misses entirely the ingenuity and agency of the human being who chooses to work in the sex industry rather than, say the sweat shop industry (or even, for that matter, the knowledge industry), because the wages and working conditions are, to his or her mind, better’.²²³

Beloso concludes her argument by stating:

‘To proclaim that prostitution harms all women, everywhere, is to cover over the harm that we all do everyday, to varying degrees, as participants in our political economy. To overlook our own complicity, as producers and consumers, in the pricing of sexual services and the construction of cultural hierarchies that enable economic exploitation in every labor sector is to refuse to flip the intersectional coin.’²²⁴

It is clear from this section that countries who continue to decriminalise sex work do so for moral and cultural reasons that severely affect the human rights of sex workers. However, the decriminalisation model clearly shows the many advantages of decriminalisation. Those who oppose decriminalisation ignore the agency of sex workers and the many complex intersectional factors that exist within sex work, including the right of sex workers to participate in the economy in the way they see fit. In contrast, those who support decriminalisation recognise that sex workers exercise rational choices in respect of their work and livelihoods in the context of their particular circumstances.

VII. CONCLUSION

The decriminalisation of sex work is an ongoing debate that spans many years. However, despite this long history, South Africa’s laws on sex work remain archaic and unable to escape this oppressive history. The time for change is now because the COVID19 pandemic and the many human rights violations experienced by sex workers during this pandemic demand that the government immediately end the violence against sex workers and decriminalise sex work. The COVID19 pandemic has made the decriminalisation of sex work an urgent human rights issue. While the Bill is a step in the right direction, it does not guarantee that the decriminalisation of sex work will occur. Public health arguments are powerful motivators for reform. It is the hope of this research report that the combination of public health and human rights imperatives, will be a

²²³Beloso op cit note 2 at 62-3.

²²⁴Ibid at 66.

powerful motivator for the legislature to accelerate the decriminalisation of sex work. Sex work needs to be destigmatized to create a society in which the rights of all are respected and observed.

As acknowledged by the Minister in his statement: ‘Criminalising sex work has not stopped the selling or buying of sex, nor has it been effective. If anything, it has led to higher levels of violence against sex workers.’²²⁵ The New Zealand model is a clear indicator that the decriminalisation of sex work can lead to positive outcomes such as better disease control and a safer environment for sex workers.

Sex workers are breadwinners, mothers, sisters, and daughters who are driven by various factors to partake in the economy in a manner they see fit. They should not be punished due to the morals of some in society. They too are citizens of South Africa whose healthcare needs and human rights are equally worthy of protection. In conclusion, sex work should be decriminalised in South Africa as a matter of urgency.

²²⁵Lamola op cit note 8.

Bibliography

Cases

Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC)

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

S v Makwanyane and Another 1995 (3) SA 391

Internet Sources

<https://www.gov.za/speeches/speaking-notes-%E2%80%93-media-briefing-criminal-law-sexual-offences-and-related-matters-amendment>

<http://www.pathologylearningcentre.uct.ac.za/syphilis-origins>

Journal Articles

Adebisi YA, Alaran AJ & Akinokun RT et al 'Sex Workers Should not be Forgotten in Africa's COVID-19 Response' (2020) 103(5) *American Journal of Tropical Medicine and Hygiene*

Beloso BM 'Sex, Work, and the Feminist Erasure of Class' (2012) 38(1) *Signs: Journal of Women in Culture and Society*

Boudin C & Richter M 'Adult, Consensual Sex Work in South Africa – The Cautionary Message of Criminal Law and Sexual Morality' (2009) 25(2) *South African Journal on Human Rights*

Farley M 'Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized' (2004) 10(10) *Violence Against Women*

Kruger R 'Sex Work from a Feminist Perspective: a Visit to the Jordan Case' (2004) 20 *South African Journal on Human Rights*

Lewin J 'Sex Color and the Law' (1963) 10(6) *Africa Today*

Marshall R 'Sex Workers and Human Rights: A Critical Analysis of Laws regarding Sex Work' (2016) 23(1) *William & Mary Journal of Women and the Law*

Mgbako C & Smith LA 'Sex Work and Human Rights in Africa' (2010) 33(4) *Fordham International Law Journal*

Roure JG 'The Reemergence of Barriers during Crises & Natural Disasters: Gender-Based Violence Spikes among Women & LGBTQ+ Persons during Confinement' (2020) 21(2) *Seton Hall Journal of Diplomacy and International Relations*

Spies A 'Better late than never: Lessons from S v Jordan in strengthening women's participation in litigation' (2015) 30(2) *Southern African Public Law*

Spies A 'The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform' (2021) 65(3) *Journal of African Law*

Sullivan KM 'Constitutionalizing Women's Equality' (2002) 90(3) *California Law*

Sutherland K 'Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade' (2004) 42(1) *Osgoode Hall Law Journal*

Thusi I 'Radical Feminist Harms on Sex Workers' (2018) 22 *Lewis & Clark Law Review*

Thusi IG 'Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa' (2015) 38(1) *Fordham International Law Journal*

Legislation

Constitution of the Republic of South Africa, 1996

Contagious Diseases Acts 1864

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981)

Immorality Act 5 of 1927

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Sexual Offences Act 23 of 1957

Miscellaneous

South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002)

South African Law Reform Commission Discussion Paper 0001/2009 (Project 107) Sexual Offences – Adult Prostitution (2009)

South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2017) 1.

UNPFA ESARO *A Rapid Scoping Assessment of the Impact of Covid-19 On Sex Worker Programmes in East and Southern Africa* (2020)