

THE UNCONSTITUTIONAL CRIMINALISATION OF ADULT SEX WORK

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‘Hard work and discipline will never fail you’.

SUMMARY

The continued criminalisation of adult commercial sex work in South Africa seems to have contributed to the unjust violation of sex workers' constitutional rights such as the rights to equality, human dignity, privacy and the right to bodily integrity. It is evident that laws enforcing sexual morality often increase the stigmatisation and marginalisation of minority groups. In *Teddy Bear Clinic for Abused Children and Others v Minister of Justice and Others*, both High Court and Constitutional Court held that the criminalisation of consensual sexual intercourse and consensual sexual violation between two minors of ages twelve to fifteen is inconsistent with the Constitution. In *Teddy Bear* both courts relied on the argument that the criminalisation constituted a violation of the children's rights to dignity, privacy and self-autonomy. The courts' reasoning is logical. However, it takes one back to the issue of adult commercial sex which still remains criminalised in South Africa. If both courts in *Teddy Bear* could order for the decriminalisation of consensual sex between minors of certain age groups, then the continued criminalisation of adult commercial sex work should also be called into question.

This dissertation argues that the regulation of sexual morality often unjustly infringes the constitutional rights of those targeted. It has also been identified that criminal and human- rights law are frequently applied in an unfair and biased manner by South African courts. Examples are cited in the dissertation of court cases where courts applied a flexible approach towards the development of common law, whilst in other cases the courts seemed to hide behind the separation of powers doctrine instead of tackling the issues of human- rights violations.

The first chapter of the dissertation contains the problem statement, research questions, motivation, literature review and a brief outline of the chapters. The second chapter explores the question of the morality which is endorsed by the South African Constitution. The third chapter identifies the biased and unfair application of criminal and human- rights law by South African courts. The fourth chapter contains an argument on the courts' duty to interpret legislation and to develop common law

in a manner that promotes the spirit, objects and purport of the Bill of Rights. Chapter five contains a brief international perspective on adult commercial sex work, by looking at the New Zealand position and other relevant international law instruments. Chapter six contains the conclusion of the dissertation.

It is proposed that when dealing with the issue of adult commercial sex work, the legislature should be careful not to enact laws which disregard the sex workers' human- rights. Here one can cite New Zealand as a country that has taken a human- rights approach when tackling the issue of adult commercial sex work. A human - rights approach aims to empower people in the sex work industry to make informed choices regarding their health and other choices relating to their overall safety. This approach represents a shift from a moralistic approach to sex work to an approach that recognises the rights of sex workers. The case of *S v Jordan* provided a platform that the judiciary should have used to eliminate human -rights violations brought by the criminalisation of adult commercial sex work. Failure of the Constitutional Court in *Jordan* to approach the matter from a human-rights perspective has come as a huge disappointment to the attempts to reform one of the oppressive and moralistic laws which continue to exist even during the post Constitutional era.

LIST OF ABBREVIATIONS

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

ICPR The International Committee for Prostitutes' Rights

NICRO National Institute for Crime Prevention and Reintegration of Offenders

RAPCAN Resources Aimed at the Prevention of Child Abuse and Neglect

SACJ South African Criminal Law Journal

SAJHR South African Journal for Human Rights

SAPS South African Police Service

SWEAT Sex Workers Education and Advocacy Taskforce

UDHR Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCTION

1.1 Problem statement and objectives of the study

This dissertation contains arguments highlighting the potential clash between the regulation of sexual morality by criminal sanction and the protection of constitutional rights. The continued criminalisation of adult commercial sex work in South Africa seems to have contributed to the unjust violation of sex workers' constitutional rights such as the rights to equality, human dignity and the right to bodily integrity. It is evident that laws enforcing sexual morality often increase the stigmatisation and marginalisation of minority groups such as homosexuals and sex workers who often have different moral views from the rest of the society.

The objectives of this dissertation are firstly, to establish the kind of morality that is envisaged by the South African Constitution of 1996. Secondly, to point out the sometimes unfair and biased application of criminal and human- rights law in relation to sexual relations. The third objective is to establish the extent of courts' constitutional duty to interpret legislation and to develop the common law in line with the spirit, object and purport of the Bill of Rights. The fourth objective is to make recommendations towards reforming laws relating to the criminalisation of adult commercial sex work.

1.2 Research questions

The study is based on this key research question:

- i. To what extent does South African law protect adult commercial sex workers in present day South Africa?

In responding to this question the following subsidiary questions have also been dealt with:

- ii. How does South African law deal with questions of morality in relation to the Constitution?
- iii. How fairly or unfairly has the law been used to regulate adult commercial sex under South Africa's constitutional legal system?
- iv. What are the duties of the courts in terms of section 39(2) of the Constitution?
- v. What international perspectives can be relied on to justify the protection of adult commercial sex work?
- vi. What could be done in South Africa to ensure that adult commercial sex workers enjoy the same universally-recognised human-rights guaranteed to everyone?

1.3 Motivation

The enforcing of morality through criminal law is nothing new in the South African jurisprudence. It dates back to the period before the constitutional transition of 1994, where laws such as the Immorality Act¹ declared consensual sexual acts 'between white people and non-white people' a criminal offence punishable in terms of criminal law.

Various arguably victimless acts such as homosexuality and the possession of pornographic material were in the past criminalised in South Africa. Although the criminalisation of the above-mentioned acts was declared unconstitutional, after 1994 adult consensual sex work still remains a criminal offence. One may argue that the criminalisation of victimless conduct performed by consenting adults is unjust and constitutes a violation of constitutional rights.

¹ Sec 1 of the Immorality Act 5 of 1927 provides as follows: 'any European male who has illicit carnal intercourse with a native female, and any native male who has illicit carnal intercourse with a European female, in circumstances which do not amount to rape, an attempt to commit rape, indecent assault, or a contravention of section two or four of the Girl's and Mentally Defective Women's Protection Act, 1916 (Act No. 3 of 1996) shall be guilty of an offence and liable on the conviction to imprisonment for a period not exceeding five years'.

The Constitutional Court has established in previous cases that the criminalisation of certain victimless acts constituted a violation of some of the guaranteed constitutional rights. The court held in *Curtis v Minister of Safety & Security*,² that section 2(1) of the Indecent or Obscene Photographic Matter Act³ was unconstitutional and violated the constitutional right to privacy. The Act prohibited the possession of indecent or obscene photographic materials.

In the cases of *S v Kampher*⁴ and *National Coalition for Gay & Lesbian Equality v Minister of Justice*⁵ it was held that the criminalisation of sodomy was incompatible with the constitutional rights to equality and privacy. In *Geldenhuys v National Director of Public Prosecutions & Others*⁶ the Constitutional Court declared invalid certain parts of sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act 23 of 1957.⁷ These sections set the age of consent for sexual intercourse at nineteen for same-sex sexual acts, while setting the age of consent at sixteen for heterosexual sexual acts.

² *Curtis v Minister of Safety & Security & Others* 1996 (3) SA 617 para 97.

³ Section 2 (1) of the Indecent or Obscene Photographic Act 37 of 1967 provides as follows: 'Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment'.

⁴ *S v Kampher* 1997 (2) 417 (C) para 31, 61.

⁵ *National Coalition for Gay & Lesbian Equality v Minister of Justice* 2000 (1) BCLR 39 para 108.

⁶ *Geldenhuys v National Director of Public Prosecutions & Others* 2009 (2) SA 310 (CC) para 45.

⁷ Sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act 23 of 1957 provides as follows: 'Sexual offences with youths—

(1) Any male person who—

(a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or

(b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.

(3) Any female who—

(a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or

(b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a boy or girl to the commission of an immoral or indecent act, shall be guilty of an offence.'

In the case of *Philips & Another v The Director of Public Prosecutions & Others*⁸ it was held that section 160 (d) of the Liquor Act⁹ was unconstitutional and infringed the constitutional right to freedom of expression. This section of the Act makes it a punishable by law for the holder of a consumption liquor licence to allow on his or her premises entertainment that involves the performance or appearance by a person who is improperly clothed or not clothed at all.

The constitutional rights to bodily and psychological integrity as well as the right to health care were emphasised in the case of *Christian Lawyers Association v Minister of Health*.¹⁰ The applicants in the case unsuccessfully challenged the validity of the Choice on Termination of Pregnancy Act¹¹ and argued that it violated the right to life in terms of section 11 of the Constitution. The Pretoria High Court dismissed their argument, ruling that constitutional rights only apply to natural persons and not to fetuses.

The case law cited here illustrates that criminal law has often been used to enforce morality. Criminal law is usually used to regulate acts that are considered to be immoral, disgusting or unacceptable, although such conduct does not cause harm to anyone. This is what is referred to as the criminalisation of victimless acts. There is a very thin line between the regulation of private immorality and the infringement of constitutional rights.

Law makers must find a way to justify why they deem it necessary to regulate acts involving private immorality. It would be justifiable for the law to intervene in private matters, where gradual or immediate harm can be proved. Using disgust and unfounded moral views as a criterion to declare certain acts as unlawful is in itself to

⁸ *Philips & Another v The Director of Public Prosecutions & Others* 2003 (3) SA 345 para 33.

⁹ Section 160 (d) of the Liquor Act 27 of 1989 provides as follows: 'the holder of an on-consumption licence who allows any person to perform an offensive, indecent, or obscene act or who is not clothed or not properly clothed, to appear, on any part of the licensed premises where entertainment of any nature is presented or to which the public has access shall be guilty of an offence.

¹⁰ *Christian Lawyers Association v Minister of Health* 1998 (11) BCLR 1434 (T) at 1123B/C.

¹¹ Act 92 of 1996.

my mind not enough for criminalising these acts. Whose moral values should be followed? Who establishes what is right and which moral standards should be applied?

In the case of *Teddy Bear Clinic for Abused Children & Others v Minister of Justice & Others*,¹² it was held that the criminalisation of consensual sexual intercourse and consensual sexual violation between two minors of ages twelve to fifteen is inconsistent with the Constitution. The High Court relied on the argument that the criminalisation constituted a violation of the children's rights to dignity, privacy and self- autonomy.¹³ It was further argued that children would be vulnerable as they will not be able to make informed sexual choices as a result of the failure to consult and request guidance from parents and caregivers.¹⁴ Educators highlighted the fact that abstinence campaigns which took place in schools have proved to be rather unsuccessful. Instead of criminalisation, it would be more feasible to focus on educating children on healthier sexual choices. Child psychologists, through surveys and research conducted have also indicated that most adults' first sexual encounters take place during their early adolescent years. The focus should rather be on accepting this reality and empowering children through sexual education to enable them to make informed choices regarding their sexuality.¹⁵ The Constitutional Court recently confirmed the *Teddy Bear* High Court ruling, therefore giving it legal force.

The reasoning in *Teddy Bear* though logical, takes one back to the issue of adult commercial sex which still remains criminalised in South Africa. One can easily argue that the criminalisation of adult commercial sex also constitutes a violation of the constitutional rights to: dignity, privacy, the right to economic activity and the right to bodily and psychological integrity. The Sex Workers Education and Advocacy

¹² *Teddy Bear Clinic for Abused Children & Others v Minister of Justice & Others* (73300/10) [2013].

¹³ *Teddy Bear supra* note 12 at para 83.

¹⁴ *Teddy Bear supra* note 12 at para 59.

¹⁵ *Teddy Bear supra* note 12 at para 58.

Taskforce (SWEAT) have on numerous occasions argued that the continued criminalisation renders sex workers even more vulnerable to abuse.¹⁶

In this dissertation I argue against the enforcing of unfounded and prejudicial moral views which compromise constitutional values. Another important closely-related aspect relates to the sometimes biased application of criminal and-human-rights law. If the courts in *Teddy Bear* could order for the decriminalisation of consensual sex between minors of certain age groups, then the continued criminalisation of adult commercial sex work should certainly be called to question.

1.4 Literature review

The Wolfenden Report on Homosexual Offences and Prostitution published in Britain on 4 September 1957 is often quoted through argumentation on the issue of sexual morality and the law. The report highlighted the view that it is not the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour.¹⁷ The Wolfenden Report emphasised the law's function as follows:

“The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others....It is not, in our view, the function of the law to intervene in private life of citizens or to seek to enforce any particular pattern of behaviour.”¹⁸

The South African Law Reform Commission Discussion Paper¹⁹ highlighted that proponents of the regulation of adult commercial sex work believe that the regulation could help reduce crime, improve health, increase tax revenue and allow individuals to make their own choices.

¹⁶ *S v Jordan* 2002 (11) BCLR 1117 para 118.

¹⁷ 'Report of the Departmental Committee on Homosexual Offences and Prostitution' available at: http://en.wikipedia.org/wiki/Wolfenden_report (accessed: 28 August 2013).

¹⁸ *Supra* note 17.

¹⁹ South African Law Reform Commission Discussion Paper 0001/2009 Project 107, *Sexual Offences, Adult Prostitution* page 179.

The applicants in the *Teddy Bear* -case argued that the criminalisation of consensual sexual intercourse between children between ages twelve to fifteen violates their constitutional rights to dignity and privacy. Apart from the violation of such rights, it was further argued that criminalisation will discourage adolescents from seeking help with regard to their sexuality.²⁰

In the case of *S v Jordan*²¹ the Constitutional Court was challenged with the question whether the criminalisation of adult commercial sex work constitutes an infringement of the rights to economic activity, privacy, human dignity and the right to freedom of the person.

Ackerman J in the case of *National Coalition for Gay & Lesbian Equality* stated that '[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose.'²² The decision in the case of *Kylie v CCMA*²³ accepted that the relationship between the sex worker and third parties such as brothel keepers, massage parlour owners, club owners, escort agencies and pimps was one of employment, which should guarantee them the right to fair labour practices contained in section 23(1) of the Constitution. The Court in this case further mentioned that the right to fair labour practices is a cornerstone of the right to dignity.²⁴ Pete argues from a liberal perspective and states as follows:

To interfere with the freedom of each South African to make his or her own moral choices is to interfere with the very foundation of South Africa's hard won constitutional democracy. In order to convince those committed to truly liberal principles of the need for the criminal law to prohibit sex work, it must show that it either causes harm or offence to others.²⁵

²⁰ *Teddy Bear supra* note 12 para 58.

²¹ *S v Jordan supra* note 16 para 51.

²² *National Coalition for Gay & Lesbian Equality & Another v the Minister of Justice & Others* 1999 (1) SA 6 (CC) para 37.

²³ *Kylie v CCMA & Others* 2010 (7) BLLR 705 (LAC) para 54.

²⁴ Smith S 'Locatio conductio leno: Employment in the third-party prostitution industry' (2011) 19 *South African Mercantile Law Journal* 235 at 239.

²⁵ Pete S 'The proposed legalization of prostitution in South Africa' (2010) 31 *Obiter* 535 at 536.

Pudifin and Bosch have stated that section 9 of the Constitution, which guarantees the right to equality and section 10 which guarantees human dignity compel the law to reform adult commercial sex work in South African towards an approach that favours the decriminalisation of adult commercial sex work.²⁶

1.5 Outline of chapters

The study is organised in six chapters, which includes this introductory chapter, four main chapters and a concluding chapter. This present chapter, which makes up the introduction presents the problem statement and objectives of the study, the research questions, the motivation to the study and a brief literature review.

In chapter two I examine the issue of the regulation of morality in relation with the South African Constitution. With reference to the case *S v Jordan* I argue that moral values that are not in line with constitutional values were enforced.

In chapter three, I look at how fairly or unfairly the law has been used to regulate adult commercial sex under South Africa's constitutional legal system. In that regards, I make a comparison between the judgments of the *Teddy Bear*- case and the case of *S v Jordan*. The aim of the comparison is to illustrate how criminal- and human- rights law were applied selectively and unconstitutionally. I conclude with the argument that the unfair application of human- rights and criminal law in the *Jordan*-case resulted in human-rights violations of sex workers.

In chapter four, I try to give a comprehensive explanation of the obligation of the courts in terms of section 39(2), which is to interpret legislation and to develop the common law in line with the spirit, purport and objects of the Bill of Rights. The chapter aims to establish whether the Constitutional Court in *Jordan* could be said to have fulfilled its constitutional duty in terms of section 39(2) of the Constitution.

²⁶ Pudifin S & Bosch S 'Demographic and social factors influencing public opinion on prostitution' (2012) 15 *Potchefstroom Law Journal* 1 at 30-31.

In chapter five, I give a brief examination of international perspectives on adult commercial sex work, by looking at the New Zealand position and other relevant international instruments such as the United Nations human- rights law instruments and the World Charter for Prostitutes' Rights, which is a soft -law instrument.

I then conclude in chapter six with some concluding remarks and a few general recommendations.

CHAPTER TWO

REGULATION OF MORALITY: WHOSE MORAL VALUES DOMINATE?

2.1 Introduction

The controversial debate on the criminalisation of adult commercial sex work inevitably raises an important concern on the relationship between morality and criminal law. Members of the public and other stakeholders hold diverse views concerning whether adult commercial sex work should continue to be criminalised or should be decriminalised.²⁷ Some are of the view that decriminalisation would lead to increased crime such as human trafficking and the increased spreading of sexually-transmitted diseases. Others are of the view that decriminalisation would result in better-informed health choices and the effective combating of commercial sex-work related crimes.²⁸

It has also been argued that decriminalisation could result in sexual liberation and the removal of the negative stigma attached to adult commercial sex work.²⁹ On issues relating to the regulation of sexual morality in South Africa, which values take precedence, taking into account the diversity of the South African community? Should criminal law be used to enforce morality? In this chapter it is argued that the judgment in the case of *S v Jordan*³⁰ endorsed the enforcement of a morality which is not in line with constitutional values.

²⁷ SA Law Reform Commission *supra* note 19, 11-12.

²⁸ SA Law Reform Commission *supra* note 19.

²⁹ SA Law Reform Commission *supra* note 19.

³⁰ *S v Jordan supra* note 16.

2.2 Is the criminalisation of adult commercial sex work in line with our constitutional values?

The enforcement of morality by the courts cannot be said to be wrong. However, one needs to be careful on the type of morality which is being enforced. A common morality can serve a good purpose in a community. A prominent British legal philosopher named Devlin has argued that a shared and common morality serves as a bond that keeps society together and prevents such a society from disintegrating.³¹ Devlin further argues that morality and society are interconnected and therefore, if society's morality is threatened; the whole of society itself is threatened.³² According to Devlin, a society has every right to defend itself against attacks on any aspects of its common morality the same way that it does to preserve its government.³³ The moral judgments of a reasonable person were used to ascertain the moral judgments of a society according to Devlin's argument.³⁴ This reasonable person was not expected to be a rational person. The reasonable person was not expected to reason about anything and his judgment was largely a matter of feeling.³⁵

Devlin's arguments notwithstanding, issues relating to the regulation of morality should be treated with caution so as to avoid the imposition of moral standards which could leave minority groups stigmatised and unable to fully access their constitutional rights. The imposing of prejudicial moral standards could take us a step backwards to a kind of society where government may impose a morality which denies South African citizens equal benefits and the protection of the law.

2.2.1 Morality should be enforced according to the values of the South African Constitution of 1996

In this section I argue that any question of morality that is not in context with constitutional values should not be imposed by courts, as this could result in the

³¹ Johnson D, Pete S & Du Plessis M 'Jurisprudence: A South Africa perspective' (2001) 107-108.

³² Johnson *supra* note 31.

³³ Johnson *supra* note 31.

³⁴ Johnson *supra* note 31.

³⁵ Johnson *supra* note 31.

infringement of a variety of constitutional rights. It is submitted that the constitutional values contained in section 1 of the Constitution, most especially the values of human dignity and equality should play an important role in shedding light on how constitutional rights should be interpreted.

The case of *Minister of Home Affairs v National Institute for Crime Prevention*³⁶ emphasised the importance of interpreting constitutional rights in line with section 1 values. The Constitutional Court in the matter held that although section 1 values do not by themselves create enforceable rights, courts have a duty to interpret the Bill of Rights consistently with the values enshrined in section 1. The dispute in the case involved the introduction of provisions into the Electoral Act.³⁷ These provisions in effect deprived convicted prisoners serving sentences of imprisonment without the option of a fine, of the right to participate in elections during the period of their imprisonment.³⁸ In the founding affidavit the applicants representing the prisoners relied on section 1(d) of the Constitution which highlights the constitutional value of universal adult suffrage. It was then that the Constitutional Court mentioned that apart from the unenforceability of the section 1 values, these values cannot be overlooked as they are of fundamental importance in informing and in giving substance to all provisions of the Constitution.³⁹

Albertyn has also argued that the interpretation of constitutional rights in line with section 1 values ensures that courts make decisions which are most faithful to the Constitution. It is clear that the Constitution is a document that aims to ensure transformation and therefore results in the protection of the most vulnerable members of society. It can therefore be argued that an interpretation method that is in line with section 1 values contributes in setting transformative aspirational ideals leading to legal and social change as envisaged by the Constitution.⁴⁰ Prisoners and

³⁶ *Minister of Home Affairs v National Institute for Crime Prevention & the Re-integration of Offenders* (NICRO) 2004 5 BCLR (CC) para 21.

³⁷ Act 73 of 1998.

³⁸ *Minister of Home Affairs supra* note 36 para 2.

³⁹ *Minister of Home Affairs supra* note 36 para 21.

⁴⁰ Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253 at 260.

sex workers can be cited as vulnerable members of society, as in most cases due to their social status they are seen as less worthy of constitutional protection. This as a result often leads to the unjustified abuse of such persons. In order to avoid this; it is of the utmost importance that courts should guard against overlooking these vulnerable members of society.

In South Africa the regulation of morality through the enacting of legislation must be required to pass the constitutional test. The Constitutional Court has a duty to strike down any laws or legislation which contravenes the values enshrined in the Constitution. This is evident from the case of *S v Jordan*⁴¹ wherein it was argued that: '[o]ur constitutional framework not only permits, but requires the legislature to enact laws which foster morality, but morality must be one which is founded on our constitutional values'.

The foundational constitutional values as contained in section 1 of the Constitution⁴² which are relevant to this study are those of human dignity, the achievement of equality, non-sexism, non-racialism and supremacy of the Constitution and rule of law principle. It is common knowledge in South Africa that any law advancing any sort of morality will be subject to constitutional scrutiny and will run the risk of invalidation if it conflicts with the constitutional values. Boudin and Richter have argued that laws regulating sexual morality in South Africa often carried the legacy of being unfairly discriminative, racist and sexist and such laws resulted in the minorities often being stigmatised.⁴³ The question remains whether the continued criminalisation of adult commercial sex work is in line with constitutional values?

It is of crucial importance to base moral judgments on existing facts, and the fact of the matter is that women dominate more in the adult commercial sex work industry. This can be attributed to the fact that women have often found themselves in lower-income earning jobs. In healing past injustices, promoting constitutional values such as human dignity and gender equality, the legislature has to follow a realistic

⁴¹ *S v Jordan supra* note 16 para 104.

⁴² Constitution of the Republic of South Africa 1996.

⁴³ Boudin C & Richter M 'Adult consensual sex work in South Africa: The cautionary message of criminal law and sexual morality' (2009) 25 *South African Journal on Human Rights* 179 at 184.

approach and avoid enacting laws that will further stigmatise already marginalised members of the society. The *S v Makwanyane*⁴⁴ -case, which I will discuss in greater detail below, serves as a good example where the Constitutional Court placed constitutional values above popular morality. The Court can also in *Makwanyane* be said to have used a substantive approach based on constitutional values rather than applying a formalistic approach based purely on legal rules and political reasoning.

2.2.2 Morality principle applied in *S v Makwanyane*

In the *Makwanyane* matter two accused were convicted of murder and robbery with aggravating circumstances. They were sentenced to death at the Witwatersrand Local Division. They however, appealed against the sentence on the basis that a sentence for murder conflicts with the rights to life, dignity and equality.⁴⁵ The Constitutional Court in entertaining the appeal was called upon to decide whether section 277(1)(a) of the Criminal Procedure Act⁴⁶ was in line with the Constitution of the Republic of South Africa. The Court emphasised the duty of the courts to adopt a generous and purposive interpretation of the fundamental rights enshrined in the Constitution so as to ensure that individuals receive the full protection of their constitutional rights.⁴⁷

Public opinion on the death sentence was not a decisive factor because the Constitutional Court based its findings on whether the Constitution permits the imposition of the death sentence.⁴⁸ Despite the fact that members of the public expressed their concern for their lives in a society where the incidence of violent crime is high, the Constitutional Court in its decision stressed the importance of individual rights rather than generalisations.⁴⁹ It appears that the perpetrators' rights to life, dignity and equality outweighed the society's outcry and concerns on the high levels of violent crime and the low rate of apprehension. The Constitutional Court further mentioned that cognisance must be taken of minority opinions with at least

⁴⁴ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

⁴⁵ *S v Makwanyane supra* note 44 para 1.

⁴⁶ Act 51 of 1977.

⁴⁷ *S v Makwanyane supra* note 44 para 9.

⁴⁸ *S v Makwanyane supra* note 44 para 87.

⁴⁹ *S v Makwanyane supra* note 44 para 168.

equal force to majority opinions. The Court emphasised that one of the core functions of the Constitution is to protect unpopular minorities from abuse and to rescue them from marginalisation.⁵⁰ The Constitutional Court also mentioned its function of having to pay regard to the values of all sections of society and not to only confine itself to values of one portion of the society.⁵¹ Our country has moved to a system of constitutionalism which focuses on the achievement of equality, freedom, openness, accommodation and tolerance.⁵²

The Constitutional Court's reasoning reflected a new order whereby courts are tasked with the duty to protect minorities and others who cannot protect their rights adequately through the democratic process. The Constitutional Court mentioned that those entitled to claim this protection include social outcasts and marginalised people of our society.⁵³

It is important therefore to mention that the *Makwanyane*-case focused on an approach towards the protection of minorities and often stigmatised members of the community. A convicted criminal can easily fall into the stigmatised category, so instead of further stigmatising such a person, the Constitutional Court favoured an approach leaning more towards a rather generous interpretation of fundamental rights. This generous interpretation assisted in ensuring that the marginalised receive maximum protection of the law. Despite the public outcries and the public's express need for the retention of the death penalty, the Constitutional Court applied a substantive approach, taking into account the values of the Constitution rather than following a formalistic approach based solely on the rigid interpretation of the law.

A question to be posed is whether the Constitutional Court in *Jordan*⁵⁴ followed the same liberal approach that was applied in the *Makwanyane* -case?⁵⁵ It is submitted

⁵⁰ *S v Makwanyane supra* note 44 para 369.

⁵¹ *S v Makwanyane supra* note 44 para 370.

⁵² *S v Makwanyane supra* note 44 para 391.

⁵³ *S v Makwanyane supra* note 44 para 88.

⁵⁴ *S v Jordan supra* note 16.

⁵⁵ *S v Makwanyane supra* note 44.

that the approach in the *Jordan*⁵⁶ - case was formalistic and seems to have aimed at enforcing a morality that resulted in the further stigmatising and marginalisation of sex workers.

2.2.3 Morality principle applied in *S v Jordan*

According to Kruger, the Constitutional Court in *Jordan* missed the opportunity to vindicate the rights of a vulnerable sector of our society. Kruger goes further to emphasise that the arguments of the *amicus curiae* regarding the consequences of criminalisation of sex work were not seriously considered. She claims that in delivering its judgment, the Constitutional Court held that the source of human -rights infringements is actually sex work itself and not the law criminalising sex work. She came to the conclusion that the Constitutional Court seemed uninterested to defend the rights of sex workers.⁵⁷

With regard to the facts of the case, three appellants namely, a brothel owner, a salaried employee of the brothel and a sex worker were charged for the contravention of the Sexual Offences Act.⁵⁸ Section 20(1)(Aa) of the Act criminalises the act of providing sex for a reward and also of brothel keeping. The appellants admitted before the Magistrate's Court that they had indeed contravened the Act. However, they claimed that the relevant provisions of the Act were unconstitutional and should be declared invalid.⁵⁹ Since the Magistrate's Court has no power to declare statutes unconstitutional, the appellants had to appeal their sentences to the Pretoria High Court. The matter eventually ended up in the Constitutional Court.

The Counsel for the appellants (sex workers) alleged in the Constitutional Court that the criminalisation of adult commercial sex work limits the following fundamental constitutional rights namely; equality, human dignity, freedom and security of the

⁵⁶ *S v Jordan supra* note 16.

⁵⁷ Kruger R 'Sex work from a feminist perspective: A visit to the Jordan case' (2004) 20 *South African Journal on Human Rights* 179 at 149-150.

⁵⁸ *Supra* note 7.

⁵⁹ *S v Jordan supra* note 16 para 34.

person, privacy and the right to economic activity.⁶⁰ The alleged infringed rights are discussed below.

2.2.3.1 The right to equality

The wording of section 20(1) prior to its amendment was interpreted to the effect that only the supplier of the sexual services would be penalised and not the customer. Section 20 provides that;

Persons living on earnings of prostitution or committing or assisting in the 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 a reward;

shall be guilty of an offence.

This section has, however, been amended by Section 11 of the Criminal law (Sexual Offences) Amendment Act.⁶¹ The section criminalised both actions of clients and of sex workers by providing as follows:

A person who engages the services of a person eighteen years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act irrespective of whether the act is committed or not; or by committing a sexual act with the person is guilty of the offence of engaging the sexual services of a person eighteen years or older.

Prior to the amendment it was contended that since a large number of sex workers are women, the unequal application of the criminal sanction had the effect of furthering patterns of gender equality and harmful sexual stereotypes.⁶² However the state responded to the argument by stating that one of the ways of curbing commercial sex is to strike at the merchant by means of criminal sanctions.⁶³ Although the law has been amended to hold customers equally liable for the crime, in practice clients are seldom found guilty and only sex workers are prosecuted. It is

⁶⁰ *S v Jordan supra* note 16 para 51.

⁶¹ Act 32 of 2007.

⁶² *S v Jordan supra* note 16 para 97-98.

⁶³ *S v Jordan supra* note 16 para 10.

also a known fact that most sex workers are women. The Constitutional Court's argument that sex workers are targeted because of their likeliness to be repeat offenders is argued to reinforce double standards which disapprove of promiscuity in women, while regarding men who have many sexual partners as victims of predatory women.⁶⁴ This legal differentiation between suppliers and customers tracks and reinforces in a profound way negative stereotypes and as a result constitutes discrimination.⁶⁵ This results in sex workers being denied equal protection and benefit of the law as well as guaranteed constitutional rights.

2.2.3.2 The right to human dignity

On the issue of the infringement of the right to human dignity the Constitutional Court in both majority and minority judgments held that by engaging in commercial sex work, sex workers knowingly accept the risk of lowering their standing in the eyes of the community.⁶⁶ The Constitutional Court further pointed out that in using their bodies as commodities in the marketplace, sex workers themselves undermine their status and become vulnerable.⁶⁷ The Court further declared that, the diminution of the dignity of sex workers arises from the character of commercial sex work itself and not from the law.⁶⁸

Pertaining to the right to human dignity, Bonthuys has stated that the Constitutional Court's position raises the question whether a sex worker's inherent human dignity is diminished by her profession? She points out that this is problematic as the judgment contains no indication that the client's human dignity is also reduced by his or her way of procuring sex. The Constitutional Court's stance according to Bonthuys, can lead to the assertion that by behaving in a less dignified manner a person can be held as undeserving of any dignified treatment.⁶⁹ Another form of discrimination that

⁶⁴ Bonthuys E 'Women's sexuality in the South African Constitutional Court' (2006) 14 *Feminist Legal Studies* 391 at 394.

⁶⁵ Bonthuys *supra* note 64 at 394.

⁶⁶ *S v Jordan supra* note 16 para 16.

⁶⁷ *S v Jordan supra* note 16 para 66.

⁶⁸ *S v Jordan supra* note 16 para 74.

⁶⁹ Bonthuys *supra* note 64 at 398.

is brought about by the criminalisation is the fact that the law does not take cognisance of the various guises of transactional sex.⁷⁰

Boudin and Richter have noted that in South Africa there are various kinds of sexual relationships entailing an element of material exchange.⁷¹ Some women and men engage in transactional sex in the form of survival sex with, for instance, older sex partners, which could also be categorised as a form of sex work.⁷² The fact that these people do not identify themselves as professional sex workers leads to the creation of a form of differential treatment between ‘such guises’ and the confirmed professional sex workers. This can be said to be in direct contradiction with the Constitution which envisages the treatment of all people with due respect for their dignity, irrespective of their positions in society, their race, class, age or disability.⁷³

In *Kylie v CCMA and Others*⁷⁴ the Labour Appeal Court reinforced Bonthuys’ argument by emphasising that the fact that adult commercial sex work is rendered illegal does not destroy all the constitutional protection which may be enjoyed by someone if they were not sex workers.⁷⁵ It is therefore evident that criminalisation of adult commercial sex work is an unsatisfactory response to sex work as it has the effect of devaluing some of the entrenched human- rights of sex workers.⁷⁶

2.2.3.3 The right to freedom and security of the person

The Constitutional Court held that the sex worker makes himself/herself liable for arrest and imprisonment for violating the law. The Constitutional Court emphasised that any invasion of freedom of security follows from the breach of the law and not from any intrusion by the state.⁷⁷ The case of *Sex Worker Education and Advocacy*

⁷⁰ Boudin & Richter *supra* note 43 at 188.

⁷¹ Boudin & Richter *supra* note 43.

⁷² Boudin & Richter *supra* note 43.

⁷³ Bonthuys *supra* note 64 at 398.

⁷⁴ *Kylie v CCMA supra* note 23.

⁷⁵ *Kylie v CCMA supra* note 23 para 54.

⁷⁶ Kruger *supra* note 57 at 139.

⁷⁷ *S v Jordan supra* note 16 para 75.

*Taskforce v Minister of Safety and Security*⁷⁸ presents a good argument that criminalisation does in fact lead to the unjustifiable infringement of the right to freedom and security of the person.

In this matter the appellant, a non-profit organisation representing sex workers approached the Western Cape High Court for relief aimed at preventing the alleged continued unlawful and wrongful arrest of sex workers.⁷⁹ The complaint laid against the South African Police Service (SAPS) was that arrests of sex workers took place while the SAPS knew very well that such arrest will not lead to prosecution.⁸⁰ It was alleged by the appellant that the arrests of the sex workers were made with the motive of harassing, punishing and intimidating them and such conduct cannot be said to be sanctioned by law.⁸¹ This cannot be said to serve a legitimate purpose. Indeed the respondents' confirmatory affidavits did confirm the absence of any prosecutions.⁸²

It was pointed out in the case that section 12(1) of the Constitution protects each person's right to freedom, which includes the right not to be deprived of his or her freedom arbitrarily or without a just cause.⁸³ Since such arrest will not enable sex workers to challenge its lawfulness before a court, it can be argued that the arrest contradicts section 35(2)(d) of the Constitution and thus unlawful. The section provides that every detained person has the right to challenge the lawfulness of his or her detention before a court and, if the detention is unlawful, to be released.⁸⁴ The Western Cape High Court also observed that the police could therefore not be said to be targeting the illegality of sex work per se, but rather the public manifestations of it.⁸⁵ The Court in conclusion ruled in favour of the appellant and awarded an interdict

⁷⁸ *The Sex Worker Education & Advocacy Taskforce v Minister of Safety & Security & Others* 2009 (6) SA 513 (WCC).

⁷⁹ *SWEAT supra* note 78 para 1.

⁸⁰ *SWEAT supra* note 78 para 3-4.

⁸¹ *SWEAT supra* note 78 para 2.

⁸² *SWEAT supra* note 78 para 13.

⁸³ *SWEAT supra* note 78 para 18

⁸⁴ *SWEAT supra* note 78 para 18.

⁸⁵ *SWEAT supra* note 78 para 57.

against the respondents restraining them from making arrests in circumstances where they knew with a high degree of probability that no prosecutions will follow.⁸⁶

2.2.3.4 The right to privacy

The Constitutional Court established in the *Jordan*- case that a person who commits a crime in private cannot claim the protection of the privacy clause. It was further pointed out that the law should be as concerned with crimes that are committed in private as it is with crimes that are committed in public. Sex workers are according to the Constitutional Court entitled to use their bodies in any manner as long as it does not involve the sale of sex and breaking a law validly made. The Constitutional Court made reference to the *National Coalition for Gay and Lesbian Equality and Another* - case.⁸⁷ It was held that *Jordan* and *National Coalition* cannot be compared.

In the case of commercial sexual activity the sex worker, unlike in homosexual relations, is not nurturing human relationships but rather makes her conduct public and thus becomes vulnerable to public intrusion.⁸⁸ According to Bonthuys, this implies that only people who are in nurturing relationships are considered worthy of the law's protection. This approach cannot be said to be acceptable in a democratic country as it further marginalises sex workers and draws an unjustified and discriminatory distinction between different classes of women.⁸⁹

2.2.3.5 The right to economic activity

As regards the right to economic activity, it was held that the legislature has the responsibility to combat social ills and where appropriate use criminal sanctions. Accordingly, the criminal sanction for commercial adult sex work was a measure intended to eliminate the harmful effects of commercial sex work in order to improve and protect quality of life.⁹⁰

⁸⁶ *SWEAT supra* note 78 para 58.

⁸⁷ *National Coalition for Gay & Lesbian Equality supra* note 22.

⁸⁸ *S v Jordan supra* note 16 para 76.

⁸⁹ Bonthuys *supra* note 64 at 400.

⁹⁰ *S v Jordan supra* note 16 para 25-26.

The case of *Kylie v CCMA and Others*⁹¹ dealt extensively with the issue of sex workers' right to fair labour practices. The case involved an appellant who was a sex worker employed in a massage parlour to perform sexual services for a reward.⁹² The appellant's employment contract was later terminated without a prior hearing.⁹³ The court *a quo* held that the CCMA did not have jurisdiction to arbitrate on an unfair dismissal in a case of an illegal nature.⁹⁴ It was further established that the common law principle of *ex turpi causa non aritur* action prohibits the enforcement of an illegal contract and courts must thus regard the contract as void and unenforceable.⁹⁵ The Labour Appeal Court, however, held that the illegal activity of a sex worker does not prevent such worker from enjoying a range of constitutional rights.⁹⁶

It was also held by the Labour Appeal Court that sex workers form part of a vulnerable class by the nature of the work that they perform.⁹⁷ They are thus as a result subject to potential exploitation, abuse and assault on their dignity.⁹⁸ On that basis it was held that there was no principled reason why sex workers should be denied constitutional protection designed to protect their dignity, including the kind of protection rendered in the Labour Relations Act.⁹⁹ The Labour Appeal Court finally ruled that the CCMA has the jurisdiction to determine the dispute between the parties.¹⁰⁰ Nyathi-Mokoena and Choma have expressed their agreement with the Labour Appeal Court's judgment. They argued that an expansive interpretation of the definition of employee is required in order to include protection for vulnerable groups like sex workers who cause harm to no one when they engage in the 'illegal activity' of sex work.¹⁰¹

⁹¹ *Kylie v CCMA supra* note 23.

⁹² *Kylie v CCMA supra* note 23 para 1-2.

⁹³ *Kylie v CCMA supra* note 23 para 2.

⁹⁴ *Kylie v CCMA supra* note 23 para 2.

⁹⁵ *Kylie v CCMA supra* note 23 para 7.

⁹⁶ *Kylie v CCMA supra* note 23 para 20.

⁹⁷ *Kylie v CCMA supra* note 23 para 44.

⁹⁸ *Kylie v CCMA supra* note 23.

⁹⁹ *Kylie v CCMA supra* note 23.

¹⁰⁰ *Kylie v CCMA supra* note 23 para 61.

¹⁰¹ Choma HJ & Nyathi-Mokoena UCA 'Prostitution under the Sexual Offences Act in South Africa: A Constitutional test' (2013) 3 *International Journal of Humanities and Social Sciences* 233 at 236.

2.3 Conclusion

Was the judgment in *Jordan* in line with constitutional values in comparison to *Makwanyane*? It can be argued that the judgment in the *Jordan*-case failed to uphold constitutional values. Firstly, although it has been argued that the criminalisation of sex work serves a legitimate constitutional purpose, the Constitutional Court has not convincingly shown the presence of a link between social ills and sex work. As a result the Constitutional Court failed to recognise that its judgment was gender-insensitive and thus inconsistent with the constitutional values of human dignity and equality. It has also been argued that the Constitutional Court failed to examine the implications and stigma suffered by sex workers resulting from the criminalisation of sex work. The judgment also failed to explain why the commodification of sexual services is necessarily pernicious and injurious.¹⁰²

The Constitutional Court's judgment in the *Jordan*- case illustrates a negative moral judgment, which caused judges to turn a blind eye on human- rights infringements caused by the criminalisation of sex work.¹⁰³ The Constitutional Court's approach contradicts the values of the present constitutional state, which should be based upon ideas of unity in diversity and tolerance of unpopular forms of behaviour.¹⁰⁴ The Constitutional Court's judgment in the *Jordan* matter can thus, not be equated to that of the *Makwanyane* judgment which places emphasis on a generous and purposive approach towards the interpretation of human- rights in order to ensure individuals a full measure of protection. Instead of protecting the weak, economically- vulnerable and socially-exploited members of the society, the judgment seemed to further reinforce the negative stigmatisation and marginalisation of sex workers.

¹⁰² Fritz N 'Crossing Jordan: constitutional space for (un)civil sex?' (2004) 20 *South African Journal on Human Rights* 230 at 239-240.

¹⁰³ Kruger *supra* note 57 at 149.

¹⁰⁴ Pete *supra* note 25 at 547.

CHAPTER THREE

UNFAIR APPLICATION OF CRIMINAL AND HUMAN RIGHTS LAW

3.1 Introduction

Robson has pointed out contrasting applications of the law by the courts when dealing with gay and lesbian sexuality and adult commercial sex work.¹⁰⁵ The message that the courts ultimately send out is that homosexual relationships fall into a 'model minority' entitled to constitutional protection on the basis of the right to sexual orientation.¹⁰⁶ The courts have depicted homosexuals as the only sexual minorities entitled to constitutional protection whereas adult commercial sex work in South Africa is portrayed as unworthy of constitutional protection in terms of the right to sexual orientation. This selective application of the law is disturbing in the sense that the law appears to be applied in a biased and unfair manner.

Most disturbing is the Constitutional Court's failure in *Jordan* to recognise sex workers as part of a vulnerable group worthy of constitutional protection. Even more startling was the Pretoria High Court's decision in *Teddy Bear*¹⁰⁷ declaring parts of section 15 and 16 of the Criminal Law (Sexual Offences Act)¹⁰⁸ as unconstitutional. Sections 15 and 16 criminalised acts of sexual violation and sexual penetration between minors of certain age groups. In *Teddy Bear* it was held that such criminalisation infringed minors' constitutional rights to privacy, dignity and freedom of autonomy. The paradox is that the *Teddy Bear*-case concerned minors younger than fifteen years whose right to sexual autonomy was condoned and encouraged by a High Court, while in the *Jordan*-case adults are refused the right to sexual

¹⁰⁵ Robson R 'Sexual democracy' (2007) 23 *South African Journal on Human Rights* 409 at 424.

¹⁰⁶ Robson *supra* note 105 at 431.

¹⁰⁷ *Teddy Bear supra* note 12.

¹⁰⁸ *Supra* note 61.

autonomy based on unsound and unproven beliefs. These decisions raise concerns with regard to the unfair and biased application of the law, which tends to prevent the equal protection and benefit of constitutional rights.

In this section of the study I demonstrate the unfair application of the law by primarily contrasting the *Jordan* decision and the *Teddy Bear* High Court decision. The Constitutional Court has confirmed the ruling made by the High Court in the *Teddy Bear*-case. This ruling held that certain provisions of the Criminal law (Sexual Offences and Related Matters) Amendment Act¹⁰⁹ relating to the criminalisation of consensual sex with children of a certain age are constitutionally invalid.¹¹⁰ I justify my reliance on the *Teddy Bear* High Court ruling in this dissertation on the basis that the ruling has been upheld by the Constitution Court, which means that the ruling has gained legal force.

3.2 Criminal-law perspective on adult commercial sex work and sexual practices between minors of certain ages

3.2.1 Criminalisation of adult commercial sex work

Snyman has argued that the decision in *Jordan* is surprisingly conservative in its approach to enforcing morality and that it is difficult to reconcile with the liberal attitude pursued by the Constitutional Court in respect of consensual sex between people of the same sex as it was decided in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.¹¹¹ This argument comes as a result of the Constitutional Court's failure in *Jordan* to take into account that the overwhelming majority of sex workers are women and those men who pay for their services are seldom charged.

¹⁰⁹ *Supra* note 61.

¹¹⁰ *Teddy Bear Clinic for Abused Children & Another v Minister of Justice & Constitutional Development & Another* (CCT 12/13) [2013] ZACC 35 para 2.

¹¹¹ Snyman CR *Criminal Law* (2008) 5th edition 385; *National Coalition for Gay & Lesbian Equality supra* note 22.

This inevitably leads to the promotion of gender inequality.¹¹² It also demonstrates the selective and biased application of the law. Snyman has further pointed out that the entire law regarding the criminalisation of adult commercial sex work is an anachronism, thus irrelevant to the current times. He emphasised this by referring to how men and women advertise their sexual services indirectly through the media, although these advertisements do not expressly speak of sex, they nevertheless have implicit sexual connotations.¹¹³ He goes on to state that as a result the criminalisation of adult sex work appears to have little or no practical effect at all.

Gweshe has also noted the lack of promotion of sex workers' constitutional rights to equality, dignity and security of person that are reflected in the *Jordan-* case. These rights are argued to be essential to sex workers right to autonomy and their right to determine a lifestyle of their choice.¹¹⁴

3.2.2 Criminalisation of sexual activities between minors of certain ages

Snyman's argument also holds that the sexual penetration of a child between the ages of twelve and sixteen was criminalised because such a child is considered not mature enough to appreciate the implications of a sexual act.¹¹⁵ Consent by the child to the commission of the act could not constitute a defence. The ages of both children who took part in the sexual activity was also irrelevant. It was further argued in Snyman that cases where sexual intercourse takes place between minors between the ages of twelve and sixteen occurred quite regularly. As a result the prosecution of this crime would cause more harm than good and it was pointed out that some form of educational treatment may prove more beneficial than the institution of criminal proceedings.¹¹⁶

Gallinetti and Waterhouse have also argued that the Bill of Rights in the Constitution accords rights to all persons, which includes children. Of relevance to this dissertation are the rights to equality, the right to dignity, the right to freedom of

¹¹² Snyman *supra* note 111 at 385.

¹¹³ Snyman *supra* note 111.

¹¹⁴ Smythe D, Pithey B & Artz L (eds) *Sexual Offences Commentary* (2011) 6-6.

¹¹⁵ Snyman *supra* note 111 at 393.

¹¹⁶ Snyman *supra* note 111 at 393.

security and the right to privacy.¹¹⁷ They also highlighted the tension between the child's rights to be protected from harm resulting from sexual activity against the child's exposure to the formal criminal-justice system which could be even more harmful. This exposure was argued not to be in a child's best interests.¹¹⁸

It is questionable that the law was called into question only in the case of the criminalisation of minor sexual activities and not adult commercial sex work. From the decisions handed down in the *Teddy Bear* and *Jordan*- cases, it appears that the constitutional rights of sex workers' are not seen as worthy of any protection.

3.3 Analysis of the facts and decision of the *Teddy Bear*- case

3.3.1 Facts of the case

The applicants in this matter namely, the Teddy Bear Clinic for Abused Children and RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect)¹¹⁹ challenged certain sections of the Criminal Law Amendment Act.¹²⁰ Of the challenged sections our main focus is sections 15 and 16. Both section 15 and 16 concern the sexual penetration and sexual violation of a child in the age group of twelve to fifteen years.¹²¹ The applicants did not seek to impugn the constitutional validity of the sections insofar as they criminalise adults engaging in consensual sexual acts with the children in the age group of twelve to fifteen years.¹²² The applicant's main contention was that instead of protecting only adolescents from sexual advances from adults, section 15 and 16 also criminalises adolescents engaging in sexual acts with other adolescents no matter how harmless or developmentally healthy.¹²³ The applicants argued that the criminalisation could lead to unhealthy sexual behaviour as a result of the adolescents' failure to seek help

¹¹⁷ Smythe, Pithey & Artz *supra* note 114 at 9-5.

¹¹⁸ Smythe, Pithey & Artz *supra* note 114 at 9-8.

¹¹⁹ RAPCAN acronym for 'Resources Aimed at the Prevention of Child Abuse and Neglect'.

¹²⁰ *Supra* note 61.

¹²¹ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 18.

¹²² *Teddy Bear Clinic v Minister of Justice supra* note 110 para 22.

¹²³ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 57.

concerning their sexuality.¹²⁴ It was pointed out that social stigmatisation resulting from the criminalisation will be more likely felt by girls than boys due to the gendered construction of sexual relations in our society.¹²⁵ Criminalisation was argued to result in the inappropriate use of the law and the failure to distinguish between healthy and unhealthy sexual behaviours.¹²⁶

3.3.2 Constitutional rights infringements referred to in *Teddy Bear*

The *amicus curiae* in the *Teddy Bear*-case highlighted that sections 15 and 16 infringe upon a range of constitutional rights pertaining to children.¹²⁷ Firstly, it was held that although the impugned provisions are rarely enforced, the symbolic impact of such criminalisation has a severe effect on the social lives and dignity of those targeted.¹²⁸ Secondly it was argued that the impugned provisions violate the rights of children to have control over their own bodies thus affecting the right to autonomy. This right is protected by section 12(2) of the Constitution, which provides that everyone has the right to bodily and psychological integrity.¹²⁹ Thirdly, it was pointed out that the children's right to private and intimate personal relationships as protected by section 14 of the Constitution¹³⁰ is also infringed by such impugned provisions.

¹²⁴ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 60.

¹²⁵ *Teddy Bear Clinic v Minister of Justice supra* note 110.

¹²⁶ *Teddy Bear Clinic v Minister of Justice supra* note 110.

¹²⁷ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 71.

¹²⁸ *Teddy Bear Clinic v Minister of Justice supra* note 110; *National Coalition supra* note 22 para 28 and 23.

¹²⁹ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 78.

¹³⁰ Section 14 of the Constitution provides as follows: 'Everyone has the right to privacy, which includes the right not to have
Their person or home searched;
Their property searched;
Their possessions seized; or
The privacy of their communications seized'.

3.3.3 The Court's final decision

The Constitutional Court declared that section 15 is inconsistent with the Constitution to the extent that it criminalises consensual sexual penetration between two children both between the ages of twelve and sixteen. Section 15 was also held to be inconsistent with the Constitution as it criminalised consensual sexual penetration of a child between the ages of sixteen and eighteen with a child younger than sixteen years and who is not more two years younger than the older child. The same ruling was made with regard to section 16 relating to sexual violation.¹³¹ The Constitutional Court confirmed the High Court's ruling in the *Teddy Bear*-case by finding that sections 15 and 16 of the Sexual Offences Act infringe adolescents' rights to human dignity, privacy and that such provisions are not in accordance with the best interests of the child.¹³² The Constitutional Court further held that those sections of the Act may irrationally cause prejudice to adolescents by subjecting them to criminal liability for their sexual choices.¹³³

3.4 Comparison between the outcomes in *Jordan* and *Teddy Bear*

3.4.1 Distinction between voluntary, coerced and manipulative behaviour

In the *Jordan*- case there seemed to be a failure on the part of the Constitutional Court to distinguish between voluntary and coerced commercial sex work. Choma and Nyathi-Mokoena have noted that those who engage in voluntary adult commercial sex work should be awarded the freedom to practice their trade, occupation or profession freely.¹³⁴ Such distinction would also assist in curbing the social ills associated with commercial sex work, as sex workers would be encouraged to report unlawful and criminal activities to law enforcers. The effect of criminalisation results in the failure of sex workers to report any malpractices and abuses levelled against them.

¹³¹ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 123.

¹³² *Teddy Bear Clinic v Minister of Justice supra* note 110 para 49.

¹³³ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 77, 79.

¹³⁴ Choma & Nyathi-Mokoena *supra* 101 at 235.

The *Teddy Bear*-case made a distinction between consensual sexual activities involving two adolescent children from consensual sexual activities between an adolescent child and an adult. The High Court agreed with the applicants on the point that due to the vulnerability of adolescents to the psychological influence of adults it would be logical to rather target and prevent the exploitation that could result from such unequal relationships.¹³⁵ The Court in this case seemed to support the applicants' clear distinction between healthy sexual relationships and manipulative sexual relationships. The approach in the *Teddy Bear*-case therefore appears to successfully regulate harmful sexual practices and at the same time allows adolescents the right to exercise and enjoy their freedom of autonomy.

3.4.2 Assessment

According to Bonthuys, the Constitutional Court in *Jordan* seemed to reinforce practices that are unrealistic and at odds with sexual practices in the contemporary urban South African society. This approach according to Bonthuys inevitably excludes many South African women from being regarded as “respectable” women who are entitled to legal and social protection.¹³⁶ The Constitutional Court in *Jordan* failed to acknowledge various guises of transactional sex that exist in the contemporary South African environment. In this regard, Boudin and Richter have noted that due to increased unemployment it is no surprise that an increasing amount of women who head their households end up engaging in transactional sex as a form of survival. As a result, a significant amount of women informally exchange sex for resources without expressly identifying themselves as commercial sex workers.¹³⁷ The Constitutional Court can therefore be said to have failed to acknowledge the true state of affairs that exist within the contemporary South African environment.

The High Court in the *Teddy Bear* -case applied a more flexible approach. The Court acknowledged that puberty generally occurs before or around the age of twelve with other physical indicators of sexual maturity manifesting between the ages of twelve

¹³⁵ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 32.

¹³⁶ Bonthuys *supra* note 64 at 392.

¹³⁷ Boudin & Richter *supra* note 43 at 188.

and sixteen.¹³⁸ The Court thus added that it is not unusual or unnecessarily unhealthy and harmful for adolescents to engage in sexual behaviour as this forms part of their development and maturity.¹³⁹ The Court's response appears to be realistic of the current state of affairs and thus allowing criminal law only to intervene in cases of abusive and manipulative sexual behaviour.

3.4.3 Need for a gender-sensitive law

Simpson has advanced the view that the Constitutional Court in the *Jordan*-case refused to acknowledge the reality that women sex workers are more vulnerable to poverty than male sex workers. Simpson also argued that the Court seemed to ignore the fact that the law criminalising adult commercial sex work mostly operates in a disproportional manner especially towards women and thus negatively affects women involved in sex work.¹⁴⁰

In *Teddy Bear* surprisingly, reference was made to the case of *S v M*¹⁴¹ and it was argued that laws must be both gender-sensitive and child-sensitive.¹⁴² The High Court further emphasised this argument by highlighting that the social stigmatisation caused by the criminalisation of consensual sexual activities between minors will be more keenly felt by girls than boys due to the gendered construction of sexual relations in our society.¹⁴³

3.4.4 Stigmatisation of vulnerable groups

Both the minority and majority judgments in the *Jordan*-case seemed to agree that the source of violation of human dignity is actually sex work itself. The Constitutional Court appeared unwilling to defend the rights of sex workers.¹⁴⁴ As Simpson has

¹³⁸ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 52.

¹³⁹ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 59.

¹⁴⁰ Simpson J 'Stereotyping Sex Workers: *S v Jordan & others*' (2009) unpublished article University of Toronto, Faculty of Law.

¹⁴¹ *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).

¹⁴² *Teddy Bear Clinic v Minister of Justice supra* note 110 para 72.

¹⁴³ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 60.

¹⁴⁴ Kruger *supra* note 57 at 149-150.

noted, the Constitutional Court failed to recognise that the law can serve as a powerful tool whereby stigma can be created, prevented or remedied. In the case of the criminalisation of commercial adult sex work it was argued that the law worked towards reinforcing the stigmatisation of sex workers.¹⁴⁵

In the *Teddy Bear*-case it was emphasised that the criminal punishment of consensual sexual conduct is a form of stigmatisation which infringe the dignity of those targeted. It was further pointed out that such criminalisation results in insecurity and vulnerability in the daily lives of those targeted.¹⁴⁶

3.4.5 Constitutional right to privacy

The appellant's argument in *Jordan* that criminalisation violates sex workers' right to privacy failed. The Constitutional Court held that the constitutional right to privacy does not extend to sexual relationships that are based purely on commercial transactions.¹⁴⁷

On the contrary, in the *Teddy Bear*-case it was held that the criminalisation is a violation of the children's right to privacy and affects the ability to have intimate and nurturing relationships as protected by section 14 of the Constitution.¹⁴⁸

3.4.6 Right to autonomy

The Constitutional Court in the *Jordan* judgment is said to have given little space to acknowledge that sex for women might and indeed should entail personal pleasure and the expression of desire.¹⁴⁹ Thus sex workers should be given the freedom of autonomy to be able to govern their sexual relations without the interference of the law or the fear of criminal sanctions.

¹⁴⁵ Simpson *supra* note 140.

¹⁴⁶ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 76-77.

¹⁴⁷ *S v Jordan supra* note 16 para 27-28.

¹⁴⁸ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 79.

¹⁴⁹ Fritz *supra* note 102 at 230.

The Court in *Teddy Bear*, despite children's vulnerability and lack of maturity pointed out that criminalisation may actually harm the targeted children's ability to achieve self-identification and self-fulfilment.¹⁵⁰

3.5 Conclusion

Meyerson has argued that it is difficult to avoid the impression that the Bill of Rights is being applied selectively. Meyerson draws a comparison between the *Jordan* and *Makwanyane* cases to illustrate that in the *Makwanyane*-case, the state was required to justify limitation of rights in accordance with very strict standards of justification. In contrast, in the *Jordan*-case the state virtually bore no burden of justification at all. Meyerson has further ascertained that the Court in *Jordan* took a legislative or political approach rather than a constitutional approach. The judges in the case failed to take the Bill of Rights seriously by not questioning the impact that the criminalisation of sex work may have on the inherent constitutional rights of sex workers.¹⁵¹

Meyerson is not the only one who holds this view. Kruger has also stated that the Constitutional Court in *Jordan* refrained from a proper constitutional analysis and rather hid behind the doctrine of separation of powers.¹⁵² This is evident from the Constitutional Court's acknowledgement that it is its duty to determine the legality of legislation but not to evaluate the content of the morality which the legislature tries to enforce. Even if the Court does not agree with the morality that is being enforced, its function is only restricted to determining the constitutionality of the chosen route and not to recommend a particular morality which the legislature should subscribe to.¹⁵³

The selective application of human- rights is no doubt detrimental to the constitutional right to equality. Fritz and Robson hold the view that courts have become prone to create what can be referred to as a 'model sexual minority' or 'civil

¹⁵⁰ *Teddy Bear Clinic v Minister of Justice supra* note 110 para 36.

¹⁵¹ Meyerson 'Does the Constitutional Court of South Africa take rights seriously' (2004) 46 *Acta Juridica* 138 at 154.

¹⁵² Kruger *supra* note 57 at 149.

¹⁵³ Joubert JJ 'Essays in honour of CR Snyman' (2008) 202; *S v Jordan supra* note 16 para 45.

sex'.¹⁵⁴ The term 'model sexual minority' was coined by Robson. She argues that the message sent out is that in order to be constitutionally protected not only must our sexual relations be caused by a 'closely-held personal characteristic' but must be life affirming and nurturing, and must not be with strangers, indiscriminate or loveless.¹⁵⁵ It is submitted that such an approach pursued by the courts in sexual adjudication matters results in the inference that only sexual activities 'packaged in sentimental wrappings' and characterised by true love deserve constitutional protection. Such an approach undermines the importance and acceptance of difference and diversity. Instead, the law channels the exercise of the peoples' choice towards a particular outcome.¹⁵⁶

The term 'model sexual minority' can be equated to '*civil sex*' which was coined by Fritz. According to Fritz civil sex is expressive of private intimacy, which in turn establishes and nurtures human relationships. Fritz emphasises that the model of civil sex was elaborated in the *Jordan*-case, where the Constitutional Court argued that civil sex is in contrast to commercial sex work.¹⁵⁷ Commercial sex work is the opposite of a nurturing relationship, does not have any deep attachment or commitment and is purely commercial and impersonal in nature.¹⁵⁸ The above consideration played a significant role in the Constitutional Court's decision that the criminalisation of sex work was not unconstitutional. The civil sex argument in the *Jordan*-case according to Fritz, portrays a very sanitised and pastoral picture of sex which raises the question whether criminalisation is based solely on enforcing a particular religious moral view.¹⁵⁹

The unfair application of human -rights and criminal law in relation to the *Jordan*-case is worrisome particularly in the South African context, which is characterised by the reality of diversity. It is submitted that the biased and unfair application of the law can lead us decades back to that situation where the law was applied selectively.

¹⁵⁴ Fritz *supra* note 102; Robson *supra* note 105.

¹⁵⁵ Robson *supra* note 105.

¹⁵⁶ Robson *supra* note 105 at 426.

¹⁵⁷ Fritz *supra* note 102 at 234.

¹⁵⁸ Fritz *supra* note 102 at 234-235.

¹⁵⁹ Fritz *supra* note 102 at 234-235.

CHAPTER FOUR

DUTIES OF THE COURTS IN TERMS OF SECTION 39(2) OF THE CONSTITUTION

4.1 Introduction

South African courts have a constitutional obligation when interpreting legislation and when developing the common law, to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights. This obligation is imposed on the courts by section 39(2) of the Constitution, which constitutes the primary tool that gives authority to the courts to promote and to articulate the provisions of the Bill of Rights.

Section 39(2) specifically provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. The Constitutional Court in the *Jordan*-case pointed out that its duty is only to determine the legality of legislation and not to evaluate the context of the morality that is being enforced. The Constitutional Court further mentioned that its task is not to recommend a particular morality which the legislature must enforce.¹⁶⁰ In this regard, Kruger has remarked that the stance adopted by the Constitutional Court in the *Jordan*-case shows its undue refraining and its choice to hide behind the separation of powers doctrine instead of engaging in proper constitutional analysis.¹⁶¹

¹⁶⁰ *S v Jordan supra* note 16 para 45.

¹⁶¹ *Kruger supra* note 57 at 149.

The purpose of this chapter is therefore to ascertain whether the Constitutional Court in *Jordan* refrained from performing its constitutional duty in terms of section 39(2) of the Constitution. It has been established that in the *Jordan*- case, the main issue at stake was the Court's duty to interpret legislation and not the duty to develop the common law. There are important similarities between the interpretation of legislation and the developing of the common law in line with the Bill of Rights. Due to the presence of these similarities, I examine how and to what extent the courts have successfully developed the common law as required by section 39(2) without prejudicing the separation of powers doctrine. The courts' duty to interpret legislation in conformity with the Constitution would first be discussed before proceeding to examine how in interpreting the common law the courts contribute in developing the common law.

4.2 Duty to interpret legislation in conformity with the Constitution

Section 39(2) of the Constitution places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Statutory interpretation must positively promote the Bill of Rights and other provisions of the Constitution, particularly the fundamental values in section 1.¹⁶² This duty was emphasised in the following cases: *Investigating Directorate: Serious Economic Offences v Hyundai Motors*¹⁶³ and *Fraser v Absa Bank Ltd*.¹⁶⁴

In *Hyundai Motors* the constitutional validity of a provision in the National Prosecuting Authority Act¹⁶⁵ was under scrutiny. The challenged provision authorised searches and seizures of property in order to facilitate the investigation of certain specified offences.¹⁶⁶ The searches and seizures were done for purposes of a

¹⁶² Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6th edition 57.

¹⁶³ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC).

¹⁶⁴ *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC).

¹⁶⁵ Act 32 of 1998.

¹⁶⁶ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* *supra* note 163 para 1.

‘preparatory investigation’ and without the presence of reasonable grounds to suspect that a specified offence had been committed.¹⁶⁷ It was argued that the provision unjustly invaded the privacy of persons. The Court in the matter emphasised that the interpretation of statutes in line with the Constitution is a measure that ensures transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens.¹⁶⁸ This means that judicial officers must read legislation in ways which give effect to fundamental values.¹⁶⁹

Most relevant to the *Jordan*-case is the Court’s argument in *Hyundai* that the execution of a search warrant has to be conducted with strict regard to decency and order, including the respect for a person’s right to dignity, to personal freedom and security and to personal privacy. The Court undoubtedly interpreted the challenged legislation in accordance with the section 1 values which reflects human dignity and the advancement of human- rights and freedom. Thus, the Court complied with its section 39(2) duty and held that the search warrant may be properly obtained only on the basis of a reasonable suspicion that an offence has been committed. This interpretation can be said to promote the section 1 values and thus promoting the spirit, purport and objects of the Bill of Rights.

The case of *Fraser v Absa Bank* dealt with a constitutional challenge to a provision contained in the Prevention of Organised Crime Act.¹⁷⁰ This provision contains a mechanism for the confiscation by the state of proceeds derived from criminal activities. The main argument was that the interpretation of the challenged section violates the party’s right to a fair trial as well as his right not to be arbitrarily deprived of his property.¹⁷¹ The Court made it clear that section 39(2) fashions a mandatory

¹⁶⁷ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* note 163 para 3.

¹⁶⁸ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* note 163 para 21.

¹⁶⁹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* note 163 para 22.

¹⁷⁰ Act 121 of 1998.

¹⁷¹ *Fraser v Absa supra* note 164 para 28.

constitutional canon of statutory interpretation.¹⁷² The effect of the above is that courts are mandated to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. The Court further highlighted that legislation could have far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and values protected in the Constitution.¹⁷³ The Court also pointed out that section 39(2) requires more from a court than simply to avoid an interpretation that conflicts with the Bill of Rights. Section 39(2), according to the Court demands the promotion of the spirit, purport and objects of the Bill of Rights.¹⁷⁴

4.3 Duty to develop the common law

When dealing with the interpretation of legislation and the development of common law, courts are required in both instances to conform to the values underpinning the Constitution. It is submitted that the above case law dealing with the interpretation of legislation is closely related to the case law in which courts developed common law so as to conform to the values underpinning the Constitution. Therefore I refer to case law in which common law was developed without fear of usurping the executive function or of prejudicing the separation of powers doctrine. This is aimed at shedding light on the appropriate way in which the Constitutional Court in *Jordan* could have interpreted legislation in a manner that gives effect to fundamental values without jeopardising the separation of powers doctrine.

4.3.1 Duty to develop the common law in line with the Bill of Rights

The courts' duty to develop the common law goes hand in hand with the protection and the promotion of human rights. Section 173 of the Constitution empowers courts to develop the common law and provides as follows:

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.

¹⁷² *Fraser v Absa supra* note 164 para 28.

¹⁷³ *Fraser v Absa supra* note 164 para 46.

¹⁷⁴ *Fraser v Absa supra* note 164 para 47.

The importance of developing amongst others the common law stems from the Constitution's vision to promote gender equality and to recover from a history of inequalities and discrimination. In achieving the above vision, the Constitutional Court has been viewed as an institutional voice for the vulnerable members of our society and also most importantly as the key developer of a strong human -rights jurisprudence.¹⁷⁵ It can therefore be argued that by developing the common law, the courts have protected those who were traditionally discriminated against and those who are socially subordinated such as women, homosexuals and children. Dersso has argued that where the Constitutional Court has failed to give full effect to the rights to dignity, equality and personal security of all persons, it has by so doing abdicated from the proper exercise of its constitutional mandate of developing the common law.¹⁷⁶

The need to develop the common law arises in four situations; namely: (i) when the common law conflicts with the Bill of Rights, (ii) when a common law principle fails to reflect the Constitution's underlying values (iii) when certain common law principles are in need of constitutional scrutiny and (iv) when common law principles are in need of constitutional development.¹⁷⁷ Although the development of common law plays a significant role in a democratic state, in the words of Du Bois' when exercising their powers to develop common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary'.¹⁷⁸

Since the Constitutional Court in *Jordan* raised the question of the separation of powers doctrine, it becomes crucial to question whether the development of the common law inevitably results in the infringement of separation of powers. Dersso however, convincingly argues that where the development of the common law is required in order to give full effect to the Bill of Rights, the separation of powers

¹⁷⁵ Ntlama N 'Masiya: Gender equality and the role of common law' (2009) 3 *Malawi Law Journal* 303 at 304.

¹⁷⁶ Dersso S 'The role of courts in the development of the common law under 39(2)' (2007) 23 *South African Journal on Human Rights* 373 at 385.

¹⁷⁷ Du Bois F *Wille's Principles of South African Law* (2007) 9th edition 94.

¹⁷⁸ Du Bois *supra* note 177 at 99.

doctrine should not hinder the courts unduly.¹⁷⁹ It is important for the courts to ensure that the development of the common law is at all times not beyond what is required to give full effect to the rights at issue or to make it consistent with the spirit, purport and objects of the Bill of Rights.¹⁸⁰

In order to assess whether the Constitutional Court in *Jordan* unduly missed the opportunity to interpret legislation in conformity with section 39(2), it is vital to assess cases dealing with the development of the common law in the context of gender equality. These cases indicate the importance of the development of common law and how this development can occur without infringing the separation of powers doctrine. The importance of analysing these cases is in order to use them as a yardstick for measuring the extent to which the courts can promote the spirit, object and purport of the Bill of Rights, without jeopardising the separation of powers doctrine. Ultimately, the purpose is to establish whether the *Jordan*- case respected and protected the principle of separation of powers at the expense of protecting the constitutional rights of sex workers.

4.3.2 Developing the common law in gender- equality cases

The cases of *Masiya v Director of Public Prosecutions*¹⁸¹ and *K v Minister of Safety and Security*¹⁸² are relevant to this discussion because like in *Jordan*, they dealt with the adjudication of sexual offences and the protection of the rights to dignity, equality and sexual autonomy in line with the values enshrined in the Bill of Rights.

Ntlama, Dersso and Maseko¹⁸³ have contributed substantially to the discussion on the development of the common law in gender- equality cases. Flowing from their contributions are the following yardsticks that may be followed in the development of the common law. Firstly, the need for maximum protection and benefit of constitutional rights, secondly, the arbitrariness or irrationality of the limiting provision

¹⁷⁹ Dersso *supra* note 176 at 373.

¹⁸⁰ Dersso *supra* note 176 at 381.

¹⁸¹ *Masiya v Director of Public Prosecutions & Another* 2007 (5) SA 30 (CC).

¹⁸² *K v Minister of Safety & Security* 2005 (9) BCLR 835 (CC).

¹⁸³ Maseko T 'The impact of the principle of separation of powers on the development of common law and the protection of rape victims' rights' (2008) 53 *Obiter* 53 at 59.

or law must be taken into account and thirdly, the importance of uplifting and upholding constitutional values must be emphasised. The cases are discussed below, highlighting the use of these yardsticks by the courts.

4.3.2.1 *Masiya v Director of Public Prosecutions Pretoria and Another*

This matter raised the question of the constitutional validity of the then common-law definition of rape to the extent that it excluded anal penetration.¹⁸⁴ The accused was brought before the Magistrate's Court of Sabie on a charge of rape.¹⁸⁵ He pleaded not guilty to the charge of rape as the evidence established that the complainant was penetrated anally. According to the applicable common law, rape consisted only of vaginal penetration.¹⁸⁶ The question that remained to be answered was whether there was a need to develop the common law so as to include anal penetration under the definition of rape. The matter was eventually brought before the Constitutional Court where it was held that the definition of rape should be developed in order to achieve constitutional objectives.¹⁸⁷ Thus the Constitutional Court established as follows:

Ensuring maximum constitutional protection to rape victims

The Constitutional Court acknowledged that the matter undoubtedly raised issues involving the protection of the right to dignity, equality, freedom and security of the person.¹⁸⁸ In addressing these issues the Court held first and foremost that the extended definition of rape would protect the dignity of survivors, especially young girls who may not be able to differentiate between the types of penetration.¹⁸⁹

Secondly with regard to the right to privacy, the Court held that by protecting the rape victim's right to privacy, the Constitutional Court was fulfilling the object of

¹⁸⁴ *Masiya supra* note 181 para 1.

¹⁸⁵ *Masiya supra* note 181 para 6.

¹⁸⁶ *Masiya supra* note 181.

¹⁸⁷ *Masiya supra* note 181.

¹⁸⁸ *Masiya supra* note 181 para 18.

¹⁸⁹ *Masiya supra* note 181 para 38; *Maseko supra* note 183 at 59.

criminalisation of anal penetration which seeks to protect the dignity, sexual anatomy of women and young girls as being the most vulnerable. This the Constitutional Court held to be in line with values enshrined in the Bill of Rights.¹⁹⁰ Thirdly, pertaining to the right to equality, the Constitutional Court held that the inclusion of anal penetration will increase the extent to which the traditionally vulnerable and disadvantaged groups will be protected extensively by the law.¹⁹¹

Arbitrariness or irrationality of the limiting provision or law

The Constitutional Court held that the distinction made between non-consensual anal intercourse and vaginal intercourse in fact appears to be irrational and senseless. The Court further established that non-consensual sexual penetration is no less private, no less subject to injury, no less subject to abuse and it is no less humiliating than vaginal intercourse. The Constitutional Court, based on that argument held that the common-law definition of rape excluding non-consensual anal penetration was nothing but archaic and irrational and amounted to arbitrary discrimination.¹⁹² As a result such arbitrary application of the law resulted in the failure of victims to enjoy full protection and benefit of the law.¹⁹³

Importance of upholding constitutional values

The Constitutional Court referred to the history of the law and explained that in some African cultures the rape of a woman was seen a deprivation of an economic interest suffered by the father, husband or guardian of the female survivor of rape. It stated that such a history emphasises the perpetuation of stereotypes, male dominance and the reference of female as objects.

The recognition of females as bearers of the right to bodily integrity deserving protection from degradation and abuse is accordingly a step in the right direction towards a constitutional dispensation based on democratic values of human dignity, equality and freedom. The removal of such distinction between the forms of non-consensual sexual penetration was viewed by the Constitutional Court as a gradual

¹⁹⁰ *Masiya supra* note 181; *Maseko supra* note 183 at 61.

¹⁹¹ *Masiya supra* note 181 para 39; *Maseko supra* note 183 at 62.

¹⁹² *Masiya supra* note 181 para 9.

¹⁹³ *Masiya supra* note 181 para 10.

move towards empowering the previously stigmatised and vulnerable members of society such as women and children.¹⁹⁴

4.3.2.2 *K v Minister of Safety and Security*

This case concerned the rape of a woman by three uniformed policemen on duty who had offered her a lift home. The applicant laid charges of rape and kidnapping against the policemen. Proceedings were also instituted to claim compensation from the policemen and the Minister of Safety and Security. The legal question was whether the Minister of Safety and Security could be held vicariously liable based on the policemen's conduct. The Johannesburg High Court held that the Minister was not liable because the policemen were not acting within the scope of their employment at the time of the rape.¹⁹⁵ In reaching this conclusion the High Court declared that while committing the rape, the policemen deviated from their functions and duties to such a degree that it could not be said that they were exercising their official functions.¹⁹⁶

The applicant (rape victim) then approached the Supreme Court of Appeal on the same legal question (on whether or not the policemen were acting within the scope of their employment at the time of the rape). The Supreme Court of Appeal dismissed the applicant's claim.¹⁹⁷ It was when the applicant approached the Constitutional Court that the test for vicarious liability was developed considering the spirit, purport and objects of the Bill of Rights.¹⁹⁸ The Constitutional Court eventually concluded that there was a sufficiently close connection between the policemen's conduct and their employment.¹⁹⁹ On application of the extended test, the Constitutional Court held the Minister of Safety and Security vicariously liable for the conduct of the policemen.²⁰⁰

¹⁹⁴ *Masiya supra* note 181 para 25.

¹⁹⁵ *K v Minister of Safety & Security supra* note 182 para 1.

¹⁹⁶ *K v Minister of Safety & Security supra* note 182 para 7-8.

¹⁹⁷ *Maseko supra* note 183 at 56.

¹⁹⁸ *Maseko supra* note 183 at 56.

¹⁹⁹ *Maseko supra* note 183 at 56.

²⁰⁰ *K v Minister of Safety & Security supra* note 182; *Maseko supra* note 183 at 56.

Ensuring maximum constitutional protection to rape victims

It was held that when developing the common law the court should take cognisance of the applicant's constitutional rights to freedom and security of the person, the right to privacy and the right to dignity, which requires all to be free from all forms of violence either from public or private sources. This was held to be in accordance with the spirit, purport and objects of the Bill of Rights.²⁰¹ On the issue of the right to dignity, the Court held that the policemen in raping the applicant while on duty and in uniform failed to perform their duty to protect the applicant. The Court further held that in committing the crime, the policemen not only failed to protect the applicant, but they also infringed her rights to dignity and security of person.²⁰² The Court also held, with regard to the right to equality that South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect of impairing the enjoyment by women of fundamental rights and freedoms.²⁰³

Arbitrariness or irrationality of the limiting provision or law:

The Constitutional Court stated that in refusing to extend the common-law application of vicarious liability, the respondents would be unjustly released from performing their constitutional duties towards the applicant.²⁰⁴ These duties involve the respondents' duty to protect the applicant from danger. The failure to extend the common law would inevitably result in a denial of the applicant's constitutional rights, which have been hard- earned by our constitutional democracy.

Importance of uplifting and upholding constitutional values:

It is clear from the Constitutional Court's stance that the promotion of constitutional values pertaining to eradication of past inequalities was at the core. This was portrayed by the Court's mentioning of sexual violence as one of the greatest causes of female subordination in society. The Court proceeded to mention that South Africa has a duty under international law to protect women and children from any form of violence.²⁰⁵

²⁰¹ *K v Minister of Safety & Security supra* note 182 para 14.

²⁰² *K v Minister of Safety & Security supra* note 182 para 57.

²⁰³ *K v Minister of Safety & Security supra* note 182 para 18.

²⁰⁴ *K v Minister of Safety & Security supra* note 182 para 14.

²⁰⁵ *K v Minister of Safety & Security supra* note 182 para 18.

4.4 Tension between developing the common law and respecting the separation of powers doctrine

Maseko has argued, particularly with regards to rape victims that there seems to be no uniformity and consistency between the courts on the question of interfering with the powers of the legislature.²⁰⁶ This is not only apparent in rape cases, as can be seen from the cases discussed earlier in this study such as the *Teddy Bear* and *Makwanyane* cases where the Courts are shown to defend constitutional values without hiding behind the separation of powers doctrine. In *Jordan* on the contrary, the Constitutional Court seemed uninvolved in the constitutional battle to enforce the human- rights of sex workers who can be classified as a stigmatised group in the society. In order to avoid the continuous inconsistent approaches to the separation of powers doctrine; it is argued that there should be stipulated guidelines or a standard test to assist courts when they see it fit to develop the common law and to interpret legislation in conformity to the Bill of Rights. The proposed guidelines are to be discussed below with reference to their application to the *Jordan* -case.

4.4.1 Rights violation

This first guideline calls for courts to consider the importance of the constitutional rights limited by the particular law and the extent to which such rights have been violated. In the case of *S v Jordan* it was established that the sex workers' constitutional rights to dignity, privacy, right to economic activity and right to bodily integrity have been infringed by the criminalisation of commercial sex work. In stressing the importance of the guaranteed rights, it is important to reflect on the preamble of the South African Constitution which promises to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human- rights. The preamble further emphasises the importance of the equal protection of the law to all people.

It can thus be said that the importance of protecting sex workers' constitutional rights lies at the heart of our constitutional order, which aims at removing oppressive laws

²⁰⁶ Maseko *supra* note 183.

and allowing for equal protection of constitutional rights and benefit of the law to all South Africans. The criminalisation of commercial adult sex work is archaic, as it imposes social and political majoritarian views on minority and marginalised groups and therefore hampers the constitutional promise of a better society for all South Africans.²⁰⁷ It is submitted that the Constitutional Court's approach in *Jordan* towards sex workers was harsh and constituted a failure to acknowledge the long history of marginalisation based on intolerance and exclusion of certain members of the society and thus further stamps and approves such oppressive laws.²⁰⁸

4.4.2 Non-compliance with the Bill of Rights

The *Jordan* approach of turning a blind eye on sex workers' human- rights has the effect of rendering sex workers as social outcasts and unworthy of constitutional protection.²⁰⁹ The argument in the *Jordan*-case that the nature of sex work itself devalues one's dignity cannot be said to be in line with the spirit, purport and object of the Bill of Rights. This is evident from Justice O'Regan's statement in *Makwanyane* where she said:

Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in...[the Bill of Rights].²¹⁰

A person's inherent human dignity cannot be determined by his or her occupation. Such a construction has the effect of creating 'social outcasts' and that cannot be said to be in line with the spirit of the Bill of Rights. The Court's reasoning therefore would have to be adapted to fit the spirit of the Bill of Rights.

²⁰⁷ Boudin & Richter *supra* note 43 at 182.

²⁰⁸ Robson *supra* note 105 at 419.

²⁰⁹ Boudin & Richter *supra* note 43 at 194.

²¹⁰ Jivan U & Perumal D 'Let's talk about sex baby - but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the *Jordan* case' (2004)17 *South African Journal of Criminal Justice* 368 at 376; *S v Makwanyane supra* note 44 para 144.

4.4.3 Shortfalls in legislation on adult commercial sex work

Although the legislature has since amended the law regarding commercial adult sex work to expressly hold both the sex worker and client liable for the commission of the offence, certain aspects of human-rights violations have still not been addressed.²¹¹ In principle the amendment appears to be successful but has little practical effect. The participants of the crime are still subject to differential treatments. Sex workers are still seen as the main perpetrators of the crime whilst clients are seldom penalised. The selective application of the law still continues despite the amendment. One may argue that the penalising of only the sex worker results in the infringement of the right to equality, it is evident that the sex worker and the client do not receive equal benefit and protection of their constitutional rights.

Poor health choices, abuse and degrading treatment is still suffered by sex workers. Instead of focusing only on the aspect of the right to equality, the legislature when making the amendment should have also looked at the violations to the right to privacy, freedom and security of the person and the right to dignity. The legislature has still not removed the stereotype that the sex worker's human dignity is diminished by her occupation.²¹² The amendment also fails to vindicate the rights of a vulnerable sector of our society those such as desperate sex workers who have entered the profession as means of economic survival. It can thus be argued that the legislature still owes it to sex workers to create laws removing human-rights violations suffered as a result of the criminalisation of commercial adult sex work.

4.5 Conclusion

It is questionable whether the Constitutional Court in *Jordan* performed its constitutional duty in terms of section 39(2) when interpreting legislation. The Court

²¹¹ Section 11 of the Criminal law (Sexual Offences) Amendment Act 32 of 2007 provides as follows: 'a person who engages the services of a person eighteen years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act irrespective of whether the act is committed or not; or by committing a sexual act with the person is guilty of the offence of engaging the sexual services of a person eighteen years or older'.

²¹² Bonthuys *supra* note 64 at 393.

ought to have been guided by the duty to ensure maximum protection and benefit of constitutional rights or it could have also investigated whether the criminalisation of commercial sex work was irrational or arbitrary. It appears that the Constitutional Court also failed to acknowledge and emphasise the importance of uplifting and upholding constitutional values. It is submitted that the Court in *Jordan* hid behind the separation of powers doctrine without any justification. Thus, in failing to acknowledge the dire human rights infringement resulting from the criminalisation of adult commercial sex work the Court consequently neglected its duty to promote the spirit, purport and object of the Bill of Rights in accordance to section 39(2). The Constitutional Court's lack of engagement in the argument concerning the alleged human rights violation amounted to a refusal to perform its constitutional mandate.

CHAPTER FIVE

INTERNATIONAL PERSPECTIVE ON ADULT COMMERCIAL SEX WORK

5.1 Introduction

The discussion that follows focuses on New Zealand's approach and on the applicable international instruments dealing with adult commercial sex work. It has been suggested by Pudifin and Bosch that the New Zealand human -rights approach could provide a solution to the situation of adult commercial sex work in South Africa. Their justification is based on the fact that the New Zealand Prostitution Reform Act passed in 2003, represents a shift from a moralistic approach to adult commercial sex work to one based on concerns for the human- rights and health of the sex workers themselves.²¹³ The New Zealand approach, like our South African Constitution has a strong human- rights flavour which could result in the elimination of discriminatory effects resulting from the criminalisation of adult commercial sex work. Apart from the New Zealand model, Choma and Nyathi-Mokoena have also point out international instruments such the World Charter for Prostitutes' Rights which affords sex workers' labour rights. They further argue that sex workers should ultimately be afforded human rights that are guaranteed under international treaties.²¹⁴

5.2 Compatibility between South African and New Zealand Law

It is argued that the New Zealand experience cannot be transposed directly into the South African environment due to the vast difference in numbers of sex workers involved in the industry. South African policy makers are, however, given our

²¹³ Pudifin & Bosch *supra* note 26 at 287.

²¹⁴ Choma & Nyathi- Mokoena *supra* note 101 at 234.

constitutional dispensation urged to incorporate a human- rights foundation to policies covering issues of adult commercial sex work.²¹⁵

It is submitted that the South African and New Zealand positions are comparable to each other due to the presence of the following relevant sections found in the New Zealand Bill of Rights Act.²¹⁶ Firstly, section 6 of the Act requires courts to interpret the law in a way that is consistent with the human rights in the Bill of Rights. Secondly, section 19 of the Act calls for freedom from discrimination and also provides measures to advance groups of persons who were previously disadvantaged. Thirdly, section 22 guarantees the protection of minorities from any form of discrimination and lastly, section 22 of the Act guarantees persons the right to liberty and the protection from any arbitrary arrest or detention.

It can therefore be argued that New Zealand like South Africa has a comprehensive Bill of Rights aimed at advancing human- rights protection. Like in New Zealand, South African courts have to interpret the law in a manner that promotes the Bill of Rights. New Zealand can therefore be said to provide an effective model to the issue of adult commercial sex work that is in line with the values enshrined in the Bill of Rights. The social circumstances in both New Zealand and South Africa also do not warrant different approaches.

5.3 New Zealand Prostitution Reform Act 2003

The parliament of New Zealand recognised that attempting to prevent sex work through criminal law would not yield any success and so it instead opted to target the harm caused by the practice. Contrary to public fears there seemed to be no increase in the number of people who entered the industry. This is encouraged by the Act's clear purpose that although it decriminalises sex work, it does not seek to endorse or encourage sex work.²¹⁷ The Prostitution Reform Act that was passed in

²¹⁵ Pudifin & Bosch *supra* note 26 at 285.

²¹⁶ New Zealand Bill of Rights Act of 109 1990.

²¹⁷ Boudin & Richter *supra* note 43 at 195.

2003 thus promotes the human rights of sex workers and protects sex workers in the following ways:

The Act recognises commercial sex contracts as valid and enforceable contracts.²¹⁸ This results in sex workers being entitled to access legal protection against any alleged abuse resulting from failure to comply with contractual obligations.

Sex workers are also protected from human- trafficking activities. This is provided for by section 16 of the Act, which prohibits the inducing and compelling of persons to provide commercial sexual services.²¹⁹

Section 20 of the Act prohibits the use of any person under age eighteen in providing commercial sexual services.²²⁰ This provision assists in ensuring that minors are not coerced or manipulated into joining the commercial sex industry.

The health of sex workers is improved by granting inspectors powers to enter relevant premises and inspect compliance with health and safety requirements. In order to avoid violations to the right to privacy, any entry of such premises has to take place with the consent of the occupier or in extreme cases, such entry must be authorised by a warrant.²²¹

5.4 Applicable international instruments

²¹⁸ Section 7 of the Prostitution Reform Act 2003 provides as follows: “No contract for the provision of commercial sexual services is illegal or void on public policy or other similar grounds.

²¹⁹ Section 16 of the Prostitution Reform Act 2003 provides as follows:

No person may do anything with the intent of inducing or compelling another person to-

Provide, or continue to provide, commercial sexual services to any person; or

Provide, or to continue to provide, to any person any payment or other reward derived from commercial sexual services provided by person A.

²²⁰ Section 20 of the Prostitution Reform Act 2003 provides as follows: ‘No person may cause, assist, facilitate, or encourage a person under 18 years of age to provide commercial sexual services to any person’.

²²¹ Section 26(1) of the Prostitution Reform Act 2003 provides as follows: ‘any inspector may, at any reasonable time, enter premises for the purpose of carrying out an inspection if he or she has reasonable grounds to believe that a business of prostitution is being carried on the premises’.

The rights of commercial sex workers like those of every other human being are guaranteed and protected by international human- rights law instruments, which include the Universal Declaration of Human-Rights, the Convention on the Elimination of All forms of Discrimination against Women and The World Charter for Prostitutes' Rights. These international instruments guarantee to sex workers the same human- rights and basic labour rights that are available to every other person by virtue of the fact that they are human. The relevant provisions of these treaties are discussed below.

5.4.1 Universal Declaration of Human -Rights (UDHR)

The Universal Declaration of Human- Rights (UDHR) was adopted during 1948 in Paris by the United Nations General Assembly. This declaration gives expression to rights which all human beings are inherently entitled to.²²² Choma and Nyathi-Mokoena have argued that South Africa has a responsibility to protect the rights of everyone including prostitutes in respect of the core provisions of the UDHR which, though not a treaty, has become a binding international customary law.²²³

Choma and Nyathi-Mokoena also argue that the UDHR provides that everyone has the right to work, to free choice of employment, to just and favourable conditions of work. It has been argued that the word 'everyone' definitely covers sex workers, who in turn have the right to choose the type of work they would like to do, provided that such work does not harm or directly affect another person negatively.²²⁴

5.4.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The CEDAW was adopted in 1979 by the United Nations General Assembly and came into force in 1981. This Convention defines what constitutes discrimination against women and sets up an agenda for national action to end discriminatory

²²² 'Universal Declaration of Human Rights' available at: <http://en.wikipedia.org/wiki/Universal-Declaration-of-Human-Rights> (accessed: 19 October 2013).

²²³ Choma & Nyathi- Mokoena *supra* note 101 at 235.

²²⁴ Choma & Nyathi- Mokoena *supra* note 101 230.

practices against women.²²⁵ The treaty was ratified by the South African government in December 1995.²²⁶ This implies that in accepting the treaty, the South African government committed itself to undertake a series of measures to end discrimination against women in all forms. These measures include the abolishing of discriminatory laws and the adopting of appropriate ones to prohibit discrimination against women.²²⁷

It has been argued that since adult commercial sex work may be regarded as employment it therefore implies that sex workers, the majority of whom are women deserve to work under free, safe and fair working conditions just like any other class of employees.²²⁸ The denial of safe and fair working conditions for sex workers is discriminatory and can thus be argued to be against the CEDAW.

5.4.3 World Charter for Prostitutes' Rights

This Charter is the most relevant legal instrument pertaining to this study. It was adopted in 1985 in Amsterdam by the International Committee for Prostitutes' Rights (ICPR) to protect the rights of sex workers worldwide. The ICPR emerged out of the prostitutes' rights movement in the 1970's.²²⁹ The Charter has become very relevant and applicable because of its strong human- rights approach to adult commercial sex work. Although this instrument has been well- received by the world it has no legally-binding force and not a state initiative but merely serves as soft law.²³⁰ However, this does not mean that the Charter is of no use. In fact it is quite useful in the South African situation where the protection of human- rights is greatly endorsed by the Constitution.

²²⁵ 'Convention on the Elimination of All Forms of Discrimination against Women' available at: <http://www.un.org/womenwatch/daw/cedaw> (accessed: 18 October 2013).

²²⁶ 'List of parties to the Convention on the Elimination of All Forms of Discrimination Against Women' http://en.wikipedia.org/wiki/List_of_parties_to_the_Convention_on_the_Elimination_of_All_Forms_of_Discrimination_Against_Women (accessed: 18 October 2013).

²²⁷ 'Treaty' available at: <http://en.wikipedia.org/wiki/Treaty> (accessed: 18 October 2013)

²²⁸ Choma & Nyathi- Mokoena *supra* note 101 at 237.

²²⁹ 'World Charter for Prostitutes Rights' available at: <http://en.wikipedia.org/wiki/world-charter-for-prostitutes'-rights> (accessed: 18 October 2013).

²³⁰ World Charter *supra* note 229.

The Charter could also be relied on as a useful interpretative tool which is of the nature of the section 1 constitutional values of equality and dignity. It may also serve as a source of inspiration for a change of laws that are discriminatory in nature. It calls for the decriminalisation of all aspects of adult prostitution resulting from individual decisions. Choma and Nyathi- Mokoena argue that this improves freedom of choice of individuals and also recognises instances where sex workers enter into the industry voluntarily.²³¹

It is noted that in terms of the Charter commercial sex work is considered a legitimate activity, which must be recognised and regulated, in order to protect the workers' rights and to prevent abuse. The Charter also states that sex workers should be guaranteed 'all human rights and civil liberties, including freedom of speech, travel, immigration, work, marriage and motherhood, and the right to unemployment insurance, health insurance and housing'. It has also been pointed out by Kimberly Klinger, that this Charter has become a template used by human - rights groups all over the world except for the fact that its provisions are non-binding.²³²

5.5 Conclusion

Based on the analysis of the international legal instruments and the New Zealand prostitution model, it becomes evident that the main issue under focus is the human rights of sex workers. It is obvious that sex workers are first and foremost human beings before being labelled as 'prostitutes', which means they deserve to be treated equally with other human beings.²³³ The human- rights based approach adopted in New Zealand provides an appropriate model for South African policy makers to embrace. This argument is motivated by the fact that the South African Constitution has a strong human-rights focus, which makes provision that the most vulnerable, marginalised and condemned groups in society are deserving of maximum

²³¹ Choma & Nyathi-Mokoena *supra* note 101 at 237

²³² Choma & Nyathi-Mokoena *supra* note 101 at 238; Klinger K ' Prostitution, Humanism, and a Woman's Choice: Perspectives on prostitution' (2003) 63 *Humanist* 16 at 17

²³³ Choma & Nyathi-Mokoena *supra* note 101 at 238.

protection of the law.²³⁴ Although the South African Constitution like the New Zealand legislation could also be considered to form the ultimate standard against which proposals for reforming the law on commercial sex work should be measured, it is yet to achieve that goal. Hence, it is recommended that sex workers in South Africa should be afforded those particular human-rights guaranteed by the Constitution as well as those that are extended to women under the international instruments that have been discussed in this chapter.

²³⁴ Pudifin & Bosch *supra* note 26 at 287.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 Concluding remarks

It appears that the regulating of morality by way of criminal law is unsuitable in South Africa especially in this post-apartheid era. One of the main reasons why the regulation of morality by law is considered unsuitable relates to the discriminatory and invasive effects of such regulation. The use of criminal law to regulate morality can be said to result in the unjust violation of constitutional rights, as in most cases the regulation relates to victimless offences. How can criminal law justify the interference into the private lives of consenting adults without having any clearly identifiable victims? Criminal law in such cases can also result in the undermining of one's right to self-autonomy; as one is often prevented from acting according to his or her own will especially where no harm is caused to anyone. The greatest challenge also relates to the sometimes 'unfounded' moral values which are at times enforced by way of criminal law. It is submitted that criminal law must only be used to regulate morality, where such morality is based on constitutional values.

The continued criminalisation of adult commercial sex work in the post-apartheid era remains questionable considering the benchmark set by the *Makwanyane*-case with regard to its generous approach and promotion of constitutional values of equality and human dignity. The *Makwanyane*-case serves as model jurisprudence on the interpretation of the Bill of Rights in a manner that resulted in greater constitutional protection. With regard to adult commercial sex work the concern that arises is whether its criminalisation is based on a morality that is not founded on the constitutional values of human dignity and equality.

The criminalisation of adult commercial sex work can be said to be unjustifiable when compared with the decision in the *Teddy Bear*-case where the High Court applied an accommodating approach to constitutional rights adjudication in a manner that promoted the protection of vulnerable members of the society. It remains

questionable that the unfair application of the Bill of Rights continues to exist in the post- apartheid era. The different outcomes in the *Jordan* and *Teddy Bear* cases remains unsettling as it promotes inequality and undermines the importance and acceptance of difference and diversity. Finally, it also becomes unclear whether the Constitutional Court in *Jordan* applied its constitutional duty in terms of section 39(2) of the Constitution when interpreting the law criminalising adult commercial sex work. It is submitted that an interpretation in accordance with section 39(2) would have resulted in the promotion of section 1 values of equality and dignity.

Thus the continued criminalisation of commercial adult sex work cannot be said to be justified particularly taking into account the Bill of Rights, which places great emphasis on the promotion of constitutional values. As far as the regulation of sexual morality by way of criminalisation is concerned, there is no doubt that non-consensual and coerced sexual activities should remain criminalised. This also relates to sexual activities involving persons lacking the required mental capacity and mental appreciation to partake in sexual activities.

6.2 General recommendations

A compromise approach might have to be adopted whereby commercial sex work is allowed but the practice of it should be controlled. This compromise could be achieved by pursuing a human-rights approach to commercial sex work. The Constitution of South Africa has a strong human- rights focus and demands that the most vulnerable, marginalised and condemned groups in society are provided maximum protection of the law. The New Zealand human- rights approach could provide a model for the regulation of adult commercial sex work that is worth emulating in South Africa.

Apart from the New Zealand approach, international instruments also strongly require the protection of the human -rights of sex workers, as their worth as human beings is not established by their profession but by the fact that they are human. It is recommended therefore of the South African legislature to stand firmly in favour of the human- rights culture that it has embraced even when the result might offend moral sensibilities. This can only be done if the 'prostitution law' in South Africa is reviewed in such a manner that it results in the decriminalisation of adult commercial sex work.

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