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Mapping a way forward for the Decriminalisation of Sex Work in South Africa: The case for an intersectional and rights-based approach to regulation

by

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My supervisor, Dr Yvonne Jooste; you truly are my favourite girl. Thank you for holding my hand and cementing my thoughts with direction. I celebrate you. To my husband and my mother, I am eternally grateful for the support you have given me throughout this journey. Thank you for raising my children through the storms that have come with this journey. To the EFF, thank you for existing in the ways that you do. You have made education fashionable in my personal life and I am evidence of your commitment to education.

Dedication

My first encounter with sex work related advocacy that subverted social order was at church; Mamelodi Baptist Church. My pastor, Dr Thembelani Jentile moved me to my core retelling the story of Rahab the sex worker - how God saw her, redeemed her and planted her existence in the very make of Christ's lineage. An overt encounter with a sex worker was with sis' Dudu in the Netherlands in the year 2017 at the World AIDS Conference. Through that encounter, so many internalised hatreds I inherited from society were undone from that moment onwards. I had an opportunity to truly invest myself in compassion and a passion for human rights advocacy.

Sis' Dudu was all the women who had raised me and fought for my voice to find a place in this world that abhors women who speak. Sis' Dudu is particularly important for women like me, women who talk back to power. I'm eternally grateful to have crossed paths with women like my grandmother intombi kaMlesu, umalambadl' imbobela Ngwenya Nkomo, uNomonde Ncokazi, my mother who created me, Sibongile Joy Chirwa, sex workers in the Decriminalisation advocacy space and Dr Tlaleng Mofokeng.

These women have cushioned my compassion for women with real politics. These women have led me to loving women in multilayered ways that have gracefully and radially taught me to take on the shame "other" women are subjected to because they are women. Encounters with these women demanded that I abandon my comfort and form part of a collective. I am eternally grateful.

Sex workers carry a shame of borne of conquest and oppression that neither of us should ever carry. I have learned this and will teach this. This thesis is dedicated to my daughter, Milani Kwakhanya Limile Mpungose. Be like Jesus. Defend and protect women. You are them. Be like Brenda Fassie. Love who you will and live boldly. Be like Esther, bloom where you are standing. You are many women, and they are you too. Human rights. Women's rights. Sex worker's rights. All rights. Love is our truest evidence that we are of God.

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CHAPTER 1

Introduction

1.1 Introduction

The decriminalisation of sex work has been on the national agenda for some time in South Africa. It has remained a controversial topic in the context of South African law reform.[1] On 30 November 2022, Cabinet approved the publishing for public comment of the Sexual Offences and Related Matters Amendment Bill of 2022.[2] This Bill proposed the decriminalising of the sale and purchase of adult sex services and proposed the repeal of the Sexual Offences Act 23 of 1957 as well as section 11 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, which together criminalises the buying and the selling of sex. The Bill also proposed the expunging of the criminal records of those who have been previously convicted of sex work.[3] The Bill initially followed a two-pronged approach by firstly decriminalising sex work with regulation of the industry only to follow at a later stage. The two-pronged approach was aimed at ensuring decriminalisation earlier so that sex workers were no longer criminally charged.[4]

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[1] The current legislative framework in South Africa criminalises sex work. The purchase, the sale, and the provision of residences for the purpose of consuming or selling sex are included in the regulation and prohibition of sex work. The Sexual Offences Act 23 of 1957 specifically criminalises prostitution and bans brothels from receiving any form of monetary gain from selling sex or indirect monetary benefit from such a service.
Section 20(1)(a) of the Act states: "Any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward, shall be guilty of an offence." Section 2 of the act states that any person who keeps a brothel shall be guilty of an offence, and section 3 provides that certain persons would be deemed to keep a brothel including "(b) any person who manages or assists in the management of any brothel; (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel."
Section 11 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 criminalises the engaging of a person 18 years or older for the purpose of acquiring a sexual service/act. This amendment therefore criminalises the clients of sex workers and was prompted by the Constitutional Court minority judgement in *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC).
Further, because of the difficulty of arresting sex workers – i.e. the difficulty in proving the receiving of payment with the intent to sell sex - a number of Municipal By-Laws that encompass the provisions of criminalising sex work are used to this effect, namely the arrest and prosecution of sex workers and clients of sex workers. See for example Mgbako *et al* "The Case for Decriminalisation of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1423. "Importuning any person for the purpose of sex work," "loitering," "public nuisance" and "soliciting" are some of the Municipal By-Laws that are utilised by the police to physically remove and/or arrest sex workers; see Killander "Criminalising Homelessness and Survival Strategies through Municipal By-Laws: Colonial Legacy and Constitutionality" (2019) *SAJHR* 35 70–93.

[2] Speaking Notes – Media Briefing on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 re the decriminalisation of sex work. (Available at: https://www.gov.za/speeches/speaking-notes-–-media-briefing-criminal-law-sexual-offences-and-related-matters-amendment).

[3] As above.

[4] As above.

Although the Bill is not yet law and as such not in effect, the change in the legal landscape will mean that South Africa will become the first African nation to decriminalise sex work.[5] Former Minister of Justice and Correctional Services, Ronald Lamola, stated that the Bill, "follows the view that the ongoing criminalisation of sex work contributes to [gender-based violence and femicide] as it leaves sex workers unprotected by the law, unable to exercise their rights as citizens and open to abuse generally, not least when they approach State facilities for assistance."[6] Further, it is hoped that the proposed legislation "will minimise human rights violations against sex workers, [promote] better access to health care and reproductive health services for sex workers, as well as [ensure] compliance with health and safety and labour legislation [...] it would also afford better protection for sex workers, better working conditions and less discrimination and stigma."[7]

The publishing of the Bill was welcomed by activists and sex workers who have worked for decriminalisation to protect the fundamental Constitutional rights of sex workers.[8] Many activists and scholars have highlighted and demonstrated the extent to which the criminalisation of sex work in South Africa contributes to and exacerbates the violation of sex workers' rights.[9] As such, the prospect of decriminalisation was perceived as a much-needed step in the right direction.

[5] Kempen "Sex work/prostitution... should it be decriminalised?" (2016) *Servamus: Community-Based Safety and Security Magazine* 109.6 32-37.
[6] Speaking Notes – Media Briefing on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 re the decriminalisation of sex work. (Available at: https://www.gov.za/speeches/speaking-notes-–-media-briefing-criminal-law-sexual-offences-and-related-matters-amendment).
[7] As above.
[8] See BusinessTech "New laws to decriminalise sex work in South Africa" December 2022 (Available at: https://businesstech.co.za); Daily Maverick "Published bill a win for sex workers' rights" December 2022 (Available at: https://www.dailymaverick.co.za/article/2022-12-09-published-bill-a-win-for-sex-workers-rights/)
[9] See for example Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1423; South African Medical Research Council "Research shows that female sex workers are exposed to extremely high levels of violence" 24 August 2021 (Available at: https://www.samrc.ac.za/press-releases/research-shows-female-sex-workers-are-exposed-extremely-high-levels-violence); Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 327.

However, the Office of the State Law Adviser subsequently raised concerns about the constitutionality of the Bill.[10] The view of the Adviser, supported by the legal opinion of a senior council, is that the Bill must also provide for the regulation of sex work if it is to pass constitutional muster.[11] This therefore casts doubt on the two-pronged approach first proposed by the Bill. In this regard, the Department of Justice and Constitutional Development has stated that it intends to engage with role-players and draft the provisions necessary for the Bill to be constitutional to ensure that a revised Bill is ready for tabling in Parliament after the 2024 general elections.[12] Following the 2024 National and Provincial Elections in South Africa on the 29th of May, this process is yet to unfold.

The postponement of the decriminalisation of sex work means that sex workers will, for now, continue to face violations of their rights and be subject to arrest and the associated violence. Nevertheless, the proposed new legal landscape provides an opportunity to reflect on sex work in South Africa and map a way forward for the regulation of sex work.[13]

1.2 Background

1.2.1 Regulatory models and overview of human rights abuses experienced by sex workers

The regulation of sex work remains a contentious issue globally.[14] Sex work is regulated through five main legal models or approaches to the sex work industry, namely, prohibitionist, abolitionist, legalisation, partial decriminalisation and

[10] Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP, at the Debate on Vote 25 (Justice and Constitutional Development), National Assembly, 30 May 2023 (Available at: https://www.justice.gov.za/m_speeches/2023/20230530-BudgetVote-DMin.html).
[11] As above.
[12] As above.
[13] It should be noted that throughout this dissertation, the term "sex work" is used rather than "prostitution". Where the term "prostitution" is used, it is in reference to sources that use such terminology.
[14] Dewey, Crowhurst & Chimaraoke "Globally circulating discourses on the sex industry: A focus on three world regions" (2018) *Routledge international handbook of sex industry research* 186-197.

decriminalisation.[15] These regulatory models will be discussed in detail in chapter 3 below. At this juncture, it should be noted that the most common regulation of sex work is criminalisation, which encompasses the prohibitionist and abolitionist models.[16] The prohibitionist framework aims at the full prohibition of sex work and all its related activities including the buying and the selling of sex, brothel keeping and facilitators of sex work.[17] Under the abolitionist model of regulation, sex work as a practice is not necessarily criminalised, rather persons using another person's sex work for their commercial benefit is criminalised. The model aims to advance the ultimate abolishing of sex work by discouraging demand to eventually render supply-related services as insignificant.[18]

Legalisation pertains to sex work being legalised and necessary means to regulate the industry including taxation are implemented.[19] The legalisation of sex work may involve certain limitations including certain kinds of sex work being permitted whilst others remain criminalised. This model may also include a limitation on geographical spaces where sex trade can take place whilst prohibiting sex work in other areas. Procedures such as licensing, for example, become a requirement.[20]

Partial decriminalisation, also referred to as the neo-abolitionist model, refers to the decriminalisation of the selling of sex work but the criminalisation of the buying of sex work remains. Some proponents of this system assert that this is done with the intention to reduce the demand for sex work by criminalising the client/buyer.[21]

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[15] Cox "Vocation or Victimization: An Analysis of Legal Models Addressing Prostitution" (2021) *Honors Projects* 126 (Available at: https://digitalcommons.spu.edu/honorsprojects/126).
[16] Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1425.
[17] Gerassi "A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work" (2016) *Journal of Sociology and Social Welfare* 42(4) 79-100.
[18] Bateman "How Decriminalisation Reduces Harm Within and Beyond Sex Work: Sex Work Abolition as the 'Cult of Female Modesty' in Feminist Form" (2021) *Sexuality Research and Social Policy* 18 819-836.
[19] Lee & Persson "Human Trafficking and Regulating Prostitution" (2015) 11 *New York University Law and Economics Working Papers, Paper 299* 19 (Available at: http://lsr.nellco.org/nyu_lewp/299).
[20] Brents *et al The State of Sex: Tourism, Sex, and Sin in the New American Heartland* (2010).
[21] Mathienson "Prostitution Policy: Legalisation, Decriminalisation and the Nordic model' (2015) *Seattle Journal for Social Justice* 14 367.

Full decriminalisation is a model that sees the complete decriminalisation of the selling and buying of sex. With this model, sex workers and their clientele are protected from the legal consequences imminent in the other models explained above. This model, it is argued, ensures the protection of the human rights of sex workers, and eliminates the negative effects that exist in other models, including arrests, profiling by the police, and a decrease in the vulnerability to violence.[22]

The harms of the criminalisation of sex work (whether criminalising sex workers, their clients, or third parties) have been well documented.[23] There are various negative consequences to the criminalisation of sex work. The impact of criminalisation and the harm experienced by sex workers will be investigated throughout this dissertation. Below, I highlight some of these harms to contextualise the research problem identified in this research.

Sex workers in South Africa routinely experience violence, police abuse, and lack of access to health care and the justice system.[24] The levels of violence meted against female sex workers in South Africa are exorbitant. In the year 2020 alone, 71% of sex workers experienced physical violence and abuse whilst 58% were raped.[25] Of these rapes, one in seven were committed by a policeman.[26]

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[22] Mathienson "Prostitution Policy: Legalisation, Decriminalisation and the Nordic model" (2015) *Seattle Journal for Social Justice* 14 367.

[23] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf; South African Health Monitoring Survey (SAHMS): An Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013 – 2014 Final Report (Available at: https://www.anovahealth.co.za/wp-content/uploads/2016/03/SAHMS-Report.pdf); United Nations *A guide on the human rights of sex workers*, March 2024 (Available at: https://www.ohchr.org/sites/default/files/2024-03/2024-march-sex-work-guide-un-report-short.pdf); Matlala "Overview and Impact of Criminalisation of Sex Work in South Africa" (2021) *Sabinet Gender and Behaviour* 19 1; Fokazi "Police, Clients and Partners Responsible for Most Rapes of Sex Workers – Study" Sowetan. 10 September 2021 (Available at: https://www.sowetanlive.co.za/news/south-africa/2021-09-10-police-clients-and-partners-responsible-for-most-rapes-of-sex-workers-study/); Rangasami, Konstant & Manoek "Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015" Women's Legal Centre, 2016 (Available at: https://wlce.co.za/police-abuse-of-sex-workers/); Hendricks "The Challenges Faced by Commercial Sex Workers in Port Elizabeth: Eastern Cape, South Africa" (2020) *Journal of Gender, Information and Development in Africa* 8(2) 189-196.

[24] Medical Research Council Press Release "Research shows that female sex workers are exposed to extremely high levels of violence." South African, 24 August 2021(Available at: https://www.samrc.ac.za/press-releases/research-shows-female-sex-workers-are-exposed-extremely-high-levels-violence).

[25] As above.

[26] As above.

Sex workers also experience several rights violations because of the nature of their work and the criminalisation of sex work.[27] Criminalisation impedes successful HIV public health intervention practices, and sex workers face an increased risk of infection with HIV and other sexually transmitted diseases as criminalisation fosters stigma against sex workers in health services and fuels police abuse of sex workers.[28]

In reported incidents, the police justify arrests on account that individuals who carry condoms render evidence for the trade of sex work.[29] This causes sex workers to abandon efforts in protecting themselves and their customers from sexually transmitted diseases to escape humiliation and arrest by the police, which adversely affects their access to healthcare and sexual reproductive health rights.[30]

Further, in the circumstance where a sex worker has been violated (raped, harassed and/or attacked by customers, the police and/or onlookers), the sex worker is unable to explore the possibility of accessing justice since the trade is criminalised.[31] Sex workers are frequently profiled by South African Police Service personnel.[32] In addition, numerous accounts by sex workers and sex worker activists indicate that secondary violation at the hands of the police is a frequent occurrence in those instances where sex workers attempt to open a criminal case at a nearby police station.[33] On various accounts, sex workers have cited the danger in reporting crimes against them or crimes that they have witnessed to the police as they are profiled as criminals.[34]

Criminalisation also makes sex workers vulnerable to abuse from clients, intimate partners and the management of hotels and other establishments.[35] For example, clients are more likely to abuse sex workers as they are aware of the unlikeliness that

[27] Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1429.
[28] As above.
[29] As above.
[30] As above.
[31] As above at 1426.
[32] As above.
[33] As above.
[34] As above 1431.
[35] As above.

sex workers would go to or receive support from the police. Further, under the criminalisation model, sex workers' labour rights are violated in several ways. The criminal nature of sex work leads to sex workers operating in isolation, impeding efforts for sex workers to collectively organise.[36] As noted by Mgbako *et al:* "Without collective action, a large power imbalance exists between sex workers and brothel owners or pimps, who may abuse sex workers by demanding they work long hours and forcing them to work in unsafe conditions."[37]

There are myriad examples of how criminalisation of sex work results in violence, harassment, coercion, profiling and extortion of sex workers by the police, clients and the general public. In this regard, the law plays an integral role in influencing societal attitudes toward sex workers and to minimise the stigma, discrimination and abuse suffered by sex workers from many facets of South African society, including South African Policing Services (SAPS), health workers, schools, banks and other service providers.[38] What is more, "[c]riminalisation also affects family life. Despite being breadwinners for their families, stigma causes many sex workers to feel shame and to try and hide their profession. Sex workers also report that their children face stigma."[39] As one sex worker argued, "[s]ex work is our job—we work to put food on the table for our children and people are judging us. The government has to do something about people judging us."[40]

1.2.2 The recent trajectory of sex work in South Africa

As mentioned above, the decriminalisation of sex work has been on the national agenda for some time.[41] As such, the new Sexual Offences and Related Matters Bill was perceived as overdue, especially after the 2017 South African Law Reform Commission

[36] As above.
[37] As above.
[38] Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1426.
[39] As above.
[40] As above.
[41] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 327.

Report (SALRC) that disappointingly recommended the continued criminalisation of sex work.[42] In the section below, the trajectory of the legal and policy developments around sex work will be set out. In this regard, Spies' analysis and investigation into these developments are constructive. Spies has mapped, in detail, several policy developments and her work serves as an important resource in making sense of sex work in the South African context.[43]

As Spies explains, in 1996 the Gauteng Cabinet Committee on Safety and Security and Quality of Life was tasked with drafting a policy document that focused on how sex work was policed in the province.[44] The document recommended decriminalisation and found that police resources could be better directed.[45] Not long after the release of the policy document, the Department of Justice and Constitutional Development issued a Gender Policy Statement that stated that the decriminalisation of sex work should be seriously considered given South Africa's international obligation under CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women).[46] This statement coincided with the SALRC being tasked with an investigation

[42] South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017).
[43] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 327-349.
[44] As above at 36.
[45] Wojcicki "The movement to decriminalize sex work in the Gauteng province, South Africa, 1994–2002" (2003) *African Studies Review* 46 87.
[46] The Department of Justice and Constitutional Development's Gender Policy Statement (1999) 27–28 (Available at: https://justice.gov.za/policy/1999-GenderPolicyStatement.pdf). The Convention on the Elimination of All Forms of Discrimination Against Women is an international body formulated by the United Nations whose aim is to platform the global rise and relevancy of women's rights. CEDAW is utilised as a monitoring tool for state cooperation in implementing, protecting and preserving the rights of women as captured through its articles." The CEDAW framework on state obligations requires State parties to take appropriate and effective measures, 'immediately' and 'without delay' to overcome all forms of discrimination against all women, whether by public or private actors. This requires states to act with due diligence in combating any forms of discrimination or rights violations against sex workers and ensuring practical realisation of their rights." Specifically,
"The State must respect the rights of women: the State or its agents cannot do anything that violates the rights of women in sex work (Articles 2(d) and 2(f)). This places a duty on state to ensure that criminal, civil, administrative and labour laws are not used against sex workers but rather provide an effective legal framework that prevents discrimination and violence. The State must protect the rights of women by prohibiting discrimination that binds both public and private actors such as other institutions, private enterprises or individuals (Article 2(b) and 2(e)). This places positive obligation on the state to exercise due diligence in protecting sex workers from violence and other forms of violations committed by public institutions or non-state actors. It ensures that enabling and safe environment is created to ensure that women in sex work are able to access justice, in timely manner, in cases of discrimination and violence. The State must promote rights of women. It must create awareness on rights of sex workers among all sectors of society. Thus, the State party is to be forward looking and adopt policies and programmes of action that include education and awareness campaigns targeted at eliminating stereotypes,

into sexual offences by and against children, which was later expanded into a broader project concerning sexual offences against adults, which included adult sex work.[47] The SALRC released three reports with the project spanning over a decade.[48]

The first, the 2002 SALRC Issue Paper, was an investigation into adult sex work in South Africa, which included comparative analyses, feminist views on sex work, international human rights framework implications, HIV/Aids and sex work, and human trafficking.[49] The issue paper explored various regulatory options for sex work and compiled several questions to which it invited responses. The SALRC noted that it would not indicate support for a specific policy option as there was litigation pending before the Constitutional Court regarding the decriminalisation of sex work.

The case of *S v Jordan* was heard by the Constitutional Court (CC) in early 2002 where it was argued by Jordan (a brothel keeper) that the relevant sections of the Sexual Offences Act that criminalise sex work were unconstitutional as it infringed on the rights to privacy, equality, and freedom of trade.[50] The State's arguments against decriminalisation revolved around sex work as degrading to women and that it commodified their sexuality.[51] Further, it was argued that there are various social ills associated with sex work including violent physical abuse, encouragement of

prejudices and discrimination against women in sex work. The State must fulfil rights of all women, including sex workers. It must remove impediments, take positive steps, create institutions and remedies for legal protection of wo women, and provide enabling measures (Articles 2(a), 2(c), 2(f), 3 and 4)." See IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf).

[47] South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017).

[48] The reports followed the working method of the SALRC in first publishing an issue paper that outlines the problems encountered in a specific area of law; then inviting submissions on possible solutions. Thereafter, a discussion paper is drafted that includes responses to the issue paper and further research on the topic. A discussion paper usually concludes with a proposal for reform that can include a draft Bill on the topic. Responses to the discussion paper and additional research form the basis of the final report that is submitted to the Minister of Justice and Constitutional Development for his/her consideration and implementation. See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 336.

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

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

[51] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 337-338.

trafficking in women and children, the spread of sexually transmitted diseases, drug abuse and crimes such as bribery, corruption, drug trafficking, assault, public nuisance, and robbery.[52] The CC ultimately found against decriminalisation.

As Spies notes:

> "The litigation was controversial, as advocacy groups and non-governmental organizations felt that both Jordan's circumstances and the factual scenario of the case were not representative of the broader sex work trade, specifically that of outdoor sex workers. Concerned organizations, including the Commission for Gender Equality (CGE) and the Sex Workers Education and Advocacy Taskforce (SWEAT), in collaboration with the Centre for Applied Legal Studies and the Reproductive Health Research Unit, participated as amici curiae in order to provide the Constitutional Court with contextual evidence to ensure that the voices of all sex workers were represented."[53]
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> […]
>
> "The case dealt a blow to the consultative framework that was established by sex worker advocacy groups, NGOs and government in reforming the sex industry. Sex work reform and the possibility of decriminalization fell off the legislative agenda for a number of years."[54]

The second paper, the Discussion Paper, was only released in 2009 and comprised a lengthy analysis of the current legal framework, social and economic factors that influence and shape sex work, and a comparative analysis of the policy directives of different African jurisdictions.[55] The discussion paper identified two workable policy options – continued criminalisation or total decriminalisation.[56] The Commission stated that criminalisation did not effectively regulate sex work in South Africa and contributed to sex workers' vulnerability, exploitation and abuse.[57] The Commission

[52] W Trengove (SC) and A Cockrell "Written submissions of the State" Case number: CCT 31/01 para 5.
[53] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 338.
[54] As above at 339.
[55] South African Law Reform Commission Discussion Paper 0001 (Project 107) Sexual Offences: Adult Prostitution (2009). Decriminalization was supported in a joint submission by the Centre for Applied Legal Studies, SWEAT, the Women's Legal Centre (WLC), People Opposing Women Abuse, the Legal Resources Centre, Tshwaranang Legal Advocacy Centre to end Violence Against Women, the Commission on Gender Equality (CGE), the Gay and Lesbian Coalition and Sexual Harassment Education Project.
[56] South African Law Reform Commission Discussion Paper 0001 (Project 107) Sexual Offences: Adult Prostitution (2009) 177-184.
[57] As above.

again requested further input regarding available policy options to assist the Commission in drafting its final report.[58]

After the release of the issue paper, there was a six-year delay in drafting the final report in 2015 and another two-year delay in publishing it in 2017. As Spies notes

> "[t]he delay may be ascribed to the fact that the SALRC was without any commissioners between 2011 and 2013, but even taking this into consideration, the delay was unreasonably long and without any real explanation as to why that would have been."[59]

It should be noted that, as Spies explains, during the delay in the publishing of the final report, organisations and advocacy groups continued their work for decriminalisation and called for sex workers' rights to be protected.[60] In 2012 the Sexual Offences Act was amended to criminalise the clients (buying) of sex work.[61] After the amendment, the Commission for Gender Equality (CGE) confirmed its support for total decriminalisation and advised that South Africa's sex work policy needed to respond to and realise the constitutional rights of sex workers.[62] Further, the Government through various initiatives and parliamentary discussions continued to support decriminalisation. Then Deputy President Cyril Ramaphosa stated that there is a need to respond to the legal, social and health issues experienced by sex workers comprehensively and consistently during the launch of the South African National Sex

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[58] As above.
[59] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 340.
[60] As Spies notes (340): "In 2010 SWEAT, supported by the Women's Legal Centre, approached the Labour Appeal Court (LAC) in Kylie v CCMA and Others to gain protection for a sex worker who was apparently unfairly dismissed by the massage parlour where she worked. The LAC found that although it could not sanction sex work, its criminalisation could not derogate sex workers' constitutional rights, including the right to fair labour practice, and that the Commission for Conciliation, Mediation and Arbitration (CCMA) did have the necessary jurisdiction to hear the matter, which the initial court found it had lacked. Kylie was a positive indication that organizations did not give up on litigation after Jordan to protect sex workers' rights." See *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC).
[61] The Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 amended sec 11 of the Criminal Law (Sexual Offences Act) 32 of 2007, which now states: "A person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C') (a) For the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or (b) By committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older. The imposition of penalties in respect of this section is left to the discretion of the courts."
[62] Commission for Gender Equality "Commission for Gender Equality: Position on sex work" (2013) (http://www.cge.org.za/index.php).

Worker HIV Plan in March 2016.[63] Also in 2016, the Multi-Party Women's Caucus (MPWC) held a session in parliament to discuss the decriminalisation of sex work and heard submissions from different stakeholders on the topic.[64] During this discussion, the Commission of Gender Equality, SWEAT, and the Sisonke Sex Workers Movement again called for decriminalisation and raised concerns regarding the delay in the SALRC report.[65]

The SALRC final report was released on 26 May 2017 and suggested either partial criminalisation or continued criminalisation.[66] The findings of the report were disappointing as it was in contradiction with the South African government's support for decriminalisation. Many of the arguments in the report reflected the State's arguments in *S v Jordan* premised on the concept that decriminalisation would increase exploitative practices such as sex trafficking and child prostitution.[67] The Commission stated that:

> "The Commission believes that in South Africa, prostitution in its many guises – albeit 'voluntary' – clearly exploits women and men who provide sexual services. Even ostensibly self-chosen or self-initiated involvement in prostitution is a symptom of the inequality and marginalisation that are a daily experience of many impoverished people, especially women. The exploitation of a person's lack of alternatives does not amount to a considered exercise of that person's own choice. Prostitution in South Africa can also be viewed as an aspect of male violence against women and children. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection. Changing the legislative framework could create an extremely dangerous cultural shift juxta-posed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. Furthermore, the Commission believes that legalising prostitution would increase the demand, locally and internationally, for more prostituted persons, and would foster a culture that normalises prostitution and sexual coercion. Overall, the Commission believes that due to the systemic inequality between men

[63] The Presidency "Deputy President Ramaphosa: Launch of the South African National Sex Worker HIV plan" (11 March 2016) (Available at: https://www.gov.za/speeches/address- deputy-president-cyril-ramaphosa-launch-south-african-national-sex-worker-hiv-plan).
[64] Multi-Party Women's Caucus "Sex work decriminalisation: Commission on Gender Equality, SWEAT, South African Law Reform Commission, Department of Justice, Parliamentary Legal Services" (17 August 2016) (Available at: https://pmg.org.za/committee-meeting/23084/).
[65] As above.
[66] South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017).
[67] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 342; *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC).

> and women in South Africa, any form of legalisation will not magically address the power imbalance between the buyer and the prostitute, or the demand by buyers for unsafe or high-risk sex."[68]

For Spies, this meant that "[t]he SALRC final report is a clear indication that many in South Africa (as elsewhere) are still being influenced by so-called "rescue politics" that insinuate that all sex workers should be saved and that salvation is necessary [...]"[69] The MPWC, in response to the report, hosted a sex work summit in 2018 to invite responses from stakeholders.[70] As mentioned, in general, the report was not well-received and many stakeholders problematised the fact that the SALRC did not engage or consider inputs from sex workers themselves. The summit's findings were discussed in Parliament the same year and the MPWC noted that SALRC did not clarify its findings and that it disregarded developments in the area of sex work policy reform and gender-based violence during the interim period.[71]

In March 2019, President Cyril Ramaphosa again noted the need to develop a policy on the decriminalisation of sex work during the launch of the Declaration Against Gender-Based Violence and Femicide.[72] After the South African general election in 2018, the MPWC was reconstituted, and during its first meeting in 2019, it was noted that the project on the decriminalisation of sex work would continue under its term.[73]

Also in 2019, Human Rights Watch conducted research on sex work in four provinces and found that almost three-quarters of sex workers had been arrested more than once and that a broad pattern of police harassment, extortion, coercive sex and verbal

[68] South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017) para 43.
[69] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 332.
[70] Multi-Party Women's Caucus "Multi-Party Women's Caucus to deliberate further on decriminalisation of sex work" (https://www.parliament.gov.za/news/multiparty-womens-deliberate-further-decriminilisation-sex-work).
[71] As above.
[72] As above.
[73] As above.

abuse existed.[74] The report further found that criminalisation is a barrier to ensuring proper health care services for sex workers.[75]

As mentioned, in November 2022, the Cabinet approved the publishing for public comment of the Sexual Offences and Related Matters Amendment Bill 2022, and decriminalisation was postponed until after the 2024 general elections to ensure the constitutionality of the Bill. Currently, the process of decriminalisation is stalled.

1.3 Problem Statement, Research Question and Objectives

As mentioned above, the decriminalisation of sex work has ostensibly been on the national agenda since at least 1999. Against the background of the slow development of alternative regulatory frameworks for sex work, it becomes necessary to map a way forward for the regulation of sex work in South Africa. A revised Bill that can meet the test of constitutionality and comprehensively regulate the industry will arguably take some time, which means that the rights violations and stigma experienced by sex workers daily will continue. What is more, there are several aspects that must form part of legal reform and the reconfiguration of the discourses around sex work to ensure regulatory decriminalisation that protects the rights of sex workers. This dissertation is an attempt to highlight and investigate possibilities for legal reform and transformation in the context of sex work.

The urgency to decriminalise and regulate sex work is informed by a contradiction in the South African legal framework. The South African Constitution is committed to the protection and realisation of fundamental human rights.[76] It also requires the state to

[74] Human Rights Watch "Why should sex work be decriminalised in South Africa" (2019) (Available at: https://www.hrw.org/site).
[75] As above.
[76] Constitution of the Republic of South Africa, 1996, section 7. – "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom; (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights; (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."
The Constitution of the Republic of South Africa, 1996' section 1. "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.

promote the values of human dignity, the achievement of equality and the advancement of freedoms.[77] These objectives of the Constitution cannot be achieved if sex workers are ostracized by and excluded from the protection of the law. Furthermore, there is a national call to protect women against gender-based violence.[78] However, the criminalisation of sex work results in sex workers' human rights being actively violated as they are unable to exercise several rights, and violence against them is often justified based on their categorisation as criminals. The contracted and controversial trajectory to regulate sex work has thus placed sex workers in an untenable position – with support from various facets of society and the acknowledgement of the harms they experience but without any concrete change for over 20 years.

Any proposed regulatory model should be informed by a rights-based approach that takes the history of sex work and the harms of the criminalisation model into account.[79] Further, several comparative regulatory models make it possible to learn lessons from other jurisdictions on the regulation of sex work.[80] What becomes essential in any discussion on the proposed regulation is the voices and concrete accounts of the lived reality of sex workers in South Africa. To properly respond to the rights claims of sex workers, theoretical ideologies and questions that influence the understanding of sex

(c) Supremacy of the Constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness."

Further, the Bill of Rights state that "[e]veryone has the right to bodily and psychological integrity, which includes the right–
(a) to make decisions concerning reproduction;
(b) to security in and control over their body."

[77] As above.

[78] State of the Nation Address 2023 – The National Strategic Plan on GBVF: "The National Strategic Plan on GBVF is the government's comprehensive strategy for tackling all forms of violence and abuse against women and children. Since the launch of the strategic plan in 2020, several new interventions have been implemented: Extensive legal reform; Support for survivors through the provision of evidence kits at police stations; Psychological and social services; The establishment of a GBVF Response Fund; Support for Thuthuzela and Khuseleka Care Centres, which provide vital services for GBV survivors. Around R21 billion has been dedicated over the medium-term to the implementation of the six pillars of the plan, including the economic empowerment of women" (Available at: https://www.gov.za/news/speeches/president-cyril-ramaphosa-2023-state-nation-address-09-feb-2023).

[79] See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 327-349.

[80] Munro and Giusta "The regulation of prostitution: Contemporary contexts and comparative perspectives" in Munro & Giusta (eds.) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (2008).

work and law reform must also be taken into account.[81] Specifically, theoretical questions grounded in feminist theory and that speak to the uniquely South African context. It can be argued that differences in policy approaches are inextricably linked to different feminist ideologies on the topic; feminist debate undoubtedly influences political and legislative responses.[82] This is for example evident in the SALRC's 2017 which arguably followed a radical feminist approach by focussing its arguments around stressing the exploitative nature of selling sex.[83] In addition, it is pivotal to understand, contextually, the systems of power and privilege that shape the lives of sex workers as sex work intersects with histories of oppression and inequality.

The main research question can be formulated as follows:

Against the background of the agenda to reform the regulation of sex work as well as the history of human rights violations experienced by sex workers, how are we to map regulation going forward and what theoretical questions should inform our understanding of sex work in South Africa?

To respond to this question, the following objectives can be formulated:

1. To provide an historical overview of the regulation of sex work and the varying contexts of sex work in South Africa.
2. To consider the dominant regulatory frameworks and their concomitant harms to and protection of sex workers.
3. To make the case for a human rights-based and intersectional approach for the regulation of sex work.
4. To investigate the dominant feminist theoretical approaches to sex work in order to understand the discourses that determine various regulatory frameworks.

[81] As above.
[82] As above.
[83] As above. See also Kruger "Sex work from a feminist perspective: A visit to the Jordan case" (2004) *South African Journal on Human Rights* 20 140. See also Asijiki Coalition to Decriminalise Sex work in South Africa (2015) Fact Sheet (Available at: www.asijiki.org.za); Mkhize & Vilakazi "Rethinking gender and conduits of control: A Feminist Review" (2021) *Dis/Positions: Reflections on Gender, Sexuality, Race and Culture* 35 1.

5. To consider the concrete contexts of the human rights abuses of sex workers in South Africa and make the case for a substantive equality approach to sex work.
6. To contextualise the systems of power that shape sex workers' agency and autonomy as well as the ways in which these intersect with oppression and inequality.

1.4 Methodology & Theoretical Approach

1.4.1 Methodology

The research will first involve a review of the historical legal developments of sex work in South Africa. This section of the work will adopt a desktop analysis and discuss the varying contexts, concepts and understandings of sex work historically. The discussion will focus on sex work in precolonial times, during Dutch colonisation and British colonial rule, the Union of South Africa, Apartheid and the democratic era.[84] The experiences of women are complex and it thus becomes essential for the proposed research to explicate the specificity of South African history, especially as it relates to the positionality of sex workers.

A broader historical overview also becomes necessary to fully grasp the underpinnings of the current legal framework in place in South Africa. For example, the Sexual Offences Act of 1957 and subsequent amendments created the current legal framework of criminalisation.[85] The Sexual Offenses Act grew out of the apartheid-era Immorality Act, which banned sex between races.[86] Thus, the current law that criminalises sex work in South Africa is rooted in apartheid-era law and the government's attempts to control consensual adult sexual behaviour.[87] Further, under

[84] Matlala & Odeku "Sex Work in South Africa: History, Forms of Sex Works and Abuses being Faced by Sex Workers (2021) *Gender & Behaviour* 19 18316 – 18322; Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) *Faculty Scholarship* 243; Mgbako "Sex Work/Prostitution in Africa" in *Oxford Research Encyclopaedia of African History* (2019) (Available at: https://doi.org/10.1093/acrefore/9780190277734.013.562).
[85] Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1423.
[86] As above.
[87] As above.

colonialism, sex work operated along the lines of racist and gendered oppression, which historically has shaped the categorisation of sex workers as inferior beings.[88] An historical overview therefore also sheds light on the discourses that have shaped the law and societal stigma towards sex workers.

From there, the research will provide an overview of important developments in sex work in Democratic South Africa. This discussion will focus on the applicable legislation, the South African Law Reform Commission Report on Sexual Offences: Adult Prostitution Project 107 (and the Commission's preceding issue and discussion papers)[89] as well as the cases of *S v Jordan* and the *Kylie* case.[90] This section of the work will also adopt a critical approach to the SALRC Report. This critical approach is informed by the various academic literature, studies, and activist accounts that have demonstrated the harm of the criminalisation model and that have criticised the report from various perspectives.[91]

A desktop review of journal articles, chapters in books, and quantitative studies on the violence and rights violations experienced by sex workers will be discussed to show how the criminalisation of sex work exacerbates the human rights violations suffered by sex workers. Studies have demonstrated that the criminalisation model is ineffective and costly, resulting in stigma experienced by sex workers, police abuse, abuse from clients and others with whom sex workers transact, lack of access to justice, lack of access to health care, and lack of access to labour rights.[92] It has also been argued that

[88] See Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) *Faculty Scholarship* 243 (Available at: https://scholarlycommons.law.cwsl.edu/fs/243).
[89] South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002); South African Law Reform Commission Discussion Paper 0001 (Project 107) Sexual Offences: Adult Prostitution (2009).
[90] *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC); *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC).
[91] Kruger "Sex work from a feminist perspective: A visit to the Jordan case" (2004) *South African Journal on Human Rights* 20 140. See also Asijiki Coalition to Decriminalise Sex work in South Africa (2015) Fact Sheet (Available at: www.asijiki.org.za); Mkhize & Vilakazi "Rethinking gender and conduits of control: A Feminist Review" (2021) *Dis/Positions: Reflections on Gender, Sexuality, Race and Culture* 35 1; Marshall "Sex workers and human rights: A critical analysis of laws regarding sex work" (2016) *William & Mary Journal of Race, Gender, and Social Justice* 23 47.
[92] Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1423.

decriminalisation can better fulfil the human rights of sex workers, specifically the rights to dignity, freedom of association and work, the right to freedom and security of person, and the right to access the highest attainable standard of healthcare.[93]

This discussion is followed by an analysis of the dominant sex work regulatory models along the lines of the jurisdictions of Egypt, India, Canada, the Netherlands, and New Zealand.[94] The legal frameworks of these jurisdictions have different implications and impacts on the human rights of sex workers and the research will reflect on the lessons that could be gleaned for the regulation of sex work in the South African context.

Further, the proposed study will consider theoretical questions that inform societal understandings of sex work and the regulation of the sex work industry. Specifically, liberal, radical, black and African feminist approaches towards sex work will be explored.[95] It can be argued that differences in policy approaches are inextricably linked to different feminist ideologies on the topic; feminist debate undoubtedly influences political and legislative responses.[96] Feminists have debated over the issue of sex work for several years and most responses can be traced the opposing theories of choice and subordination.[97] The chapter serves to argue for conversations and discourse around sex work that move beyond the liberal/radical feminist divide; to approach sex work along the lines of African and black positionality; to view sex work

[93] As above. See also Tyler "Theorising harm through the sex of prostitution" in Coy (ed.) *Prostitution, Harm and Gender Inequality: Theory, Research and Policy* (2012).
[94] See for example Sudhanshu "Prostitution in Colonial India" (2010) *Mainstream* 26 (n.p.); Francesca *Sex Work in Colonial Egypt: Women, Modernity and The Global Economy* (2018); Barnett, Casavant & Nicol *Prostitution: A Review of Legislation in Selected Countries* (2011); Bruckers & Hannem "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work (2013) *Journal of Law and Society* 28 43-63; Jordan *The Sex Industry in New Zealand: A Literature Review* (2005); Scouler "Regulation of Sex Work in the Netherlands" (2011) (https://dx.doi.org/10.2139/ssrn.1868193); Jeffrey "Canadian sex work policy for the 21st century: Enhancing rights and safety, lessons from Australia" (2009) *Canadian Political Science Review* 3 60; Comte "Decriminalization of sex work: Feminist discourses in light of research" (2014) *Sexuality and Culture* 18 198.
[95] Van Marle & Bonthuys "Feminist theories and concepts" in Bonthuys and Albertyn (eds.) *Gender, Law and Justice* (2007); Mgbako & Smith "Sex work and human rights in Africa" (2010) *Fordham International Law Journal* 33 1178; Mgbako "The mainstreaming of sex workers' rights as human rights" (2020) *Harvard Journal of Law & Gender* 43 91; Mgbako *To Live Freely in This World: Sex Worker Activism in Africa* (2016); Richter "Sex work as a test case for African feminism" (2012) *Buwa: A Journal on African Women's* Experiences 2 62.
[96] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 327-349.
[97] As above.

through an intersectional lens; and to demonstrate that human rights protection and decriminalisation offers the possibility of strategically decreasing the violence, vulnerabilities and the subjugation that sex workers must live with daily.

The research moves on to shed light on the lived realities of South African sex workers by focusing on the various discriminations, violence and exclusion faced by them. The first section will highlight how moral debates around sex work impede alternative understandings and conversations around sex work, and the second and third sections focus on police brutality against sex workers and discrimination in healthcare respectively. The fourth section sheds light on societal stigmas and the final section discusses the various rights violations experienced by sex workers. The final section will call for a substantive equality approach to sex work.

Against the historical colonial and apartheid background, the dissertation in chapter 6, will engage sex work within the broader contexts of racialisation, colonisation, capitalist exploitation and gendered oppression. It will return to South African historical discourses to demonstrate the confines of economic necessity and colonialism and racist sexualisation that shape sex workers' autonomy and agency. This chapter calls for understanding and regulating sex work in a way that takes into account the complexity of these imposed identities and the difficult contexts and legacies that sex workers must grapple with whilst understanding how sex workers voice their resistance.

1.4.2 Theoretical Approach

Three main theoretical approaches will be adopted in the proposed research.

Firstly, the research is based on an acknowledgement of the importance of a **human rights-based approach** to decriminalisation of sex work.[98] Against the background of the evidence of the harms caused by the criminalisation model, specifically the exacerbation of rights violations of sex workers, the research works from the point of

[98] As above.

view that any proposed regulation should focus on how to protect the constitutional rights of sex workers.[99] Sex work remains a contentious issue that continues to be debated with those opposing decriminalisation based on religious and moral arguments, the objectification and commodification of women and associated societal ills, and those that support decriminalisation pointing to the exacerbation of harms through criminalisation and the lived realities of sex workers.[100] The proposed research aims to consider possibilities that would affect constitutional rights such as the freedom of choice of work, access to justice and healthcare, dignity, gender equality and freedom from discrimination.[101] It thus works from the standpoint that rights can act as a vehicle for change. Further, as mentioned the law plays a powerful role in influencing societal attitudes toward sex workers and to minimise the stigma, discrimination and abuse suffered by sex workers from many facets of South African society. More importantly, the dissertation will show that a human rights-based approach is a strategic approach to harm reduction and when sex work is viewed as legitimate work, sex workers will have the same rights to dignity, healthcare, labour rights and access to justice. It will also be demonstrated in chapter 4 that the human rights-based approach assists in opening up a discursive space that goes beyond the traditional radical and liberal feminist views on sex work. This approach is also complemented and supplemented by an intersectional lens.

Secondly, the research adopts an **intersectionality-based approach**. Criminalisation has a disproportionate impact on poor, mostly black, and female sex workers. It therefore becomes important to adopt an approach that can speak to and be cognisant of the positionality of sex workers. Black women make up the largest portion of the labour force in the sex work trade in South Africa – 96% and 97% in

[99] Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1426.
[100] As above.
[101] Jackson "Framing sex worker rights: How U.S. sex worker rights activists perceive and respond to mainstream anti-trafficking advocacy" (2016) *Sociological Perspectives* 59 27; Marshall "Sex workers and human rights: A critical analysis of laws regarding sex work" (2016) *William & Mary Journal of Race, Gender, and Social Justice* 23 47.

Johannesburg and Durban in the years 2013 and 2014 respectively.[102] Intersectionality as pioneered by Crenshaw is cognisant of the interlocking factors of race, gender, class, sexuality and other tangents of oppression or, put differently, it considers the multiple markers of identity that can together exacerbate exclusion and oppression.[103] Such an approach becomes essential given the South African context shaped by a colonial-apartheid history, gender violence and discrimination, and the disproportionate socio-economic impact experienced by black women. Further, an intersectional approach aims to address LGBTQI+ positionalities in sex work. As will be explained below, an intersectional understanding of sex work acknowledges the divergent and diverging ways in which differently situated individuals engage in sex work and express their gendered sexuality, as well as how multiple oppressions related to positionality intersect. An intersectional and rights-based approach will also contribute to the protection of the fundamental rights of LGBTQI+ sex workers. Ultimately, the dissertation aims to view sex work through an intersectional lens; and to demonstrate that human rights protection and decriminalisation offer the possibility of strategically decreasing the violence, vulnerabilities and subjugation that sex workers must live with daily. Intersectional thinking provides the opportunity to approach phenomena within complex economic, social, cultural and political frameworks concerning persons' positionality and particular histories.

Thirdly, the research adopts a **decolonial approach** to sex work. Bonzaaier has called for a feminist decolonial and intersectional understanding of sex work that recognises "the coloniality of gender, which includes an analysis of racialisation, colonisation, capitalist exploitation and gendered oppression".[104] Such an approach takes cognisance of the history of colonial and capitalist oppression that shapes sex workers'

[102] South African Health Monitoring Survey (SAHMS): An Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013 – 2014 Final Report (Available at: https://www.anovahealth.co.za/wp-content/uploads/2016/03/SAHMS-Report.pdf)
[103] Crenshaw "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour" (1991) *Stanford Law Review* 43 1241–1299; Crenshaw *et al Critical Race Theory: The Key Writings that Formed the Movement* (1995).
[104] As above at 483.

choices, agency and autonomy. This approach coheres with "African feminist approaches that are mindful of the power relations at play in black women's lives".[105] Sex work intersects with histories of oppression and contexts of inequality and a decolonial approach places focus on the impact of broader economic and political subordination and thus places understandings of sex work within the framework of the "coloniality of power".[106]

1.5 Motivation and Limitations

1.5.1 Limitations

The first limitation relates to the fact that the study places much focus on Black women sex workers as this group encompasses the majority of sex workers in South Africa.[107] To be sure, transgender and male sex workers also experience stigma and a myriad of rights violations.[108] As such, the study does not deny the lived experiences of these sex workers and attempts to, throughout the dissertation, acknowledge the experiences of LGBTQI+ sex workers.[109] In addition, the research calls for an intersectional understanding of sex work to emphasise the need to be cognisant of the divergent and diverging ways in which differently situated individuals engage in sex work and express their gendered sexuality, as well as how multiple oppressions related to positionality intersect. An intersectional and rights-based approach will also contribute to the protection of the fundamental rights of LGBTQI+ sex workers.

[105] As above at 468.
[106] The coloniality of power is a concept that demonstrates the interrelation of the practices and legacies of European colonialism in social orders and forms of knowledge that persist in postcolonial societies and into contemporary times. See *Quijano* "Coloniality of Power, Eurocentrism, and Latin America" (2000) *Nepantla: Views from the South* 1 533–580.
[107] South African Health Monitoring Survey (SAHMS): An Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013 – 2014 Final Report (Available at: https://www.anovahealth.co.za/wp-content/uploads/2016/03/SAHMS-Report.pdf)
[108] Yingwana "Queering Sex Work and Mobility" (2022) *Anti-Trafficking Review* 19 66 (https://doi.org/10.14197/atr.201222195); Ritshidze "Key Populations: State of Health" February 2023 (https://ritshidze.org.za/wp-content/uploads/2023/03/Ritshidze-State-of-Healthcare-for-Key-Populations2023.pdf)
[109] Nuttbrock *Transgender Sex Work and Society* (2017).

The delineation of female and especially black female sex workers is therefore based on the fact that these individuals are hugely overrepresented in the sex work industry.[110] LGBTQI+ sex workers experience numerous differentiated harms based on their specific positionality, and the research, as such, attempts to open up discussions for future research that can speak to the specific harms experienced by these individuals. In addition, the insights provided by research on LGBTQI+ sex workers form part of the critical analysis of the historical discourses around sex work, which will be focused on in several sections throughout this dissertation.

The second limitation relates to the fact that the study will be primarily limited to analysing physical sex work/street-based sex work as opposed to online sex work and pornography. The constraints and specific harms that exist in the online sector and pornography are not necessarily mirrored in the physical and street-based forms of sex work.[111] In the current wake of technological development, many street-based sex workers utilise online platforms to amplify to markets they serve. However, street-based sex workers are by far the majority in South Africa, and the majority of sex workers oscillate between the street and online platforms to physically meet clients. In the latter case, sex workers are still vulnerable to violence from clients and face the same stigma.

1.5.2 Motivation

As a public representative and member of the National Assembly in the 6th Administration and a current member of the National Council of Provinces in the 7th Administration, it has been a personal aspiration to merge academic work on human rights and the liberation of women with advocacy geared towards the decriminalisation of sex work amongst other social manifestations of violence against women. Sex workers have experienced and continue to experience lives of violence,

[110] South African Health Monitoring Survey (SAHMS): An Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013-2014 Final Report (https://www.anovahealth.co.za/wp-content/uploads/2016/03/SAHMS-Report.pdf).
[111] Young *Commodification of Sexual Labor: : The Contribution of Internet Communities to Prostitution Reform* (2016).

abuse, exploitation, and stigma, and are not afforded the rights to health, justice, dignity, security, and freedom of person, and labour rights.

The protracted journey to the publishing of the Sexual Offences and Related Matters Amendment Bill of 2022 and the subsequent shelving of the Bill serves to legitimise an interrogation of the state's response to sex work in South Africa. This research is motivated by the acknowledgement of the constant battle for the humanity of sex workers and serves as an act of solidarity with them and the organisations and activists that have long advocated for the decrmininalisation of sex work. The following efforts are notable: Gender Sisonke Justice, the Sex Worker Education and Advocacy Taskforce (SWEAT), and the Commission for Gender Equality. These organisations and other activists have continued to mobilise and fight for the betterment of the lives of sex workers.[112] SWEAT in particular has provided a place for the voice of sex workers and has mobilised in creative and inspiring ways. Lakhani has, for example, archived the multidisciplinary collections of photography, video and writings by SWEAT's members as well as their collaborations with other artists such as theatre groups.[113] These forms of creative and imaginative activism demonstrate how sex workers resist and speak back to the dominant discourses that stigmatise them as immoral, victims, and of lesser social value.

South African State institutions such as the Commission for Gender Equality (CGE) have in turn recommended the decriminalisation of sex work since 2013.[114] The CGE has continued its position to protect sex workers' rights to human dignity, freedom and security of person, the right to bodily and psychological integrity, and freedom of trade and occupation.

[112] Sex Work Donor Collaborative. "SWDC and Count Me In! Submission on Decriminalization in South Africa". 03 February 2023
[113] Lakhani "You Can't Break a SWEAT – Creatively Fighting for the Rights of Sex Workers in South Africa" (2022) *Global Public Health* 17 2342-2352.
[114] Decriminalising Sex Work in South Africa: 2013 Official Position of the Commission for Gender Equality. Commission for Gender Equality.

Further, 25 organisations that support the decriminalisation of sex work submitted comments to the Director General of Justice and Constitutional Development to the draft Sexual Offences and Related matters Amendment Bill, 2022.[115] These groups collectively formed the 'Sex Work Donor Collaborative'.[116] I would like to acknowledge these efforts that have played an inspiring role in the process of this research.

1.5 Chapter Overview

Chapter 1 (Introduction): This chapter comprises the introductory chapter. It provides an overview of the background to the research, the recent legal and policy developments on sex work in South Africa, the main research objectives, the problem statement, and limitations as well as the main theoretical approaches and methodology. The chapter also provides an overview of the main regulatory models as it relates to sex work and provides an overview of the harms and human rights violations caused by the criminalisation of sex work.

Chapter 2 (The South African Legal Framework Regulating Sex Work): This chapter will provide an overview of the varying contexts of sex work historically. The discussion will focus on sex work in precolonial times, sex work during Dutch colonisation and British colonial rule, the Union of South Africa and Apartheid. It will subsequently focus on significant moments in the legal developments related to sex work in post-1994 South Africa. Specifically, the cases of *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) and *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC), and the South African Law Reform Commission Report on Sexual Offences: Adult Prostitution (Project 107) (2015; first published 2017).[117] These legal developments will be critically evaluated.

[115] Sex Work Donor Collaborative. "SWDC and Count Me In! Submission on Decriminalization in South Africa". 03 February 2023 (Available at: https://sexworkdonorcollaborative.org/news/swdc-and-count-me-in-submission-on-decriminalization-in-south-africa).
[116] As above.
[117] South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002); South African Law Reform Commission Discussion Paper 0001 (Project 107) Sexual Offences: Adult Prostitution (2009).

Chapter 3 (Sex Work Regulation: An overview of the Prohibitionist, Abolitionist, Neo-abolitionist, Legalisation and Decriminalisation Models): This chapter will critically engage the prohibitionist, abolitionist, neo-abolitionist, legalisation and decriminalisation models.[118] It will provide an overview of five countries that have each taken one of these legal approaches to regulating sex work. This chapter aims to provide an overview of the possibilities for regulation and to highlight the different reasonings for and against certain modes of regulation.

Chapter 4 (Dominant Feminist Theoretical Perspectives on Sex Work): This chapter will engage liberal and radical feminist perspectives on sex work and will discuss black, African and intersectional approaches to sex work. These approaches are discussed to shed light on the varying discourses around sex work. Further, these approaches are discussed to propose an intersectional human rights-based approach.

Chapter 5 (Framing Exclusion, Discrimination and Violence in the Lives of South African Sex Workers): This chapter sheds light on the lived realities of sex workers in South Africa by focusing on the various discriminations, violence and exclusion faced by them. It seeks to contextualise some of the realities of sex workers. It contextualises these realities through the themes of sex work as work, police brutality, discrimination in public healthcare, and societal stigmas. The chapter concludes by engaging the rights violations experienced by sex workers and proposes a substantive equality approach in the regulation of sex work.

Chapter 6 (Systems of Power and Privilege: Sex Work as Resistance): This chapter will serve as a reflection on the broader systems of power and privilege relevant to the lives of sex workers. It will discuss aspects of the history of colonial and capitalist oppression that shape sex workers' choices, agency and autonomy. It aims to contextualise the fact that sex work intersects with histories of oppression and contexts

[118] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).

of inequality. It calls for an understanding of sex work that acknowledges the complexity of "the coloniality of gender, which includes an analysis of racialisation, colonisation, capitalist exploitation and gendered oppression".[119] The chapter concludes by engaging sex work as a resistance to reclaiming agency and autonomy.

Chapter 7 (Conclusion): This chapter will conclude the research and put forth the outcomes of the overall study. This chapter outlines the summarized analysis of the questions posed in this chapter. It highlights the key arguments in mapping a human rights-based and intersectional approach to sex work regulation.

[119] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 483.

CHAPTER 2

The South African Legal Framework Regulating Sex Work

2.1 Introduction

This chapter provides an overview of the South African legal framework regulating sex work. It therefore speaks to the first research objective set out in Chapter 1 as it outlines the varying historical contexts of sex work and aims to shed light on how sex work has been understood and regulated throughout different periods in South African history – from colonial and apartheid understandings to the current post-1994 legislative and policy framework. The chapter therefore sets out the historical-legal context of sex work in South Africa to provide an understanding of the discourses around sex work as well as its legal development. The chapter first engages pre-colonial understandings of sex work after which it moves on to investigate sex work under Dutch colonisation and British colonial rule. The chapter also highlights legal developments around sex work during the Mineral Gold Rush and the Union of South Africa. The chapter subsequently sets out pivotal developments in the post-1994 democratic era, which includes discussing the cases of *S v Jordan* and *Kylie v CCMA and Others*, and the South African Law Reform Commission Report on Sexual Offence: Adult Prostitution.[120]

2.2 Varying Contexts of Sex Work and Prostitution

2.2.1 Introduction

It is important to note that focussing on the colonial and apartheid periods in the discussion below, does not imply that forms of sex work did not exist in South Africa before the advent of colonial rule.[121] Indigenous populations, including the Khoi-Khoi,

[120] *S v Jordan and Others* 2002 (6) SA 642 (CC); *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8; South African Law Reform Commission Report 107: Sexual Offences Adult Prostitution, June 2015 (Published 2017).
[121] See Aderinto "Pleasure for Sale: Prostitution in Colonial Africa, 1880s-1960s" in Jacob (ed.) *Prostitution: A Companion to Mankind* (2016) 469-480 at 469.

the San as well as a large portion of the Bantu-speaking population were present in pre-colonial South Africa.[122] Most of these pre-colonial African communities were permissive of a variety of sexual practices.[123] Cohabitation and sexual activity with more than one partner were widespread in early communities.[124] Individuals acted within the framework of their cultural practice and women were not subjected to harsh restrictions as it concerns their sexuality – in comparison to Eurocentric views on morality and sexuality during the colonial periods.[125] For example, in the Xhosa and Pondo societies, certain 'free' women - primarily widows, fugitives/runaways/escapees in hiding or single mothers - engaged in extramarital affairs.[126] Having more than one sexual partner was a sign of masculinity or "*isoka*" in the culture of the Zulu.[127] Also within the Zulu tradition, wedded women's hidden lovers or paramours became known as "*isidikiselo*", which translates to "top of the pot".[128] In Xhosa and Sesotho, "*makhwapheni*"[129] and "*nyatsi*"[130] were names used to refer to hidden sexual relationships respectively.[131] More pertinently, as demonstrated below, sexual activity in exchange for favours occurred in the oldest African cultures.[132]

In this regard, two aspects should be further emphasised.

Firstly, many African feminists have pointed to the fact that moral conceptions of sexuality in pre-colonial African societies were less gendered and hierarchal than

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[122] See Thompson *A history of South Africa* (2002) 2. These encompass the present-day Ndebele, Basotho, Swazi, Batswana, Nguni, Pondo, Zulu, Xhosa, and Tsonga peoples.
[123] Ndulo "African customary law, customs, and women's rights" (2011) *Indiana Journal of Global Legal Studies* 18(1) 87-120; Delius & Glaser "Sex disease and stigma in South Africa: Historical Perspectives" (2005) *African Journal of AIDS Research* 4(1) 29-36. See also Ngubane (2010) *Gender roles in the African culture: Implications for the spread of HIV/AIDS* (Unpublished LLM Dissertation), Cape Town: University of Western Cape.
[124] As above at 30.
[125] Thompson *A history of South Africa* (2002) 6.
[126] Delius & Glaser "Sex disease and stigma in South Africa: Historical Perspectives" (2005) *African Journal of AIDS Research* 4(1) 31.
[127] See Oppenheimer (2014) *Prostitution as the exploitation of women and a violation of women's rights*. (Unpublished MPhil Dissertation). Cape Town: University of Cape Town.
[128] Arnfred *Re-thinking sexualities in Africa* (2004) 59.
[129] Jewkes, Morrell, Sikweyiya, Dunkle & Penn-Kekana "Transactional relationships and sex with a woman in prostitution: Prevalence and patterns in a representative sample of South African men" (2012) *BMC Public Health* 12(1) 4.
[130] See Leakey & Vetch "Africa Wins Every Time You Prevent HIV" (2010) *SAfAIDS* 16(1) 1-36.
[131] As above at 4.
[132] Aderinto "Pleasure for Sale: Prostitution in Colonial Africa, 1880s-1960s" Jacob (ed.) *Prostitution: A Companion to Mankind* (2016) 469-480.

initially understood.[133] Oweywumi has, for example, pointed to the Yoruba culture in which social hierarchy was not determined by gendered body type but rather by social roles that depended on one's role in a specific society and an individual's temperament.[134] It was rather the colonial imposition of a system of binary gender that led to stricter hierarchies and the policing of those who did not conform to this system. As noted by Westman,

> "it is necessary, however, not to romanticise pre-colonial attitudes and behaviour towards gender and sexual diversity, as this would erase the sex and gender hierarchies that may have been present in pre-colonial African societies. Nevertheless, one should remain cognisant of the ways in which colonial conceptions of gender and sexuality have mapped onto contemporary post-colonial conceptions of gender and sexuality and continue to impact on [...] persons within South Africa today."[135]

Secondly, Aderinto emphasises that prostitution like other aspects of human existence has a history rooted in social, cultural, political and economic experiences across diverse African societies.[136] Further, from the 1880s (before the imposition of colonialism over much of Africa), diverse forms of sexual behaviour existed across time and space.[137] Aderinto points out that these multiple and diverse sexual behaviours such as concubinage and ritual sex did not involve sex in exchange for payment in a straightforward manner.[138] Rather, the socio-cultural systems relating to forms of sex work were more complex.[139] Aderinto refers to the Ghanian example and I quote her at length:

> "Oral traditions and written sources by European explorers who visited Africa before the nineteenth century are replete with reference to complex socio-sexual behaviour that seemed

[133] Saidi "Women in Precolonial Africa" *Oxford Research Encyclopedia of African History* (2020) (Available at: https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-259); Ratele "Masculinities Without Tradition" (2013) *Politikon: South African Journal of Political Studies,* 40(1) 133-156; Ratele "Hegemonic African masculinities and men's heterosexual lives: Some uses for homophobia" (2014) *African Studies Review* 57(2) 115-130; Muholi "Thinking through lesbian rape" *Agenda: Empowering women for Gender* Equity 61 116-125.
[134] Oyěwùmí *The Invention of women: Making an African Sense of Western Gender Discourses* (1997) 3.
[135] Westman "Colonialism and Sexual Orientation and Gender Identity: South Africa" (2023) (Available at: https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-oth-westman.pdf) at 3.
[136] Aderinto, "Pleasure for Sale: Prostitution in Colonial Africa, 1880s-1960s" Jacob (ed.) *Prostitution: A Companion to Mankind* (2016) 469.
[137] As above at 470.
[138] As above.
[139] As above.

> to be highly entrenched in the life of several communities. Among the Akan of modern southern Ghana in the seventieth and eighteenth centuries, communities kept select women (mostly slaves) called abrakree (public women) who rendered sexual services to men, especially bachelors. These women were not expected to charge money for their services; but could receive gifts. Married men who slept with them could be fined. The public women phenomenon was a significant aspect of prevailing religio-cultural identities that manifested in the distribution of political power along gender and social class. It involved an initiation which reinforced the power of sex in everyday life of the people. Aside from the public women, certain class of women called etiguafou (prostitutes) "dispensed sexual favours for a negotiated price."[140]

It is thus entirely possible that sexual favours in exchange for gifts or other valuable reciprocities existed in South Africa before the advent of colonialism. As Mgbako notes, sex work as the exchange of sexual services for financial or other reward between consenting adults, has existed in Africa in varying forms from precolonial to modern times.[141]

At this juncture, it should be noted that the forms of sex work previously practised by African communities were heavily reshaped and distorted in the colonial encounter.

African sexual mores and conventions were reconfigured by European colonialism, particularly with the imposition of Christianity.[142] Africans were introduced to the notions of "shame" and "sin" as a result of violating accepted and legal sexual standards imposed by European conquest and imperialism.[143] Polygyny, premarital sex, and extramarital sex amongst Black Africans were all viewed as kinds of sexual transgressions by colonisers.[144] Further, Europeans valued female chastity in contrast to the more sex-friendly attitudes of African communities.[145]

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[140] As above.
[141] Mgbako "Sex Work/Prostitution in Africa" (2019) *Oxford Research Encyclopedia of African History* (Available: https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore9780190277734-e-562).
[142] Ndulo "African Customary Law, Customs, and Women's Rights" (2011) *Indiana Journal of Global Legal Studies* 18(1) (Available at: https://www.repository.law.indiana.edu/ijgls/vol18/iss1/5) at 95.
[143] Okafor "The Indigenous Concept of Sexuality in African Tradition and Globalization" (2018) *Global Journal of Reproductive Medicine* 6(1) 1-5.
[144] Mkhize (2015) *Polygyny & Gender: The Gendered Narratives of Adults Who Were Raised in Polygynous Families* (Unpublished Gender studies D.Phil. Thesis). Pietermaritzburg, University of KwaZulu-Natal.
[145] Arnfred *Re-thinking sexualities in Africa* (2004) 29.

2.2.2 Dutch Colonisation and Sex Work in South Africa

Dutch colonialism took place in April of 1652 when Jan van Riebeeck of the Dutch East India Company (VOC) occupied the Cape Colony as it was ideally situated on the VOC's shipping trade routes between the Netherlands and Batavia.[146] It started as a small refreshment station but grew into a settler colony. Thusi notes that VOC employees began to retire to the colony and could lease plots of land used for farming from the company.[147] As farming on these plots were labour-intensive, settlers began to import slaves from Madagascar, Mozambique, and Asia, which increased the inhabitants of the colony.[148] Sex work was a natural consequence of the influx of company sailors as thousands of "company soldiers and sailors disembarked each year at Cape Town for ten days to three weeks of recreation."[149] Sex work thus expanded to cater to the seamen who were temporary visitors as well as the settlers to the colony. Thusi further explains that there was a vibrant community of taverns, canteens and "houses of ill fame" which catered specifically to the seamen passing through the port of the Cape Colony.[150] Trotter notes as follows:

> "After months at sea in an all-male environment, many seafarers desired female companionship when they reached Cape Town. For a long time, there were few women to provide this service. Only when the society stabilized and grew did a notable prostitution sector emerge".[151]

To keep the morale of the seamen, sex work was allowed to continue unhindered at the time and it was, as such, seen as a "necessary evil".[152] The first recorded mention of brothels in the Cape dates to 1681.[153] Later, during the 18th century, the so-called Slave Lodge rose to prominence as Cape Town's top brothel when brothels had already

[146] Abrahams (2017) *Reflections on a Body of Work/Water: Re-Membering the Post-Slave Female Body Through Performance Practice*. (Unpublished MA Dissertation) Cape Town, University of Cape Town.
[147] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 208.
[148] As above.
[149] As above.
[150] As above at 209.
[151] Trotter "Dockside prostitution in South African Ports" (2008) *History Compass* 6(3) 675.
[152] As above.
[153] González-Stout (2021) *Carnal Vigilance, Vending Vice: Race, Gender and Sexual Commerce in Cape Town, 1868-1957* (Unpublished D.Phil. Thesis) Pretoria, University of South Africa.

been firmly entrenched throughout the colony.[154] Most domestic labour such as cleaning, trading and maintenance was performed by female slaves poorly compensated, if at all, and as a result, prostitution emerged as a means of bolstering their meagre earnings.[155] There are also reports of poverty-stricken Khoi-Khoi women that developed the need for prostitution.[156] Trotter notes that "white women were initially scarce at the settlement, but some ended up prostituting themselves due to the loss or absence of their husbands."[157] However, this does not mean that all prostitutes were passive victims of their circumstances as there are many reports of opportunistic sex workers and madams awaiting seaman at the port to direct them to their establishments and sex work became a means for some women to purchase their freedom.[158] Between 1652 and 1850, the Placaaten of 1659 restricted males from engaging in unlawful sex with slave women or maintaining concubines yet did not specifically forbid prostitution.[159] Men who violated these sexual laws were charged and penalised for "immoral" behaviours, which also included drinking, gambling, or unruly behaviour.[160]

By the time of British occupation, an expansive sex industry had already been established in the Cape colony.

2.2.3 British Colonisation and Sex Work in South Africa

The British took control of the Cape as a halfway station to the East in 1795.[161] The VOC was on the verge of bankruptcy and Britain had founded the British East India Company.[162] The British returned the colonies to the Dutch Government in 1803 after

[154] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 210.
[155] Thompson *A history of South Africa* (2002) 43.
[156] Trotter "Dockside prostitution in South African Ports" (2008) *History Compass* 6(3) 675.
[157] As above.
[158] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 209.
[159] As above.
[160] Thornberry *Colonizing Consent: Rape and Governance in South Africa's Eastern Cape* (2019) 77.
[161] Oliver & Oliver "The Colonisation of South Africa: A unique case" (2017) *HTS Teologiese Studies/ Theological Studies* 73(3) 5.
[162] As above.

peace was concluded with the French with the Treaty of Amiens.[163] However, in 1806, the British again took control of the Cape with the Beginning of the Napoleonic wars to protect the sea route to their Asian Empire.[164] As Oliver notes, this marked the end of nearly a century and a half of Dutch rule.[165] This also marked the introduction of almost a century and a half of English domination up to 1961 when South Africa became an independent republic after it became a Union under British supervision in 1910.[166]

What is important to note in the context of sex work is its stricter regulation with the Contagious Diseases Acts that were passed in England in 1864, 1866 and 1869, and which had the objective of stopping the spread of venereal diseases, specifically syphilis and gonorrhoea.[167] These Acts formed part of an era of "sexual purification" and moral regulation during the reign of Queen Victoria.[168] As Thusi notes, "[t]he spread of venereal diseases in England and the colonies created fervour to regulate the body of the sex worker."[169] The preamble of the English Act stated that "with the peculiar conditions of the naval and military services, and the temptations to which men are exposed, justifies special precautions for the protection of their health and their maintenance in a state of physical efficiency."[170]

The Contagious Diseases Act was enacted in the Cape in 1868. This act mirrored many of the regulations and requirements introduced under the three English Acts. It made the registration of sex workers compulsory. Gardner notes in this regard that "common

[163] As above.
[164] As above
[165] As above
[166] As above.
[167] The Contagious Diseases Acts, 1864, 1866 and in 1869. See Martens "'Almost a Calamity': Prostitutes, 'Nurseboys' and Attempts to Control Venereal Diseases in Colonial Natal, 1886-1890" (2001) *African Historical Journal* 45 32. See also Walkowitz *Prostitution and Victorian Society: Women, Class, and the State* (1980); Baker "The Contagious Diseases Acts and the Prostitute: How Disease and the Law Controlled the Female Body" (2012) *Journal of Law and Jurisprudence* 1(1) 88.
[168] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 211. See also Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (1980); Seidman "The Power of Desire and the Danger of Pleasure: Victorian Sexuality Reconsidered" (1990) *Journal of Social History* 24(1) 47–67.
[169] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 213.
[170] The Contagious Diseases Acts, 1864 (27 & 28 Vict. c. 85, 29 July 1864).

prostitutes" were subjected to routine physical and vaginal examinations for venereal diseases.[171] Sex workers began to be treated as a site of contagion.[172] Examination of clients was not required under the Acts in England as a result, feminists – who saw the acts as unfair as it only focussed on the sex worker that they deemed a victim of her circumstances – mobilised, and the Acts were repealed in England in 1886.[173] The Act was only repealed in the Cape Colony in 1919.[174]

It is important to note that administrators in the Colony of Natal attempted to implement the Contagious Diseases Act in 1886, however, it failed in the legislative council and after it was later passed, the secretary of the colonies refused to give it Royal Assent due to its repeal in England.[175]

In 1898 regulations were introduced in the Cape Colony that punished owners of properties used as brothels with fines and/or imprisonment, and the Police Offences Amendment Act later extended this punishment for soliciting and pimping.[176] In the Colony of Natal, the Police Offences Act penalised "prostitutes who loiters in any public place for purposes of solicitation or prostitution to the annoyance of the public with a fine or imprisonment".[177]

Under the Contagious Diseases Act, sex workers who were said to be infected with a venereal disease were confined to hospitals and subject to involuntary treatment.[178] In India, a similar Act was adopted in 1868 and in Malta, Hong Kong, Australia and Gibraltar nearly identical forms of the English Acts were adopted.[179] The involuntary

[171] Gardner "Criminalising the Act of Sex: Attitudes to Adult Commercial Sex Work in South Africa" in Steyn & Van Zyl (eds.) The Prize and the Price: Shaping Sexualities in South Africa (2009) 330-31.
[172] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 222.
[173] As above at 230.
[174] As above.
[175] Nembudani "Sex work in South Africa: A History of Ineffective Laws" 5 January 2023, Mail and Guardian (Available at: https://mg.co.za/thought-leader/opinion/2023-01-05-prostitution-in-south-africa-a-history-of-ineffective-laws/
[176] Martens "'Almost a Calamity': Prostitutes, 'Nurseboys' and Attempts to Control Venereal Diseases in Colonial Natal, 1886-1890" (2001) *African Historical Journal* 45 32.
[177] Act No. 44 of 1898 (S. Afr.).
[178] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 216.
[179] As above.

treatment that sex workers were subjected to posed the risk of death as the only treatment available was mercury, which was used to eradicate the disease was close to fatal.[180] What is more, the Act gave the police the power to determine who was a sex worker; these women had to stay in the mentioned hospitals until pronounced "clean".[181] Women who did not want to agree to the examination were given the alternative of hard labour or three months imprisonment.[182] Thusi notes that the Act demonstrates how the public health discourses around sex workers as a site of contagion resulted in their heavy policing and surveillance through formal state intervention."[183] The era of British rule was thus marked by efforts to regulate, police and surveil sex workers.

2.2.4 The Great Trek, the Mineral Gold Rush and the Union of South Africa

From 1836 onwards, Dutch-speaking settlers migrated north into the interior of Southern Africa to escape British colonial administration.[184] This is known as the Great Trek, which eventually led to the founding of the independent Boer Republics – The Transvaal (The South African Republic) and the Orange Free State.[185] In 1886, gold was discovered at Witwatersrand, which attracted mining companies and therefore workers.[186] During the first 10 years, there was very little regulation of sex work.[187] Thusi explains:

> "Johannesburg was at the centre of the fifty miles consisting of mines and had a population that was eighty percent male, two thirds single, and primarily young adults between the ages of twenty and forty. Black men migrated there to work on gold mines and as domestic workers in white households [...] black women had limited economic options and frequently employed sex work and the sale of liquor to the black mine workers as a form of income generation [...]

[180]Martens "'Almost a Calamity': Prostitutes, 'Nurseboys' and Attempts to Control Venereal Diseases in Colonial Natal, 1886-1890" (2001) *African Historical Journal* 45 32.
[181] As above.
[182] As above.
[183] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 217.
[184] South African History Online: Towards the people's history "Great Trek 1835-1846" (2022) (Available at: https://www.sahistory.org.za/article/great-trek-1835-1846).
[185] As above.
[186] Van Onselen "Who killed Mayor Hasenfus? Organised crime, policing and informing on the Witwatersrand, 1902-08" (2009) *History Workshop Journal* 1at 1.
[187] As above.

> The disproportionate number of men, who were mostly single and their youthfulness contributed to the persistence of sex work in the Transvaal. The Transvaal quickly earned a reputation for prostitution, illicit liquor trade, and crime."[188]

During the subsequent period, sex work was regulated inconsistently as it was viewed as a "moral vice" but, once again, a necessary evil.[189] In 1902, the Transvaal criminalised male persons who knowingly lived of the earnings of sex workers after pressure from mining companies and organised prostitution rings that colluded with and paid off the police.[190] Later, the same legislation was enacted in the pre-union Cape, the Orange Free State, and Natal (which also included female persons).[191] Also in 1902, the Morality Act criminalised sexual relations between black males and white prostitutes in the Cape Colony.[192] The same legislation was also passed in the remaining colonies in 1910 when South Africa became a Union.[193] This legislation was part and parcel of "the black peril" where the sexuality of black males was feared and seen as a threat to white women and a threat to the masculinity of white men.[194] These threats were extended to white sex workers and several initiatives and commissions ensued, including the 1913 Commission on Assaults on Women which saw sex between black male clients and white female sex workers as indicative of the threat to white women in general.[195] The idea of white sex workers willingly engaging in sex with black clients created moral outrage.[196]

Several measures were implemented to prohibit interracial relationships and other measures were enacted to regulate sex workers as a public nuisance – for example,

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[188]Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 223.
[189] As above at 225.
[190] Section 21(1)1(a) of Ordinance 46 of 1903 (Transvaal).
[191] Section 33(1) of Act 34 of 1902 (The Cape); section 13(1)(a) of Ordinance 11 of 1903 in the Orange Free State and section 15(1)(a) of Act 31 of 1903 in Natal.
[192] The Morality Act 36 of 1902.
[193] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 226.
[194] As above.
[195] See Keegan "Gender, Degeneration and Sexual Danger: Imagining race and class in South Africa, 1912" Southern African Studies (2001) 27 459; Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 227.
[196] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 228.

Union Bill 350 that aimed to limit the migration of European women for sex work; Act 2 of 1911 that imposed fines on "common prostitutes or night walkers" loitering in public places; and Act 41 of 1911 that criminalised the activities of brothel keepers.[197] A series of court cases painted sex workers as unreliable witnesses and as inherently untrustworthy.[198] By 1927, relationships between black and white people were criminalised. The Immorality Act of 1927 prohibited interracial sexual relations and the South Africa Act 31 of 1928 regulated sex work through public nuisance provisions.[199] Brothel keepers, however, were sentenced to six months of hard labour.[200]

The Union therefore did not explicitly criminalise prostitution, but it actively regulated it. Interracial sexual interactions were criminalised, however, whether in the context of sex work or not.[201]

2.2.5 Sex Work during Apartheid

The year 1948 marked the advent of Apartheid when the National Party won the election. Apartheid was defined by violent racist segregation and subjugation and white minority rule. The Immorality Act of 1950 and later the Sexual Offences Act of 1957 regulated the sexual lives of South Africans.[202] These Acts (as with their predecessors, the Immorality Act of 1927 and the Immorality Act of 1950) prohibited sexual relationships and marriage between whites and other South Africans of different races and regulated certain aspects of sex work as well as the establishment and management of brothels.[203] The Apartheid era was heavily influenced by Christian

[197] Union Bill 350, No 553 of 1913; Act 2 of 1911; Act 41 of 1911. See Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 229-230 for a more detailed discussion of these provisions.
[198] *Rex v Wynberg* 1916 OPD 653 that noted that courts must be careful to convict men based upon the uncorroborated evidence of a prostitute; *Rex v Christo* 1917 OPD 420 where the court noted that a 'prostitute's' testimony must be amply corroborated, which precedent was confirmed in *Rex v Dikant* 1948 (1) SA 693 (OPD). See Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 230.
[199] The immorality Act 5 of 1927 and the South Africa Act 31 of 1928, which provided that "loitering or being in any street or public place for the purposes of prostitution or solicitation to the annoyance of the inhabitants or passengers".
[200] The South Africa Act 31 of 1928.
[201] The Immorality Act 5 of 1927.
[202] The Immorality Act 21 if 1950; the Sexual Offences Act 23 of 1957.
[203] Section 10 of the Immorality Act 21 if 1950.

notions of morality and patriarchy that viewed women as property and expected them to be sexually innocent.[204] Section 10 of the Sexual Offences Act of 1957 criminalised brothel keeping whilst section 19 criminalised the clients of sex workers. Sex workers were, as previously, regulated through public nuisance provisions.[205] Section 22 criminalised activities related to living off the earnings from sex work.[206] Notably, the Act provides for imprisonment for a period not exceeding seven years "where it is proved that the person convicted kept a brothel and that unlawful carnal intercourse took place in such a brothel to his knowledge between a white female and a coloured male or between a coloured female and white male […]"[207] As such, race was a factor that led to stricter punishment and regulation in the context of sex work.

Sex workers were viewed through the lens of the usual stigmas – disreputable and with suspicion. In the case of *R v Sibande*, the court found that the rape of a prostitute is not as severe as the rape of a "woman of refinement" and that "prostitutes are disreputable people, undeniably".[208] Even with the strict prohibition of interracial relationships and with the regulation of sex work, sex work continued and clients transgressed interracial prohibitions.[209] Interestingly, there was also official resistance to the regulation of sex work:

> "In 1977, the Cape Town Medical Officer of Health [supported] decriminalisation of sex work by stating that 'prostitution will always be with us. If it is legalised it will be brought into the open, and allow the authorities to more effectively combat not only the occurrence and spread of [venereal diseases], but other associated evils like pimping and blackmail.' In the same year […] Head of the University of Natal Department of Sociology, argued, "No advanced society has managed to stamp out prostitution and it is unrealistic to pretend it does not exist.'"[210]

[204] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 233. See also Ritner "The Dutch Reformed Church and Apartheid" (1967) *Journal of Contemporary History* 2 17.
[205] Sections 10 and 19 of the Sexual Offences Act 23 of 1957.
[206] Section 22 of the Sexual Offences Act 23 of 1957.
[207] Section 19 of the Sexual Offences Act 23 of 1957.
[208] *R v Sibande* 1958 (3) SA 1 (A).
[209] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 235.
[210] As above at 236.

Further, in 1988, there was a parliamentary debate on the decriminalisation of sex work. The debate highlighted that no law has ever succeeded in stopping sex work and that sex work should be decriminalised to ensure standards of health in preventing venereal diseases and fighting against AIDS.[211] In the case of *State v Horn*, the Appellate Division found in 1988 that the criminal law did not intend for sex workers to be held criminally liable.[212] The legislature later responded by Amending the Immorality Act 2 of 1988 to explicitly criminalise sex work, which signalled the first unambiguous criminalisation of sex work in South Africa.[213]

2.3 The Regulation of Sex Work in the Democratic Era

As mentioned in Chapter 1, the decriminalisation of sex work has been on the national agenda for some time in South Africa.[214] These efforts eventually culminated in the Cabinet approving the publishing for public comment of the Sexual Offences and Related Matters Amendment Bill of 2022 on 30 November 2022.[215] As mentioned, the Bill proposed the decriminalising of the sale and purchase of adult sex services and proposed the repeal of the Sexual Offences Act 23 of 1957 as well as section 11 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, which together criminalises the buying and the selling of sex. The Bill also proposed the expunging of the criminal records of those who have been previously convicted of sex work.[216] The Bill proposed a two-pronged approach by decriminalising sex work and subsequently regulating the sex work industry. The two-pronged approach was aimed at ensuring decriminalisation earlier so that sex workers were no longer criminally charged.[217]

[211] As above at 237. *House of Assembly* Hansard, 15 February 1998, Col 14768.
[212] *S v Horn* 1988 SA 46 (AD) at 59.
[213] Immorality Amendment Act 2 of 1988.
[214] See section 1.1 above.
[215] Speaking Notes – Media Briefing on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 re the decriminalisation of sex work (Available at: https://www.gov.za/speeches/speaking-notes-–-media-briefing-criminal-law-sexual-offences-and-related-matters-amendment).
[216] As above.
[217] As above.

However, as also mentioned in Chapter 1, the Office of the State Law Adviser subsequently raised concerns about the constitutionality of the Bill.[218] The view of the Adviser, supported by the legal opinion of a senior council, is that the Bill must also provide for the regulation of sex work if it is to pass constitutional muster.[219] This therefore casts doubt on the two-pronged approach first proposed by the Bill. In this regard, the Department of Justice and Constitutional Development has stated that it intends to engage with role-players and draft the provisions necessary for the Bill to be constitutional to ensure that a revised Bill is ready for tabling in Parliament after the 2024 general elections.[220] This is yet to happen.

Thus, currently, sex work in South Africa is still criminalised. The purchase, the sale, and the provision of residences to consume or sell sex are included in the regulation and prohibition of sex work. The Sexual Offences Act 23 of 1957 specifically criminalises "prostitution" and bans brothels from receiving any form of monetary gain from selling sex or indirect monetary benefit from such a service.

Section 20(1)(a) of the Act states: "Any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward, shall be guilty of an offence." Section 2 of the act states that any person who keeps a brothel shall be guilty of an offence, and section 3 provides that certain persons would be deemed to keep a brothel including "(b) any person who manages or assists in the management of any brothel; (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel."[221]

Section 11 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 criminalises the engaging of a person 18 years or older to acquire a sexual service/act.

[218] Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP, at the Debate on Vote 25 (Justice and Constitutional Development), National Assembly, 30 May 2023 (Available at: https://www.justice.gov.za/m_speeches/2023/20230530-BudgetVote-DMin.html).
[219] As above.
[220] As above.
[221] The Sexual Offence Act 23 of 1957.

This amendment therefore criminalises the clients of sex workers, which amendment was prompted by the Constitutional Court judgement in *S v Jordan and Others*.[222]

Further, as explained in Chapter 1, because of the difficulty of arresting sex workers – i.e. the difficulty in proving the receiving of payment with the intent to sell sex – several Municipal by-laws are used to this effect, namely, the arrest and prosecution of sex workers and clients of sex workers. "Importuning any person for the purpose of sex work," "loitering," "public nuisance" and "soliciting" are some of the Municipal by-laws that are utilised by the police to physically remove and/or arrest sex workers and clients.[223] Sex workers are rarely prosecuted under the Sexual Offences Act of 1957.[224]

The legal framework that criminalises sex work has significant negative impacts on the everyday lives of sex workers, specifically the violation of their rights to freedom from violence, safety and security of person, access to healthcare, privacy, dignity, access to justice and within the context of police brutality against sex workers.[225] Some of the violent aspects of the current legal framework were touched upon in Chapter 1. However, chapters 3 and 5 specifically will set out the human rights violations, discrimination and contexts of violence that sex workers face daily. It will also be argued that the criminalisation of sex work exacerbates and maintains these contexts of violence and discrimination.

The recent policy and legal developments around sex work in South Africa were set out in chapter 1. At this juncture, it is important to highlight, in more detail, pivotal moments in sex work regulation in post-1994 South Africa.

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[222] *S v Jordan and Others* 2002 (6) SA 642 (CC).
[223] See for example Mgbako *et al* "The Case for Decriminalization of Sex Work in South Africa" (2013) *Georgetown Journal of International Law* 44 1423; Killander "Criminalising Homelessness and Survival Strategies through Municipal By-Laws: Colonial Legacy and Constitutionality" (2019) *SAJHR* 35 70–93.
[224] See, for example, the City of Cape Town By-Law Relating to Streets, Public Places and the Prevention of Noise Nuisances (C24/05/07) that regulates sex work through prohibiting in public the performing of any sexual act or the soliciting or importuning any person for the purpose of prostitution or immorality (sections 3 (f) and (j) respectively).
[225] See IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf) at 10.

2.3.1 S v Jordan and Others; Kylie v CCMA and Others

In the case of *S v Jordan*,[226] the appellants were a brothel owner, a brothel employee and a sex worker who were convicted in the Magistrate's Court for contravening relevant sections of the Sexual Offences Act, 1957.[227] They appealed their convictions to the High Court by arguing that the relevant sections of the Act (the provisions that relate to the criminalisation of activities related to brothel keeping and the criminalisation of sex workers) were unconstitutional based on the rights to human dignity, and freedom of person, privacy and economic activity in the interim Constitution.[228] It was also argued that the constitutionality of section 20(1)(aA) that differentiates between the buyer and the seller of sex contravenes the rights to gender equality and equality before the law in sections 9(1) and 9(3) of the Constitution.[229] The CC unanimously agreed with the High Court decision that the provisions with regards to brothel keeping are valid and thus constitutional. The majority also concluded that "the prostitution" provision which criminalises sex work is constitutional and thus not infringe on the rights set out above.[230] The CC also agreed that the regulation of sex work is a matter for the legislature, and it is thus for Parliament to decide how to regulate sex work within the framework of the Constitution.[231] The CC therefore did not address the merits of the criminalisation framework.

The Court did, however, disagree on whether the provisions that only criminalise the sex worker constitution unfair gender discrimination. The majority found per Ngcobo J that id did not amount to unfair discrimination. The court held:

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[226] *S v Jordan and Others* 2002 (6) SA 642 (CC).
[227] Sections 2, 3 and 20(1)(a) of the Sexual Offence Act 23 of 1957.
[228] The interim Constitution was applicable as this Constitution (1993) was in force when the acts that gave rise to these proceedings were committed. The CC did however find that there is no material difference between the provisions of section 8 of the interim Constitution and section 9 of the Constitution, both of which deal with discrimination. Para 4 of *S v Jordan and Others* 2002 (6) SA 642 (CC).
[229] Section 8 of the interim Constitution of the Republic of South Africa, 1993.
[230] Paras 8-20 of *S v Jordan and Others* 2002 (6) SA 642 (CC).
[231] Para 26 & 116 of *S v Jordan and Others* 2002 (6) SA 642 (CC).

> "[15] And if there is any discrimination, such discrimination can hardly be said to be unfair. The Act pursues an important and legitimate constitutional purpose, namely, to outlaw commercial sex. The only significant difference in the proscribed behaviour is that the prostitute sells sex and the patron buys it. Gender is not a differentiating factor. Indeed, one of the effective ways of curbing prostitution is to strike at the supply. Two points to note here are the ones already stressed: first, the prohibition is gender neutral, it punishes both female and male prostitutes; and, second, guilt and punishment are equal for both the prostitute and the customer. In the circumstances any "discrimination" resulting from the prostitute and the customer being dealt with under different provisions of the law cannot be said to be unfair."[232]

The minority per Sachs and O'Regan JJ found that the provision did amount to unfair discrimination as by making the sex worker the primary offender, the law reinforces sexual double standards and perpetuates gendered stereotypes, which does not cohere with a society that aims to advance gender equality.[233] The minority held that:

> "[64] This distinction is, indeed, one which for years has been espoused both as a matter of law and social practice. The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women."[234]

Several amicus curiae joined the litigation including the Commission for Gender Equality, SWEAT, the Centre for Applied Legal Studies, and the Reproductive Health Research Unit.[235] The Commission for Gender Equality as well as SWEAT were concerned about the fact that the appellants did not adequately address the concerns of sex workers.[236] The Commission argued that the criminalisation of sex work distinguished between 'chaste' women who need protection and 'unchaste' women who should be punished and that the enforcement of morality is not one of the government's legitimate purposes.[237] The Commission also argued that the

[232] Para 15 of *S v Jordan and Others* 2002 (6) SA 642 (CC).
[233] Para 64 of *S v Jordan and Others* 2002 (6) SA 642 (CC).
[234] As above.
[235] For a detailed discussion of the *amicus curiae* see Spies "Better late than never: Lessons from *S v Jordan* in strengthening women's participation in litigation" (2015) *SAPL* 30 505 -518.
[236] Written submissions of the CGE, case number: CCT 31/01.
[237] Written submissions of the CGE, case number: CCT 31/01 para 69.2.

criminalisation of sex work disproportionately affect women and as such is discrimination on the grounds of gender.[238]

The Commission argued that:

> "What does, however, emerge as a thread common to almost all depictions of prostitution is the recognition (albeit sometimes tacit) that prostitution is inextricably linked to the experience of being a woman. This is because prostitution cannot be severed from the reality of women's experiences of inequality which experience is manifested in the most extreme cases in abuse and subordination and in less extreme cases in the limited options or choices available to women. Ultimately, however it is told, the story of prostitution is fundamentally a story about women and their position in society."[239]

SWEAT based their arguments on the right to freedom and security of a person and the implication that sex workers have the right to autonomy in determining what to do with one's own body.[240] SWEAT further contended that the Act violated sex workers' right to dignity, their right to free economic activity, and their right to privacy.[241] Importantly, SWEAT also highlighted the vulnerabilities faced by sex workers because of criminalisation, namely, vulnerability to violence, unsafe, unfair and poor working conditions, the stigmatisation of sex workers, their access to health, social, police, legal and financial services, the prohibition's adverse impact on safe sex practices and the ability to find other employment.[242]

In general, the litigation was controversial as these advocacy groups and others felt that the Jordan-case was not representative of the broader sex industry, specifically as it relates to street-based sex workers.[243] The amicus curiae wanted to provide the CC with more contextual evidence to ensure that the voices of sex workers are heard. In essence, the case "dealt a blow" to advocates and organisations fighting for decriminalisation.[244]

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[238] Written submissions of the CGE, case number: CCT 31/01 para 94.
[239] Written submissions of the CGE, case number: CCT 31/01 para 5.4.
[240] Notice of Motion to be admitted as *amici curiae*, SWEAT brief, case number: CCT 31/01 para 18.
[241] As above.
[242] Notice of Motion to be admitted as amici curiae, SWEAT brief, case number: CCT 31/01 6.57-6.85.
[243] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 338.
[244] As above.

In the case of *Kylie v CCMA and Others*,[245] the appellant was a sex worker who had been employed by a massage parlour. She was dismissed and took the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA).[246] The CCMA referred to matter to the Labour Court where it was found that because sex work was illegal, the employee therefore did not have a valid contract of employment. As such, the appellant was not entitled to protection under the Labour Relations Act[247] and section 23 of the Constitution that guarantees "everyone has the right to fair labour practices" as these do not protect illegal employment.[248]

The Labour Appeals Court eventually found that constitutional rights, including section 23, are vested in all persons, whether they have a formal employment contract or not, even if the relevant work is illegal.[249] The appellant could be considered and employee and was also entitled to form and join trade unions although collective agreements between brothel owners and sex workers would not be enforceable.[250] The Labour Appeals Court held that:

> "[41] If the purpose of the [Labour Relations Act] was to achieve these noble goals, then courts have to be at their most vigilant to safeguard those employees who are particularly vulnerable to exploitation in that they are inherently economically and socially weaker than their employers [...] this consideration applied with even greater force in the case of sex workers who are an especially vulnerable class exposed to exploitation and abuse by a range of people with whom they interact, including their employers [...]"[251]

and

> "[44] In the circumstances, where a sex worker forms part of a vulnerable class by the nature of the work that she performs and the position that she holds and she is subject to potential

[245] *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8.
[246] "The Commission for Conciliation, Mediation and Arbitration (CCMA) is a statutory body established in terms of Section 112 of the Labour Relations Act, 1995 (Act no. 66 of 1995) [as amended] (LRA) and draws its legislative mandate principally from Section 23 of the Constitution of the Republic of South Africa (1996) and the LRA. The CCMA, as a national public entity in terms of Schedule 3A of the Public Finance Management Act (PFMA), is an independent body that neither belongs nor is affiliated with any political party, trade union or business. The CCMA derives its mandate from the purpose of the LRA, which is to 'advance economic development, social justice, labour peace and the democratisation of the workplace'." See CCMA "Mandatory and Discretionary Funtions" (Available at: https://www.ccma.org.za/about-us/).
[247] Section 185(a) of the Labour Relations Act 66 of 1995.
[248] Section 23 of the Constitution of the Republic South Africa, 1996.
[249] Paras 30-60 of *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8.
[250] Para 60 of *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8.
[251] Para 41 *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8.

> exploitation, abuse and assaults on her dignity, there is, on the basis of the finding in this judgment, no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalised in the [Labour Relations Act]."[252]

The Court also referred to the minority judgment in S v Jordan,[253] to confirm that the illegal activity of a sex worker does not *per se* prevent the latter from enjoying a range of constitutional rights.[254] The Kylie case is a significant acknowledgement of the fact that sex workers are deserving of protection under the law, and specifically the emphasis that sex workers are a vulnerable section of society and that their criminal status does not by implication mean that they do not have the same labour rights.

2.3.2 The South African Law Report Commission Report on Sexual Offence: Adult Prostitution

The trajectory after the SALRC Report 107[255] was explained in Chapter 1.[256] This section will provide a short summary of the trajectory and will then highlight specific sections relevant to the dissertation.

As explained in Chapter 1, in 1996 the Gauteng Cabinet Committee on Safety and Security and Quality of Life was tasked with drafting a policy document that focused

[252] Para 44 *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8.
[253] *S v Jordan and Others* 2002 (6) SA 642 (CC) - "[74] Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute.30 To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body. This is not to say that as prostitutes they are stripped of the right to be treated with respect by law enforcement officers. All arrested and accused persons must be treated with dignity by the police. But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge, that occurs in the course of arrest or incarceration cannot be attributed to section 20(1)(aA), but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute."
[254] Para 20 of *Kylie v CCMA and Others* 2010 (CA10/08) ZALAC 8.
[255] South African Law Reform Commission Report 107: Sexual Offences Adult Prostitution, June 2015 (Published 2017).
[256] See section 1.2.2.

on how sex work was policed in the province.[257] The document recommended decriminalisation and concluded that police resources could be better spent elsewhere.[258] Not long after the release of the policy document, the Department of Justice and Constitutional Development issued a Gender Policy Statement that stated that the decriminalisation of sex work should be seriously considered given South Africa's international obligation under CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women).[259] This statement coincided with the SALRC being tasked with an investigation into sexual offences by and against children, which was later expanded into a broader project concerning sexual offences against adults, which included adult sex work.[260] The SALRC released three reports with the project spanning over a decade.[261]

The reports followed the working method of the SALRC in first publishing an issue paper that outlines the problems encountered in a specific area of law; then inviting submissions on possible solutions.[262] Thereafter, a discussion paper is drafted that includes responses to the issue paper and further research on the topic. A discussion paper usually concludes with a reform proposal that can include a draft Bill on the topic. Responses to the discussion paper and additional research form the basis of the

[257] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 336; South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002) 36.
[258] Wojcicki "The movement to decriminalize sex work in the Gauteng province, South Africa, 1994–2002" (2003) *African Studies Review* 46 87.
[259] The Department of Justice and Constitutional Development's Gender Policy Statement (1999) 27–28 (Available at: https://justice.gov.za/policy/1999-GenderPolicyStatement.pdf).
[260] South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017).
[261] The reports followed the working method of the SALRC in first publishing an issue paper that outlines the problems encountered in a specific area of law; then inviting submissions on possible solutions. Thereafter, a discussion paper is drafted that includes responses to the issue paper and further research on the topic. Responses to the discussion paper and additional research form the basis of the final report that is submitted to the Minister of Justice and Constitutional Development for his/her consideration and implementation. See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 336.
[262] See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 336.

final report that is submitted to the Minister of Justice and Constitutional Development for his/her consideration and implementation.[263]

As the discussion papers were discussed in Chapter 1, the section below will focus on the final report.[264] The scope of the final report was framed to:

- "codify the substantive law relating to sexual offences in an easily accessible and workable act;
- To develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, which will protect the rights of victims as well as ensure the fair management and trial of persons suspected, accused and convicted of committing a sexual offence;
- To provide workable legal solutions for the problems surrounding adult prostitution; and
- improve the regulation of pornography, including on the internet."[265]

The Commission was clear in its assertion that a national strategy should be implemented to regulate sex work that offers viable alternatives to sex work and to assist sex workers who want to exit the trade.[266] Further, the commission suggested support for sex workers is reskilling, education and health initiatives for sex workers as well as promoting their economic independence and safe sexual practices.[267]

The extensive report discussed theoretical approaches to sex work including sex work as an economic contract, in the context of exploitation, the theory that legalised sex work increases human trafficking, that sex work should be seen in the context of gender-based violence, the theory that sex work is as a result of addiction, theories on contagion, combating the spread of STIs and HIV, and access to health care.[268] The

[263] As above.
[264] South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002); South African Law Reform Commission Discussion Paper 0001 (Project 107) Sexual Offences: Adult Prostitution (2009).
[265] Para 1.21 of SALRC Report (Project 107).
[266] As above at para 1.17.
[267] As above.
[268] Pages 44-190 SALRC Report (Project 107).

report also investigated the dominant models for the regulation of sex work – partial criminalisation (where only the client is criminalised); partial criminalisation (other activities such as brothel keeping are criminalised); and "non-criminalisation".[269] The report also engaged the following questions: "How can harm and vulnerability to abuse or exploitation be reduced for prostitutes? How can prostitutes be assisted to enforce their rights to equality and access to health? How can the stigma and discrimination of prostitutes be avoided? Concerns regarding prostitution and crime; Concerns about public health and HIV Creating an environment to help prostitutes exit prostitution; and What happens to a criminal record (for selling sex for reward) when a person exits prostitution and seeks other employment?"[270]

The report suggested legislation models and set out draft legislation for each. The two options suggested by the report were partial criminalisation which does not criminalise the conduct of sex workers but criminalises brothel keeping and related activities as well as certain aspects such as soliciting or sexual acts in a public space.[271] The second option, preferred by the SALRC, recommended continued criminalisation of all sex work, with the option for sex workers to be diverted from the criminal justice system,[272] which sex worker must acknowledge responsibility for the offence, not unduly influence in such acknowledgement; and there is a prima facie case against the sex worker; the sex worker consents to the diversion; and the prosecutor agrees to such a diversion.[273]

The Report was met with much criticism as the South African government had previously demonstrated a willingness to support the decriminalisation of sex work. Spies states that report was "badly drafted" and "not supported by any theoretical reference or discussion".[274] Further, as mentioned in Chapter 1, the report regarded

[269] Pages 95-112 SALRC Report (Project 107).
[270] Pages 117-181 SALRC Report (Project 107).
[271] Page 418 SALRC Report (Project 107).
[272] Pages 434 of the SALRC Report (Project 107).
[273] Page 443 of the SALRC Report (Project 107).
[274] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 336.

sex work as wholly exploitative and that the decriminalisation of sex work would increase exploitative practices such as child prostitution. Further, it was stated in the report that criminalisation reduced the demand for sex work without providing any evidence of this assertion. The Multi-Party Women's Caucus hosted a sex work summit to discuss the report. The caucus demonstrated that the report was not well received and one of the major criticisms related to the fact that the voices of sex workers themselves were not included. It also demonstrated that the SALRC did not adequately clarify its findings and that it did not take into account policy developments during the sixteen-year period between the issue and discussion papers and the final report. Further, Human Rights Watch conducted a research study on why sex work should be decriminalised in 2019 directly contradicting the SALRC report findings:

> "The report found that almost three-quarters of sex workers had been arrested more than once, and that a broad pattern existed of police harassment, including extortion, coercive sex and the use of derogative language towards sex workers. The report further found that criminalisation remained one of the main barriers to sex workers having access to proper health care services, despite a policy document that ensured sex workers' access to such services. Thus, it confirms the corrupt nature of policing sex work in South Africa, and also states that the police extort money not only from the sex workers themselves, but also from their clients in return for not arresting them."[275]

Of specific concern in the context of this dissertation are some specific assertions in the findings of the SALRC report. It should be noted that these assertions discussed below will be discussed in detail throughout the dissertation. I discuss it here tentatively to further critically engage with the SALRC report. Firstly, the report found that because of the personal nature of the interactions between sex workers and their clients, decriminalisation would not in itself protect sex workers from abuses and violence by clients.[276] Problematically, the report does not consider the impact that decriminalisation will have on the ability of sex workers to have access to justice; in reporting abuses and violence against them by clients to the authorities Further, it is exactly because their work is criminalised that sex workers cannot properly control the

[275] Human Rights Watch "Why South Africa should decriminalize sex work" (2019) (Available at: https://www.hrw.org/sites/default/files/report_pdf/southafrica0819_web_0.pdf)
[276] Para 3.114 SALRC Report (Project 107).

conditions within which they offer sexual services nor negotiate for minimum acceptable working conditions and health and safety. Violence against sex workers by their clients is exacerbated because clients are aware that sex workers have no legal recourse. Criminalisation prohibits sex workers' ability to call on legal protection from violence and other crimes, including rape.[277] International research has demonstrated that the marginalised status of sex workers makes them more susceptible, which in turn negatively impacts their ability to seek legal recourse.[278]

Secondly, the report stated that sex work exploits women and that it can be viewed as an aspect of male violence against women.[279] This aspect will be discussed in detail in chapter 4 of the dissertation. At this stage, it can be noted many scholars have critiqued the idea of the "victim narrative" which assumes that women are forced into sex work.[280] This portrays sex workers as helpless and in need of rescue; with no agency, autonomy or ability to negotiate the contexts within which they must survive. Evidence demonstrates that the perpetual victim does not reflect the actual experiences of sex workers.[281] Sex work in many cases is a strategic decision based on available options and although poverty plays a role in entering the sex industry, sex workers do have decision-making power over their lives and ways of subsistence.[282] This narrative sets sex workers as victims of "false consciousness" and erases how sex workers resist dominant discourses on them and negotiate complex contexts in making their way in the world.[283]

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[277]See IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf) at 37.
[278] As above.
[279] South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017) paras 2.460 & 2.499.
[280] See IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf). Also see Mbatha and Terre Blanche "Elucidating the discursive landscape of sex work in Johannesburg, South Africa" (2021) *Psychology in Society* 62 61-86.
[281] As above.
[282] As above.
[283] See IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf) At 9.

Lastly, the report found that "allegations of police brutality and extortion are not unique to prostitution and should be dealt with as a police problem that requires corrective measures to be taken".[284] This assertion is particularly problematic given research that demonstrates that sex workers in many countries experience many forms of police abuse.[285] More importantly, in the South African context, studies have shown that police violence against sex workers rather than being the result of some "bad actors", is systemic.[286]A national study conducted in 2021 concluded that, in the year 2020, 71% of female sex workers stated that they had been exposed to physical violence and 58% indicated that they had been raped.[287] One in seven of these women reported rape at the hands of a policeman.[288] In another study conducted, the majority of sex workers stated that the police in most cases request bribes or sexual favours to allow them to continue with their trade and not pay hefty fines.[289] Further, in a study conducted on Southern Africa, 80% of South African sex workers who were surveyed stated that they had experienced harassment and intimidation by the police because they were carrying condoms.[290]

Ironically, 17 years into the democratic era, the report maintained and perpetuated the discourse of regulating sex workers as a public nuisance in its assertion that: "Sending

[284] Para 2.509 South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution (2015; first published 2017).
[285] See IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf). Human Rights Watch "Off the Streets: Sex Workers at Risk: Condoms as Evidence in Four US Cities" (2012) (Available at: https://www.hrw.org/reports/us0712ForUpload_0.pdf).
[286] Decker, Crago, Chu & Sherman "Human rights violations against sex workers: burden and effect on HIV" (2015) *The Lancet* 385 186-199; Jewkes, Otwombe, Dunkle *et al.* "Sexual IPV and non-partner rape of female sex workers: Findings of a cross-sectional community-centric national study in South Africa" (2012) *SSM – Mental Health* 1 1-9.
[287] Jewkes, Otwombe, Dunkle *et al.* "Sexual IPV and non-partner rape of female sex workers: Findings of a cross-sectional community-centric national study in South Africa" (2012) *SSM – Mental Health* 1 1-9 at 4.
[288] As above.
[289] Fick "Policing and the Sex Industry: Sex Workers Speak Out" (2006) *Sabinet African Journals: SA Crime Quarterly* 15 13-18.
[290] Jewkes, Otwombe, Dunkle *et al.* "Sexual IPV and non-partner rape of female sex workers: Findings of a cross-sectional community-centric national study in South Africa" (2012) *SSM – Mental Health* 1 1-9 at 4.

the message that street solicitation for prostitution will not be tolerated constitutes a valid legislative aim."[291]

2.4 Conclusion

As explained above, African feminists have pointed to the fact that moral conceptions of sexuality in pre-colonial African societies were less gendered and hierarchical. The discussions of pre-colonial African societies above highlighted the necessity of being cognisant of how colonial conceptions of gender and sexuality have been mapped onto postcolonial times. Colonialism thus reconfigured gendered roles and transformed expressions of sexuality. Sex work in exchange for social reward and other favours existed before the advent of European colonialism. African sexual mores and conventions were significantly reshaped by European colonialism.

During Dutch rule, sex work was a consequence of the influx of soldiers and settlers and was generally tolerated. By the time of British colonial rule, an expansive sex trade had been established at the Cape. British colonisation brought about stricter regulation of sex work. The Victorian era was marked by sexual purification and the spread of venereal diseases in Britain and its colonies. This created the impetus to regulate the bodies of sex workers through the Contagious Diseases Act. As such, sex workers became a site of contagion against which the British military and navy had to be protected. During British rule, sex work was regulated through public nuisance and loitering provisions and the discourses around contagion resulted in heavy policing and surveillance through state intervention.

In 1886, the discovery of gold at Witwatersrand resulted in a heavy increase in the sex trade in the Transvaal to cater to the large population of labourers. The area became reputable for illicit liquor trade, crime and sex work. Later, regulations to prohibit sexual relationships between black males and white women were implemented. These measures were motivated by the so-called 'black peril' that represented a threat to

[291] Para 4.280 of the South African Law Reform Commission (Project 107) Report on Sexual Offences: Adult Prostitution.

white women, the masculinity of white men and white supremacy. Race thus placed a significant factor in the regulation of sex work. The period of the Union saw the Immorality Act 5 of 1927 and the South Africa Act 31 of 1928 which prohibited interracial sex and relationships and policing sex work through provisions around public nuisance and loitering.

During Apartheid, interracial relationships were strictly prohibited and met with moral outrage, which was heavily influenced by Christian notions of sexual purity and sexual conservatism as well as patriarchal notions of women as property. Sex workers were subjected to stigmas that painted them as disreputable and suspicios by society and the legal system. Support for the decriminalisation of sex work was met by the enactment of the Immorality Amendment Act 2 of 1988, which for the first time explicitly criminalised sex work.

In the democratic era, sex work remained criminalised under the Sexual Offences Act 23 of 1957. However, the use of by-laws on loitering, solicitation and public nuisance remains the main way in which sex workers are regulated. The case of *S v Jordan* dealt a blow to the concerted efforts of organisations and activists that advocated for the decriminalisation of sex work while the *Kylie-case* at least signalled the acknowledgment of sex workers' right to be protected by certain labour laws.

The South African Law Report Commission Report which took 6 years to finalise was met with criticism. It perpetuated views of sex work as inherently exploitative and advanced rescue politics and victim narratives instead of starting with claims to equality, labour rights and the living stories of sex workers.

To conclude, the varying understandings of sex work and sex workers in this chapter demonstrated that historically sex work has been allowed, tolerated, seen as a necessary evil, and a moral vice. Sex workers have been configured as sites of contagion, public nuisances, policed and surveilled, as threats to patriarchy, masculinity, and white purity. Throughout these contexts the buying and selling of sex has remained.

CHAPTER 3

Sex Work Regulation: An overview of the Prohibitionist, Abolitionist, Neo-abolitionist, Legalisation and Decriminalisation Models

3.1. Introduction

The regulation of sex work differs vastly depending on region, country and the specific economic, political, social and cultural contexts of that jurisdiction. As explained in Chapter 1, although there are a variety of legal approaches to regulating sex work, I will use five different models to organise these approaches, namely, the prohibitionist, abolitionist, neo-abolitionist, legalisation and decriminalisation models.[292] Below, I discuss five countries that have each taken one of these legal approaches to regulating sex work. This discussion aims to provide an overview of the possibilities for regulation and to highlight the different reasonings for and against certain modes of regulation. These legal frameworks each have different implications for the harms that sex workers face and are discussed critically to evaluate each model's potential for advancing sex workers' human rights. This chapter therefore speaks to the second research objective outlined in Chapter 1.

These discussions serve to emphasise the argument for the full decriminalisation of sex work as well as the importance of adopting a harm-reduction and rights-based approach in legislative and policy reform on sex work in South Africa.

3.2. The Criminalisation / Prohibitionist Framework – Egypt

Sex work in Egypt was historically practised and tolerated by the state/ruling authorities and local communities in certain periods whilst being prohibited during other periods.[293] The strictest legal regulation of sex work in Egypt roughly coincided

[292] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[293] Jean-Michel, Garcia & Paul "Trafficking in Women (1924-1926)" (2017) Geneva: United Nations Publications (Available at: https://digitallibrary.un.org/record/1324583?ln=en).

with colonial occupation by the British in 1882.[294] This coheres with the regulation of sex work in South Africa during colonial rule, especially British colonial rule.[295] These and subsequent laws were purported to protect "prostitutes" and the nation, but were, as in the case of colonisation in South Africa, partly instituted to increase the control of the colonial government over the sexual practices, reproduction and lives of the population.[296] This type of regulation was, as in other British colonies, rooted in religious moralism and the identified need to protect women.[297] This approach characterised the regulation of sex work in Egypt for almost two centuries following British military occupation.[298] It can be argued that the current Egyptian government's approach to dealing with sex work is essentially colonial and resulted in the adoption of a prohibitionist framework.[299]

The abolition of sex work in Egypt was declared by the nationalists in 1951.[300] The abolishment of sex work was central to the development of the current prohibitionist framework as captured in Law No. 10/1961 on the Combating of Prostitution.[301] According to this law, the buying and selling of sex and sexual activities are strictly prohibited and anyone found to be practising or inciting others to practice sex work faces serious legal consequences, including a possible prison sentence.[302]

Specifically, article 9(c) criminalises persons "habitually engaged in prostitution or debauchery" with imprisonment of no less than three months and no more than three years and a financial fine or one of the two penalties.[303] The term "prostitution" describes sex work for females and "debauchery" for males.[304] Further, the law also

[294] Biancani *Sex Work in Colonial Egypt: Women, Modernity and the Global Economy* (2018).
[295] See section 2.2.3 above.
[296] Biancani *Sex Work in Colonial Egypt: Women, Modernity and the Global Economy* (2018).
[297] Kozma "Prostitution and Colonial Relations" in García (ed.) *Selling Sex in the City: A Global History of Prostitution 1600s-2000s* (2017) 730–747.
[298] As above.
[299] Biancani *Sex Work in Colonial Egypt: Women, Modernity and the Global Economy* (2018).
[300] As above.
[301] Law No. 10/1961 on the Combating of Prostitution (Egypt).
[302] As above.
[303] Ahmed & Noralla The Legal and Media Observatory of Sex Work Crimes in Egypt, Media Monitoring Between (January 2021 and December 2022), June 2023 (Available at: https://cairo52.com/2023/06/02/the-legal-and-media-obsravtory-of-sex-work-crimes-in-egypt/).
[304] As above.

includes provisions for other crimes related to sex work, such as advertising and incitement to prostitution and debauchery.[305]

It should also be noted that some ambiguity exists regarding the application of some legal provisions and the law is interpreted in such a way to prosecute women alone, and not the male client who is considered a victim of the sex worker's enticement.[306] This reflects the patriarchal and male-dominated character of these laws and society.[307]

Further, in 2018, the Cybercrime Law was approved and stipulates punishment for "violating the principles or family values in Egyptian society" through "electronic prostitution."[308] Some criminal provisions in these laws place criminal responsibility on third parties such as content supervisors, homeowners, and pimps.[309]

The prohibitionist legal framework thus in general aims at the full prohibition of sex work and all its related activities. It is critical to note that this particular model, therefore, does not distinguish between the buyer, seller or facilitator of the sex work, but treats all parties within the same category of "prostitution" under the law, albeit implemented unequally between men and women as noted above.[310]

Those who argue in favour of the prohibitionist framework tend to indicate that decriminalisation or legalisation serves more harm than good.[311] At the centre of this belief is the contention that the majority of sex workers are not willing participants.[312] The prohibitionist framework depends strongly on what Weitzer refers to as an "oppression paradigm", the insistence that sex work is an inherently and wholly exploitative and destructive practice for women.[313] This line of argumentation holds

[305] As above
[306] As above
[307] As above
[308] As above.
[309] As above
[310] Gerassi "A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work" (2016) *Journal of Sociology and Social Welfare* 42 79-100.
[311] Farley et al. "Prostitution and Trafficking in Nine Countries" (2004) *Journal of Trauma Practice* 2 33-74.
[312] As above.
[313] Weitzer "The Mythology of Prostitution: Advocacy Research and Public Policy" (2010) *Sex Res Soc Policy* 7 15–29.

that the majority of sex workers have been compelled into sex work by socioeconomic conditions such as poverty, homelessness, and/or mental health issues.[314]

Prohibitionists thus largely depend on the narrative that prostitution is the ultimate form of male domination over the bodies of women.[315] Prostitution is viewed as inherently harmful to women and subjects them to perpetual domination by men, which also culturally aligns with the prohibitionist sentiments of the Egyptian government and the majority of its citizens.[316]

As previously demonstrated, most human rights scholars and activists agree that full criminalisation results in a wide variety of negative consequences.[317] Prohibition has harmful implications not only for the quality of life of sex workers but also for the extent to which their human rights are respected and upheld. The prohibitionist framework results in sex workers being dehumanised as they are reduced to criminals.[318] In addition to this, sex workers who live under a prohibitionist system are stripped of their dignity as they are viewed as moral deviants and, as such, are forced to conduct their trade in secret, making them vulnerable to violence, abuse, and coercion.[319] Sex workers are also denied benefits which come from state regulation such as economic incentives, government support, and labour protection through unionising. Further, this legal framework results in high rates of illness amongst and preventable deaths of sex workers due to the inability to access public health facilities and protection from policing systems.[320] The prohibitionist framework seeks to ultimately do away with the institution of sex work altogether.[321]

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[314] Farley et al. "Prostitution and Trafficking in Nine Countries" (2004) *Journal of Trauma Practice* 2 33-74.
[315] Biancani *Sex Work in Colonial Egypt: Women, Modernity and the Global Economy* (2018).
[316] As above.
[317] Cameron et al. "Crimes against Morality: Unintended Consequences of Criminalizing Sex Work" (2020) *The Quarterly Journal of Economics* 136 427-469.
[318] Crago "'Bitches Killing the Nation': Analysing the Violent State-Sponsored Repression of Sex Workers in Zambia, 2004-2008" (2014) *Signs* 39 365-381.
[319] Gerassi "A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work" (2016) *Journal of Sociology and Social Welfare* 4 79-100.
[320] Jacobssen "Dignity Violation In Healthcare" (2009) *Qualitative Health Research* 19 1536-1547.
[321] Biancani *Sex Work in Colonial Egypt: Women, Modernity and the Global Economy* (2018).

3.3. Abolitionist Framework – India

Bhandari locates sex work already in the pre-colonial history of India.[322] Sex work is prevalent in Indian mythology and historical texts and was during many stages fully permitted and closely linked to the performing arts.[323] The period of British colonial rule in India stretched from 1757 – 1858.[324] With the growth of trade in the country in general and the port of Bombay acting as a key port in the world cotton trade starting around 1869, sailors, seamen and soldiers who visited India increased.[325] This, as demonstrated in the case of Dutch and British colonial rule in South Africa, resulted in an increase in sex workers and eventually in a thriving sex work industry. As Chatterjee notes: "The growth of commercial sex trade and the beginnings of organised commercial prostitution in urban spaces, as we know it today, were closely related to the booming of port economies in nineteenth-century India. For instance, the development of urban pockets of sex work in Calcutta were closely tied to infrastructural developments that accompanied Calcutta's becoming the capital of British India."[326]

During the 19th and 20th centuries, authorities facilitated and regulated sex work in India in different forms.[327] Two notable regulatory frameworks are (1) the Cantonment Act of 1864 which regulated sex work in military bases and provided for 12 -15 Indian women for each regiment of British soldiers and (2) the Contagious Diseases Acts (1864, 1866, 1869) that were implemented in parts of India.[328] As with the case of British colonial rule in South Africa, sex workers were required to be licensed and

[322] Bhandari "Prostitution in Colonial India" (2010) *Mainstream*, 26, 19 June 2010 (Available at: https://www.mainstreamweekly.net/article2142.html).
[323] As above.
[324] As above.
[325] Chatterjee "Race, Prostitution and the British Empire" (2009) *Royal Historical Society - Race, Ethnicity and Equality* (Available at: https://blog.royalhistsoc.org/2021/05/24/race-prostitution-and-the-british-empire/).
[326] As above.
[327] See Mondal "Women in Cantonments: Evolution of Regulated Military Prostitution in Colonial India" (2022) *Indian Journal of Gender Studies* 29 384-393; Jain "The Queen's Daughters: White Prostitutes, British India and the Contagious Diseases Acts" (2021) *Indian Journal of Gender Studies* 2 4-10.
[328] As above.

undergo medical examinations for venereal diseases. The Contagious Diseases Act were eventually repealed in 1884.

This legal practice of sex work was sustained in Bombay well into the 1920s.[329] Brothels were outlawed in the early 1930s and later, anti-sex work movements gained traction in the early 1950s and registered a critical victory in 1956 through the passing of the Immoral Traffic (Prevention) Act of 1956. [330]

This act is the fundamental legal document that outlines the legal framework for the regulation of sex work in India.[331] According to this act, the commercialisation of sex work rather than its trade is criminalised.[332] India essentially adopts an abolitionist framework in its regulation of sex work. Unlike the prohibitionist framework that criminalises all aspects of sex work, the abolitionist framework only criminalises a single aspect, namely, the benefiting from or exploitation of a sex worker's trade by a third party.[333]

Therefore, under the abolitionist framework, sex work as a practice is not necessarily criminalised. What is criminalised is a person using another person's sex work for their commercial benefit. In adopting this approach, nations such as India hope to advance the ultimate abolishing of sex work by discouraging demand to eventually render supply-related services as insignificant.[334]

There are several negative consequences for sex workers who trade under this model. The abolitionist framework criminalises the commercial purchasing of sex work, which

[329] Tambe "The Elusive Ingénue: A Transnational Feminist Analysis of European Prostitution in Colonial Bombay" (1005) *Gender and Society* 19 160–79.
[330] Kotiswaran "Beyond the Allures of Criminalization: Rethinking the Regulation of Sex Work in India" (2014) *Criminology & Criminal Justice* 14 565-579.
[331] Bhandari "Prostitution in Colonial India" (2010) *Mainstream*, 26, 19 June 2010 (Available at: https://www.mainstreamweekly.net/article2142.html).
[332] Kotiswaran "Beyond the Allures of Criminalization: Rethinking the Regulation of Sex Work in India" (2014) *Criminology & Criminal Justice* 14 565-579.
[333] Skillbrei & Holmström *Prostitution Policy in the Nordic Region: Ambiguous Sympathies* (2016).
[334] Bateman "How Decriminalisation Reduces Harm Within and Beyond Sex Work: Sex Work Abolition as the "Cult of Female Modesty" (2021) *Sexuality Research and Social Policy* 18 819-836.

in turn drives sex work into underground markets.[335] This creates a situation where sex workers are vulnerable to unmitigated violence and domination by men, as these spaces usually have no law enforcement whatsoever.[336] This then defeats the entire purpose of the abolitionist framework, the central concern of which is the protection of the sex workers who it views as victims.[337] Sex workers are again positioned as victims who must be rescued.[338] In addition, bodily autonomy and agency include freedoms of choice relating to sexual matters, thereby stripping away the agency of sex workers and individuals. This model also essentially perpetuates the domination of third parties over the circumstances in which sex workers can sell their trade.[339]

In this regard, state institutions neglect to consider pertinent issues, particularly the distinction between those who choose to be sex workers and those who are coerced or forced into sex work.[340] It becomes critical to prevent and address abuse by distinguishing between agency and coercion.

The insistence on this conflation causes serious harm to those who choose to do sex work. They are hindered from engaging in healthy sexual practices due to being pushed to the margins of society.[341] The abolitionist framework also creates unsafe working environments for sex workers as they are forced to conduct their trade in secret, ultimately compromising their right to safety.[342]

Finally, much like the prohibitionist framework, this framework infringes on the dignity of sex workers and denies them the basic labour rights and protections which can be offered by the state and organised labour. Sex workers are also, under this model,

[335] Bhandari "Prostitution in Colonial India" (2010) *Mainstream*, 26, 19 June 2010 (Available at: https://www.mainstreamweekly.net/article2142.html).
[336] Kotiswaran "Beyond the Allures of Criminalization: Rethinking the Regulation of Sex Work in India" (2014) *Criminology & Criminal Justice*, 14 565-579.
[337] Bhandari "Prostitution in Colonial India" (2010) *Mainstream*, 26, 19 June 2010 (Available at: https://www.mainstreamweekly.net/article2142.html).
[338] As above.
[339] Bateman "How Decriminalisation Reduces Harm Within and Beyond Sex Work: Sex Work Abolition as the "Cult of Female Modesty" (2021) *Sexuality Research and Social Policy* 8 819-836.
[340] Bhandari "Prostitution in Colonial India" (2010) *Mainstream*, 26, 19 June 2010 (Available at: https://www.mainstreamweekly.net/article2142.html).
[341] As above.
[342] As above.

unable to solicit the necessary support to ensure safe and healthy working conditions, with dire consequences for sex workers.[343]

3.4. Neo-Abolitionist / Partial Decriminalisation Framework – Canada

The neo-abolitionist framework, also known as the Nordic model of sex work regulation, is founded on the view that sex work is a manifestation of patriarchal male violence.[344] This framework originated in Sweden and was designed to redistribute the blame and shame of sex work from sex workers to those who create the demand for sex work – the clients.[345] It was advocated for by many Swedish politicians for decades before it was formally implemented in 1998 through the introduction of legislation which prohibited the purchase of sexually related activities.[346]

The Swedish government introduced this law to achieve three objectives: To change attitudes around the purchasing of sexual acts especially amongst the buyers; to drive down trafficking by decreasing demand for sexual services; and to ultimately reduce the market for sex work.[347]

This hybrid approach aims at penalising "the demand for commercial sex while decriminalising individuals in prostitution and providing them with support services."[348] It is argued that the goal of the Nordic Model is to end, rather than regulate, sex work.[349] In addition, the Swedish government introduced exit programs for those who wish to stop doing sex work in an effort to provide comprehensive social services.[350]

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[343] Kotiswaran "Beyond the Allures of Criminalization: Rethinking the Regulation of Sex Work in India" (2014) *Criminology & Criminal Justice* 14 565-579.
[344] Skillbrei & Holmström *Prostitution Policy in the Nordic Region: Ambiguous Sympathies* (2016).
[345] Coalition Against Trafficking in Women Australia. CATWA Submission to the Draft General Recommendation on Trafficking of Women and Girls in the Context of Global Migration (2019) (Available at: https://www.catwa.org.au/catwa-submissions/).
[346] As above.
[347] As above.
[348] As above.
[349] Mathienson "Prostitution Policy: Legalization, Decriminalization and the Nordic Model" (2015) *Seattle Journal for Social Justice* 14 367.
[350] Coalition Against Trafficking in Women Australia. CATWA Submission to the Draft General Recommendation on Trafficking of Women and Girls in the Context of Global Migration (2019) (Available at: https://www.catwa.org.au/catwa-submissions/).

Since the passage of the hybrid model in Sweden, many countries have adopted this framework including Norway and Iceland. In 2014, the European Union and the Council of Europe adopted resolutions recommending state parties adopt the Nordic Model, and Northern Ireland became the first country to implement this model in the United Kingdom.[351]

This framework was officially implemented in Canada on the 4th of November 2014 through the passing of the Protection of Communities and Exploited Persons Act (PCEPA) (Bill C-36).[352] The act was followed by a Supreme Court of Canada ruling that declared certain sections of the nation's Criminal Code of Conduct as it relates to sex work as unconstitutional.[353] The court indicated that these sections were fundamentally in contravention of the rights of sex workers to health and security as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms.[354] The PCEPA was passed to secure the health and security rights of sex workers and declaring the *purchasing* of sex illegal.[355] Within the Canadian context, this legislation has objectives of reducing violence in sex work, human trafficking across the world, and the overall demand for sex work.[356]

The neo-abolitionist model has had a range of implications for sex workers' rights and livelihoods. According to Galbally, this legislation is inconsistent with various articles of the Convention on the Elimination of All Forms of Discrimination against Women

[351] As above.
[352] Galbally "Playing the Victim: A Critical Analysis of Canada's Bill C-36 from an International Human Rights Perspective" (2016) *Melbourne Journal of International Law* 17 (Available at: https://ssrn.com/abstract=2800939).
[353] Kunimoto "Critical analysis of Canada's sex work legislation: Exploring gendered and racialized consequences" (2018) *Stream: Inspiring Critical Thought* 10 27–36.
[354] Bruckert, & Hannem "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work" (2013) *Canadian Journal of Law and Society / Revue Canadienne Droit et Societe*, 28 43–63.
[355] CBC News (2013, December 20). Supreme Court strikes down Canada's prostitution laws. (Available at: http://www.cbc.ca/news/politics/supreme-court-strikes-down-canada-s-prostitution-laws-1.2471572of-shame-post-prostitution-arrest-photos-online-20130809
[356] Galbally "Playing the Victim: A Critical Analysis of Canada's Bill C-36 from an International Human Rights Perspective" (2016) *Melbourne Journal of International Law* 17 (Available at: https://ssrn.com/abstract=2800939).

(CEDAW).[357] CEDAW outlines the approach which should be taken by member states about sex work as one concerned with bringing an end to exploitation within sex work through third parties.[358] CEDAW indicates that states must focus on reducing the demand for sex work by addressing the root drivers of women entering sex work, which are largely socio-economic.[359]

It has also been argued that C-36 fails to maintain a gender-neutral approach to sex work regulation as prescribed by the CEDAW, and is plagued by sexist undertones.[360] Specifically, the stigmatisation which paints women as helpless victims and the fact that this model still creates conditions which make them vulnerable to human rights abuses and violence.[361]

A range of international organisations such as UNAIDS, Amnesty International, and the World Health Organisation (WHO) have found that criminalisation has dire implications for sex workers.[362] A fundamental claim in this regard is that criminalisation of the purchasing of sex, as with other models, makes the conditions under which sex work is done much more dangerous to women as it drives the trade underground.[363]

Those who support the Nordic Model argue that it is a feminist resolution to sex work.[364] Supporters have pointed to the fact that three of the four countries with the highest level of gender equality have adopted the neo-abolitionist model.[365] However,

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[357] Galbally & Rikki "The CEDAW: A Holistic Approach to Women's Equality and Freedom" in Hellum & Sinding (eds.) *Women's Human Rights: CEDAW in International, Regional and National Law* 95, 97.
[358] Otto "Making sense of zero tolerance policies in peacekeeping sexual economies." in Munro & Stychin (eds.) *Sexuality and the Law: Feminist Engagements* (2007) 259–282.
[359] Freeman et. al. *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A Commentary* (2012).
[360] Missing Women Commission of Inquiry Report (Canada) 1 August 2013 (Available at: https://missingwomen.library.uvic.ca/index.html).
[361] Miller & Vance "Sexuality, Human Rights, and Health" (2004) *Health and Human Rights* 7 5–15.
[362] See UNAIDS 'Getting to Zero' (Strategy Report No WC 503.6, UNAIDS, 2011-2015), Amnesty International 'Draft Policy on Sex Work' (Available at: https://www.unaids.org/sites/default/files/sub_landing/files/JC2034_UNAIDS_Strategy_en.pdf
[363] As above.
[364] Vuolajärvi "Governing in the Name of Caring—the Nordic Model of Prostitution and Its Punitive Consequences for Migrants Who Sell Sex" (2019) *Sexuality Research and Social Policy* 16 151–65.
[365] Mathienson "Prostitution Policy: Legalization, Decriminalization and the Nordic Model" (2015) *Seattle Journal for Social Justice* 14 367.

critics argue that this model has increased the stigmatisation of and discrimination against sex workers who are not able to quit their trade.[366] One of the biggest pitfalls of this model is that by criminalising the buying of sex, buyers are encouraged to seek sex services in more clandestine markets, and this also means sex workers are not able to control or choose the circumstances under which sexual acts occur, leaving them vulnerable to violence.[367]

3.5. Legalisation – the Netherlands

The Netherlands is seen as one of the most progressive nations in the regulation of sex work.[368] However, it has been argued that legalisation and strict regulation do not necessarily translate into better conditions for sex workers.[369] Citing issues such as the high level of unregistered sex workers (estimated at 96% in 2014) and the high numbers of foreign sex workers who are mostly illegal immigrants (60% in 2008), some hold that the Dutch model might be ideologically progressive, but is a practical failure.[370] Before 2000, the Dutch implemented a neo-abolitionist framework which criminalised third-party acts relating to soliciting sex work, but this was changed following extensive public engagements.[371]

On 1 October 2000, the Dutch government lifted bans on third-party involvement and effectively legalised sex work, becoming the first European nation to do so.[372] The legalisation of sex work in the Netherlands included a range of state regulations that

[366] As above.
[367] As above.
[368] Murray "Legislating Lust: A Comparative Analysis of Prostitution Legal Frameworks in Western and Central Europe" (2014) Proceedings of The National Conference On Undergraduate Research (NCUR) 2014 University of Kentucky, Lexington, KY April 3-5, 2014 (Available at: https://libjournals.unca.edu/ncur/wp-content/uploads/2021/07/1148-Murray.pdf).
[369] Barnett & Casavant & Nicol "Prostitution: a review of legislation in selected countries. Library of Parliament, Canada 2011 (Available at: https://publications.gc.ca/collections/collection_2015/bdp-lop/bp/2011-115-1-eng.pdf).
[370] As above.
[371] Weitzer "Legal Prostitution: The German and Dutch Models" in Savona, Kleiman, Calderoni (eds) *Dual Markets* (2017) (Available at: https://doi.org/10.1007/978-3-319-65361-7_24).
[372] Outshoorn "Policy Change in Prostitution in the Netherlands: from Legalization to Strict Control" (2012) *Sex Res Soc Policy* 9 233–243.

placed certain obligations on sex workers.[373] Sex workers are expected to be registered with and have permits from their municipalities and to pay income tax.[374]

As Murray notes, this type of approach couples state regulation with decriminalisation.[375] In addition to legalising voluntary and adult sex work, Dutch policies sought to simultaneously combat human trafficking (which is often facilitated through sex work) and offer a number of protections to sex workers.[376]

There is a continuation of contending views surrounding the implications of legalisation. On one hand, some of the practical consequences of the Dutch framework have had harmful consequences for sex workers. Specifically, the initial manner in which sex work licenses were first issued - by prioritising existing illegal brothels which in turn disadvantaged independent sex workers from taking full advantage of decriminalisation.[377]

This has resulted in a monopoly over commercial sex work, which is controlled by individuals who are not sex workers themselves but benefit from sex work.[378] In addition, the legalisation of sex work in the Netherlands has not necessarily improved the stigmatisation and discrimination experienced by sex workers.[379] Further, as Siegel-

[373] Murray "Legislating Lust: A Comparative Analysis of Prostitution Legal Frameworks in Western and Central Europe" (2014) Proceedings of The National Conference On Undergraduate Research (NCUR) 2014 University of Kentucky, Lexington, KY April 3-5, 2014 (Available at: https://libjournals.unca.edu/ncur/wp-content/uploads/2021/07/1148-Murray.pdf).
[374] Siegel "Human trafficking and legalized prostitution in the Netherlands" (2009) *Temida* 12 5 – 16.
[375] Murray "Legislating Lust: A Comparative Analysis of Prostitution Legal Frameworks in Western and Central Europe" (2014) Proceedings of The National Conference On Undergraduate Research (NCUR) 2014 University of Kentucky, Lexington, KY April 3-5, 2014 (Available at: https://libjournals.unca.edu/ncur/wp-content/uploads/2021/07/1148-Murray.pdf).
[376] Outshoorn "Policy Change in Prostitution in the Netherlands: from Legalization to Strict Control" (2012) *Sex Res Soc Policy* 9 233–243.
[377] Murray "Legislating Lust: A Comparative Analysis of Prostitution Legal Frameworks in Western and Central Europe" (2014) Proceedings of The National Conference On Undergraduate Research (NCUR) 2014 University of Kentucky, Lexington, KY April 3-5, 2014 (Available at: https://libjournals.unca.edu/ncur/wp-content/uploads/2021/07/1148-Murray.pdf).
[378] Weitzer "Legal Prostitution: The German and Dutch Models" in Savona, Kleiman, Calderoni (eds) *Dual Markets* (2017) (Available at: https://doi.org/10.1007/978-3-319-65361-7_24).
[379] Outshoorn "Policy Change in Prostitution in the Netherlands: from Legalization to Strict Control" (2012) *Sex Res Soc Policy* 9 233–243.

Rozenblit indicates, legal sex work is subject to stricter law enforcement, which can lead to many sex workers to rather work illegally.[380]

Murray, on the other hand, argues that although much is still to be addressed to improve the lives of sex workers and protect their rights, the lives of sex workers have in reality improved.[381] The safety of sex workers, particularly related to trafficking, has improved as the security forces are better empowered to detect and combat trafficking activities.[382]

In this regard, government employees have been empowered to identify victims of trafficking and provide decisive interventions.[383] Fundamentally, irrespective of sex work being legalised, state regulation and intervention, which is inherent to the legalisation framework, has had several adverse effects, specifically the burdensome processes of licensing, permitting and stricter law enforcement, which makes sex workers opt for illegal sex work .

3.6. Decriminalisation – New Zealand

New Zealand is a nation which many advocates for decriminalisation (sex workers and sex worker organisations) refer to as having the most desirable regulatory framework.[384] Prior to the decriminalisation of sex work, several laws existed that prohibited specific activities related to sex work.[385] These laws criminalised the operation of brothels, solicitation, and financially benefiting from sex work.[386] Before

[380] Siegel "Human trafficking and legalized prostitution in the Netherlands" (2009) *Temida* 12 5 – 16.
[381] Murray "Legislating Lust: A Comparative Analysis of Prostitution Legal Frameworks in Western and Central Europe" (2014) Proceedings of The National Conference On Undergraduate Research (NCUR) 2014 University of Kentucky, Lexington, KY April 3-5, 2014 (Available at: https://libjournals.unca.edu/ncur/wp-content/uploads/2021/07/1148-Murray.pdf).
[382] Weitzer "Legal Prostitution: The German and Dutch Models" in Savona, Kleiman, Calderoni (eds) *Dual Markets* (2017) (Available at: https://doi.org/10.1007/978-3-319-65361-7_24).
[383] Murray "Legislating Lust: A Comparative Analysis of Prostitution Legal Frameworks in Western and Central Europe" (2014) Proceedings of The National Conference On Undergraduate Research (NCUR) 2014 University of Kentucky, Lexington, KY April 3-5, 2014 (Available at: https://libjournals.unca.edu/ncur/wp-content/uploads/2021/07/1148-Murray.pdf).
[384] Bateman "How Decriminalisation Reduces Harm Within and Beyond Sex Work: Sex Work Abolition as the "Cult of Female Modesty" in Feminist Form" (2021) *Sexuality Research and Social Policy* 18 819-836.
[385] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[386] As above.

the passing of the Prostitution Reform Act (PRA)[387] in 2003, sex work itself was not illegal but was extremely difficult to conduct legally due to various restrictions surrounding the trade of sex.[388]

The process that preceded the adoption of the RPA enjoined the Justice and Electoral Committee to consult with different sectors of society as a means to determine the general perception surrounding the decriminalisation of sex work.[389] One of the themes that emerged consistently from this process was the fact that people agreed with the necessity to decriminalise the sex worker, albeit not necessarily acknowledging sex work as a legitimate profession.[390] Therefore, the population conceded that irrespective of moral and other concerns surrounding it, sex work exists and cannot be dealt with effectively through criminalisation.[391]

This outlook largely influenced the adoption of the PRA and its subsequent focus. In contrast to all other frameworks including legalisation, the decriminalisation framework focuses primarily on the protection and promotion of sex workers' rights.[392] This includes the right to choose without having one's agency questioned as well as rights to safety and access to basic health care. This framework does not seek to abolish sex work, but to attempt to create a safer and healthier environment for those who choose to do sex work. It simultaneously focuses on the prevention of coerced or forced sex work. Further, one of the main objectives of the PRA is to prevent the sex work industry from going underground.[393]

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[387] Prostitution Reform Act of 2003, New Zealand.
[388] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[389] Report of the Justice and Electoral Committee, Prostitution Reform Bill, New Zealand, 2003.
[390] As above.
[391] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[392] Abel "A decade of decriminalization: Sex work 'down under' but not underground" (2014) *Criminology & Criminal Justice* 14 580 – 592.
[393] As above.

The RPA clearly distinguishes between sex workers and sex trafficking victims. In doing this, it steers away from viewing women as helpless victims, preserving their agency, bodily autonomy, and liberty. The central aim of the act is to decriminalise sex work while not necessarily promoting or morally endorsing it as a legitimate form of work. It seeks to create a decriminalisation framework that:

- protects the rights of sex workers;
- ensures that the welfare and occupational health and safety of sex workers is promoted;
- creates conducive conditions for public health;
- prevents underage prostitution; and
- implements a range of other interventions necessary to create better conditions for sex workers.[394]

This decriminalisation framework of sex work regulation is viewed by many as the most progressive and practical approach to regulating sex work.[395] Decriminalisation is a framework that removes criminal liability and allows it to operate like any other industry – albeit with differing conditions depending on specific legislation. Jordan states that decriminalisation was supported because it was a harm-reduction approach to regulating sex work.[396]

This framework also allows sex workers to operate with minimum regulation, which greatly decreases state-sanctioned human rights violations and violence at the hands of law enforcement. For example, up to four sex workers from the same household are allowed to operate independently without any license or regulatory requirements that

[394] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[395] As above.
[396] Jordan, Ministry of Justice, The Sex Industry In New Zealand: A Literature Review, 21, March 2005 (Available at: https://www.nzpc.org.nz/pdfs/Jordan,-J-(2005),-Sex-Industry-in-New-Zealand-A-literature-review.pdf)

relate to brothels.[397] The PRA has empowered sex workers with the ability to refuse state intervention and strict regulation without facing any consequences.[398]

Further, according to a report by the Prostitution Law Review Committee published in 2008, the majority of sex workers in New Zealand indicated that they did not feel pressured to provide sexual services to anyone and could refuse clients whenever they wanted to do so.[399] Undoubtedly, the fact that sex workers can turn to police forces impacts on the number of clients who attempt coercion or force sex workers. In addition, although it made no significant changes to employment conditions, the RPA played a significant role in helping sex workers to not sell their services on streets or underground/black markets.[400]

It has also played a role in how sex workers view themselves, as they can execute their trade from their homes and in circumstances under their control as opposed to the degrading environments or places, which in turn has an impact on the agency and dignity of sex workers.[401]

As Marshal notes, the PRA was passed with the establishment of the New Zealand Prostitutes Collective, who actively sought parliament members who previously championed reform.[402] The collective is government-funded and works to promote the health, education and rights of sex workers.[403] Although there remain issues around the sex trade, the enactment of the PRA has been widely considered as a success:

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[397] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[398] As above.
[399] New Zealand, Ministry of Justice, Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008 (Available at: https://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf).
[400] As above.
[401] Hindle, Barnett & Casavant, Legal and Legislative affairs Division, Parliament of Canada, 20 November 2003. (Available at: https://web.archive.org/web/20180309133125/https://lop.parl.ca/content/lop/ResearchPublicationprb0329-e.htm#notes).
[402] Marshall "Sex workers and human rights: a critical analysis of laws regarding sex work" (2016) *Wm. & Mary J. Women & L* 23 47.
[403] As above.

> "[R]elationships with police [...] has led to greater health and well- being of sex workers. The stigma traditionally associated with sex workers is also beginning to fade. In fact, one sex worker was able to successfully sue her employer for sexual harassment. Such actions, advocates of decriminalization believe, will lead to an increase in safer environments for sex workers."[404]

3.7. Conclusion: A Critical Evaluation of the Regulatory Frameworks

As a way of concluding this chapter, the section below provides a critical overview of the regulatory models. The critical evaluation will include the impact of the different frameworks on the lives of sex workers as put forth by the Sisonke Sex Workers Movement (Sisonke) in their research on these models.[405] Such an evaluation also serves to contextualise these regulatory models within the South African landscape.

Many activists and organisations have demonstrated that there is little evidence to suggest that the criminalisation model has an impact on the demand and supply of sex work.[406] Rather, it has a notable impact on the behaviour of the police towards sex workers and on maintaining the stigma that sex workers face.[407] The criminalisation model has been in operation in South Africa for 67 years with clients criminalised in 2007. As confirmed by Sisonke:

> "In South Africa, studies have documented substantial levels of direct violence against sex workers from clients, non-paying partners and the police as well as structural violence against sex workers. The unequal power relations between sex workers and their sexual partners, heightened in a criminalised environment, limit sex workers' ability to insist on the use of condoms during sex, thus increasing their risk of contracting HIV and other STIs. Discrimination, prejudices and sexual moralism of some health care workers create barriers for sex workers to access the health services that they are entitled to [...] Criminalisation exposes sex workers, who

[404] Marshall "Sex workers and human rights: a critical analysis of laws regarding sex work" (2016) *Wm. & Mary J. Women & L* 23 47.
[405] Sisonke National Sex Workers Movement of South Africa. Sisonke is a non-profit organisation formed by sex workers and human rights activists. It was launched in Cape Town in 2003 and has since established offices in 6 other provinces. It has roughly 1500 members nationally (https://www.sisonke.org.za).
[406] Sisonke "An Easy Guide to Sex Work Law Reform: The difference between criminalisation, decriminalisation, legalisation and regulation of sex work" (Available at: https://static.pmg.org.za/docs/120919guide.pdf). See also African Sex Worker Alliance "*Every sex worker has got a story to tell about violence":* Violence against sex workers in Africa, Nairobi, 2019 (Available at: https://www.nswp.org/sites/default/files/aswa_report_final_low_res-2.pdf). Abel, Fitzgerald & Brunton "The impact of decriminalisation on the number of sex workers in New Zealand" (2009) *Journal of Social Policy* 38 515 -531; International Committee on the Rights of Sex Workers in Europe, *Declaration of the Rights of Sex Workers in Europe,* 2005 (Available at: http://www.sexworkeurope.org/en/ resources-mainmenu-189/declaration- mainmenu-199).
[407] New Zealand, Ministry of Justice, Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008. (Available at http://www.justice.govt.nz/policy/ commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf).

> are overwhelmingly women, to massive indignities through their interaction with police and other state agents, both in the work they do, and if they fall victim to crimes."[408]

The legalisation framework commonly involves inter alia the following: Registration of sex workers by the government; mandatory regular testing for HIV and STIs; bans on street work, or the establishment of areas where sex work is allowed; and restrictions on brothels.[409]

As mentioned above, this model also has had little effect on the supply and demand of sex work. Evidence from the Netherlands, for example, suggests that only 4% of sex workers are registered and, as such, legal.[410] This puts unregistered sex workers in the same position as those who work under the criminalisation framework. When considering this model in the South African context, Sisonke has noted that it involves considerable regulatory expense on the part of the state and increases the work on an already strained police force.[411] What is more, it will be particularly difficult to implement in South Africa as more than 70% of sex workers are street-based. Under this model, sex workers are still targeted and treated differently than other working individuals.[412]

In terms of the neo-abolitionist framework, as mentioned, the criminalising of the client has numerous negative impacts on sex workers. One of the most notable consequences of this model is that by criminalising the buying of sex, buyers are encouraged to seek sex services in more clandestine markets, and this results in sex workers not being able to control or choose the circumstances under which sexual acts occur, leaving them vulnerable to violence.[413] This is also the case for the abolitionist model that criminalises third parties involved in the sex work industry – sex workers as they are forced to conduct their trade in secret, ultimately compromising their right to

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[408] Sisonke "An Easy Guide to Sex Work Law Reform: The difference between criminalisation, decriminalisation, legalisation and regulation of sex work" (Available at: https://static.pmg.org.za/docs/120919guide.pdf) 2.
[409] As above.
[410] As above.
[411] As above.
[412] As above.
[413] Mathienson "Prostitution Policy: Legalization, Decriminalization and the Nordic Model" (2015) *Seattle Journal for Social Justice* 14 367.

safety.[414] The neo-abolitionist and abolitionist frameworks maintain the stigma that sex workers face. These models also specifically advance the view that sex workers are helpless victims, thereby conflating agency and coercion. The criminalisation of the buying of sex is still a refusal in law to accept sex work as work. As Sisonke notes:

> "The legal presumption that all sex workers are exploited and subordinated by their clients leads to the presumption that sex workers are unable to consent to have sex in return for pay, but that they are always coerced. The concrete consequence of the law's normative influence is a chilling violation of sex workers' rights to be acknowledged in the most basic way as socially-relevant human beings, bearing the capacity to decide on their own physical integrity."[415]

Further, Watson has noted that it should be permissible for all human beings to engage in sexual activity on their terms.[416] Thus, engaging in sexual activity and receiving money or gifts in exchange is a matter of human freedom, autonomy and agency. She asserts that the intersection of these rights is not in violation of any other right.[417]

She further takes issue with the moral basis advanced to argue against the selling of sex.[418] Specifically, it is permissible for one to have sex with another to make a former lover envious/jealous; there are a variety of so-called immoral reasons for engaging in sexual activity, however, it should still be within a person's right to choose consensual sexual partners and relations, even if for conventionally *bad* reasons.[419]

Thus, the criminalisation and regulation of consenting adults' sex lives and, by implication, the consensual trade of sex between consenting adults, goes to the core of the rights to bodily autonomy and privacy.[420] In this regard, it can be argued that registration and licensing, as in the legalisation model as well as the criminalising of the buying of sex works against these rights as it is an attempt to control the private

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[414] Bhandari "Prostitution in Colonial India" (2010) *Mainstream*, 26, 19 June 2010 (Available at: https://www.mainstreamweekly.net/article2142.html).
[415] Sisonke "An Easy Guide to Sex Work Law Reform: The difference between criminalisation, decriminalisation, legalisation and regulation of sex work" (Available at: https://static.pmg.org.za/docs/120919guide.pdf) 16.
[416] Watson & Flanigan, *Debating Sex Work* (2020) 36-40.
[417] As above.
[418] As above.
[419] As above.
[420] This aspect will be further discussed in Chapter 5 of the dissertation.

sexual activities of consenting individuals. It entrenches control over the mobilities of sex work.[421]

Decriminalisation has been described as the only rights-based approach to sex work. A 5-year review process of the impact of decriminalisation in New Zealand has indicated that there was no marked evidence of an increase in sex work, human trafficking, or underage sex workers.[422] The report also indicated better relationships between sex workers and their clients and sex workers and the police.[423] The model also allows for clients and brothel owners to be prosecuted for abusive behaviour and crimes against sex workers. It should be noted that the decriminalisation model does not involve any regulation of sex work whatsoever. Rather the decriminalisation model aims to repeal laws that criminalise sex workers, clients and other parties involved in the sex work industry; prevent the use of by-laws that are utilised against sex workers; new laws to protect sex workers and clients (in terms of labour and health and safety); the maintenance of laws against public indecency; and the protection of the dignity of sex workers so that discrimination against them are made illegal.[424] Sisonke contends:

> "Decriminalisation of sex work would be right for South Africa because it is human rights-focussed, it is proven, it is built on a public health model (harm minimisation) and it moves the relationship between sex workers and the state from a conflict-based relationship with the police (as enforcers of criminalisation) to links through to a wide range of government agencies responsible for promoting welfare, guarding health and safety and protecting labour rights, all of which reinforce fundamental rights of citizenship. All this builds the dignity of sex workers, the great majority of whom are women."[425]

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[421] Maher et al. *Sex Work* (2012).
[422] New Zealand Ministry of Justice "Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act" (2003) (Available at http://www.justice.govt.nz/policy/ commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf).
The authors interviewed a number of sex workers on the Prostitution Review Act, and noted the following on page 77 of the Report: "The positive outcomes resulting from the PRA [Prostitution Reform Act] were seen as significant. Sex workers were no longer considered criminals, and they could earn a living as a sex worker without fear of being prosecuted and having to live with the stigma associated with criminal convictions. They now had rights similar to those working in other occupations, and were able to take legal action against those who denied them these rights. They were better able to negotiate safer-sex practices and seek assistance from the Police over issues of safety. Providing assistance to sex workers was also seen to be easier – as sex workers were more accessible, and barriers to discussing illegal behaviour had been removed."
[423] As above.
[424] Sisonke "An Easy Guide to Sex Work Law Reform: The difference between criminalisation, decriminalisation, legalisation and regulation of sex work" (Available at: https://static.pmg.org.za/docs/120919guide.pdf) 7.
[425] As above.

Decriminalisation, due to its harm reduction approach, is the most desirable model of regulation when it comes to preserving and protecting the human rights of sex workers.[426] Conceptualising law reform for sex work requires the recognition that sex workers exist, that they are human, and deserving of human rights and lives free of violence.[427] The issue of the regulation of sex work and the debates around the different forms of regulation usually involve the morality of sex work and harm to the public good. Whatever the moral standpoint may be, and whatever the regulatory model, sex work will continue to exist. What becomes important is the law's impact directly and indirectly on the lives of sex workers. The focus should be the reduction of harm and human rights violations. Chapter 5 of the dissertation will provide a more comprehensive discussion of what a human-rights-based approach to sex work entails. The next chapter will discuss the feminist approaches and politics surrounding sex work.

[426] Jan Jordan, Ministry of Justice, The Sex Industry In New Zealand: A Literature Review, 21, March 2005 (Available at: https://www.nzpc.org.nz/pdfs/Jordan,-J-(2005),-Sex-Industry-in-New-Zealand-A-literature-review.pdf) 21.
[427] Abel et al. *Taking the Crime Out of Sex Work* (2010).

CHAPTER 4

Dominant Feminist Theoretical Perspectives on Sex Work

4.1. Introduction

Feminism encompasses heterogeneous schools and viewpoints across a range of disciplines including the humanities, law, education and economics.[428] The feminist approaches and perspectives discussed in this chapter are the dominant perspectives that have influenced and continue to influence the discourses on sex work reform in South Africa.[429] More specifically, the liberal and radical feminist perspectives are at the centre of global sex work policy reform and legislation.[430] These approaches are also central in influencing the continued prohibitionist/criminalisation framework as well as the arguments against it.[431] Put differently, and as Spies explains, the differences in policy approaches are inextricably linked to different feminist perspectives on the topic.[432] Feminist debate has, therefore, influenced political and legislative responses.[433] As mentioned, much of the debate has centred around the specific theoretical divide between liberal and radical feminist approaches. Spies describes this divide as follows:

> "Radical feminists view sex work as the ultimate form of male sexual oppression, with sex workers as victims of this oppression and domination. Radical feminists prefer the term prostitute/ prostitution as it stresses the exploitative nature of selling sex. In seeming opposition, liberal feminists argue that sex work is no different from any other form of work that women choose to do."[434]

Similarly, Krüger has noted that the challenge in reforming sex work legislation revolves around the tension between resisting the commodification of women's

[428] Menon "Is Feminism about 'Women'? A Critical View on Intersectionality from India" *Economic and Political Weekly* (2015) 50 37–44 (Available at: http://www.jstor.org/stable/24481823).
[429] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform". (2021) *Journal of African Law* 65 327–349.
[430] Tong *Feminist Thought: A more Comprehensive Introduction* (2009).
[431] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform". (2021) *Journal of African Law* 65 327–349.
[432] As above at 328.
[433] As above.
[434] As above.

sexuality (which means restricting the agency of women who insist that they voluntarily do sex work) *and* supporting women to freely choose the work they wish to do (which means enforcing male dominance).[435] This divide has also been described along the lines of the oppression paradigm v empowerment paradigm and the sexual domination discourse v the pro-rights/sex work approach.[436]

In addition, Black and African feminist approaches have been making considerable strides in the public discourse and the academia in South Africa.[437] In addition, these perspectives' influence on the policy positions of the South African government has grown considerably over the last decade or so.[438]

This chapter will discuss liberal, radical, black and African feminist perspectives on as well as intersectional approaches to sex work. The chapter serves to further the argument for a human-rights-based approach to sex work and aims to argue for an inclusive and intersectional understanding of sex work in South Africa. This chapter therefore speaks to the third and fourth research objectives set out in Chapter 1.[439]

4.2 Liberal Feminism on Sex Work

Liberal feminism focuses on the ideals of democracy, autonomy, equal citizenship and equal rights for women.[440] This type of feminism is premised on liberalism as such, the political and moral philosophy that originated during the Enlightenment (17th Century Europe) and is described as the dominant ideology of modern history, marked by the ideals of the rights of the individual, liberty, consent to be governed, equality before

[435] KrüGer "Sex Work from a Feminist Perspective: a Visit to the *Jordan Case*" (2002) *South African Journal on Human Rights* 20 140.
[436] Connelly "Debates on prostitution: an introduction to feminist politics and their influence upon international policy and practice" in Jacob (ed.) *Prostitution: A Companion of Mankind. Peter Lang* (2016) 61 – 76.
[437] Lewis, Desiree & Baderoon *Surfacing: On Being Black and Feminist in South Africa* (2021).
[438] Bensimon, Mara & Marshall "Like It or Not: Feminist Critical Policy Analysis Matters" (2003) *The Journal of Higher Education*, 74 337–49; Ahikire "African feminism in context" (2014) *Feminist Africa* 19 7-23.
[439] Namely, to make the case for a human rights-based and intersectional approach for the regulation of sex work, and to investigate the dominant feminist theoretical approaches to sex work in order to understand the discourses that determine various regulatory frameworks.
[440] Tong *Feminist Thought: A more Comprehensive Introduction* (2009).

the law, private property and political equality.[441] This political philosophy is closely related to the idea of the natural rights of people to liberty and their innate ability to reason and be rational.[442] Effectively, liberal feminism provides the basis for the arguments that women are not second-class citizens and must be afforded all the rights afforded to their male counterparts.[443]

Liberal feminists call for the independence and self-determination of women.[444] It places a specific emphasis on the equality of women in all spheres of society including education and political representation.[445] Liberal feminism contends that the persistence to view women as *less-than* individuals is largely influenced by customs and laws which prohibit women from accessing opportunities ordinarily available to their male counterparts.[446] These customs and laws are usually premised on the argument that women are biologically and inherently different to men.[447]

The most central contribution of liberal feminism has thus been in raising awareness of the unequal treatment that women are subjected to.[448] This feminist school of thought has resulted in many policy and legislative changes globally.[449] Liberal feminism arguably remains the most influential and widely accepted strand of feminism as it focuses on various social and political elements of women's liberation and cuts across racial barriers.[450] In this manner, this study understands liberal

[441] Courtland & Schmidtz "Liberalism" *Stanford Encyclopaedia of Philosophy* (2022) (Available at: https://plato.stanford.edu/entries/liberalism/)
[442] Tong *Feminist Thought: A more Comprehensive Introduction* (2009); Bailey "Feminism, Liberal" in Naples, (ed.) in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (2016) 669-671.
[443] Kabasakal "Feminisms, women's rights, and the UN: Would achieving gender equality empower women?" (2015) *American Political Science Review* 109 674-689; Buchi. *Second Class Citizen* (1979).
[444] Tong *Feminist Thought: A more Comprehensive Introduction* (2009).
[445] Khattak "Feminism in Education: Historical and Contemporary Issues of Gender Inequality in Higher Education." (2011) *Occasional Papers in Education & Lifelong Learning: An International Journal* 5 67-81.
[446] Enyew & Mihrete "Liberal feminism: Assessing its compatibility and applicability in Ethiopia context" (2018) *International Journal of Sociology and Anthropology* 10 59-64.
[447] Gregory "Are Women Different and Why Are Women Thought to Be Different? Theoretical and Methodological Perspectives" (1990) *Journal of Business Ethics* 2 57-66 (Available at: http://www.jstor.org/stable/25072034).
[448] Reskin & Roos *Job Queues, Gender Queues: Explaining Women's Inroads into Male Occupations* (1990).
[449] Bensimon & Marshall "Like It or Not: Feminist Critical Policy Analysis Matters" (2003) *The Journal of Higher Education* 74 337-49.
[450] Mitra & Mitra "The discourse of liberal feminism and Third World women's texts: Some issues of pedagogy" (1991) *College Literature* 18 55-63.

feminism as a strand of feminism which focuses on the general protection and advancement of the individual rights of women and a form of feminism that mainly advocates for the decriminalisation of sex work.[451]

When it comes to sex work, liberal feminists contend that sex work is not distinguishable from other forms of work that women choose to do and is, as such, a legitimate form of labour.[452] As Spies notes, this falls within the general liberal feminist acceptance "of the ideal of autonomous individuals who are free to make choices that benefit themselves".[453] Most liberal feminists argue for decriminalisation as this would decrease the police brutality that sex workers face, decrease their vulnerability and "place sex workers within the protective ambit of labour law regulation."[454] The liberal argument goes to the core of women having the right to sexual self-determination and the right to practice commercial sex work; the right to do what they wish to do with their bodies.[455] It should be noted that liberal feminists emphasise the distinction between forced sexual labour and voluntary sex work.[456] Further, as Connelly notes:

> "Liberal feminists have [...] sought to shift the dominant discourse away from a radical ideology towards the viewpoint that sex work is a legitimate form of employment. Indeed, sex work may represent a credible, flexible and viable labour option, particularly for migrant women seeking to escape poverty."[457]

For liberal feminists, the sex industry is not in itself problematic.[458] Rather, as Connelly further explains, it is the poor working conditions and societal stigma that facilitate exploitation.[459] As such, a regulatory framework needs to be adopted within which sex workers are seen as legitimate workers entitled to the rights that all workers have. Ultimately, the argument for decriminalisation is based on sex work as a manifestation

[451] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 327–349.
[452] As above at 330.
[453] As above at 330.
[454] As above at 330.
[455] Connelly "Debates on prostitution: an introduction to feminist politics and their influence upon international policy and practice" in Jacob (ed.) *Prostitution: A Companion of Mankind* (2016) 61-76 at 1.
[456] As above at 5.
[457] As above at 6.
[458] As above.
[459] As above.

of agency, economic liberty and expression.[460] Liberal feminism is based on freedom of choice to provide sexual services on the open market, which is based on the liberal feminist view that capitalist democracy enacts laws to protect individual rights and gender equality, including protecting sex workers within the sex work industry. Nussbaum, for example, has criticised the undermining of female autonomy in the criminalisation of sex work and has argued that the sex services market should be regarded as any other labour industry or market.[461]

The stigmatisation and devaluing of sex workers are seen by liberal feminists as an injustice and the aim is to address the shame that sex workers face and restore their dignity.[462]

4.3 Radical Feminism on Sex Work

Radical feminism originated in New York, USA during the 1960s and was founded by women who participated in anti-war and civil rights campaigns.[463] Graham describes radical feminism as the extreme evolution of liberal feminism, which is, as noted above, arguably the most influential strand of feminism.[464] Radical feminism's main objective is the combatting of male dominance in society through the opposition to patriarchy.[465] According to Jensen, radical feminism maintains a primary focus on the power that men have over and above women in society.[466] It is thus driven by the belief that women in society are oppressed and marginalised due to systemic patriarchy.[467]

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[460] Burkhart "The Implications of our Lives: Choice, Agency, and Intersectionality in Prostitution" (2020) *Philosophy* 18 35-40.
[461] Nussbaum "Whether from reason or prejudice": Taking money for bodily services" (1998) *The Journal of Legal Studies* 27 693-723.
[462] As above.
[463] Millet *Sexual Politics* (1970).
[464] Graham "Liberal vs Radical Feminism Revisited" (1994) *Journal of Applied Philosophy* 11 155-170.
[465] Hager "Sex in the Original Position: A Restatement of Liberal Feminism" (1999) *Wisconsin Women's Law Journal* 14 at 181.
[466] Haak "The End of Patriarchy: Radical Feminism for Men" (2020) *Canadian Woman Studies/les cahiers de la femme* 34 1-2.
[467] Rowland & Klein "Radical feminism: Critique and construct" (2013) *Feminist Knowledge (RLE Feminist Theory)* 271-303.

Radical feminism sees the gender divide as foundational.[468] As such, radical feminism sees male dominance as the primary driver of the oppression of women.[469] Women experience socioeconomic, cultural and political oppression, exclusion and exploitation because of patriarchy and male supremacy.[470]

According to radical feminists, patriarchy is psychologically entrenched and therefore manifests in all aspects of society.[471] For this reason, radical feminism tends to pay less attention to other forms of oppression – along the lines of race, class and sexual orientation for example.[472] This aspect represents the central difference between radical feminism and other feminist schools/strands in that it emphasises the impact of the power dynamics between the sexes in the social order and how it relates to culture, sexuality, the economy and law.[473] Vukoičić, for example, characterises radical feminism as a theory of conflict as it emphasises the negative implications caused by the inequality between the sexes.[474]

The most central elements of radical feminism are power, oppression and patriarchy.[475] Patriarchy as a self-sustaining system is said to maintain the systemic subjugation of women, power is the fundamental driving force behind patriarchy, and oppression is the ultimate result of the use of power through patriarchy.[476] Radical feminism also highlights the coercion and violence which men are systemically empowered to subject women to through, for example, sexual assault, sexual harassment, and the rape of women, children and vulnerable men in society.[477]

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[468] Vukoičić "Radical feminism as a discourse in the theory of conflict" (2013) *Sociološki diskurs* 3 33-49.
[469] Jóhannsdóttir, NK. Patriarchy and the subordination of women from a radical feminist point of view, 2009.
[470] Vukoičić "Radical feminism as a discourse in the theory of conflict" *Sociološki diskurs* (2013) 33-49 (Available at: https://skemman.is/bitstream/1946/3017/1/Nina_Katrin_Johannasdottir_fixed.pdf).
[471] Nachescu "Radical feminism and the nation: History and space in the political imagination of second-wave feminism" (2009) *Journal for the Study of Radicalism* 3 29-59.
[472] As above.
[473] Vukoičić "Radical feminism as a discourse in the theory of conflict" *Sociološki diskurs* (2013) 33-49 (Available at: https://skemman.is/bitstream/1946/3017/1/Nina_Katrin_Johannasdottir_fixed.pdf).
[474] As above.
[475] As above.
[476] As above.
[477] Jensen *End of Patriarchy* (2017) 27.

There is no standard definition for radical feminism.[478] There are a range of differences in environmental, cultural and other aspects which make up the lived experiences of radical feminists.[479] For the study, radical feminism is defined as a feminist theory which seeks to eradicate patriarchy, male supremacy and gendered oppression in all social, political and economic contexts through radical thought and action to improve the lived experiences of women.[480]

Spies notes that radical feminists criticise the liberal reliance on individualism and choice and that liberal feminists disregard "the context in which women are prostituted or 'choose' so-called prostitution as a profession."[481] They argue that there is little choice or agency involved when women face extreme poverty.[482] This "choice" is therefore not "a naturally occurring opportunity" but is rather socially constructed - women's ability to choose or consent is always constrained by social and cultural forces. Sex workers are seen as the ultimate victims of patriarchal oppression.[483] Radical feminism thus emphasises the exploitation involved in sex work and views it as an extreme form of violence against women.[484] Most radical feminists support the abolition of sex work through the criminalisation of the client in order to protect women from exploitation – "Selling sex is not seen as incidental, but endemic within a patriarchal culture that promotes women's sexuality as a commodity."[485] Ultimately, radical feminists align the sex industry with the collective struggle against patriarchy; they emphasise the structural and economic inequalities that leave women with no other option but to enter sex work.[486]

[478] Duriesmith & Meger "Case For Radical Feminism In Theories Of 'The International" (2020) (Available at: https://www.ppesydney.net/a-case-for-radical-feminism-in-theories-of-the-international/).
[479] As above.
[480] As above.
[481] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 330.
[482] As above.
[483] As above.
[484] As above.
[485] As above.
[486] As above.

As explained in Chapter 1, the SALRC released its final report on sex work in 2017.[487] Spies rightly argues that the final report was rooted in radical feminist arguments.[488] The report put forth two options for regulation: (1) partial criminalisation – similar to the Swedish framework where only certain aspects of sex work such as solicitation and/or the buying of sex is criminalised - and (2) continued decriminalisation with the possibility that sex workers are diverted from the criminal justice process when acting illegally.[489] The report focuses on the exploitative aspects of sex work and points to issues such as sex trafficking and child prostitution.[490] The radical feminist argument is captured in the following section of the report:

> "The Commission believes that in South Africa, prostitution in its many guises – albeit 'voluntary' – clearly exploits women and men who provide sexual services. Even ostensibly self-chosen or self-initiated involvement in prostitution is a symptom of the inequality and marginalisation that are a daily experience of many impoverished people, especially women. The exploitation of a person's lack of alternatives does not amount to a considered exercise of that person's own choice. Prostitution in South Africa can also be viewed as an aspect of male violence against women and children. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection. Changing the legislative framework could create an extremely dangerous cultural shift juxta-posed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. Furthermore, the Commission believes that legalising prostitution would increase the demand, locally and internationally, for more prostituted persons, and would foster a culture that normalises prostitution and sexual coercion. Overall, the Commission believes that due to the systemic inequality between men and women in South Africa, any form of legalisation will not magically address the power imbalance between the buyer and the prostitute, or the demand by buyers for unsafe or high-risk sex."[491]

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[487] South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002); South African Law Reform Commission Discussion Paper 0001 (Project 107) Sexual Offences: Adult Prostitution (2009). The reports followed the working method of the SALRC in first publishing an issue paper that outlines the problems encountered in a specific area of law; then inviting submissions on possible solutions. Thereafter, a discussion paper is drafted that includes responses to the issue paper and further research on the topic. A discussion paper usually concludes with a proposal for reform that can include a draft Bill on the topic. Responses to the discussion paper and additional research form the basis of the final report that is submitted to the Minister of Justice and Constitutional Development for his/her consideration and implementation. See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 342.

[488] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 342.

[489] As above at 339.

[490] Para 43 South African Law Reform Commission Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution (2002).

[491] As above.

For Spies, "[t]he SALRC final report is a clear indication that many in South Africa [...] are still being influenced by so-called 'rescue politics' that insinuate that all sex workers should be saved and that salvation is necessary [...]".[492]

Similarly, the Constitutional Court in the 2002 case of *S v Jordan* ruled against the decriminalisation of sex work.[493] The State's arguments were based on sex work as degrading to women and as commodification of their sexuality, lines of thinking grounded in radical feminism.[494] It was also argued that there are various "social ills" associated with sex work including violent physical abuse, encouragement of trafficking in women and children, the spread of sexually transmitted diseases, drug abuse and crimes such as bribery, corruption, drug trafficking, assault, public nuisance, and robbery.[495]

It therefore becomes clear that radical feminist arguments have heavily influenced legal discourse and decision-making on sex work in South Africa.

It is important to note that for radical feminists, sex work does not entail violence against sex workers only. Rather,

> "it is symptomatic of patriarchal oppression more broadly and demonstrative of violence against *all* women. The 'prostituted body' therefore becomes the site for the enactment of male domination and female subjugation; the 'prostitute' constructed as the paradigmatic image of women's economic, sexual and social repression in society as a whole."[496]

4.4 Critical Discussion

In the context of the radical and liberal feminist debate, scholars such as Spies, Mgbako and Krüger, have called for approaches to sex work that go beyond this dichotomy or

[492] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 345.
[493] *S v Jordan and Others* 2002 (6) SA 642 (CC).
[494] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 337-338.
[495] Trengove (SC) and Cockrell "Written submissions of the State" Case number: CCT 31/01 para 5.
[496] Connelly "Debates on prostitution: an introduction to feminist politics and their influence upon international policy and practice" in Jacob (ed.) *Prostitution: A Companion of Mankind* (2016) 61-76 at 3.

divide.[497] In addition, the traditional liberal and radical feminist perspectives have been heavily criticised by sex workers themselves who argue that these accounts and interpretations do not account for their experiences.[498] Moreover, it is argued that traditional feminist theory does little to protect the rights of actual sex workers.[499]

In general, radical feminists fail to acknowledge that not all consent is necessarily constrained but is "instead structural and changeable and that individuals' ability to participate in consent should be acknowledged."[500] On the other hand, individual choices are entangled in a complex system of political, social and economic forces that determine the choices that are available to individuals and liberal feminists fail to take patriarchal conceptions and male supremacy into account; the gendered context of poor and marginalised sex workers cannot be ignored.

In a study conducted by Mbatha and Terre Blanche that involved 5 sex workers from Johannesburg, the authors confirm the two dominant views on sex work, namely as free choice to earn income or as victims of circumstances that enter the sex work industry because of poverty or coercion.[501] The authors note that this is an oversimplification of the actual experiences of sex work.[502] Rather, sex workers oscillate between these two positions as they neither entirely see themselves as passive victims in need of rescue nor as completely liberated persons.[503] The authors rightly note that these choices accord with the ideological agendas of either a free-market orientation where people can make their own choices for themselves (liberal) or a conservative

[497] See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" *Journal of African Law* (2021) 65 337-338; KrüGer "Sex Work from a Feminist Perspective: A Visit to the *Jordan Case*" (2009) *South African Journal on Human Rights* 20 1.
[498] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 329.
[499] KrüGer "Sex Work from a Feminist Perspective: a Visit to the *Jordan Case*" (2009) *South African Journal on Human Rights* 20 140, 141.
[500] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 331.
[501] Mbatha & Terre Blanche "Elucidating the discursive landscape of sex work in Johannesburg, South Africa" (2021) *Psychology in Society* 62 61-86.
[502] As above, 61.
[503] As above, 77.

agenda in terms of which sex workers need assistance and/or rehabilitation (rescue politics/radical).[504]

Mbatha and Terre Blanche call for discursive strategies that transcend the "agency-victimhood" binary; discourses that do not "collapse the contradictions and complexities of sex work. In their findings, the authors conclude that "sex workers as a class cannot be neatly fitted into categories of being either exploited victims or entrepreneurs in a free market of sexual labour."

In this regard, Krüger notes that there is a difference between academic and feminist writing and the reality of sex workers' lives.[505] As she also rightly notes, this does not mean that feminist theories and approaches do not matter, but rather that re-evaluation of such theories is needed.[506] According to Krüger, radical feminists ("constrain feminists") overgeneralise and proclaim the 'truth' of the power imbalances between men and women whilst liberal feminists ("choice feminists") ignore the potential constraints imposed by sexual violence and power imbalances.[507] Krüger calls for a more inclusive approach that acknowledges the differences between sex workers and includes the voices of sex workers themselves.[508] As she contends, in the South African context, there are sex workers from all walks of life, from different social and cultural backgrounds, that enter the sex industry for different reasons, and from different ethnic backgrounds.[509]

Spies, similarly, calls for a "politics of inclusions" -

> "that acknowledges the complexity of selling sex. This would require an understanding of the economic need, lack of viable options, poverty and conflict that create motivating agents for selling sex. Such a politics of inclusion would be grounded in recognising multiple standpoints, experiences and realities of everyone (women, men and young people) involved in selling sex,

[504] As above, 76.
[505] KrüGer "Sex Work from a Feminist Perspective: a Visit to the *Jordan Case*" (2009) *South African Journal on Human Rights* 20 140.
[506] As above, 140.
[507] As above, 141.
[508] As above.
[509] As above, 142.

> locating these experiences within a framework of rights' recognition, respect and redistribution."[510]

It therefore becomes clear that the liberal and radical feminist dichotomy does not properly speak to the complexities, histories, contexts and standpoints of sex workers. In many ways, this theoretical tension has resulted in alternative accounts and discourses being pushed to the side. As such, it becomes important to consider approaches that more pertinently speak to the contexts and experiences of sex workers.

4.5 Black Feminism, African Feminism and Intersectionality: An overview

4.5.1 Black Feminist Thought

In the context of the US, black feminism represents a multidimensional feminist school of thought.[511] Black feminist thought is grounded in the lived experiences of black women whose gender oppression does not occur in silos but is largely linked to their racial identity.[512]

Frankenburg notes that white feminists have often been guilty of perpetuating stereotypes about black women within their feminist movements.[513] Black feminist thought then found expression within this context and has pointed to the fact of white women's direct involvement in the systemic marginalisation and oppression of black people.[514] Black feminism is generally associated with the eradication of racial and capitalist patriarchy.[515] To be sure, there are a range of movements that are related to

[510] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 345.
[511] Taylor "The historical evolution of black feminist theory and praxis" (1998) *Journal of Black Studies* 29 234-253.
[512] See Taylor "The historical evolution of black feminist theory and praxis" (1998) *Journal of Black Studies* 29 234–253; Brewer "Black Feminism and Womanism" in Naples (ed.) *Companion to Feminist Studies* (2021) 91-104.
[513] Frankenburg *White Women, Race Matters: The Social Construction of Whiteness* (1999).
[514] See Carby "White woman listen! Black feminism and the boundaries of sisterhood" in The Centre for Contemporary Cultural Studies (ed.) *The Empire Strikes Back: Race and Racism in 70s Britain, 1982* (2020) 212–235; *Hooks Feminist Theory: From Margin to Center* (1984); Davis *Women, Race, and Class* (1981); Dill "The dialectics of black womanhood" (1979) *Signs* 4 543–555; Reddock "Diversity, difference and Caribbean feminism: the challenge of anti-racism" (2007) *Caribbean Review of Gender Studies I* 1–24.
[515] Hooks *Feminist Theory: From Margin to Center* (1984).

black feminist thought including black radical, black queer, black Trans and black liberal feminisms.[516] Black liberal feminism for example seeks reforms of the oppressive systems that black women face through liberal methods whilst black radical feminists seek the total dismantling of the systems that facilitate gender, racial and class oppression.[517] Black radical feminism also articulates an anti-capitalist approach, which they argue keep black women in bondage.[518]

Black queer feminism has gained significant ground in contemporary feminist thought as many black women are now in environments which better enable them to exercise their queer expression.[519] Effectively, black queer feminism can be understood as a category of black feminism which seeks to centre the sexual orientation-based oppressions faced by black queer women.[520] Effectively this approach asserts that black queer women are oppressed and marginalised not solely based on their gender, race and social class, but also based their sexual orientation and expression.[521]

Black feminism with its multiple intersecting movements can be viewed as an intersectional type of feminism.[522] According to Smith, the concept at the centre of this type of feminism is simultaneity.[523] Simply defined, this is the concept of many things at once – a multitude of oppressions faced by differing identities.[524] Black feminist thought thus emphasises the necessity of multiple identities being accommodated and multiple oppressions being integrated and fought on different

[516] Various scholars have outlined different types of black feminism. For more in-depth understanding, see Carruthers *Unapologetic: A Black, Queer and Feminist Mandate for Radical Movements* (2018); Smith "Black feminism and intersectionality" (2013) *International Socialist Review* 9 6; Davis *Beyond Trans: Does Gender Matter?* (2017); Nash *Black Feminism Reimagined After Intersectionality* (2019).
[517] Brewer "Black Feminism and Womanism" in Naples (ed.) *Companion to Feminist Studies* (2021) 91-104.
[518] Carruthers *Unapologetic: A Black, Queer and Feminist Mandate for Radical Movements* (2018).
[519] Garrett-Walker, Broussard, Whitneé & Garrett-Walke "Re-imagining masculinities: How Black queer feminism can liberate Black people from the toxicity of patriarchal masculinity" (2019) *Journal of Black Sexuality and Relationships* 5 69-98.
[520] Ransby *Making All Black Lives Matter: Reimagining Freedom in the 21st Century* (2019).
[521] Garrett-Walker, Broussard, Whitneé & Garrett-Walke "Re-imagining masculinities: How Black queer feminism can liberate Black people from the toxicity of patriarchal masculinity" (2019) *Journal of Black Sexuality and Relationships* 5 69-98.
[522] Xaba "Challenging Fanon: A Black radical feminist perspective on violence and the Fees Must Fall movement" (2017) *Agenda* 31 96-104.
[523] Smith *Home Girls: A Black Feminist Anthology* (1983).
[524] As above.

fronts.[525] Although there is no single definition that can be attributed to black feminism, it can be described as a feminism which seeks to alleviate the multiple oppressions on the shoulders of black women through theoretically and practically integrating them and combatting them simultaneously.

4.5.2 African Feminist Perspectives

Western feminism, whether liberal or radical, has been incomplete in addressing the specific contexts of African women. African feminism is the school of thought that is geared towards theoretically and practically filling this vacuum.[526] Within the context of the developmental history of African nations, African feminism has pointed to the role women have played in liberation movements across the continent in the attainment of independence from colonial rule.[527] African feminism emerges against the background of colonialism and its concomitant violence, racist subjugation, and erasure of African knowledge systems and ways of life.[528] African feminism therefore centres on specific historical, social and economic contexts of African countries.[529] African feminism engages the injustices faced by African women in particular as part and parcel of the perpetuation of the colonial legacy.[530] To be sure, African feminist approaches are not homogenous but rather particular to specific countries, regions and cultural, social and ethnic societies.[531]

There are therefore different and diverse strands of feminism that exist under the umbrella of African feminism.[532] In general, however, African feminism as a strand of feminist thought prioritises the upliftment of African women through engaging in

[525] Nash *Black Feminism Reimagined After Intersectionality* (2019).
[526] Atanga "African Feminism? in Atanga, Sibonile, Litosseliti & Sunderland (eds.) *Gender and Language in Sub-Saharan Africa: Tradition, struggle and change* (2013) 301–314.
[527] Stuhlhofer "Navigating African Feminisms: Wangari Maathai as a Portrait" Draft paper for the Africa Knows! Conference; panel G42 (2022) (Available at: https://nomadit.co.uk/conference/africaknows/paper/58023).
[528] As above.
[529] Maathai *The Challenge For Africa* (2009).
[530] Atanga "African Feminism? in Atanga, Sibonile, Litosseliti & Sunderland (eds.) *Gender and Language in Sub-Saharan Africa: Tradition, struggle and change* (2013) 301–314.
[531] As above.
[532] As above.

colonisation, gendered oppression and the historical and environmental conditions that play a role in the racist subjugation of African peoples.

4.5.3 Intersectionality

Intersectional thinking, as first pioneered by Kimberlé Crenshaw, contends that the exploitation of women is indeed a reality, but is not divorced from their exploitation as poor people, and as black people.[533] Intersectionality rejects a myopic lens focusing solely on gender manifestations of oppression, but also brings economic and racial understandings to bear on the experience of black women.[534] It calls for the acknowledgement of the intersection of a range of interlocking systems of oppression and how they construct the lives of women.[535] Crenshaw indicates that intersectionality is a byproduct of decades of activism from women across the world.[536] She notes the important role played by identity politics-related activism, citing it as a source of intellectual development, strength and community for those involved.[537]

The approach of intersectionality has had a significant impact on contemporary global politics, with intersectionality continuing to provide a framework for understanding identity politics.[538]

It has garnered major support over the decades, with many scholars and activists relying on it to advance understanding of how oppression functions and manifests.[539] In addition to this, intersectionality has continued to influence the discourses of different international institutions and international political discourse.[540] It is viewed today as arguably one of the most important contributions made by women's studies

[533] Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) *Stanford Law Review* 43 1241-1299.
[534] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 467.
[535] Carastathis "The Concept of Intersectionality in Feminist Theory" (2014) *Philosophy Compass* 9 304–314.
[536] Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) *Stanford Law Review* 43 1241-1299.
[537] As above.
[538] As above.
[539] Ferree "Intersectionality as Theory and Practice" (2018) *Contemporary Sociology* 47 127-132.
[540] Carastathis "The Concept of Intersectionality in Feminist Theory" (2014) *Philosophy Compass* 9 304–314.

to the world of scholarship.[541] In this regard, Carastathis describes how institutions such as the United Nations' Beijing Platform for Action (2000), the Commission on Human Rights (2002), and the Committee on the Elimination of Racial Discrimination (2000) have adopted intersectional postures.[542] Intersectionality thus remains one of the important concepts used to study the nature of oppression and guide anti-oppression movements.[543]

Intersectionality draws attention to the shortcomings of concepts that take a myopic and separationist approach to studying systems of oppression.[544] Crenshaw used this concept to demonstrate that systems of oppression, when isolating one and/or disregarding how it is influenced by others, result in the many aspects of lived experience falling through the cracks.[545] As a concept, it is arguably the culmination of decades of black feminist thought which emphasised the interrelated and intertwined nature of oppression on identity (race, class, gender, sexuality et al).[546] Oppression is not a binary or singular process, but one which has a multitude of intertwined systems.[547] It is a framework which provides strategies to analyse the interdependencies and interconnections between social groups and systems – particularly those relating to oppression.[548] In this manner, intersectionality is understood by scholars as a metaphor, a concept, a paradigm of research, a knowledge project, an ideograph and a paradigm of analysis.[549]

[541] McCall "The Complexity of Intersectionality" (2005) *Signs* 30 1771–1800.
[542] Carastathis "The Concept of Intersectionality in Feminist Theory" (2014) *Philosophy Compass* 9 304–314.
[543] Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) *Stanford Law Review* 43 1241-1299.
[544] As above.
[545] As above.
[546] Carastathis "The Concept of Intersectionality in Feminist Theory" (2014) *Philosophy Compass* 9 304–314.
[547] As above.
[548] Atewologun "Intersectionality Theory and Practice" in Aldag (ed.) *Oxford Research Encyclopedia in Business and Management* (2020).
[549] Rodriguez, Holvino, Fletcher & Nkomo "The theory and praxis of intersectionality in work and organisations: Where do we go from here?" (2016) *Gender, Work & Organization* 23 201–222.

As a framework, it is utilised to demonstrate how patriarchy, racism, homophobia, economic disadvantage and other discriminatory practices that result in marginalisation work to subjugate.[550]

Hill-Collins highlights the notion of community and spacialisation, which is then characterized as *social intersectionality* for this study; that refers to the socialisation of communities and social constructs and perceptions of identities.[551] Hill-Collins asserts that the mention of the term 'intersectionality' isn't necessarily what makes a discussion intersectional. She states that what affirms an intersectional perspective is the adoption of the term to a discussion of different tenets and their relation to power.[552] Ultimately, intersectional thinking provides the opportunity to approach phenomena within complex economic, social, cultural and political frameworks with reference to persons' positionality and particular histories.

4.5 Conclusion: Mapping Human Rights onto Black, African and Intersectional Approaches

Spies notes how African feminists have called for a more inclusive approach to sex work by paying heed to the various contexts in which sex work is sold, specifically as it relates to the circumstances of poor and marginalised sex workers.[553] Mgbako argues that the rescue politics furthered in South African legal discourse is the actual source of sex workers' abuse and vulnerability.[554] Mgbako rightly points to the fact that criminalisation pushes sex work underground and means that sex workers have no access to healthcare, labour rights and other social and economic safety nets.[555] Criminalisation sees the police acting with impunity by taking advantage of sex

[550] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 467.
[551] Hill Collins *Intersectionality as Critical Social Theory* (2019) 158.
[552] As above.
[553] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 330.
[554] Mgbako and Smith "Sex work and human rights in Africa" (2009) *Fordham Int'l LJ* 33 105.
[555] Mgbako *To live freely in this world: Sex worker activism in Africa* (2016) 58.

workers and sex workers have no access to justice when exploited by their clients.[556] In the context of radical feminist arguments, Mgbako notes:

> "If we say that sex workers are incapable of consenting to the provision of sexual services for pay, and it is all tantamount to paid rape, then a sex worker who is actually raped by a client is invisible. If we insist that a sex worker is "selling her body", when in fact she still retains her body after the exchange and instead is providing a service, then we remove her from the world of labour – with all its potential protections – and banish her to the realm of sexual moralism."[557]

As mentioned above, Spies has called for a politics of inclusion that would recognise the multiple experiences, realities and standpoints of people selling sex.[558] This coheres with an intersectional lens. Further, as contended by Spies and Krüger, African feminisms in general draw attention to intersectionality approaches when understanding sex work, which refers to multiple oppressions including race, gender, and poverty and the contexts within which they occur.[559] Moreover, an intersectional approach can draw attention to marginalised sex workers such as LGBTQI+ individuals in the sex trade. The majority of sex workers in South Africa are black women.[560] However, the particular histories and struggles of LGBTQI+ individuals can provide valuable insight when it comes to sex work in general. More importantly, any approach to sex work should not further marginalise individuals who operate outside of the "normal" framework of sexual labour, sexuality and sexual expression. Mckay, for example, has noted that sex work should be viewed as 'queered' because it directly challenges heteronormativity.[561] Sex work in general is considered deviant or "immoral" and as noted by Valadier, "[f]rom this perspective, one can say that the sexual practices of sex workers are 'queer' insofar as they manifest a non-conformist form of freedom or a disruptive position against the socio-political order of a

[556] As above.
[557] As above.
[558] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 349.
[559] As above. See also KrüGer "Sex Work from a Feminist Perspective: A Visit to the *Jordan Case*" (2009) *South African Journal on Human Rights*, 20 138-150.
[560] South African Health Monitoring Survey (SAHMS): An Integrated Biological and Behavioural Survey among Female Sex Workers, South Africa 2013 – 2014 Final Report (Available at: https://www.anovahealth.co.za/wp-content/uploads/2016/03/SAHMS-Report.pdf)
[561] McKay "Is Sex Work Queer?" (1999) *Social Alternatives* 18 48.

heteronormative patriarchy."[562] Similarly, Yingwana has noted in this regard that we should go beyond the heterosexual v LGBTQI+ binary when it comes to sex work as the queering of sex work can enable us to "unpack how particular embodiments, expressions, and practices of gendered sexualities influence national politics of belonging, recognition/denial of certain human rights, and allocation of developmental resources."[563]

Indeed, such an approach can also assist in opening up a discursive space that goes beyond the traditional radical and liberal feminist views on sex work. Although I do not expand on such a project, I contend that an intersectional understanding of sex work can help foster space for those even further marginalised in recognising specific histories, circumstances, sexualities and bodies.

At this juncture, it is important to note that the support for decriminalisation and a human-rights based approach to sex work should not be conflated with a liberal feminist approach. Rather, the need for an African and Black intersectional understanding – as opposed to calling for equal treatment across racial, economic and other barriers – emphasises the need to realise the complexities of selling sex; that sex workers' voices should be central to conversations around sex work; and at that sex work should be understood considering the complexity of the needs of women and their locus of placement especially as it concerns race, gender and economic circumstance.[564] Burkhart notes that sex work must be viewed within the framework of intersectionality and the debate around criminalisation versus abolition must centre those most affected by its continuation – sex workers themselves.[565] Decriminalisation is an approach of harm-reduction and when sex work is viewed as legitimate work, sex

[562] Valadier "Migration and Sex Work through a Gender Perspective" (2018) *Contexto Internacional* 40 514.
[563] Yingwana "Queering sex work and mobility" (2022) *Anti-trafficking review* 19 66-86.
[564] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 329.
[565] Burkhart "The Implications of our Lives: Choice, Agency, and Intersectionality in Prostitution" (2020) *Philosophy375* 18 35.

workers will have the same rights to dignity, healthcare, labour rights and access to justice.[566]

Furthermore, this approach does not deny that sex workers' choices are constrained by multiple factors such as dire poverty. It is instructive to note that even scholars such as Freeman, who support a radical feminist approach to eradicate sex work and "[destroy] the conditions of male consumption", argue that decriminalisation and human rights protection is the best short-term approach to decrease vulnerability and should be the first step policy reform.[567] Such an approach is thus not in denial of the fact that sex workers' lives and experiences are shaped by broader categories of power and privilege.[568] Essentially, such an approach also opts for a different starting point; in contrast with the SALRC Report: Sexual Offences on Adult Prostitution[569] that highlighted the exploitative nature of sex work and the need to protect sex workers from sex work through "stories of misery and destitution", the conversation around sex work should start with claims to dignity and equality, labour rights, and the "living stories" of sex workers.[570]

This chapter served to argue for conversations and discourse around sex work to move beyond the liberal/radical feminist divide; to approach sex work along the lines of African and black positionality; to view sex work through an intersectional lens; and to demonstrate that human rights protection and decriminalisation offers the possibility of strategically decreasing the violence, vulnerabilities and the subjugation that sex workers must live with daily.

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[566] Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform" (2021) *Journal of African Law* 65 329.
[567] Freeman "The feminist debate over prostitution reform: Prostitutes' rights groups, radical feminists and the (im)possibility of consent" (1989) *Berkeley Women's Law Journal* 75 76.
[568] Chapter 6 below will explore this in more detail.
[569] See section 2.3.2. South African Law Reform Commission Report 107: Sexual Offences Adult Prostitution, June 2015 (Published 2017).
[570] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (Accessed 20 November 2024)) at 29.

Chapter 5

Framing Exclusion, Discrimination and Violence in the Lives of South African Sex Workers

> "*In jurisdictions which criminalize sex workers, violations of their rights are numerous, and range from arbitrary arrests (for simply standing on the street or for having condoms), lack of respect for the rights of defense, police abuses (extortion of money or sexual services, discrimination, and degrading treatment), failure to protect sex workers from violence by private individuals and lack of access by sex workers to adequate healthcare.*"[571]

5.1 Introduction

This chapter aims to shed light on the lived realities of sex workers in South Africa by focusing on the various discriminations, violence and exclusion faced by them. It, therefore, seeks to contextualise some of the realities of sex workers. The first section highlights how moral debates around sex work impede alternative understandings and conversations around sex work, the second and third sections focus on police brutality against sex workers and discrimination in healthcare respectively. The fourth section sheds light on societal stigmas and the final section discusses the various rights violations experienced by sex workers. The final section also serves to call for a substantive equality approach to sex work. As such, this chapter speaks to the fifth research aim explained in Chapter 1, namely, to consider the concrete contexts of the human rights abuses of sex workers in South Africa and make the case for a substantive equality approach to sex work.

5.2 Redirecting Sex Work as Work

As mentioned, many countries that have opted to criminalise sex work, do so with the belief that criminalisation reduces demand for the trade.[572] However, not only is the demand not affected by criminalisation, but it has harmful effects when it isn't regulated in the interests of preserving the human rights of sex workers and their

[571] United Nations *A guide on the human rights of sex workers*, March 2024 (Available at: https://www.ohchr.org/sites/default/files/2024-03/2024-march-sex-work-guide-un-report-short.pdf).
[572] Matlala "Overview and Impact of Criminalisation of Sex Work in South Africa" (2021) *Sabinet Gender and Behaviour* 19 1.

safety.[573] Essentially when considering the purpose(s) of criminalisation, the regulation of sex work in this manner becomes a futile exercise that drains resources and fosters an environment that furthers the exploitability and vulnerability of sex workers.[574]

The criminalisation of sex work is underpinned by several normative assumptions including the assumption that sex work morally corrupts societies.[575] As mentioned, in Chapter 3, it should be permissible for all people to engage in sexual activity on their terms. Watson argues that this goes to the heart of human freedom, autonomy and agency.[576] The moral basis of arguments against the decriminalisation of sex work is especially problematic as it involves implications for women's agency over their bodies.[577] The current Sexual Offences Act, of 1957 essentially morally regulates sex workers' behaviour.[578] As Thusi notes, "the Sexual Offences Act appears to provide a moral authority for viewing sex workers as morally reprehensible."[579] The Act, like laws that criminalise sex work in other jurisdictions, is difficult to enforce and rarely, if ever, results in prosecution. Rather sex work is regulated through municipal by-laws and ordinances such as loitering and public disturbance and nuisance. This provides police officers with a high level of discretion when regulating/policing sex work. Importantly, as further noted by Thusi:

> "The Sexual Offences Act may nonetheless legitimize the regulation of sex workers by providing police officers with a moral bargaining chip for explaining why this population should be subjects to special surveillance. In this way, even where legislation is unable to directly achieve its aims by resulting in more of a particular type of prosecution, it is able to do so indirectly by providing moral currency through delegitimising the activities of a particular group. The mere

[573] Matlala "Overview and Impact of Criminalisation of Sex Work in South Africa" (2021) *Sabinet Gender and Behaviour* 19 1.
[574] Mgbako et al. "The Case for Decriminalization of Sex Work in South Africa" (2013) *Geo. J. Int'l L.* 44 1423.
[575] Peers Victoria Research Society "Stigma and Sex Work" 2014 (Available at: https://www.safersexwork.ca/wp-content/uploads/2014/06/PEERS-SexWorkStigma-25June2014.pdf).
[576] Watson & Flanigan *Debating Sex Work* (2020) 36-40.
[577] As above.
[578] The selling of sex is criminalised under the Sexual Offences Act 23 of 1957 and the buying of sex is criminalised in The Sexual Offences Amendment Act 32 of 2007 after the judgment in *S v Jordan* 2006 (6) SA 426 (CC).
[579] Thusi "Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa" (2015) 38 210.

> existence of the legislation may influence how sex workers are policed through other regulations."[580]

Further, the focus on the South African population's interpersonal and private lives is one of the legacies of apartheid that saw strict regulation of sexuality, reproductive rights and interracial relationships along the lines of Christian conservatism and white supremacy.[581] What is more, as will be explained in Chapter 6, the decriminalisation of sex work and its method of regulation should be understood as part and parcel of the decolonial project. In this regard, Aderinto has noted with regards to colonialism and prostitution, that the appearance of women soliciting in later urban centres in South Africa was seen as an impediment to civilization, which "colonialism professed" and regulation fed into the broader issue of the maintenance of [colonial] law and order [...]"[582]

Moral debates further hinder any conversation around sex work through a labour framework that can focus on improving the working conditions within the sex work industry.[583] Sex workers should have recourse to the same rights as other workers including occupational health, labour organisation, and safe conditions at work. In New Zealand, which has decriminalized sex work, sex workers can take their managers to court if they refuse wages or financially exploit them and they also have protections from workplace harassment and discrimination.[584] In a well-known case from 2014, a sex worker was awarded damages by the New Zealand Human Rights Review Tribunal after she filed a complaint involving sexual harassment from her manager in a brothel.[585] The tribunal noted:

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[580] As above at 238.
[581] See Aderinto "Pleasure for Sale: Prostitution in Colonial Africa, 1880s-1960s" in Jacob (ed.) *Prostitution: A Companion to Mankind* (2016) 469.
[582] As above at 477.
[583] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (Accessed 20 November 2024) at 16.
[584] As above. New Zealand Occupational Safety and Health Service, 2004 "A Guide to Occupational Health and Safety in the New Zealand Sex Industry" (Available at: http://www.worksafe.govt.nz/worksafe/information-guidance/all-guidance-items/sex-industry-a-guide-to-occupational-health-and-safety-in-the-new-zealand).
See *DML v Montgomery and M&T Enterprises Ltd* 2014 NZHRRT 6.
[585] *DML v Montgomery and M&T Enterprises Ltd* 2014 NZHRRT 6.

> "Sex workers are as much entitled to protection from sexual harassment as those working in other occupations. The fact that a person is a sex worker is not a licence for sexual harassment, especially by the manager or employer at the brothel. Sex workers have the same human rights as other workers. The special vulnerability of sex workers to exploitation and abuse was specifically recognised by the Prostitution Reform Act 2003 which not only decriminalised prostitution but also had the purpose of creating a framework to safeguard the human rights of sex workers and to promote their welfare and occupational health and safety."[586]

It is important to note that the insistence on sex work as work does not imply in any way that sex workers experience their work as only positive. Along the lines of radical feminist arguments (as explained in Chapter 4), it is important to recognise the broader economic and social conditions that constrain the choices that many sex workers can make, including conditions of dire poverty. However, labour rights are important for all workers – workers in all spheres and industries have different attitudes towards their work and do such work not because of enjoyment necessarily but pragmatically to receive income.[587] As such, it is important not to view sex work as inherently exploitative as it distracts and hinders conversations around the actual conditions "within which people sell sex and how these conditions impact on their health, human rights and wellbeing."[588]

5.3 Police Brutality

> "*As a citizen, and in particular a woman, I trust the police to protect me from harm, but in the industry, they are the ones who turn on us. Yesterday, I had to bribe a police officer with two hundred.*"[589]

> "*The took turns raping her. She is of the opinion that those police officers who do not use 'protection' are already sick.*"[590]

> "*I mean that they let go of us and sometimes ask that we have sex with them.*"[591]

[586] As above
[587] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (Accessed 20 November 2024) at 17.
[588] As above.
[589] Mbatha & Terre Blanche "Elucidating the Discursive Landscape of Sex Work in Johannesburg, South Africa (2021) *Psychology in Society* 62 at 69.
[590] As above at 70.
[591] As above.

Studies indicate that the focus of the police in regulating sex work, in many instances, are limited to street-based sex workers.[592] Arrests and fines are the most common responses as police services use municipal by-laws against those who are 'found' to engage in "loitering, public disturbance and/or public indecency".[593] Arrest to prosecute rarely occurs as it is difficult to prove monetary transactions in exchange for sexual services.[594]

Sex workers who were part of interviews conducted by SWEAT alluded to the reality that the fines they received did not discourage them from continuing with the trade.[595] They stated that it was necessary to continue as they had to make more money from selling sex to afford the fines.[596] In addition, the majority of them stated that the police in most cases request bribes or sexual favours to allow them to continue with their trade and not pay hefty fines.[597] Further, when arrested by the police, sex workers indicated that they were not allowed to make phone calls to inform their families where they were or that they were arrested.[598] One sex worker affirmed that it was unusual for them to appear in court for bail hearings. She stated that being arrested on Friday and released on Monday was a frequent occurrence.[599] Arrested sex workers don't receive food for the duration of their arrest and don't receive an opportunity to bathe.[600]

Transgender sex workers who identify as women stated that their arrests resulted in them being placed in male cells with male prisoners.[601] The police will at times encourage the male inmates to sexually assault transgender sex workers.[602] In one instance, a transgender woman was so badly physically assaulted by the police that

[592] Fick "Policing and the Sex Industry: Sex Workers Speak Out" (2006) *SA Crime Quarterly* 15 13-18.
[593] As above.
[594] As above.
[595] As above.
[596] As above.
[597] As above.
[598] As above.
[599] As above.
[600] As above.
[601] As above.
[602] As above.

she suffered severe abdominal injuries.[603] Such occurrences are most probably to punish these sex workers for their sexuality and transgenderedness.

Sisipho, a 25-year-old Cape Town-based sex worker, alluded to the reality of violence at the hands of the police.[604] Sisipho stated that she had accepted that most of the time, she will have to bribe a policeman or be raped by the police.[605] Members of SAPS frequently engage in brutality and violence against sex workers by the police is normalised and accepted.[606] This type of violence against women and transgender sex workers qualifies as gender-based violence as women and LGTBQI+ individuals are disproportionally affected.[607] Furthermore, in instances of assault and violence against sex workers, members of SAPS use their authoritative position to avoid criminal action being taken against them.[608] Sex workers are already criminally profiled, preventing sex workers from accessing justice.[609] Police are, of course, aware of the criminal status of sex workers and thus exploit their vulnerability. It should be noted that the abuse against sex workers at the hands of the police is multifaceted and nuanced as it ranges from the violation of procedures and standing orders and being denied access to justice to physical and psychological abuse.

In a particularly gruesome case, a sex worker based in the Western Cape who reported that she was raped by a client, was subsequently raped by the policemen that were supposed to assist her in opening a case of rape.[610] This incident is evidence of the discrimination and lack of access to justice that sex workers experience. Police have the liberty to thwart legal processes and further violate sex workers with no concrete

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[603] As above.
[604] Fokazi "Police, Clients and Partners Responsible for Most Rapes of Sex Workers – Study" Sowetan. 10 September 2021 (Available at: https://www.sowetanlive.co.za/news/south-africa/2021-09-10-police-clients-and-partners-responsible-for-most-rapes-of-sex-workers-study/).
[605] As above.
[606] Mwanajiti & Boko (eds) Report on *Police Brutality in Southern Africa – A Human Rights Perspective* (2002).
[607] As above.
[608] As above.
[609] Fick "Policing and the Sex Industry: Sex Workers Speak Out" (2006) *SA Crime Quarterly* 15 13-18.
[610] Rangasami, Konstant & Manoek "Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015" Women's Legal Centre, 2016 (Available at: https://wlce.co.za/police-abuse-of-sex-workers/).

consequences for their criminal actions.[611] In the above instance, the sex worker was raped by a client, suffered an economic loss, was raped by the police and denied access to justice for both cases of sexual violence perpetrated against her.

The police also play a role in inhibiting sex workers from practicing healthy sex. Sex workers who reported to the Women's Legal Center stated that the police confiscate their condoms and thus prevent their ability and agency to practice safe sex and condom negotiation with their clients.[612] Furthermore, sex workers report that the police justify arrests because they carry condoms.[613] Police frequently harass sex workers who carry condoms and demand bribes to cease harassment.[614] In a study conducted on Southern Africa, 80% of South African sex workers who were surveyed stated that they had experienced harassment and intimidation by the police because they were carrying condoms.[615] Despite this harassment by the police, 85% of the sex workers who were surveyed said that they do carry condoms.[616] This is evidence of their commitment to healthy and safe practices, which are sadly threatened by the police.

A national study conducted in 2021 concluded that, in the year 2020, 71% of female sex workers stated that they had been exposed to physical violence and 58% indicated that they had been raped.[617] One in seven of these women reported rape at the hands of a policeman.[618] The study demonstrated that sex workers are extremely vulnerable to rape by clients, intimate partners, the police and men in the community. The study concluded that decriminalisation is "foundational for measures to substantially

[611] Mwanajiti & Boko (eds) Report on *Police Brutality in Southern Africa – A Human Rights Perspective* (2002).
[612] Rangasami, Konstant & Manoek "Police Abuse of Sex Workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015" Women's Legal Centre, 2016 (Available at: https://wlce.co.za/police-abuse-of-sex-workers/).
[613] As above.
[614] Open Society Foundation "How Policing Practices Put Sex Workers and HIV Services at Risk In Kenya, Namibia, Russia, South Africa, The United States, And Zimbabwe" Sexual Health and Rights Project of the Open Society Foundations, 17 July 2012 (Available at: https://www.opensocietyfoundations.org/uploads/77d576b0-41b0-45d8-ba72-afae15438e50/criminalizing-condoms-20120717.pdf).
[615] Jewkes, Otwombe, Dunkle et al "Sexual IPV and non-partner rape of female sex workers: Findings of a cross-sectional community-centric national study in South Africa" (2021) *SSM – Mental Health* 1 1-9 at 4.
[616] As above.
[617] As above.
[618] As above.

advance the safety."[619] Other research has shown that 45% of the 101 sex workers who died between 2018 and 2019 were murdered.[620] Importantly, it was further noted that the prevalence of police violence against sex workers demonstrates that rather than being the result of some "bad actors", police violence against sex workers is systemic in nature.[621]

5.4 Discrimination in Public Healthcare

Sex workers do not only experience abuse from clients and the police but also from healthcare workers. SWEAT affirms that access to healthcare remains a struggle for sex workers in South Africa.[622] At the heart of the matter, is the deeply imbedded societal stigma against sex workers.[623] The deep-seated idea that sex workers are criminals leads to a failure in medical intervention for primary healthcare services, prevention services and specific medical intervention for issues they may have.[624]

Ntombi, a sex worker in Ekurhuleni, recorded her experience of being refused medical healthcare at a local clinic in KwaThema.[625] Ntombi, following a rape by a client during the lockdown in 2020, fell pregnant. She sought out a termination of the pregnancy at the local clinic and was recognised by one of the nurses who knew she was a sex worker in the Springs area.[626] The relevant nurse told other nurses, who then started mocking Ntombi about being a sex worker and subsequently refused her medical care at the

[619] As above at 7.
[620] Decker, Crago, Chu & Sherman "Human rights violations against sex workers: burden and effect on HIV" (2015) *The Lancet* 385 186-199.
[621] As above.
[622] Lakhani "You Can't Break a SWEAT – Creatively Fighting for the Rights of Sex Workers in South Africa" (2022) *Global Public Health* 17 2342-2352.
[623] Wimberly "Cape Town Gets Clinic for Sex Workers: Facility Aims to Provide Healthcare to People Who are Often Stigmatised in the State System" GroundUp, 12 June 2017 (Available at: https://groundup.org.za/article/cape-town-gets-clinic-sex-workers/).
[624] As above.
[625] Mutandiro "'I'm broken inside' says Springs sex worker after botched illegal abortion" GroundUp, Gauteng, 27 May 2022 (Available at: https://groundup.org.za/article/im-lucky-to-be-alive-my-baby-too-says-springs-sex-worker-after-botched-illegal-abortion/).
[626] As above.

clinic.[627] Ntombi then left the clinic without acquiring the help or the information she had sought out initially.[628]

Ntombi's interaction with the staff at the local clinic is but one example of the discrimination against sex workers in the infringement of their sexual reproductive health rights and right to access healthcare. The nurses specifically targeted and humiliated her because she was a sex worker, and she was refused healthcare for that very reason.

It is also important to note that during Apartheid access to healthcare for the majority of black people was minimal and poverty-related diseases (diseases because of poor sanitation or living conditions, infectious diseases) were pervasive in black communities.[629] Black people faced much higher maternal, child and infant mortality rates because of poor access and quality healthcare.[630] The legacy of severe healthcare disparities because of systemic racism continues and is exacerbated by a two-tier healthcare system - private and public healthcare.[631] After 1994, the burden of disease quadrupled due to an increase in diseases of poverty, non-communicable diseases, HIV/AIDs, tuberculosis and increased violence and injury.[632] While the country has made significant progress, high tuberculosis and HIV prevalence remain major issues.[633] The poor majority of people are subjected to a strained public healthcare system stemming from economic inequality.[634] A study done in the Limpopo province,

[627] As above.
[628] As above.
[629] M Cullen (2020) "Health Disparities during Apartheid in South Africa", The Borgen Project (Available at: https://borgenproject.org/health-disparities-during-apartheid/).
[630] As above.
[631] Bhengu & Maphumulo "Challenges of Quality Improvement in the Healthcare of South Africa Post-Apartheid: A Critical Review" (2019) *Curationis* 42 1–9.
[632] M Cullen (2020) "Health Disparities during Apartheid in South Africa", The Borgen Project (Available at: https://borgenproject.org/health-disparities-during-apartheid/).
[633] As above.
[634] Bhengu & Maphumulo "Challenges of Quality Improvement in the Healthcare of South Africa Post-Apartheid: A Critical Review" (2019) *Curationis* 42 1–9.

which consisted of 94 sex workers spoke to most of the difficulties as it relates to healthcare in general.[635]

Sex workers' health needs aren't limited to sexual reproductive health, although this is part and parcel of their healthcare needs.[636] As mostly poor black women, they face the same challenges that many face when it comes to access to healthcare in South Africa.

As noted by Mbatha and Terre Blanche, a discourse emerges from popular and academic writing on sex work, namely, the image of sex workers as vectors of disease, specifically of HIV.[637] This conception deepens and intersects with the societal stigma faced by sex workers, and the authors further note that although the participants in their study did not personally accept this construction, they were painfully aware of it.[638]

Decker *et al*, in analysing evidence from more than 800 studies and reports on the burden of HIV implications and human rights violations against sex workers, note that such violations directly and indirectly increase HIV susceptibility and undermine intervention and prevention efforts.[639] They specifically note violations that include "homicide; physical and sexual violence from law enforcement, clients, and intimate partners; unlawful arrest and detention; discrimination in accessing health services; and forced HIV testing".[640] The authors relate these violations to punitive criminal law and demonstrate that research findings confirm the value of rights-based approaches to

[635] Afzal et al. "Reproductive Healthcare Needs of Sex Workers in Rural South Africa: A Community Assessment" (2020) *Annals of global health* 86 68.
[636] As above.
[637] Mbatha & Terre Blanche "Elucidating the Discursive Landscape of Sex Work in Johannesburg, South Africa (2021) *Psychology in Society* 62 at 73: "This discursive object has a long history and can be traced back to the Vagrancy and Contagious Diseases Acts that were promulgated in the United Kingdom starting in the early 1800s and to innumerable public health policies that have been implemented internationally since."
[638] As above.
[639] Decker, Crago, Chu & Sherman "Human rights violations against sex workers: burden and effect on HIV" (2015) *The Lancet* 385 186.
[640] As above.

HIV for sex workers and the state's obligation to protect the rights of sex workers as a marginalised population.[641]

As mentioned above, if condoms are found on sex workers, the police confiscate them, or they are denied health care from healthcare workers.[642] Most sex workers reported feeling that they could not get adequate or quality health care because of their involvement in sex work.[643] Matlala and Odeku explain that the sexual relations between sex workers and their clients or partners account for around 20% of new HIV infections. Many factors influence this including unsafe working conditions and clients' insistence on having sex without the use of a condom.[644] Similarly, they argue that decriminalisation would lead to better access to healthcare for sex workers.[645]

5.5 Societal Stigmas

The stigmatisation of sex workers is regularly based on stereotypes about women's role in the community in in the family.[646] In this regard, 'deviant' sexuality that goes against legal, social and cultural standards of normal/'modest' sexuality is a powerful "site of stigma and prejudice flowing from gender stereotypes".[647] The criminalisation of sex work entrenches and justifies the social exclusion of sex workers. Gender stereotypes can justify violence against women who defy the norms of "chastity" by selling sex and controlling their sexuality.[648] As the majority of sex workers in South Africa are women, the language of gender-based violence should be utilised in conversations about sex work. As mentioned, in Chapter 1, South Africa is a signatory to CEDAW and General Regulation 35 provides:

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[641] As above.
[642] Matlala & Odeku "Sex Work in South Africa: History, Forms of Se Works and Abused being Faced by Sex Workers" (2021) *Gender & Behaviour* 19 18319.
[643] As above.
[644] As above.
[645] As above.
[646] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf) at 38.
[647] As above.
[648] As above.

> "[....] Article 2 (e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole [...] Under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors [...] The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations."[649]

As such, South Africa's obligations under CEDAW can be used to call for the protection of sex workers. *The Framework on the Rights of Sex Workers and CEDAW* also specifically relates the criminalisation of sex work to gender-based violence.[650] It should be noted, however, that using the language of gender-based violence includes how transgender women are attacked as women and as transgender.[651] These discriminations intersect and transgender women may face stigmas associated with misogyny and homophobia.[652] So too do gay, lesbian and sexually diverse sex workers experience a variety of intersecting stigmas and discriminations. All sex workers are stigmatised through dangerous stereotypes that justify violence against them and their marginalisation and exclusion.

Sex workers are easy targets for discrimination as they are blamed for various social ills including the breakdown of the traditional family, the spread of sexually transmitted diseases, and crime.[653] Further sex workers have historically been used as scapegoats, which is inclusive of immigrant and LGBTQI+ sex workers, sex workers that are drug users, those with HIV/AIDS, and single parent sex workers.[654] Sex workers who face

[649] As above. See Committee on the Elimination of All Forms of Discrimination against Women. General Recommendation on women's access to justice, July 2015, CEDAW/C/GC/33 (Available at: http:// tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf.)
[650] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" (Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf).
[651] As above at 36.
[652] As above.
[653] Peers Victoria Research Society "Stigma and Sex Work" 2014 (Available at: https://www.safersexwork.ca/wp-content/uploads/2014/06/PEERS-SexWorkStigma-25June2014.pdf).
[654] As above.

multiple stigmas because of their occupation, gender, sexual orientation, race, ethnicity, or socioeconomic background are also less able to access key resources, and as a result, "are less able to buffer themselves against the damaging impact of interacting stigmas."[655]

5.6 Conclusion: Mapping a Substantive Equality Approach to Sex Work

This chapter aimed to shed light on the experiences faced by sex workers in South Africa. These experiences are marked by a denial of rights, discrimination, stigma, marginalisation and social exclusion.

As a way of concluding this chapter, the discussion below will focus on a human rights-based approach to sex work that is marked by substantive equality. Such an approach also coheres with the Black, African and intersectional understandings of sex work as set out in the previous chapter.

Section 9 of the Constitution of the Republic of South Africa provides for equal protection of the law and non-discrimination based on, inter alia, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[656] The criminalisation of sex work essentially denies sex workers these rights and these rights are actively violated by state and non-state actors because of sex workers' status as criminals. Sex workers are disproportionally affected by criminal laws and municipal ordinances used to police them – sex workers are rarely prosecuted, and by-laws are used to justify surveillance, policing and harassment. The actual implementation of the Sexual Offences Act of 1957 falls by the wayside and sex workers' criminal status creates an environment that makes exploitation easy.[657] Discrimination by healthcare workers and exploitation by the police and others involved in the sex industry is a lived reality. Sex

[655] As above.
[656] Section 9(3) of the Constitution of the Republic of South Africa, 1996.
[657] The selling of sex is criminalised under the Sexual Offences Act 23 of 1957 and the buying of sex is criminalised in The Sexual Offences Amendment Act 32 of 2007 after the judgment in *S v Jordan* 2006 (6) SA 426 (CC).

workers are, inter alia, discriminated against based on their gender, sex, race and sexual orientation.

Section 10 of the Constitution provides that everyone "has inherent dignity and the right to have their dignity respected and protected."[658] Sex workers experience various violations of their dignity – the indignity of being able to access public healthcare without discrimination; the indignity of physical, sexual, economic and psychological violence perpetrated by the police and their clients; the indignity of not having their work recognised as legitimate work; the general indignity of exclusion from political, social and economic spheres because of their status as criminals and stigmatisation; and the indignity of being able to negotiate the terms and conditions of their work.

Section 12 of the Constitution provides for freedom of security of person and specifically in subsection 1(c) the right "to be free from all forms of violence from either public or private sources" and in subsection 2(b) the right "to security in and control over their body".[659] Sex workers are particularly vulnerable to violence because of their status as criminals. It is exactly this fact that exacerbates their vulnerability to exploitation and violence. Further, the experiences of sex workers described above concerning moral discourses and stereotypes around 'normal' and 'acceptable' sexuality and sexual behaviour intersect to justify violence, stigma and discrimination against sex workers; it casts them as outside of the social norms of acceptable behaviour whilst maintaining the patronising discourses around the need to rescue them and/or the oversimplified idea that they are free individuals unaffected by the constraints of their economic, social and political contexts. Sex work occurs in complex circumstances that are complicated by various influences. What becomes clear is that all sex workers should be allowed to negotiate their choices and agency when it comes to their bodies, and more importantly that such choices not be stigmatised or cast as immoral or deviant behaviour.

[658] Section 10 the Constitution of the Republic of South Africa, 1996.
[659] Sections 12(1)(c) & 12(2)(b) of the Constitution of the Republic of South Africa, 1996.

Section 14 ensures the right to privacy.[660] The right to privacy is interconnected with the right to dignity. Sex workers' rights to privacy are violated through searches by the police to find evidence of sex work, specifically condoms. Sex workers also lack decisional privacy in the sense that the state not intrude on their personal and intimate choices regarding their sexual practices. Further, because of their status as criminals, sex workers are hesitant to approach courts in realising their right to access courts as enshrined in **section 34** of the Constitution.[661] As mentioned above, sex workers do not report sexual assault (by their clients and the police) because of the systemic nature of police brutality against sex workers. Further, the police at times thwart the efforts of sex workers to report violence perpetrated by their own.

At this point, it is important to note that **section 36** of the Constitution – the limitation clause – provides that the rights in the Bill of Rights may be limited in terms of general laws if such a limitation is justifiable in an open and democratic society based on human dignity, equality and freedom when taking into account, inter alia, (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.[662]

When considering the various discussions throughout this dissertation, whilst taking into account the Constitutional Court's decision in *S v Jordan*, it can be argued that the above rights are essential and that the purpose of the limitation of these rights –

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[660] Section 14 of the Constitution of the Republic of South Africa, 1996.
[661] Section 34 of the Constitution of the Republic of South Africa, 1996 reads: "Access to Courts - Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
[662] Section 36 of the Constitution of the Republic of South Africa, 1996 reads: "Limitation of Rights - (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

through criminalisation that aims to decrease the demand for sex work as well as protect women from exploitation – does not meet the standard set in section 36.[663] The criminalisation of sex work does not decrease demand and serves to further foster exploitation by protecting those that exploit sex workers. Criminalisation leaves them more vulnerable, and the extent of the limitation (criminalisation) has far-reaching implications for the rights and lives of sex workers. Further, there are a myriad of ways in which the purpose of 'protecting women from entering the sex industry' can be achieved including offering support services, transitionary measures, education and care. It is beyond the scope of this dissertation to provide a detailed account of section 36 as it concerns the regulation of sex work. However, I do contend that when considered anew, a section 36 analysis might yield different results in the face of the evidence of the concrete harms experienced by sex workers, the discrimination that sex workers face and the constitutional obligation to protect women and marginalised groups from further discrimination.

The South African Constitution has frequently been described as aiming for **substantive equality** – in constitutional text and constitutional interpretation and adjudication.[664] Substantive equality (as opposed to formal equality that requires the equal treatment of all persons in the same situation and that such persons should not be treated differently because of arbitrary characteristics such as gender, race, religion etc.) seeks to take the contexts, differences and existing inequalities of people into account to ensure the achievement or realisation of basic human rights.[665] Substantive

[663] *S v Jordan* 2006 (6) SA 426 (CC).
[664] See for example Smith "Equality Constitutional Adjudication in South Africa" (2014) *AHRLJ* 14 609-632. See *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC); *Jordan & Others v S* 2002 (6) SA 642 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC); *MEC for Education: KwaZulu-Natal & Others v Pillay* Case CCT 51/06 [2007] ZACC 21; *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC). See also Pillay "Economic and social rights adjudication: Developing principles of judicial restraint in South Africa and the United Kingdom" (2013) *Public Law* 599; Christiansen "Using adjudication to remedy socio-economic injustice: Comparative lessons from South Africa" (2008) *University of California, Los Angeles Journal of International Law and Foreign Affairs* 13 369; Fredman "Equality: A new generation" (2001) *Industrial Law Journal* 30 145; Smith "Constitutionalising equality: The South African experience" (2008) *International Journal of Discrimination and the Law* 9 201; Albertyn "A "Substantive equality and transformation in South Africa" (2007) *South African Journal on Human Rights* 23 253.
[665] Smith "Equality Constitutional Adjudication in South Africa" (2014) *AHRLJ* 14 611-613.

equality emphasises the importance of recognising the legal, political and economic choices of groups and, as such, places a positive obligation on the state to help protect and implement positive measures to realise basic rights by breaking cycles of disadvantage.[666] Existing laws and policies should not reinforce subordination and exclusions of groups already subjected to marginalisation and disadvantage.[667] Laws should treat individuals as substantive equals by recognising and accommodating differences in context.[668] As it relates to sex workers, a substantive equality approach would recognise the effects of sex workers' specific contexts; the challenges that persons who enter the sex work industry face; the risks involved; and the exploitation and vulnerability experienced by sex workers because of legal, political, cultural and social factors.[669] Such an approach involves the recognition of "the dynamic interplay between discriminatory ideologies, actions, intentions and results."[670] As such, it would champion a more nuanced lens to laws that regulate sex work and seek to protect sex workers.[671] In this regard the *Framework on the Rights of Sex Workers and CEDAW* instructive.[672] It outlines a substantive equality approach to sex work as one that requires

> "all initiatives adopted by the state such as reform of laws, adoption of policies, and/or initiation of programmes and services to lead to
>
> i) equality of opportunity that is guaranteed by a framework of laws, policies and related programmes and other initiatives;
>
> ii) equality of access that requires establishing institutions and mechanisms to promote implementation and enforcement as well as eliminating barriers that impede access to opportunities; and
>
> iii) equality of results that demonstrate real change for the benefit of all women."[673]

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[666] As above 612-613.
[667] As above.
[668] As above.
[669] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (Accessed 20 November 2024) at 54.
[670] As above.
[671] As above.
[672] As above.
[673] As above.

Ultimately, sex work through the lens of substantive equality would assist in recognising the discriminatory effects of the legal framework that currently regulates sex work. Further, such an approach should be cognisant of the stereotypes, ideologies, systemic behaviours and actions that may impede sex workers' rights. In this regard, sex workers themselves will play a pivotal role in refining policy, programmes, and in identifying the gaps between the law, its implementation and the lived reality of sex workers.

CHAPTER 6

Systems of Power and Privilege: Sex Work as Resistance

6.1 Introduction

This short chapter serves as a reflection on the broader "systems of power and privilege" relevant to the lives of sex workers.[674] Specifically, the history of colonial and capitalist oppression that shape sex workers' choices, agency and autonomy. This chapter is necessary against the background of previous discussions specifically as it relates to sex work in the context of colonial-apartheid in Chapter 2. It also aims to deepen the human-rights-based and intersectional approach developed in chapter 4 of this dissertation. Such an exploration further coheres with "African feminist approaches that are mindful of the nexi of power relations at play in black women's lives".[675] Sex work intersects with histories of oppression and contexts of inequality. This chapter therefore speaks to the last research objective set out in Chapter 1.

Bonzaaier has called for a feminist decolonial and intersectional understanding of sex work that recognises "the coloniality of gender, which includes an analysis of racialisation, colonisation, capitalist exploitation and gendered oppression".[676] This chapter is an attempt to highlight and acknowledge these forces. It should be noted that this discussion is not meant to erase the fact that sex workers have agency in engaging with the power relations that have shaped their circumstances. It is vital to acknowledge, as Bonzaaier does, "the ways in which women talk against dominance and counteract their imposed personalities and the ways in which they negotiate dominant discourses on femininity while at the same time giving voice to their resistance".[677]

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[674] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 467.
[675] As above at 468.
[676] As above at 483.
[677] As above.

In the section below, I shed light on the intersection between capitalist exploitation and sex work. The chapter moves on to engage with aspects of the colonial legacy and the gendered and racial positionality of sex workers. The conclusion engages with sex work as resistance to reclaiming agency and autonomy.

6.2 The Confines of Economic Necessity

The sex industry can be defined as a system of supply and demand as sex work can be seen as a commodity. Huda, in discussing the gendered and classed nature of sex work, explains that:

> "The act of prostitution by definition joins together two forms of social power (sex and money) in one interaction. In both realms (sexuality and economics), men hold substantial and systematic power over women. In prostitution, these power disparities merge in an act which both assigns and re-affirms the dominant social status of men over the subordinated social status of women. The demand for commercial sex is often further grounded in social power disparities of race, nationality, caste and colour."[678]

Along the same lines, White has noted that sex work is a capitalist social relationship "not because capitalism causes [sex work] by commoditising sexual relations but because wage labour is a unique feature of capitalism: capitalism commoditised labour".[679]

Likewise, Ghodsee argues that capitalism is the primary drive behind the monetary exchange of sexual pleasure and the transactional nature of interpersonal relationships.[680] In a capitalist society, all things rely on monetary value – sex included, where women primarily supply sex in exchange for money, economic ascension, subsistence and subsequently work.[681]

[678] Huda "Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children" United Nations Commission on Human Rights, February 2006 (Available at: https://digitallibrary.un.org/record/569066?ln=en&v=pdf).
[679] White *The Comforts of Home: Prostitution in Colonial Nairobi* (1990) 11.
[680] Ghodsee *Why Women Have Better Sex Under Socialism: And Other Arguments for Economic Independence* (2018).
[681] As above.

Further, criminalisation, at its most primary level, is the manifestation of criminalising the sexual and economic liberties and options of sex workers.[682] It is cemented in the capitalist principles of ownership and control, that extends its yield beyond the supply of labour, and into the ownership of life itself.[683] Further, criminalisation is not only unable to curb the trade of sex work but further fuels it due to the demands of economic instability imminent in a capitalist society, in which pressures are felt by women living in poverty.[684]

It is also important to note and acknowledge that the majority of forms of work are primarily led by the need to be economically active and to form part of the labour force – thus the circumstances of entering the sex trade are no different to other forms of work.[685] In simple terms, it is not just sex workers who are led to do certain forms of labour outside of their desire, but all workers in general. Van der Veen, referring to Marx, asserts that prostitution is but "one form of expression of the general prostitution of the labourer."[686]

Bonzaaier's analysis is insightful in this regard as she discusses how women who enter sex work are regularly poor and struggling economically.[687] This is especially true for street-based sex workers.[688] Their economic inequality is shaped by race, class, gender and other factors, and within the contexts of globalisation and neo-liberalism which have exponentially increased unequal economic relations, sex workers are left with few economic opportunities.[689] Neo-liberalism pushes those already on the margins

[682] Pontsho & Kola "Overview and Impact of Criminalisation of Sex work in South Africa" (2021) *Gender and Behaviour* 19 18000 – 18404
[683] Bosch & Pudifin "Prostituting the 2010 Soccer World Cup – a more Practical Approach to Prostitution Policy in South Africa" (2009) *Comparative and International Law Journal of Southern Africa* 42 272 – 287.
[684] As above.
[685] Xaymaca "Sex Work as resistance to marginalization–Lessons from Black Feminist Theory, Disability Justice, and Black-led sex worker organizing" (2022) *Disability Studies Quarterly* 42 (n.p.) (Available at: https://dsq-sds.org/index.php/dsq/article/view/9116).
[686] Van der Veen "Rethinking commodification and prostitution: An effort at peacemaking in the battles over prostitution" (2001) *Rethinking Marxism* 13 30-51.
[687] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 467.
[688] As above.
[689] As above. Neo-liberalism is the philosophical view that "a society's political and economic institutions should be robustly liberal and capitalist" that must function within the framework a constitutionally limited democracy

further away and sex workers' positioning in economic and social hierarchies positions them at the bottom.[690]

Further, stigmatising discourses on sex work powerfully intersect with sex workers' identities as poor and black and Bonzaaier therefore points to the complexity of "making their way in the world".[691] Thus, material conditions and racism intersect when it comes to the decision to do sex work as poverty is one, if not the deciding factor, for why women enter sex work, especially street-based sex work.

Therefore, most street-based sex workers have few economic choices within the material structures shaped by neo-liberalism, capitalist exploitation and a history of black economic oppression (colonialism and apartheid).[692] When they exercise one of these few choices, they are punished through criminalisation, stigma and barred from entry into the formal economy. And importantly, as noted by Xaymaca, "the problems presented as inherent in sex work are imposed by a social order that values capital as the determinant of hierarchical value".[693]

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and a modest welfare state. Criticism of neo-liberalism include that fact that it undermines democracy by protecting classical liberal economic ideals such as the right to private property, which act as an impediment to citizens to redistribute wealth more fairly and democratically. Neoliberalism is also colonial in character in the sense that it was adopted by Western European and Anglophone regimes "and that this formed an international elite consensus about how economies around the world should be run." See Vallier "Neo-liberalism" *Stanford Encyclopedia of Philosophy* (2021) (Available at: https://plato.stanford.edu/entries/neoliberalism/#ColoCrit)

[690] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 470-471.

[691] As above at 482.

[692] The idea that racist exploitation and capital accumulation are mutually reinforcing has been long held. Cedric Robinson asserted that "the development, organization and expansion of capitalist society pursued essentially racial directions." See Robinson *Black Marxism: The making of the black radical tradition* (1983). Today "capitalism continues to perpetuate white supremacy, patriarchy, colonialism, imperialism, and other forms of oppression." See Guglielmo & Joffroy (2021) "A History of Domestic Work and Worker Organising" (Available at: https://www.dwherstories.com/about) (n.p.). It also maintains the global division of labour where the nations from the Global South are rich in resources, but do not control the wealth that is generated from those resources. As Guglielmo and Joffroy explain, capitalism emerged as a modern world economic system in the 1400s alongside European colonial expansion. The Portuguese, Spanish, Dutch, English and other colonialists conquered foreign territories and seized their land, which land and peoples were turned into commodities to exploit and generate wealth for colonisers. Guglielmo & Joffroy (2021) "A History of Domestic Work and Worker Organising" (Available at: https://www.dwherstories.com/about) (n.p.).

[693] Xaymaca "Sex Work as resistance to marginalization–Lessons from Black Feminist Theory, Disability Justice, and Black-led sex worker organizing (2022) *Disability Studies Quarterly* 42 (n.p.) (Available at: https://dsq-sds.org/index.php/dsq/article/view/9116).

It is also important to note that in Bonzaaier's analysis, sex workers indicated that they understood their bodies as commodities and as a job that impacts their "social value".[694] Sex work means that a woman has lost some of her worth as a 'woman', which justifies violence against her.[695] Her sexual purity has been violated and this results in a stigmatised and shameful identity.[696] Sex workers thus have to negotiate their perceived social value as women and the value of their bodies as commodities.

Akyianu explains that many marginalised communities have a problematic relationship with human rights discourse as it privileges the individual and abstract notions of personhood.[697] In the South African context, it has also done little to bring about historical justice for black people in terms of the material, social and symbolic legacies of apartheid and colonisation.[698] In this regard, it has not succeeded in substantively reconfiguring socio-economic and political realities. However, black and African feminist scholars have pointed to human rights as a pragmatic and practical vehicle to speak to subordination, and sex workers should have the minimum rights to healthcare, labour and other social and economic safety nets.[699] Furthermore, an *intersectional* human rights-based approach is cognisant of and sensitive to multiple oppressions including race, gender, and poverty and the contexts within which they occur.[700] Black feminist scholars have called for embedding human rights with other worldviews that centre individual and collective claims for the eradication of poverty,

[694] As above.
[695] As above.
[696] As above.
[697] Akyianu "An intersectional, human rights approach to sex work advocacy" 8 April 2023 (Available at: https://www.pivotlegal.org/situating_pivot_s_sex_workers_rights_campaign_within_its_colonial_roots_and_possibilities_for_new_directions).
[698] See Modiri "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" (2018) *South African Journal on Human Rights* 300-325; "Racism and the Marginality of African Philosophy in South Africa" (2017) *Phronimon: Journal of Greek Philosophy and the Humanities* 18 204-231, doi:10.17159/2413-3086/3761; "The Azanian Philosophical Tradition Today" (2021) *Theoria: Journal of Social and Political Theory* 68(3) 1-11.
[699] Mgbako *To live freely in this world: Sex worker activism in Africa* (2016).
[700] See Spies "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform". (2021) *Journal of African Law* 65 327; KrüGer "Sex Work from a Feminist Perspective: A Visit to the *Jordan Case*" (2009) *South African Journal on Human Rights* 20 138-150.

stigma and discrimination.[701] As Akyiany also notes, intersectionality at its core recognises that state and interpersonal violence is not evenly distributed but "rather that they must be understood at the intersection of racism and sexism into black and racialised women's lives that cannot be fully appreciated by looking solely at one axis of oppression [...]"[702]

6.3 Colonialism and Racist Sexualisation

Aderinto argues that the full entrenchment of 'prostitution' in Africa can be traced to the consolidation of colonial capitalism.[703] Aderinto refers to van Onselen's contention that sex work is a "functional consequence of the rise of the urban society created by early industrial capitalism".[704] Van Onselen investigated South Africa's "most explosive capitalist development" between 1886 and 1914 with a particular focus on Johannesburg.[705] In this regard, sex work is concentrated around three main sites – urban centres, military bases and mining settlements.[706] Aderinto uses these sites to interrogate the reordering of African demography according to colonial capital and the economic structures colonialists established around metropolitan gain.[707] Aderinto therefore demonstrates the relationship between sex work, space and colonial capitalism.[708] The author also explains that these sites were all "male-centred sites of imperial and economic political power".[709] These cities were not created for women, rather it was a site for cheap, black male labour.[710] This analysis signals the reconfiguration of space, sexuality, gender roles, and racial relations brought about by

[701] Akyianu "An intersectional, human rights approach to sex work advocacy" 8 April 2023 (Available at: https://www.pivotlegal.org/situating_pivot_s_sex_workers_rights_campaign_within_its_colonial_roots_and_possibilities_for_new_directions).
[702] As above.
[703] Aderinto "Pleasure for Sale: Prostitution in Colonial Africa, 1880s-1960s" in Jacob (ed.) *Prostitution: A Companion to Mankind* (2016) 471.
[704] Van Onselen *Studies in the Social and Economic History of Witwatersrand, 1886-1914* (volume 1) (1982) 103.
[705] As above.
[706] Aderinto "Pleasure for Sale: Prostitution in Colonial Africa, 1880s-1960s" in Jacob (ed.) *Prostitution: A Companion to Mankind* (2016) 471.
[707] As above.
[708] As above.
[709] As above.
[710] As above.

colonialism. In essence, the regulation of sex work plays into or is intricately linked to colonial domination and control.

It is noted within the *CEDAW Framework on Rights of Sex Workers* that postcolonial feminist approaches to sex work have called attention to broader political and economic oppression, which means that the economic agencies of sex workers should be "located within the projects and processes of imperialism, rather than solely interpreted through the lens of male domination or sexual violence by men against women".[711] Further, the idea of recognising the systems of power and privilege within which sex workers find themselves necessarily speaks to the contexts of imperialism and colonisation or the continuation of coloniality in contemporary times.[712] Sacco argues that decoloniality can be seen as reconfiguring what it means to exist from the position of a counter-voice to hegemony, racism, and patriarchy, and within the context of sex work this might signal a shift from how sex workers define themselves and how they express their identities within the margins of colonial gender expressions and sexuality.[713]

Along the same lines, Akyianu contends that the criminalisation of sex worker communities requires interrogating the historical role of the state in maintaining "racial [and gendered] otherness", which includes resistance to ongoing colonial violence.[714] This insight becomes important when considering sex work under colonial rule in South Africa discussed in Chapter 2. Specifically, the intersection between gender, race and colonial power. Firstly, Thusi explains that the stricter regulation of sex work during British colonisation should be seen from the point of view that sex work threatened

[711] IWRAW and Asia Pacific (2017) "Framework on the Rights of Sex Workers and CEDAW" Available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (Accessed 20 November 2024) at 10.
[712] Sacco "Pathways to Decolonising the Sex Industries" (n.d.) Community Psychology: Social justice through collaborative research and action (Available at: https://www.communitypsychology.com/decolonizing-sex-industries/).
[713] As above.
[714] As above.

patriarchal economic systems that deprived women of economic activities.[715] It also represented a threat to heterosexual norms that saw marriage (between men and women) as the sole site for sex and sexual expression.[716] With the instituting of the Contagious Diseases Acts during the Victorian era (also enacted in parts of South Africa under British colonial rule), sex workers were essentially blamed for the spreading of venereal diseases to dutiful wives by sleeping with their husbands.[717] They therefore represented a threat that had to be regulated.[718] However, male clients were not treated in the same way; and rather seen as victims.[719] For Thusi, sex workers represented the colonial fear of female sexuality.[720] And it was more so feared if this sexuality was primarily for the benefit of female commercial empowerment.[721]

Thusi further explains in the context of the Mineral Revolution beginning in 1886 in Transvaal, that during the first decade after the discovery of gold at Witwatersrand, there was little regulation of sex work.[722] Later, at the behest of the mining companies, stricter regulation of sex work was enforced.[723] More specifically, in most of the colonies (except Natal), sex workers were not penalised – only male clients were subjected to punishment.[724] However, in those contexts where there was a danger of interracial relationships, female sex workers *and* their clients were equally regulated.[725] This regulation was pivotal in executing racial segregation. Trotter explains that the Mineral Revolution lead to a "whitening" of sex workers.[726] The author notes:

> "In the 1880s. the Mineral Revolution ignited global migration to the Transvaal gold fields. Diggers, pimps and prostitutes passed through the coastal ports, some never going any further.

[715] Thusi "Policing Sex: The colonial, Apartheid and New Democracy – Policing of Sex Work in South Africa (2015) *Faculty Scholarship* at 222.
[716] As above.
[717] As above at 215.
[718] As above.
[719] As above.
[720] As above.
[721] As above.
[722] As above at 223.
[723] As above at 225
[724] As above.
[725] As above.
[726] Trotter "Dockside Prostitution in South Africa Ports" (2008) *History Compass* (6) 679.

> To cater to this boom, European Jewish pimps trafficked thousands of 'Continental women' to Southern Africa."[727]

The Mineral Revolution ushered in an era of brothels with European sex workers.[728] Initially, these European women catered to Cape settlers and black patrons, eventually migrating to the Transvaal for better economic opportunities.[729] By 1902, the so-called black peril hysteria - "hysteria concerning black male sexuality and the threat it posed to white male masculinity" – meant that sexual relationships between whites and black people were seen as immoral.[730] Scully notes that the "myth of the black rapist who through overexposure to civilisation came to desire white women also embodied a more generalised anxiety and ambivalence about the appropriate limits of the civilising mission".[731] Thusi argues that:

> "The racial dimension of the transactions between European sex workers and black mine workers created a panic that would result in the 1902 Morality Act that criminalised relationships between black men and white women."[732]

By 1927, the Immorality Act prohibited sexual relations between black people and whites.[733] Thusi traces the historical regulation of sex work alongside perceived threats to the survival of the white race.[734] As confirmed by Hill-Collins, controlling Black sexuality has long been important in preserving racial boundaries.[735] During colonial rule, therefore, sex work was seen intermittently as a threat to the purity of the white race, a threat to white male supremacy and masculinity, and a threat to patriarchal dominance by allowing the economic ascension of women.

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[727] As above.
[728] Thusi "Policing Sex: The colonial, Apartheid and New Democracy – Policing of Sex Work in South Africa (2015) *Faculty Scholarship* at 224.
[729] As above at 225.
[730] As above at 226
[731] Scully "Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth Century Cape Colony South Africa" (1995) *American Historical Review* 10 338.
[732] Thusi "Policing Sex: The colonial, Apartheid and New Democracy – Policing of Sex Work in South Africa (2015) *Faculty Scholarship* at 226.
[733] As above at 231.
[734] As above at 228.
[735] Hill-Collins *Black Feminist Thought* (2002) 134.

Related to white supremacist notions of being threatened by sex work, are the concomitant colonial representations of black women as over-sexualised, as objects for consumption and as racially fetishised. Black women's sexuality has been a point of contestation throughout the markings of colonial history.[736] Black women are also defeminized and presented as indecent sexual beings in colonial discourse.[737] Black women are presented as 'masculine' and capable of enduring pain and suffering in comparison to women of other races.[738] This undoubtedly shapes our perception of violence against Black women on various fronts.[739] It can be argued that it plays into the continuing criminalisation of black women sex workers and the acceptance of the abuse that they suffer.[740] Society has been desensitised to the violence against sex workers, which violence intersects powerfully with their status as *black women*.[741] Bonzaaier explains how because of their identities as sex workers, the "ideal victim" status isn't available to them.[742] Ideas around "victim worthiness" are shaped by "racialised, gendered and class constructions" which makes the ideal victim someone who is white, heterosexual, middle-class and able-bodied.[743] The latter group is deserving of public sympathy while sex workers are more likely to be blamed for their victimisation.[744]

Before concluding, it is important to explain that the previous discussions are meant to highlight that sex workers' lives and the discourses around sex work intersect with

[736] Davis *Women, Race & Class* (1983).
[737] Pockock "Bridging the Gap: Integrating Intersectional Oppression and the Unconscious Mind in Prostitution Discourse" (2015). Master's Thesis, Smith College, Northampton, MA (Available at: https//scholarworks.smith.edu/theses/721).
[738] Hooks *Ain't I a Woman : Black Women and Feminism* (1981).
[739] Pockock "Bridging the Gap: Integrating Intersectional Oppression and the Unconscious Mind in Prostitution Discourse" (2015). Master's Thesis, Smith College, Northampton, MA (Available at: https//scholarworks.smith.edu/theses/721).
[740] Benoit, Jansson & others "Prostitution stigma and its effect on the working conditions, personal lives, and health of sex" (2017) *Prostitution Stigma* 55 547.
[741] Pockock "Bridging the Gap: Integrating Intersectional Oppression and the Unconscious Mind in Prostitution Discourse" (2015). Master's Thesis, Smith College, Northampton, MA (Available at: https//scholarworks.smith.edu/theses/721).
[742] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 476.
[743] As above.
[744] As above.

historical, economic and social forces. Sex workers, as gendered and racialised beings, must negotiate their work and "make their way in the world" within contexts of economic exploitation and the legacies of colonialism and apartheid. Under current unequal economic conditions, sex workers have few economic choices. They are then punished and stigmatised for exercising one of the few choices they have for subsistence and survival. Related to this is the fact that the violence that is perpetrated against them cannot fully be appreciated or even seen because of racist and sexist views on the expression of their sexuality and their bodies; 'leftovers' from colonial and apartheid perceptions of their worth and value. In essence, sex workers' economic material conditions have been imposed on them by historically racist and sexist social orders that cast them as immoral and criminal for attempting the navigate those very same orders.

6.4 Conclusion: Sex Work as Resistance

Miller-Young, in the context of sex work in the United States, views sex work historically as a site of abuse as well as a site to reclaim autonomy.[745] She states:

> "Black women's sex work from the late 19th century to the Depression-era and World War II provided an arena for Black women to exhibit economic self-reliance and individual self-respect [...] and struggle against the meanings and modes of control that disciplined black female sexuality at every turn [....] we must continue to hold in tension the understanding that the exploitative conditions of economic disenfranchisement, discriminatory segregation, and abusive criminalisation were met by Black Women's own labours to survive, to assert themselves and to move within and against sexual expropriation in ways that suited them."[746]

Similarly, Sacco views sex work as part of the legacy of imperial and racist domination but also as a site of resistance "in which people can perform narratives and nurture relationships and networks that sharply contradict the socially induced expectation of sexual and economic subordination".[747] Sex work can therefore operate as an important location to create new ways of expressing sexuality and reimagining

[745] Miller-Young *A Taste for Brown Sugar: Black women in pornography* (2015) 49.
[746] As above.
[747] CM Sacco "Pathways to Decolonising the Sex Industries" (n.d.) Community Psychology: Social justice through collaborative research and action (Available at: https://www.communitypsychology.com/decolonizing-sex-industries/).

economies of sex and desire.[748] Sacco further opines that "when faced with the imperfect and damaged opportunities left to them by coloniality, [sex workers] continue to fight for their right to exist under legal and economic contexts" of poverty and inequality.[749] For Sacco, the resisting regulation, policing and criminalisation of sex work is part and parcel of the decolonial project by

> "[d]riving a wedge into the world of colonial thinking by continuing to make a home in the in-between places, by carving out spaces between the binarized worlds of those that hold power [...], by continuing to speak as a being with agency who refuses to be placed in a silenced category."[750]

Sex work as resistance can also allow us to more generally speak to how differently situated people navigate sex work in diverse and divergent ways.[751] Sex work is "multi-gendered" and the resistance of LGBTQI+ sex workers to conform to boundaries of gender and heteronormativity presents a powerful site of contestation. Historically, the LGBTQI+ community in general have been subjected to harmful stigma, and continuous policing and surveillance of their sexual and gendered expression. The similarity in the subjection of bodies that have historically been policed and defined as deviant, immoral, abhorrent and diseased opens up the space for more inclusive and intersectional understandings of sex work.

To conclude, this chapter aimed to shed light on sex work within the broader contexts of racialisation, colonisation, capitalist exploitation and gendered oppression. The chapter above is certainly not an exhaustive discussion of sex work within these contexts. Rather, it aims to draw attention to what Bonzaaier terms a "feminist decolonial and intersectional understanding of sex work".[752] Such an approach also deepens the human-rights-based and intersectional approach developed in Chapter 4. Sex workers navigate numerous contexts of power and privilege to make their way

[748] As above
[749] As above.
[750] As above.
[751] Xaymaca "Sex Work as resistance to marginalization–Lessons from Black Feminist Theory, Disability Justice, and Black-led sex worker organizing (2022) *Disability Studies Quarterly* 42 (n.p.) (Available at: https://dsq-sds.org/index.php/dsq/article/view/9116).
[752] Boonzaier (ed.) "Researching sex work: Doing decolonial, intersectional narrative analysis" *The Emerald Handbook of Narrative Criminology* (2019) 467.

in the world and in the process of this navigation they defy labels through the intersecting of diverse identities (racial, gender, sexual orientation identities); and imposed identities that justify their policing, criminalisation and regulation. Approaches to understanding and regulating sex work must take into account the complexity of these imposed identities and the difficult contexts and legacies that sex workers must grapple with whilst understanding how sex workers voice their resistance.

CHAPTER 7

Conclusion

The approvement of the publishing for public comment of the Sexual Offences and Related Matters Amendment Bill of 2022 by Cabinet signalled the Government's willingness to decriminalise sex work. Although it has been on the national agenda for more than 14 years, the Bill is the first step in actualising legal reform committed to the protection and realisation of the human rights of sex workers.

This research project began several years before the publishing of the Bill. However, prospective decriminalisation occasioned the opportunity to reflect on and emphasise, again, the harms, rights violations, and vulnerabilities exacerbated by the criminalisation model. What is more, it is still unclear exactly how sex work is to be regulated under the proposed decriminalisation model – arguably, the Bill can be criticised for its lack of comprehensiveness and clarity regarding the future of sex workers and the sex work industry. Sex workers remain in a precarious position. Notably, the Bill is silent on how the new legislation will impact existing by-laws. As explained, by-laws are utilised to police, surveil, target and regulate sex workers through soliciting, loitering and nuisance provisions, and, importantly, create an environment within which the police can act with impunity and brutality towards sex workers. Further, as this research has demonstrated, legal reform should include approaches to regulation that are framed by rights-protection, substantive equality, and intersectionality, and that cohere with the complex realities within which sex workers make their way in the world.

The main research question was formulated as follows:

Against the background of the agenda to reform the regulation of sex work as well as the history of human rights violations experienced by sex workers, how are we to map

regulation going forward and what theoretical questions should inform our understanding of sex work in South Africa?

To respond to this question, the following objectives were formulated:

1. To provide a historical overview of the regulation of sex work and the varying contexts of sex work in South Africa.
2. To consider the dominant regulatory frameworks and their concomitant harms to and protection of sex workers.
3. To make the case for a human rights-based and intersectional approach to the regulation of sex work.
4. To investigate the dominant feminist theoretical approaches to sex work to understand the discourses that determine various regulatory frameworks.
5. To consider the concrete contexts of the human rights abuses of sex workers in South Africa and make the case for a substantive equality approach to sex work.
6. To contextualise the systems of power that shape sex workers' agency and autonomy as well as how these intersect with oppression and inequality.

The historical overview of sex work regulation in South Africa demonstrated how European colonialism reconfigured African sexual mores, gender roles and expressions of sexuality. During early colonial rule, sex work was allowed, tolerated and seen as a necessary evil. British colonisation introduced stricter regulation within the context of sexual purification, and suppression, and in the name of protecting British soldiers and naval officers from immoral and contagious sex workers. It was during British rule that sex work started to be regulated through public nuisance and loitering provisions and the discourses around contagion resulted in the heavy policing and surveillance through state intervention. The Mineral Revolution signalled regulation along racial lines and regulation through loitering, solicitation and public nuisance continued. The regulation of sex work during Apartheid was influenced by sexual conservatism, patriarchy, racial segregation and above all white supremacy. The enactment of the Immorality Amendment Act 2 of 1988 for the first time explicitly criminalised sex work.

The varying understandings of sex work show that historically sex workers were configured as sites of contagion, public nuisances, as a threat to patriarchy, masculinity, and racial purity, and as victims in need of rescue and protection Throughout these contexts the buying and selling of sex has remained. The discourses around how sex work has been viewed allow as to see that, problematically, the regulation of sex work in the post-1994 context is shaped and still heavily influenced by perceptions and regulations that originated in colonial rule. These colonial discourses have been mapped onto our present understandings, which frames their existence as subject to continued coloniality and their bodies as subject to state control.

The objective to consider the dominant regulatory frameworks and their concomitant harms to and protection of sex workers showed that the full decriminalisation model is a model that strategically starts from the need to protect the human rights of sex workers to reduce contexts of violence and vulnerability. These efforts coincide with the fact that decriminalisation restores the dignity of sex workers as workers, not as criminals. What becomes important is the law's impact directly and indirectly on the lives of sex workers. The focus should be the reduction of harm and human rights violations.

With the investigation into the dominant feminist theoretical approaches to sex work, it became clear that it is necessary to move beyond the dominant liberal/radical feminist discourses on sex work to open up other discursive spaces and move beyond rescue politics to politics of inclusion. Intersectionality, as an approach that takes into account multiple oppressions and positionalities, provides an alternative lens that coheres with the call of black, African feminist approaches for human rights protection and decriminalisation, which offers the possibility of strategically decreasing the violence, vulnerabilities and the subjugation that sex workers must live with daily. LGBTQI+ sex workers that function outside of the 'normal' framework of sexual labour, sexuality and sexual oppression, face particular marginalisations. As such, an

intersectional approach becomes vital in recognising and protecting the diverging and divergent positionalities of all sex workers.

The lived contexts of sex workers highlighted in Chapter 5 emphasised their experiences as marked by a denial of rights, discrimination, stigma, marginalisation and social exclusion. These were contextualised through the frames of sex work as work, police brutality, discrimination in public healthcare, and social stigma. The chapter detailed violations of sections 9 (equality), 10 (dignity), 12 (freedom of security of person), 14 (privacy), and 34 (access to course and legal recourse). The importance of a substantive equality approach was set out to conform to the need to understand how existing legislation reinforces subordination and exclusions of those already subjected to marginalisation and disadvantage. As it relates to sex workers, a substantive equality approach would recognise the effects of sex workers' specific contexts; the challenges that persons who enter the sex work industry face; the risks involved; and the exploitation and vulnerability experienced by sex workers because of legal, political, cultural and social factors. This approach signals a more nuanced lens to legal reform.

Chapter 6 engaged the historical, economic and social forces that configure sex workers as gendered and racialised beings that must negotiate their work and "make their way in the world" within contexts of economic exploitation and the legacies of colonialism and apartheid. Under current unequal economic conditions, sex workers have few economic choices, and in turn, they are punished and stigmatised for exercising one of the few choices they have for subsistence and survival. Related to this is the fact that the violence that is perpetrated against them cannot fully be appreciated or even seen because of racist and sexist views on the expression of their sexuality and their bodies; 'leftovers' from colonial and apartheid perceptions of their worth and value. In essence, sex workers' economic material conditions have been imposed on them by historically racist and sexist social orders that cast them as immoral and criminal for attempting the navigate those very same orders. The chapter

also engaged sex work as a site of resistance to reclaim agency and autonomy. Sex work operates as an important location to create new ways of expressing sexuality and reimagining economies of sex and desire. Within contexts of material constraint, sex workers counteract imposed identities and resist the discourse that 'defines' them. Sex work as multi-gendered recognizes that the subjection of bodies that have historically been policed and defined as deviant, immoral, abhorrent and diseased opens up the space for more inclusive and intersectional understandings of sex work.

To conclude, sex workers have faced acute human rights violations, marginalisation and discrimination. Criminalisation has (and still does) intensified and exacerbated contexts of violence and vulnerability. In mapping a way forward for the regulation of sex work, a nuanced approach that properly speaks to the complexities, histories, contexts and standpoints of sex workers is required. A human rights-based response informed by substantive equality is called for – one that takes into account the systemic exclusion and material inequality faced by sex workers. Intersectionality in the regulation of sex work is pivotal to recognise the diversity amongst sex workers, and the intersecting oppressions and positions that contextualise their realities. The systems of power that perpetuate stigma and stereotypes as well as the possibilities of resistance shape sex workers' experiences. Legal reform in the context of sex work requires a renewed and continuous commitment to ensure the realisation of freedom from harmful control and constraint, from violence, from received historical discourses, and from stigma to live.

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