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MPHIL in Social Justice

# Prostitution as the Exploitation of Women and a Violation of Women's Human Rights

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## **ABSTRACT**

This thesis draws attention to South Africa's shift in perspective of prostitution as a criminal offense to a human rights concern. This thesis addresses the proposed adult prostitution legal reforms in South Africa. These models are analyzed and evaluated in order to discover which model best upholds international standards of human rights. International best practices and prostitution legislation in other parts of the world are used to depict current successes and failures. However, concern has been raised if certain legal reforms could succeed in a sociocultural context such as South Africa. This thesis seeks to investigate prostitution within the sociocultural context of male power and female oppression in South Africa. Prostitution is revealed as the exploitation of women and a violation of human rights. It is concluded that South Africa's context of pervasive violence against women is not unique, but a reflection of a global view of women. The Nordic model is the human rights model that is recommended for South Africa. This model is not only able to improve the sociocultural status of women, but also penalize the demand for female sexual labor, which is considered the primary force behind the sex industry.

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## CHAPTER 1: INTRODUCTION

### 1. Introduction

The cliché of ‘prostitution being the oldest profession’<sup>1</sup> illuminates how prostitution is deeply entrenched within social structures. Prostitution remains one of the most debated areas of law and society worldwide. Prostitution divides feminist scholars and is under addressed within human rights frameworks. Proposed legal reforms for prostitution continue to resurface as society shifts in its understanding of this complex phenomenon.<sup>2</sup> Traditionally, states have tried to suppress prostitution to maintain public order, uphold societal norms of morality, as well as to regulate the perceived health and safety implications on society.<sup>3</sup> As society decides whether to suppress or embrace prostitution, what does the existence of this industry mean for woman and their access to human rights?

The Constitution of the Republic of South Africa (No. 108 of 1996) is considered one of the most progressive documents in legal history, however women across the globe continue to suffer disproportionately compared to men and this disparity is evident within South African society.<sup>4</sup> In an era where prostitution has been “*rebranded as sex work*”<sup>5</sup> it is argued that women have inalienable human rights that are being denied them under the law. The fundamental debate within human rights exists on whether prostitution should be viewed as legitimate work or as exploitation of women. If prostitution is the latter, then “*prostitution is a fundamental practice of gender inequality*”<sup>6</sup> in which the practice itself is a violation of women’s human rights. Prostitution as the exploitation of women and a violation of human right is the focus of this paper that will be argued to be the most beneficial to the welfare and well-being of women.

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<sup>1</sup> Carol Harrington, “Prostitution Policy Models and Feminist Knowledge Politics in New Zealand and Sweden,” *Sex Res Soc Policy*, Vol. 9 (2012): 337–349.

<sup>2</sup> Debra Satz, “Markets in Women’s Sexual Labor,” *Chicago Journals*, Vol. 106(1) (1995): 63-85.

<sup>3</sup> Joyce Outshoorn, “Political Debates on Prostitution and Trafficking of Women, Social Politics: International Studies in Gender, State and Society,” Vol. 12(1): 141-155, 2005.

<sup>4</sup> Obiora Okafor and Basil Ugochukwu, “Have the norms and jurisprudence of the African human rights system been pro-poor?” *African Human Rights Law Journal*, Vol. 11 (2011): 396-421.

<sup>5</sup> Sheila Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>6</sup> Maddy Coy, (ed.), “Prostitution, Harm, and Gender Inequality: Theory, Research and Policy,” 2012.

## 2. Thesis Rationale

### 2.1. Law as a Reflection of Societal Values

“A society’s response to prostitution goes to the core of how it chooses between the rights of some persons and the protection of others.”<sup>7</sup>

Barbara Meil Hobson, Ph.D.

The South African Law Reform Commission published a Discussion Paper in 2009 on adult prostitution. The purpose of the Discussion Paper was to begin a dialogue where NGO, activists, and interested parties could contribute to potential reform of the law.<sup>8</sup> Even though some local NGOs continue to back the current law of full-criminalization of prostitution, key NGOs<sup>9</sup> in South Africa dedicated to prostitution policy reform align with additional models where they believe the well-being of women is more sufficiently addressed.

In 1994, a democratic government was established in South Africa.<sup>10</sup> However, the transition has not been an immediate one in society, but remains a gradual process of reforming the laws to reflect democratic ideals.<sup>11</sup> The SRLC questions if the current law regarding prostitution is advancing human rights and social justice for women or if it is failing to comply with regional and international human rights standards. The Commission seeks to investigate alternative legislative responses to criminalization that could more effectively regulate, prevent, deter or reduce prostitution. Even as the Commission is open to new forms of legislation, it first asks how

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<sup>7</sup> Barbara Meil Hobson, “Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition,” 1990.

<sup>8</sup> The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009.

<sup>9</sup> The South African ‘key NGOs’ referenced are pertaining the two dominant non-profit organizations supporting opposing policy reforms. The organization, SWEAT (Sex Worker Education and Advocacy Taskforce), supports a liberal feminist stance of decriminalization. Information can be accessed at <http://www.sweat.org.za/>. The organization, Embrace Dignity, supports a radical feminist stance of abolition or partial decriminalization. Information can be accessed at <http://embracedignity.org.za/>.

<sup>10</sup> Shireen Hassim, “Women’s Organizations and Democracy in South Africa: Contesting Authority,” 2006.

<sup>11</sup> The Economist, “What’s gone wrong with democracy and how to revive it: A six page Essay,” 1<sup>st</sup>-7<sup>th</sup> ed., 2014. available at <http://www.economist.com/news/essays/21596796-democracy-was-most-successful-political-idea-20th-century-why-has-it-run-trouble-and-what-can-be-do>.

the proposed legal models will reduce the demand for prostitution as well as reduce the harm, vulnerability, and exploitation of women.<sup>12</sup>

In 2013, I partnered with a Cape Town-based NGO<sup>13</sup>, which advocated for legal reform to end prostitution and trafficking of women. I had the opportunity to engage with an organization for a month to research and better understand the needs and challenges taking place on a grass roots level. During this time, I regularly attended planning meetings and had the opportunity to speak with staff members as well as with women who have exited prostitution. While this organization advocated for the legal model of abolition, I left questioning how any of the proposed legal models would be influenced by the socio-cultural context of South Africa. I further questioned whether any of the models would be able to address the pervasive discrimination and exploitation of women involved in prostitution. Since criminalization is the current law in South Africa regarding prostitution, it will be addressed but it will not be the area of focus due to the SRLC's request for alternate approaches that better address the needs of women and uphold human rights standards.

## **2.2. Proposed Legislative Models**

Depending on a state's stance toward prostitution, global policy reflects four major legislative models that dominate the prostitution discourse. The following four legislative models are rarely implemented in their purest form, but rather serve as ideal structures in which state legislation should strive to align.<sup>14</sup> Each model becomes unique to each state, as every country has a different structure and socio-cultural context. The extent to which these models operate is dependent on the legislation reforms made on behalf of each state to ensure their laws reflect one of the following.

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<sup>12</sup> The South African Law Reform Commission, *Discussion Paper 0001/2009 Project 107 Sexual Offences: Adult Prostitution*, 2009.

<sup>13</sup> This is in reference to my month of study, participation, and research with Embrace Dignity.

<sup>14</sup> Chi Mgbako and Laura Smith, "Sex Work and Human Rights in South Africa," *Fordham International Law Journal*, Vol. 33 (2010): 1-36.

### 2.2.1. Criminalization

The criminalization of prostitution adopts a prohibitionist stance on the buying and selling sex within society. Criminalization considers all activities surrounding payment for sexual services illegal and laws are established to prevent this practice from occurring.<sup>15</sup> Criminalization is how the majority of states have handled prostitution in the past as means of suppression.<sup>16</sup> Women selling sex, brothels, pimps, and traffickers are some of the examples of the criminalized persons and activities. However, more often than not, criminalization is enacted in a partial system. Legislation generally targets the supply side of prostitution, and the demand side of prostitution is often unaddressed, if not completely ignored in this model. Criminalization is not always the full criminalization of the buyer and the seller, but often the seller only.<sup>17</sup> As women constitute the majority of the sellers they are often the only party criminalized, as they are perceived by society to be the only party held responsible.<sup>18</sup> In recent years, this model has been re-examined due to its moralist standpoint of society, disregard for the vulnerability of women, and its inconsistency with human rights standards.

### 2.2.2. Legalization

The legalization of prostitution allows prostitution to become a lawful practice. Laws are established to regulate the sex industry and determine when, where, and how prostitution can take place.<sup>19</sup> This model functions as a method of social control and operates on the assumption that prostitution is inevitable.<sup>20</sup> Liberal feminist have argued for legalization as a way to safe

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<sup>15</sup> Hannah Carrig, "Prostitution Regimes in the Netherlands and Sweden: Their Impact on the Trafficking of Women and Children in Illicit Sex Industries," *The Monitor*, (2008): 8-15.

<sup>16</sup> All Party Parliamentary Group on Prostitution and the Global Sex Trade, "Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales," (2014): 1-59.

<sup>17</sup> Equality Now, "Survivor Stories: Legal Approaches to Prostitution," 2013. Available at: [http://www.equalitynow.org/survivorstories/australia\\_note\\_prostitution](http://www.equalitynow.org/survivorstories/australia_note_prostitution).

<sup>18</sup> *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (2) SACR 499 (CC)

<sup>19</sup> Donna Hughes, "Women's Wrongs: Decriminalization of Prostitution in Berkeley," *National Review Online*, 2004. Available at: [http://www.uri.edu/artsci/wms/hughes/womens\\_wrongs.pdf](http://www.uri.edu/artsci/wms/hughes/womens_wrongs.pdf).

<sup>20</sup> Janice Raymond, "Introduction to The Case Against the Legalization of Prostitution," *Violence Against Women*, Vol. 10(10) (2004): 1083-1086.

guard and protect women's rights in prostitution as working professionals.<sup>21</sup> In contrast, radical feminists argue that legalization does not dignify women but rather dignifies the sex industry.<sup>22</sup>

### **2.2.3. Decriminalization**

The decriminalization of prostitution is when all laws pertaining to prostitution have been removed.<sup>23</sup> Decriminalization is similar to legalization in that it also recognizes prostitution as legitimate work. However, decriminalization is less concerned with regulation and more concerned with changing the laws to no longer define prostitution as a criminal activity.<sup>24</sup> Decriminalization is seen as a way to provide women in prostitution with more choices and say over when and how they want to work. Legalization and decriminalization are both considered harm reduction strategies by politicians and public health officials.<sup>25</sup>

### **2.2.4. Abolition**

The abolition of prostitution is a model of partial decriminalization. The purpose of this model is to eliminate the practice of prostitution by targeting the demand side of female sexual labor. The buyer of sexual services remains criminalized, while penalties towards the seller are removed.<sup>26</sup> The model addresses the gender element of prostitution and is intended to change sociocultural assumptions of male and female sexual behavior. Abolitionism is considered a method to achieve gender equality in society by radical feminists.<sup>27</sup> This model views the existence of prostitution as violence against women and a harmful cultural practice under UN frameworks.

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<sup>21</sup> Dianne Post, "Legalization of Prostitution is a Violation of Human Rights," *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

<sup>22</sup> Janice Raymond, "Prostitution on Demand: Legalizing the Buyer as Sexual Consumers," *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

<sup>23</sup> All Party Parliamentary Group on Prostitution and the Global Sex Trade, "Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales," (2014): 1-59.

<sup>24</sup> Mary Lucille Sullivan, "Making Sex Work: A Failed Experiment with Legalised Prostitution," 2007.

<sup>25</sup> G. Abel, L. Fitzgerald, C. Healy, A. and Taylor, "Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation," 2010.

<sup>26</sup> Niklas Jakobsson and Andreas Kotsadam, "The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation," *European Journal Law Economics*, Vol. 35 (1)(2013): 87-107.

<sup>27</sup> Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings," *Violence Against Women*, Vol. 10:10 (2004): 1187-1218.

### 3. The Historical and Legal Context of Prostitution in South Africa

Prostitution can be dated back in some form or another to 1652 in South Africa when European colonialists settled in the Cape.<sup>28</sup> Colonial narratives depict women's sexuality through a lens of male privilege. Women were subjugated to the control of men and their duty was to be submissive. A women's existence was confined within the domestic sphere and social norms and gender relations emerged depicting what a respectable women and an immoral women look like. Women who ventured out of this sphere and operated in a non-regulated space, like prostitution, were seen as immoral.<sup>29</sup> A woman in prostitution was not allowed to solicit herself to a man, but was only allowed to sell her services if a potential buyer approached her. Women were not allowed to approach men in fear that their temptation would corrupt a man's virtue.<sup>30</sup> Nineteenth century legislation solidified society's views of the guilty party in the realm of prostitution, and all fingers pointed to the woman. Women were seen as the temptress and have been prosecuted under the law, stigmatized<sup>31</sup>, and alienated due to their assumed role as the responsibility party in prostitution.

Under South Africa's apartheid regime, policies were established to control sexual behavior and institutionalize racial segregation. The Immorality Act of 1927 was a reflection of this practice.<sup>32</sup> The Immorality Act of 1927 banned extra-marital sexual relations between white and black individuals.<sup>33</sup> This Act did not prevent the commercialization of sexual relations or the exploitation of women but was drafted by white European men to maintain separation of European individuals from people of non-European descent.<sup>34</sup> Women selling their bodies and

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<sup>28</sup> Liezl Gaum, "Turning Tricks: A Brief History of the Regulation and Prohibition of Prostitution in South Africa," *Stellenbosch Law Review*. Vol. 14(3) (2003): 319-336.

<sup>29</sup> Mfon Umoren Ekpo-Otu1, "Contestations of identity: colonial policing of female sexuality in the Cross River region of Southern Nigeria," *Inkanyiso: Journal of Humanities and Social Science*, Vol. 5(1) (2013): 72-80.

<sup>30</sup> Liezl Gaum, "Turning Tricks: A Brief History of the Regulation and Prohibition of Prostitution in South Africa," *Stellenbosch Law Review*. Vol. 14(3) (2003): 319-336.

<sup>31</sup> Liezl Gaum, "Turning Tricks: A Brief History of the Regulation and Prohibition of Prostitution in South Africa," *Stellenbosch Law Review*. Vol. 14(3) (2003): 319-336.

<sup>32</sup> Chesa Boudin and Marlise Richter, "Adult, Consensual Sex Work in South Africa – the cautionary message of criminal law and sexual morality," Submission to South African Law Reform Commission in response to Discussion Paper 0001/2009, Project 107 Sexual Offences, Adult Prostitution, 2009.

<sup>33</sup> Immorality Act No 5 of 1927, commenced on 30 September 1927 and was repealed by s 23 of Sexual Offences Act No 23 of 1957.

<sup>34</sup> John Milton, "Unfair Discrimination on the Grounds of 'Gender, Sex. [or] Sexual Orientation.' How the Sexual Offences Act 1957 does it all," *SACJ*, Vol. 10 (1997): 297-302.

men buying sex were not seen as immoral, rather Europeans having sexual relations with native black Africans was the focal point of immorality at that time.<sup>35</sup>

Prostitution was first prohibited in South Africa under the Sexual Offences Act of 1957, and not prostitution in its entirety, but rather specific acts pertaining to prostitution. Brothels, pimping, and engaging in sexual relations for a reward, were some of the illegal activities of prostitution.<sup>36</sup> For 50 years women suffered from discrimination in South Africa, as the seller was the sole party criminalized and considered the offender under the law. It wasn't until 2007, under section 11 of the Sexual Offences Act 32, that the buyer was also criminalized for prostitution.<sup>37</sup> Traditionally, women have been seen as exploiting men and it hasn't been until recent years that these roles have been seen in reverse. Even though the law now recognizes both parties as equal offenders, the equality of men and women in prostitution remain a point of contention within a human rights framework. The two years following the criminalization of the buyers, only 10 men were arrested versus the 3,385 prostituted women in South Africa. Even though both parties are criminalized under the law, the unequal treatment of enforcing the law is also considered a form of sex discrimination.<sup>38</sup>

#### **4. The Sociocultural Context**

“Culture is the shared knowledge and schemes created by a set of people for perceiving, interpreting, expressing, and responding to the social realities around them.”<sup>39</sup>

How women are perceived in society establishes a culture that will either further the advancement of women's human rights or perpetuate women's subjugation and exploitation to men. Legal reasoning and responses to prostitution have proven to be problematic in the past as

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<sup>35</sup> John Milton, “Unfair Discrimination on the Grounds of ‘Gender, Sex. [or] Sexual Orientation.’ How the Sexual Offences Act 1957 does it all,” *SACJ*, Vol. 10 (1997): 297-302.

<sup>36</sup> Sexual Offences Act 23 of 1957

<sup>37</sup> Rufaro Gweshe and Omowamiwa Kolawole, “Chapter 6, Section 11: Engaging sexual services of person 18 years or older,” Dee Smythe and Bronwyn Pithey (eds.), *Sexual Offences Commentary*, Cape Town: Juta (2011, 2014 revised).

<sup>38</sup> Catharine MacKinnon, “Trafficking, Prostitution, and Inequality,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>39</sup> John Paul Lederach, “Preparing for Peace: Conflict Transformation cross Cultures,” 1995.

societal norms and gender relations were overlooked.<sup>40</sup> In order to determine the most suitable legal model to advance women's human rights, the sociocultural context that enables prostitution to thrive will have to be recognized within the law. Prostitution does not exist in a utopian society where women are treated as equals to men, but rather is a consequence of gender biases and patriarchal structures in society.<sup>41</sup> These two elements create a sociocultural context that is oppressive to women, and it is in this context that prostitution will be analyzed on a global scale, but more specifically within South Africa.

#### **4.1. Gender Norms**

The body has been the origin of struggle for feminists,<sup>42</sup> as human anatomy has separated the sexes. However, the body is comprised of more than its physical composition.<sup>43</sup> While the sex of an individual is considered the physical body, gender is attributed to the cultural lens through which the body is perceived.<sup>44</sup> Since the body functions within a socio-cultural environment and not in isolation, cultural practices carry social meaning that form the gendered experience for the individual and society at large.<sup>45</sup> Socialization patterns, social status, and power relations between the sexes, rather than the biological differences of men and women define gender.<sup>46</sup> Gender norms exist in every society that reflects the values, expectations, and behaviors of what is considered to be masculine and feminine.<sup>47</sup> From an early age men and women are socialized into these preconceived roles. Gender norms are applied differently to each sex and become harmful to women, as women are encouraged to be passive and submissive while men are chosen to be the dominant, decision makers and the head of the household.<sup>48</sup> Gender norms have allowed

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<sup>40</sup> Elsje Bonthuys and Carla Monteiro, "Sex for Sale: The Prostitute as Business Woman," *South African Law Journal*, Vol. 121(3) (2004): 659-676.

<sup>41</sup> Maddy Coy, (ed.), "Prostitution, Harm, and Gender Inequality: Theory, Research and Policy," 2012.

<sup>42</sup> Margaret A. McLaren, "Feminism, Foucault, and Embodied Subjectivity," 2002.

<sup>43</sup> Fredrickson and Roberts, "Objectification Theory: Towards Understanding Women's Lived Experiences and Mental Health Risks." *Psychology of Women Quarterly*, Vol. 21 (1997): 173-206.

<sup>44</sup> Margaret A. McLaren, "Feminism, Foucault, and Embodied Subjectivity," 2002.

<sup>45</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>46</sup> Fredrickson and Roberts, "Objectification Theory: Towards Understanding Women's Lived Experiences and Mental Health Risks." *Psychology of Women Quarterly*, Vol. 21 (1997): 173-206.

<sup>47</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>48</sup> Sarah Bandali, "Exchange of sex for resources: HIV risk and gender norms in Cabo Delgado, Mozambique," *Culture, Health & Sexuality*, Vol. 13(5) (2011): 575-588.

women to be seen as conquests and property, forcing women to maintain an inferior status in comparison to privileged rights of men.<sup>49</sup>

## 4.2. Patriarchy

Patriarchy represents a societal structure where men hold more power than women. The existence of men is not the harm or the cause of women's subordination. However, it is the culture that allows the behavior and attitudes of men to dictate and control society that is harmful to women.<sup>50</sup> The needs of women become neglected, as a patriarchal society is one that is "*male-dominated, male-identified, and male-centered.*"<sup>51</sup> Patriarchy is so deeply ingrained within culture that its impact on women is often unrecognizable. The effects of patriarchy are multidimensional as aspects are embedded in structures that govern the political, economic, and social lives of women.<sup>52</sup> Studies have shown male dominated environments are more sexualized as patriarchy becomes the socially sanctioned right of men to sexualize females.<sup>53</sup> Prostitution is the prime example of a patriarchal institution as it is a practice powered by men and performed for the male benefit.

## 5. Research Focus

Prostitute [pros-ti-toot, -tyoot] is commonly defined as:

- 1.) a woman who engages in sexual intercourse for money; whore; harlot.
- 2.) a man who engages in sexual acts for money.
- 3.) a person who willingly uses his or her talent or ability in a base and unworthy way, usually for money.<sup>54</sup>

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<sup>49</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>50</sup> Janice Raymond, "Prostitution on Demand: Legalizing the Buyer as Sexual Consumers," *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

<sup>51</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>52</sup> bell hooks, "Understanding Patriarchy," *No Borders: Louisville Radical Lending Library*, 2004. Available at: <http://imagineborders.org/pdf/zines/UnderstandingPatriarchy.pdf>

<sup>53</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>54</sup> Prostitute defined by dictionary.com. Available at: <http://dictionary.reference.com/browse/prostitute>, 2014.

The word prostitute is instinctively associated with a woman soliciting sex. In 2003, it was estimated that 95% of individuals involved in sex work in South Africa were women.<sup>55</sup> Prostitution is gendered in nature, but contrary to what the definition suggests the majority of women are not the sellers, but rather the commodified good available for men to purchase. Men's demand for women's sexual labor remains the driving force behind the sex industry, and without the demand prostitution would not exist.<sup>56</sup>

Women in South Africa reported their entry into prostitution was the result of unstable circumstances. Women reported poverty, a lack of education, especially not knowing how to read or write, as obstacles to pursuing better employment opportunities outside prostitution.<sup>57</sup> Women that experienced a history of abuse within the home or experienced violence from an intimate partner were also reported as contributing factors that led to prostitution.<sup>58</sup> Women entered prostitution as the result of the exploitation of their vulnerable status in society. However, once in prostitution women were further exposed to control, abuse, disease, and gender based violence present within this harmful practice<sup>59</sup>. South Africa reported more than 75% of women involved in prostitution were not only trying to survive and provide for themselves, but also were responsible for providing for their family.<sup>60</sup> In a study conducted by Melissa Farley that extended over nine countries, including South Africa, 89% of women involved in prostitution reported the desire to leave, but stayed since they believed there was no other option.<sup>61</sup>

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<sup>55</sup> Rosaan Kruger, "Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case." *SAJHR*, Vol. 20 (2004): 138-150.

<sup>56</sup> Sheila Jeffreys, "The Industrial Vagina: The Political Economy of the Global Sex Trade," 2009.

<sup>57</sup> John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as the Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>58</sup> K. Dunkle, R. Jewkes, H. Brown, G. Gray, J. McIntyre, and S. Harlow, "Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection," *Social Science & Medicine*, Vol. 59 (2004): 1581-1592.

<sup>59</sup> Rachel Jewkes, Robert Morell, Yandisa Sikweyiya, Kristin Dunkle and Loveday Penn-kekana, "Transactional relationships and sex with a woman in prostitution: prevalence and patterns in a representative sample of South African men," *BMC Public Health*, Vol. 12(325) (2012): 1-10.

<sup>60</sup> John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as the Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>61</sup> Melissa Farley, "Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized," *Violence Against Women*, Vol. 10(10) (2004): 1087-1125.

This paper will be approached from a gendered perspective showing how law and society have traditionally seen women. This paper will use the socio-cultural context in South Africa as a lens to evaluate women's status in society. Prostitution complying with human rights standards cannot be achieved unless the sociocultural context of women is personified. This paper is an investigation on how to move female sexual labor into a human rights framework. The thesis question proposed by this paper asks:

In a socio-cultural context of pervasive exploitation of women, can the proposed law reforms of adult prostitution in South African fulfill international obligations to protect and promote women's human rights?

Prostitution and sex work are the terms used to describe the exchange of money for women's sexual labor. There has been a shift in language as the conventional term *prostitution* is seen as casting a moral judgment, whereas *sex work* does not. However, both terms carry different connotations and for the purpose of this paper the term prostitution will be used specifically as this term is found in the law.<sup>62</sup>

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<sup>62</sup> Rosaan Kruger, "Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case." *SAJHR*, Vol. 20 (2004): 138-150.

## CHAPTER 2: PROSTITUTION AND THE FEMINIST DEBATE

### 1. Introduction

This chapter will establish the two dominant feminist standpoints on prostitution. The feminist debate is centered on how human rights are interpreted by these opposing positions and the impact these rights have on the lives of women. These philosophical perspectives lay the foundation for feminists aligning with certain legal reforms of prostitution over others. The feminist debate will mirror the prostitution legal reforms later presented in chapter five.

### 2. Liberal vs. Radical Feminism

Liberal and Radical feminism are the two opposing schools of thought regarding prostitution policy reform. The Abolition of all forms of prostitution was the dominant viewpoint held by feminists during the first wave of the feminist movement,<sup>63</sup> from the late nineteenth century into the 1980s.<sup>64</sup> The second wave of feminism gave rise to two different feminist groups, liberal and radical feminists, which are still the dominant dialogues of today. While both groups strive for gender equality, each group has a different opinion on how equality should be achieved.

Liberal feminists argue that men dominate social structures and that these structures need to be transformed from within in order to redistribute power equally between men and women.<sup>65</sup> Radical feminists argue that restructuring is not sufficient, since patriarchy has become so deeply ingrained in society that the structures themselves need to be eradicated and recreated.<sup>66</sup> Liberal feminists focus more on equality for women in the public sphere, whereas radical feminists are attentive to oppression of women in both the public and private sphere. They do not consider women's primary struggle for equality in the lack of equal job opportunities, but rather as the struggle for equality in intimate relationships which patriarchy has deemed as private.<sup>67</sup>

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<sup>63</sup> Joyce Outshoorn, "Political Debates on Prostitution and Trafficking of Women, Social Politics: International Studies in Gender, State and Society," Vol. 12(1): 141-155, 2005.

<sup>64</sup> Shelia Jeffreys, "Prostitution, trafficking and feminism: An update on the debate," *Women's Studies International Forum*, Vol. 32 (2009): 316-320.

<sup>65</sup> Alison Jaggar, "Feminist Politics and Human Nature," 1983.

<sup>66</sup> Earl Smith, "Sociology of Sport and Social Theory." *International Forum*, Vol. 32 (2009): 316-320.

<sup>67</sup> Alison Jaggar, "Feminist Politics and Human Nature," 1983.

Prostitution cannot solely be about obtaining workers' rights, since patriarchy and power dynamics exist in all social, political, economic, and private structures in which women participate.<sup>68</sup> Prostitution cannot be separated from structural inequality, and it therefore needs to be eradicated in order for all women to be truly treated as equals in society.<sup>69</sup>

Radical feminists reignited the abolitionist discourse viewing prostitution as the exploitation of women and the exemplification of women's subordination and ultimate oppression.<sup>70</sup> The abolition of prostitution is often mistaken for prohibition, which considers all aspects of prostitution illegal and criminalizes all parties involved. However, even though abolitionists strive to eradicate the institution of prostitution itself, they recognize the only way to do this is by addressing the root cause. Men are seen as the culprits not the women and that is why this position only targets the demand side of prostitution as the way to stop this practice.<sup>71</sup> Radical feminism lost momentum due to the assumption that abolitionism was "sex negative" or a moral endeavor.<sup>72</sup> Advocacy efforts towards the abolition of prostitution have been revived in recent years based on the realization that the equality between men and women has not been achieved but continue to remain a threat to women's human rights.

### **3. The Liberal Feminist Perspective of Prostitution as Commercial Sex Work**

"All of us, with the exception of the independently wealthy and the unemployed, take money for the use of our body."<sup>73</sup>

Martha Nussbaum, Ph.D.

Liberal feminists consider prostitution a form of labor, and insist that law should recognize prostitution as sex work. By recognizing prostitution as sex work, women will no longer be

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<sup>68</sup> Alison Jaggar, "Feminist Politics and Human Nature," 1983.

<sup>69</sup> Kathleen Barry, "Prostitution of Sexuality: The Global Exploitation of Women," 1995.

<sup>70</sup> Joyce Outshoorn, "Political Debates on Prostitution and Trafficking of Women, Social Politics: International Studies in Gender, State and Society," Vol. 12(1): 141-155, 2005.

<sup>71</sup> Joyce Outshoorn, "The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce," 2004.

<sup>72</sup> Shelia Jeffreys, "Prostitution, trafficking and feminism: An update on the debate," *Women's Studies International Forum*, Vol. 32 (2009): 316-320.

<sup>73</sup> Martha Nussbaum, "'Whether from Reason or Prejudice': Taking Money for Bodily Services," *Journal of Legal Studies*, Vol. 27(2) (1998): 693-724, 693.

denied their human right to work and receive benefits that are guaranteed with employment under the law. The stance of prostitution as sex work is the dominant perspective of liberal feminist and within this discourse women have the right to autonomy over what profession they choose. Liberal feminist further support their position by emphasizing the need to normalize and dehumanize the practice of prostitution.

### **3.1. Prostitution as the Right to Autonomy**

Feminists began to break away from the abolitionist position considering it repressive of women, resulting in the emergence of sexual liberalism in the second wave of feminism. Prostitution and pornography were seen as freedoms, which allowed for women to be in control of their own bodies. Women's subordination was perceived as a sentiment of the past.<sup>74</sup> Liberal feminists no longer wanted women to be seen as victims, but rather as empowered individuals claiming their rights. The sex work standpoint was formed as a way to support women's right to autonomy and choice to enter any profession. According to liberal feminists, the freedom to choose to enter prostitution is as a human right and women have the right to do with their bodies whatever they choose.<sup>75</sup> Obtaining workers' rights for women in prostitution was viewed as a pathway to equality with men. Liberal feminism argue that if women are denied the right to become a sex worker then they are being denied their human right to non-discrimination and equality before the law, in addition to their right to autonomy, liberty, and security of person.<sup>76</sup> Liberal feminists consider sex work equivalent to any other occupation; therefore, the injustice is not in the industry itself, but rather related to the conditions of exploitation, violence, and abuse prevalent within this profession.<sup>77</sup> Radical feminist, Kathleen Barry argues that liberal feminism places individual choice over individual livelihood and the quality of human life. Kathleen Barry states that a human rights approach should not be based on an individual's consent in determining if autonomy and freedom has been protected, just as the lack of consent should not be the only

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<sup>74</sup> Shelia Jeffreys, "Prostitution, trafficking and feminism: An update on the debate," *Women's Studies International Forum*, Vol. 32 (2009): 316-320.

<sup>75</sup> Janice Raymond, "Prostitution as Violence Against Women, NGO Stonewalling in Beijing and Elsewhere," *Women's Studies International Forum*, Vol. 21(1) (1998): 1-9.

<sup>76</sup> Jeffrey Gauthier, "Prostitution, Sexual Autonomy, and Sex Discrimination," *Hypatia*, Vol. 26(1) (2011): 166-186.

<sup>77</sup> Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik, (eds.), "Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights," 2011.

factor in determining exploitation. When the justification of the sex industry is considered permissible due to consent or the choice of the individual, the understanding of how sex is used as a construct of power and the effects it has on the female experience is neglected and made obsolete.<sup>78</sup> An individual's dignity, worth, and well-being can be violated even when consent is given. Consent is not necessary to prove that an injustice has occurred and building a case on consent limits the scope of harm to the individual while ignoring the implications it has on society.

### **3.2. The Normalization of Prostitution**

Liberal feminists consider the stigma of prostitution as the harm to women, not the profession itself. The societal stigma of prostitution falls unequally on women than it does on men.<sup>79</sup> Radical and liberal feminists strive to remove any stigma associated with women involved in prostitution, as both groups remain in agreement that the women are not to be blamed. However, radical feminists do not want to establish a social acceptance of prostitution, which liberal feminists intend to achieve. Liberal feminists strive to normalize prostitution, in order to improve the treatment of women in this industry.<sup>80</sup> Prostitution is validated as sex work and is considered an acceptable practice as both parties are assumed to use one another willingly. Sex work is viewed as a means of power for women, as women are now compensated for an act that traditionally has been done for free.<sup>81</sup> According to liberal feminists, the stigma associated with prostitution only exists when prostitution is illegal. Liberal feminists do not acknowledge that the stigma of prostitution could be related to the way in which this practice perpetuates and entrenches men's perception of women as subjects to be objectified, exploited and controlled.<sup>82</sup> Radical feminists' refusal to promote the normalization of prostitution has resulted in being labeled as 'victim feminists' by liberals.<sup>83</sup> However, radical feminist theorist, Marry Daly considers this attack misplaced, and believes what is actually taking place is "*patriarchal*

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<sup>78</sup> Kathleen Barry, "Prostitution of Sexuality: The Global Exploitation of Women," 1995.

<sup>79</sup> Jeffrey Gauthier, "Prostitution, Sexual Autonomy, and Sex Discrimination," *Hypatia*, Vol. 26(1) (2011): 166-186.

<sup>80</sup> Joyce Outshoorn, "Political Debates on Prostitution and Trafficking of Women, Social Politics: International Studies in Gender, State and Society," Vol. 12(1): 141-155, 2005.

<sup>81</sup> John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as the Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>82</sup> Catharine MacKinnon, "Trafficking, Prostitution, and Inequality," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>83</sup> Shelia Jeffreys, "The Idea of Prostitution," 1997.

reversal.”<sup>84</sup> She argues that men’s role in women’s oppression has become invisible, and this invisibility has become normalized to the point that the women who are seen as the whistleblowers are also seen as the oppressors.<sup>85</sup>

### 3.3. The Dehumanization of Prostitution

Liberal feminists do not consider the body as essential to the self.<sup>86</sup> Liberal feminist, Martha Nussbaum, says sex should be able to be bought and sold without stigmatization, because sex work is no different from any other form of labor. She continues to argue that selling sex is one of the many ways we use our bodies to provide a service to the consumer. Sex work is no different than using intellect or physical forms of labor that are compensated when provided. Nussbaum even compares a sex worker to a nightclub singer, saying both women use their bodies to provide pleasure to the customer but in different ways.<sup>87</sup>

Radical feminists consider the body intrinsically linked to the sense of self, understanding that a woman cannot contract out her physical form without it some how having a ripple effect on her personhood and identity.<sup>88</sup> Radical feminists question the liberal position by arguing that if prostitution was like any other form of work, it should not require dissociation in order to survive the physical, emotional, and mental trauma that takes place in the workplace. As liberal feminists consider sex a typical work endeavor they remain confident that women involved in prostitution are able to separate their personal sex lives from their work sex lives.<sup>89</sup> However, women involved in prostitution often have to establish an alternative self or identity in order to cope.<sup>90</sup> Dissociation is a common coping mechanism among prisoners of war and this coping mechanism is as evident among prostituted women as with victims of torture.<sup>91</sup> Catharine

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<sup>84</sup> Shelia Jeffreys, “Beauty and Misogyny: Harmful Cultural Practices in the West,” 2005.

<sup>85</sup> Shelia Jeffreys, “The Idea of Prostitution,” 1997.

<sup>86</sup> Alison Jaggar, “Feminist Politics and Human Nature,” 1983.

<sup>87</sup> Martha Nussbaum, “‘Whether from Reason or Prejudice’: Taking Money for Bodily Services,” *Journal of Legal Studies*, Vol. 27(2) (1998): 693-724.

<sup>88</sup> Maddy Coy, (ed.), “Prostitution, Harm, and Gender Inequality: Theory, Research and Policy,” 2012.

<sup>89</sup> John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as the Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>90</sup> Catharine MacKinnon, “Trafficking, Prostitution, and Inequality,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>91</sup> Melissa Farley, “Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized,” *Violence Against Women*, Vol. 10(10) (2004): 1087-1125.

MacKinnon argues that women live inside their bodies and that prostitution should not be what a job let alone freedom should look like when women cannot bear to live inside their own head.<sup>92</sup>

The practice of prostitution itself is dehumanized as well as the women through sexual objectification. Sexual objectification occurs when a woman's body and sexual utility measure her worth. A woman is reduced to an inanimate object to be used regardless of her consent.<sup>93</sup> Women's body parts are seen as commodities, targeted and valued only on their ability to bring sexual fulfillment to a man.<sup>94</sup> Sexual objectification denies a woman her humanity by no longer recognizing her as a living, breathing human being. Radical feminists consider the sexual objectification of women as the cultural approval of violence against women.<sup>95</sup> Sexual objectification is a form of gender oppression and women involved in prostitution experience this in a greater magnitude.<sup>96</sup>

Sexual objectification theory studies the lived experience of women victim to a culture that sexually objectifies the female body. This theory shows how the objectification of women forces women to internalize the public display of their own disembodiment.<sup>97</sup> Women have reported suffering from various mental health problems such as depression and sexual dysfunction that disproportionately effect women compared to men. Sexual objectification is harmful to women; causing women to self-objectify and value their own worth on their exterior rather than on their capability.<sup>98</sup> When the dehumanization of women and their sexuality is considered the original human condition, prostitution cannot be recognized for what it is, sexual exploitation.<sup>99</sup>

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<sup>92</sup> Catharine MacKinnon, "Trafficking, Prostitution, and Inequality," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>93</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>94</sup> S. L. Bartky, "Femininity and Domination: Studies in the Phenomenology of Oppression," 1990.

<sup>95</sup> Mary Lucille Sullivan, "Making Sex Work: A Failed Experiment with Legalised Prostitution," 2007.

<sup>96</sup> Margaret Radin, "Contested Commodities," 1996.

<sup>97</sup> Fredrickson and Roberts, "Objectification Theory: Towards Understanding Women's Lived Experiences and Mental Health Risks." *Psychology of Women Quarterly*, Vol. 21 (1997): 173-206.

<sup>98</sup> Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, "Sexual Objectification of Women: Advances to Theory and Research," *The Counseling Psychologist*, Vol. 39(1) (2011): 6-38.

<sup>99</sup> Kathleen Barry, "Prostitution of Sexuality: The Global Exploitation of Women," 1995.

#### 4. The Radical Feminist Perspective of Prostitution as Exploitation of Women

“The prostitution exchange is the most systemic institutionalized reduction of women to sex. It is the foundation of all sexual exploitation of women. It is the prototype, the model from which all other sexual exploitation can be understood.”<sup>100</sup>

Kathleen Barry, Ph.D.

Exploitation is any harmful activity that allows one party to benefit at the expense of another.<sup>101</sup> The sexual exploitation of women is any abuse of women’s vulnerability from a position of power. It is a violation of a women’s physical and mental integrity as well as her human right to dignity and equality.<sup>102</sup> The culture-condoned practice of commodification allows women’s bodies to be bought and sold. Sexual exploitation is the inhuman treatment of women as it makes one person the means to another person’s end.<sup>103</sup> Prostitution as exploitation is the dominant stance of radical feminists. Within this discourse prostitution is considered an institution of women’s oppression and inequality. Radical feminists also argue that prostitution is an example of violence against women and a harmful cultural practice under UN frameworks.

##### 4.1. Prostitution as Oppression of Women

Prostitution is often defined as a type of financial compensation for sexual services.<sup>104</sup> However, it is not solely the economic exchange for sex that makes prostitution harmful, exploitative, and oppressive. There is no denying that women’s economic inequalities are exploited through prostitution, however radical feminist consider the exploitation that exists to be at the most basic level of human relations.<sup>105</sup> It is the ‘sex of prostitution’<sup>106</sup> or rather the manner of sex that exists within prostitution that is considered to exploit the essence of women. The sex of prostitution

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<sup>100</sup> Kathleen Barry, “Prostitution of Sexuality: The Global Exploitation of Women,” 1995: 65.

<sup>101</sup> Catharine MacKinnon, “Prostitution and Civil Rights,” *Michigan Journal of Gender & Law*, Vol. 1 (1993): 13-31.

<sup>102</sup> Mary Lucille Sullivan, “Making Sex Work: A Failed Experiment with Legalised Prostitution,” 2007.

<sup>103</sup> Vanessa E. Munro and Marina Della Giusta, (eds.), “Demanding Sex: Critical Reflections on the Regulation of Prostitution,” 2008.

<sup>104</sup> Julia O’Connell Davidson, “Prostitution, Power, and Freedom,” 1998.

<sup>105</sup> Kathleen Barry, “Female Sexual Slavery,” 1979.

<sup>106</sup> Meagan Tyler, ‘Theorizing Harm through the Sex of Prostitution,’ in Maddy Coy, (ed.), “Prostitution, Harm, and Gender Inequality: Theory, Research and Policy,” 2012.

allows men to control and dominate sexual relations while women are to be the sexual subordinate. Women are to cater to a man's desire, even when that act is demeaning to her self worth. The practice of prostitution is not founded on consensual relations between both parties. When taking a closer look it becomes evident that prostitution not only is the result of power imbalances in society but the sex of prostitution requires power imbalances within the sexual interaction.<sup>107</sup> Prostitution is more accurately defined as the practice that allows one person to have the power over another person's body.<sup>108</sup> Prostitution gives the purchasing rights of one human being's sexuality to another. This perspective alone reflects one of sexual servitude and slavery. When the gendered dimension is factored into the equation, prostitution becomes "*the purchase of rights to sexually use a woman's body*" by a man.<sup>109</sup>

Sociologist and international activist, Kathleen Barry spearheaded the debate alongside renowned radical feminist scholars such as Catharine Mackinnon, Joyce Outshoorn, and Shelia Jeffreys, in recognizing prostitution as a human rights violation and a form of sexual exploitation. Barry cautions that prostitution is overlooked as a class condition of women, instead prostitution is normalized to solely respect the choice of the individual.<sup>110</sup> Due to a culture that has allowed men to believe they have a right to control women's sexuality, radical feminists agree that whether prostitution is considered chosen or voluntary, the practice itself perpetuates a patriarchal structure that is harmful to women.<sup>111</sup> In constructing a feminist human rights perspective, Barry argues that harm is found in the act, the women's exploitative experience in prostitution, not only individually but also collectively. When exploitative acts persist and are inflicted on countless women across the globe, exploitation escalates to oppression.<sup>112</sup>

The normalization of prostitution is seen as a threat to all women, not only women involved in prostitution, as it allows a patriarchal institution to thrive which undermines the dignity and

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<sup>107</sup> Meagan Tyler, 'Theorizing Harm through the Sex of Prostitution,' in Maddy Coy, (ed.), "Prostitution, Harm, and Gender Inequality: Theory, Research and Policy," 2012.

<sup>108</sup> Julia O'Connell Davidson, "Prostitution, Power, and Freedom," 1998.

<sup>109</sup> Carole Pateman, "The Sexual Contract," 1988.

<sup>110</sup> Kathleen Barry, "Prostitution of Sexuality: The Global Exploitation of Women," 1995.

<sup>111</sup> Stephanie A. Limoncelli, "The Trouble with Trafficking: Conceptualizing Women's Sexual Labor and Economic Human Rights." *Women's Studies International Forum*, Vol. 32 (2009): 261-269.

<sup>112</sup> Kathleen Barry, "Prostitution of Sexuality: The Global Exploitation of Women," 1995.

equality of women.<sup>113</sup> As previously stated by Kathleen Barry, radical feminists consider prostitution the foundation of all sexual exploitation and therefore prostitution cannot be separated into different forms and manifestations of exploitation in the sex industry. Radical feminists criticize all forms of prostitution and do not distinguish between forced and voluntary prostitution, between child and adult prostitution, between indoor and outdoor prostitution, between trafficking of persons and prostitution. These classifications still remain a representation of exploitation and radical feminists do not identify any of these forms as being more harmful than the other.<sup>114</sup> Radical feminists do not see a ranking system to exploitation, because each specification is an expression of this injustice. Radical feminists are reluctant to distinguish between one form of sexual exploitation as it indirectly legitimizes another and the practice of prostitution itself.<sup>115</sup>

#### **4.2. Prostitution: The Inequality of ‘Equality’**

The social and sexual inequalities in society are exposed through prostitution.<sup>116</sup> Prostituted women can assume they are acting with a degree of agency over their present circumstances to enter prostitution. However, the conditions under which their choices are made often provide a false consciousness to the exploited party, especially when no alternate means are provided.<sup>117</sup> The position of prostitution as sex work considers this practice a commercial contract between two equal parties. The equality of men and women comes into question when the structure of society allows for women to be deprived socially, economically, and educationally due to socio-cultural norms. The conditions of this so-called agreement cannot be understood as an equal exchange when women’s power of negotiating is significantly less.<sup>118</sup>

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<sup>113</sup> Mary Lucille Sullivan, “Making Sex Work: A Failed Experiment with Legalised Prostitution,” 2007.

<sup>114</sup> Catharine MacKinnon, “Trafficking, Prostitution, and Inequality,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>115</sup> Shelia Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>116</sup> John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as the Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>117</sup> Vanessa E. Munro and Marina Della Giusta, (eds.), “Demanding Sex: Critical Reflections on the Regulation of Prostitution,” 2008.

<sup>118</sup> Elsje Bonthuys and Carla Monteiro, “Sex for Sale: The Prostitute as Business Woman,” *South African Law Journal*, Vol. 121(3) (2004): 659-676.

Shelia Jeffreys contends that understanding prostitution as a product of rational choice and equal exchange between men and women is actually a “*necessary fiction*” which has been promoted to further normalize and legalize this harmful practice.<sup>119</sup> Radical feminists do not see women as ‘helpless victims,’ which is often the criticism of liberals, but rather understand that societal constructs have made women’s assumed free choice a false reality due to the influence of patriarchal structures. Radical feminists insist if patriarchy goes unchallenged in society and men are allowed to dominate power relations, women’s choices will always be considered unequal, coerced, and constrained.<sup>120</sup> Jeffreys goes as far as to say that promoting women’s right to choose prostitution is victim blaming, as it places the responsibility on women. Women that have been able to exit prostitution have said that the exit should be considered the ‘choice’ rather than the entry.<sup>121</sup> Even though liberal feminists view prostitution as taking a stand for women’s rights, men do not constitute the majority of prostituted people standing on street corners soliciting sex.<sup>122</sup> Unlike women, few men have to choose prostitution. Jeffreys insists that if true equality existed, women would not have the option of prostitution, because prostitution would not exist.<sup>123</sup>

Radical feminists see the power of women’s choice and agency displayed when women are able to oppose the individual and systemic oppression of their sex rather than submit to an industry powered to meet the demands of men.<sup>124</sup> While working with prostituted women, feminist author, Maddy Coy, studied the physical and psychological harms women experienced in prostitution and witnessed women’s lack of power. She contends that the power structure at play within prostitution undermines gender equality in society by replicating a gendered hierarchical paradigm where men are in control and remain on top.<sup>125</sup> Prostitution is both a cause and consequence of gender inequality in society.<sup>126</sup>

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<sup>119</sup> Shelia Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>120</sup> Kathleen Barry, “Prostitution of Sexuality: The Global Exploitation of Women,” 1995.

<sup>121</sup> Shelia Jeffreys, “The Idea of Prostitution,” 1997.

<sup>122</sup> Kat Baynard, “Prostitution, Harm, and Gender Inequality: Theory, Research and Policy,” *Gender and Development*, Vol. 21(1) (2013): 199-201.

<sup>123</sup> Shelia Jeffreys, “The Idea of Prostitution,” 1997.

<sup>124</sup> Kathleen Barry, “Prostitution of Sexuality: The Global Exploitation of Women,” 1995.

<sup>125</sup> Kat Baynard, “Prostitution, Harm, and Gender Inequality: Theory, Research and Policy,” *Gender and Development*, Vol. 21(1) (2013): 199-201.

<sup>126</sup> Maddy Coy, (ed.), “Prostitution, Harm, and Gender Inequality: Theory, Research, and Policy,” 2012.

### 4.3. Prostitution as Violence Against Women

Radical feminists consider prostitution a form of violence against women within UN. The United Nations defines violence against women as "*any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*"<sup>127</sup> Violence is a violation of person's integrity whether it is injury to the body or the mind.<sup>128</sup> Violence against women is not only attributed to force or intimidation perpetuated by a man, but is understood to be a reflection of how society views women.

Violence against women and prostitution are both societal inflictions caused by men's assumed right to exert power and control over a women's body. Historically, men were given the authority to abuse their wives as abuse was considered a private matter outside the purview of the law. Society scrutinized women as deserving of this treatment and blamed women for not leaving their husbands after the abuse occurred. The UN Special Rapporteur on Violence against Women, Rashida Manjoo argued, "*States must acknowledge that violence against women is not the root problem, but that violence occurs because other forms of discrimination are allowed to flourish.*"<sup>129</sup> After decades of campaigning and awareness efforts by feminists, domestic violence was recognized as a human rights abuse regardless if women consented to the verbal or physical assaults of a husband or partner. The argument of consent within prostitution as with domestic violence becomes irrelevant, as it is never a man's right to abuse a woman and it is never a man's right to purchase a women's body. Violence is violence whether a pimp or batterer is the perpetrator of the injustice. Both men practice the same methods of power and control over women and subscribe to the same hegemonic ideals of masculinity.<sup>130</sup>

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<sup>127</sup> Article 1 of the Declaration on the Elimination of Violence Against Women, United Nations General Assembly, 1993.

<sup>128</sup> Ulla Bjørndahl Oslo, "Dangerous Liaisons A report on the violence women in prostitution in Oslo are exposed to," 2012. This report was written on commission by the municipality of Oslo and with support by the Ministry of Justice and Public Safety.

<sup>129</sup> Statement by Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences, 66<sup>th</sup> session of the General Assembly, New York, 2011.

<sup>130</sup> Evelina Giobbe, "An Analysis of Individual, Institutional, and Cultural Pimping," *Michigan Journal of Gender & Law*, Vol. 1(1) (1993): 33-57.

Violence against women is sustained through the attitudes, customs, and practices within society. International law recognizes these aspects as the cause of violence and requires states to modify their laws and practices to address the treatment of women.<sup>131</sup> Whether or not physical violence occurs within prostitution, radical feminists consider the existence of prostitution the harm and a manifestation of violence against women.<sup>132</sup> Violence against women is a form of discrimination as women are disproportionately affected on the basis of their gender.<sup>133</sup> Prostitution, like sexual harassment, sexual assault, or domestic violence affect women disproportionately and is considered a form of sex discrimination under international law by radical feminists.

#### **4.4. Prostitution as a Harmful Cultural Practice**

The need to address the impact of harmful cultural practices on women as well as the recognition of traditions as a violation of women's human rights is recent development within the UN. The phrase 'harmful cultural practices' or 'harmful traditional practices' was not readily used until the UN text, *Harmful Traditional Practices Affecting the Health of Women and Children*, was issued in 1995.<sup>134</sup>

The UN recognizes traditional, cultural practices to exhibit the values and beliefs of community members spanning the course of generations.<sup>135</sup> These traditions and customs go unquestioned due to the length of time they have been practiced in a community and have become an acceptable form of behavior. Prostitution being regarded as the 'oldest profession' is one example of a harmful cultural practice that has been justified due to tradition.<sup>136</sup> The common argument of inevitability states that prostitution 'has always been and therefore will always be'

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<sup>131</sup> General Recommendation Number 19 of the Convention of Elimination of Discrimination Against Women, 11<sup>th</sup> Session, 1992.

<sup>132</sup> Ronald Weitzer, "Flawed Theory and Method in Studies of Prostitution," *Violence Against Women*, Vol. 11 (2005): 934-949.

<sup>133</sup> Catharine MacKinnon, "Prostitution and Civil Rights," *Michigan Journal of Gender & Law*, Vol. 1 (1993): 13-31.

<sup>134</sup> Sheila Jeffreys, "The Industrial Vagina: The Political Economy of the Global Sex Trade," 2009.

<sup>135</sup> United Nations Office of the High Commissioner for Human Rights, "Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children," 1995.

<sup>136</sup> Maddy Coy, (ed.), "Prostitution, Harm, and Gender Inequality: Theory, Research and Policy," 2012.

demonstrates how prostitution is accepted and unchallenged due to the extent of its existence within socio-cultural norms.<sup>137</sup>

The UN's stance on *Harmful Traditional Practices Affecting the Health of Women and Children* recognizes harmful traditional and/ or cultural practices as practices that are performed for male benefit. Prostitution is argued to fit the criteria of harmful cultural practices, as prostitution is a gendered practice performed for male benefit.<sup>138</sup> Harmful cultural practices are considered to perpetuate the inferior status of women as well as preventing the attitude and structural changes necessary for gender equality.<sup>139</sup>

## 5. Conclusion

The liberal feminist perspective on prostitution and human rights remains valid, as women should have the right to work wherever they choose. However, prostitution is rarely, if ever, a choice. The position of prostitution as sex work is a limited perspective to a rights based approach that is unable to recognize the context in which this practice exists. The Radical feminists perspective of prostitution as the exploitation of women is the only human rights approach that addresses the depth of the injustice. Prostitution as a fundamental practice of inequality between men and women is the only way to eliminate a patriarchal institution that is inherently harmful to women.

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<sup>137</sup> Laura Reanda, "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions," *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

<sup>138</sup> Maddy Coy, (ed.), "Prostitution, Harm, and Gender Inequality: Theory, Research and Policy," 2012.

<sup>139</sup> United Nations Office of the High Commissioner for Human Rights, "Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children," 1995.

## CHAPTER 3: INTERNATIONAL HUMAN RIGHTS LAW AND SOUTH AFRICAN LEGISLATION

### 1. Introduction

After the atrocities of the Second World War, the United Nations was formed and the General Assembly made a decree to the world that human dignity and fundamental freedoms were entitled to every individual. In 1948, the Universal Declaration of Human Rights (UDHR) became the international bill of rights of every human being, and the notion of human rights became not only universally recognized, but also universally protected.<sup>140</sup> Human rights are not found in the law, but rather protected and affirmed by the law. This means that human rights should not be seen as something that can be granted, but rather as something that cannot be taken away from any individual.<sup>141</sup> Article 1 of the UDHR of 1948 recognizes the inherent dignity and rights of every individual. It states:

“All human beings are born free and equal in dignity and rights.”<sup>142</sup>

A human rights framework guarantees all people regardless of race, nationality or creed, certain fundamental freedoms simply because they are human and thus entitled to be treated with value, worth and dignity. Human rights are the most basic of rights. However, they are often the hardest to protect as they can conflict with societal norms that are engrained in tradition and cultural practices. Human rights protect the most vulnerable people and groups in society. Women involved in prostitution are seen as a particularly vulnerable group as they are among the lowest in socio-economic status and are susceptible to high rates of abuse, violence and neglect.<sup>143</sup> Women, including women involved in prostitution, are entitled to equal protection under the law. Human rights provide a framework to re-establish women’s right to equality and non-discrimination. Whether prostitution is viewed as an individual human right or a collective

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<sup>140</sup> Office of the High Commissioner of Human Rights, “Introduction to the Universal Declaration of Human Rights of 1948.” Available at: <http://www.ohchr.org/en/udhr/pages/introduction.aspx>.

<sup>141</sup> Chris Hunter, “The Master’s Tools Revisited: Can Law Contribute to Ending Violence Against Women?” *IDS Bulletin Institute of Development Studies*, Vol. 37(6) (2006): 57-68.

<sup>142</sup> Article 1 of the Universal Declaration of Human Rights, 1948.

<sup>143</sup> Catharine MacKinnon, “Prostitution and Civil Rights,” *Michigan Journal of Gender & Law*, Vol. 1 (1993): 13-31.

human rights violation, the fact that remains undisputed is that prostitution is no longer a question of morality but one to be questioned within a framework of human rights.

## **2. The United Nations: International Human Rights Frameworks**

The normative frameworks presented in international conventions offer human rights guiding principles and have become the standard of measurement on implementing human rights across the world. Every United Nations' human rights convention has a monitoring body to ensure that states are in compliance and progressively fulfilling their obligations specified upon ratification.<sup>144</sup> Once states have signed and ratified international conventions they are bound by law to “*respect, protect, promote and fulfill*”<sup>145</sup> the human rights and fundamental freedoms evident in these conventions.<sup>146</sup> The obligations and responsibility of member states include: the implications of signature and ratification; reservations to certain provisions; reporting obligations; a process for complaints and allegations; provision of inquiry mechanisms; and development of domestic jurisprudence. The committee monitoring bodies issue general comments, when needed, to guide states in implementing the expansive nature of human rights and fundamental freedoms.<sup>147</sup> Even though states are legally bound under international law to comply with the provisions after ratification, international treaty bodies have no direct power of enforcement. That is why it is crucial for states to incorporate universal rights, such as gender equality and non-discrimination, within their constitutions and domestic legislation. Domestic legislation enforces a greater accountability within society and is able to better ensure that the lives of women are enhanced and protected.<sup>148</sup>

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<sup>144</sup> Center for Reproductive Rights, “Briefing Paper: Freedom from Violence is a Human Right: Government duties to protect individuals from violence, ill treatment, and torture,” (2008): 1-43.

<sup>145</sup> Yakin Ertürk, Special Rapporteur on violence against women, its causes and consequences, “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women the Due Diligence Standard as a Tool for the Elimination of Violence Against Women,” United Nations Economic and Social Council, 2006. Available at: <http://www.refworld.org/pdfid/45377afb0.pdf>

<sup>146</sup> United Nations Office of the High Commission for Human Rights, “International Human Rights Law,” OHCHR 1996-2014. Available at: <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>.

<sup>147</sup> Center for Reproductive Rights, “Briefing Paper: Freedom from Violence is a Human Right: Government duties to protect individuals from violence, ill treatment, and torture,” (2008): 1-43.

<sup>148</sup> United Nations Office of the High Commission for Human Rights, “International Human Rights Law,” OHCHR 1996-2014. Available at: <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>.

## 2.1. Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW)

The United Nations Decade for Women took place between the years 1976-1985 and all efforts went to ensuring equality, development and peace for women. This period was marked by the adoption by the UN General Assembly in 1979 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>149</sup> CEDAW was known as the international bill of rights for women and has become the principle treaty regarding sex discrimination.<sup>150</sup> The Preamble to CEDAW recognizes that “*extensive discrimination against women continues to exist*”, and highlights that such discrimination “*violates the principles of equality of rights and respect for human dignity.*”<sup>151</sup> The establishment of CEDAW broke down the man made legal barrier between the public and private sphere. Prior to this convention, there were no international treaties that comprehensively recognized women's basic human rights within the political, cultural, economic, social, and private sphere.<sup>152</sup> South Africa is among the 187 countries that have signed and ratified this convention.<sup>153</sup>

### 2.1.1. Article 2

Article 2 of CEDAW addresses state responsibility and identifies specific compliance measures that states must take to eliminate discrimination against women. In addition to the state, the convention also held the individual actions of non-state actors accountable for their abuses of women.

Article 2(f) states that:

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...by any person, organization or enterprise(2)(e); [and] modify or abolish existing

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<sup>149</sup> Geraldine A. Del Prado, “The United Nations and the promotion and the protection of the rights of women: how well has the organization fulfilled its responsibility?” *William & Mary Journal of Women and Law* (1995): 51-72.

<sup>150</sup> Convention on the Elimination of All Forms of Discrimination, United Nations General Assembly, 1979.

<sup>151</sup> Preamble to the Convention on the Elimination of All Forms of Discrimination, United Nations General Assembly, 1979.

<sup>152</sup> Celina Romany, “Women as Aliens: A Feminist Critique of the Public/private Distinction in Human Rights Law,” *Harvard Human Rights Journal*, Vol. 6 (1993): 87-125.

<sup>153</sup> Country Reports, UN Women, 2000-2009. Available at: <http://www.un.org/womenwatch/daw/cedaw/reports.htm>.

laws, regulations, customs and practices which constitute discrimination against women.”<sup>154</sup>

States are required to incorporate the principle of non-discrimination, with regards to women, in their constitution and domestic legislation. State obligations create a plan of action to improve the overall condition and treatment of women. This is not only achieved through policy and legislation, but through education, participation, and due diligence on the part of the state. CEDAW recognizes how customs and religion can be used as a defence to suppress women. It requires states to ensure that religious and customary practices, which impinge on the rights of women, are banned.<sup>155</sup> Violence against women as a direct form of discrimination is not addressed in CEDAW itself, but it is specified in General Recommendation 19.

General Recommendation 19(6) states that:

“The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>156</sup>

General Recommendation 19 recognizes violence against women as a barrier to accessing all other rights. Gender-based violence is seen as trapping women in subordinate roles and contributes to a low level of political participation and an even lower level of education, skills and work opportunities for women. Sexual exploitation, forced marriage, dowry deaths, female circumcision, poverty, and prostitution are also addressed by this recommendation to be a manifestation of violence against women and a form of discrimination.<sup>157</sup>

### **2.1.2. Article 5**

CEDAW recognizes that the discrimination of women stems from societal attitudes and the power imbalances that exist between men and women. International law states traditional gender

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<sup>154</sup> Article 2(f) of CEDAW, United Nations General Assembly, 1979.

<sup>155</sup> Geraldine A. Del Prado, “The United Nations and the promotion and the protection of the rights of women: how well has the organization fulfilled its responsibility?” *William & Mary Journal of Women and Law*, (1995): 51-72.

<sup>156</sup> General Recommendation No. 19(6) to CEDAW, 11<sup>th</sup> session, 1992.

<sup>157</sup> General Recommendation No. 19 to CEDAW, 11<sup>th</sup> session, 1992.

roles in society that have oppressed women are to be changed and altered in order for women to access the right to equality.<sup>158</sup> As long as any form of gender discrimination exists the equality of men and women cannot be achieved, as women's human rights are being denied. Article 5(a) of CEDAW addresses the customary practices and prejudices that prohibit women from fully participating in society and directs states to make modifications if they intend to be in compliance with international law.

Article 5 (a) states that:

“States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of *prejudices* and customary and all other practices which are based on the idea of the *inferiority* or the superiority of either of the sexes or on *stereotyped* roles for men and women (emphasis added).”<sup>159</sup>

Radical feminists argue that Article 5(a) of CEDAW supports the claim of prostitution as a harmful cultural practice.<sup>160</sup> CEDAW states that customs and practices towards men and women that allow one gender to remain inferior while another is superior must be prohibited.<sup>161</sup> Gendered practices that perpetuate inequality, such as prostitution have been recognized and re-assessed to understand the impact they have had on the lives of countless women.<sup>162</sup> Women maintain the inferior status within prostitution as their gender is exploited and their vulnerable status in society is targeted and preyed upon by men, as men are the primary source demanding women's sexual labor.<sup>163</sup> Gender, class and racial disparities are deeply interconnected with this practice and are some of the many injustices that prove prostitution to be an institution of discrimination.<sup>164</sup> Radical feminists argue that by allowing prostitution to remain is in violation of international law as a harmful cultural practice and an extreme manifestation of discrimination.

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<sup>158</sup> Convention on the Elimination of All Forms of Discrimination, United Nations General Assembly, 1979.

<sup>159</sup> Article 5(a) of CEDAW, United Nations General Assembly, 1979.

<sup>160</sup> Sheila .Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>161</sup> Convention on the Elimination of All Forms of Discrimination, United Nations General Assembly, 1979.

<sup>162</sup> Sheila .Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>163</sup> Janice Raymond, “Prostitution on Demand: Legalizing the Buyer as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

<sup>164</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

### 2.1.3. Article 6

Article 6 of CEDAW requires ratifying states to comprehensively combat trafficking and “*exploitation of prostitution of women.*” The article states that:

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”<sup>165</sup>

Prostitution is only specifically addressed in CEDAW in Article 6, and not prostitution *per se* but the “*exploitation of prostitution.*” Even though “exploitation” was not defined by CEDAW this statement allowed the abolitionist position to be questioned and provided an opportunity for liberal feminists to argue for voluntary prostitution to be used in future UN discourse. As a formal entity, the UN does not consider prostitution as exploitation even though UN members from both feminist perspectives remain apparent in this organization.<sup>166</sup> Even though the “*exploitation of prostitution*” does not state all forms of prostitution as exploitative, it does bring state legislation into question when “*all appropriate measures*” are not taken to suppress it. The legalization of prostitution is argued to be an example of state exploitation. The taxation of prostitution allows the state to benefit from the vulnerable status of women. The money gained from a discriminatory act of violence against women remains a valid argument for the legalization of prostitution to be in violation of Article 6 by radical feminists.<sup>167</sup>

### 2.1.4. Article 11

Liberal Feminists stand behind Article 11 (1) (c) of CEDAW to justify prostitution as sex work and to substantiate the claim for the state to recognize the economic exchange of sexual services as a form of employment.

Article 11 (1) (c) states that:

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<sup>165</sup> Article 6 of CEDAW, United Nations General Assembly, 1979.

<sup>166</sup> Joyce Outshoorn, “The Politics of Prostitution: Women’s Movements, Democratic States and the Globalisation of Sex Commerce,” 2004.

<sup>167</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

“The *right to free choice* of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training (emphasis added).”<sup>168</sup>

The liberal position is founded on ensuring women’s autonomy and the right to ‘choose’ prostitution as a profession is protected. However, the question remains whether prostitution is actually a free choice, particularly in a country such as South Africa, where many women have limited educational and employment opportunities available to them.

## **2.2. UN Redefining Prostitution as ‘Forced’ and ‘Voluntary’**

In an attempt to respect a woman’s right to sexual autonomy and the freedom to choose her own profession, the UN began to distinguish between ‘voluntary’ and ‘forced’ prostitution. Forced prostitution is a term often used in association with trafficking in person and it is used to distinguish the lack of consent given by a victim. Forced prostitution is considered a human rights violation and an international criminal offence. The topic of voluntary prostitution or simply prostitution is not as readily addressed and remains a point of contention within human rights groups and within the UN. If consent remains the deciding factor under UN conventions, a former prostituted woman testified at a 1981 conference in Nice<sup>169</sup>, bringing the validity of consent into question. She stated:

“As prostitutes, we are well aware that all prostitution is forced prostitution. Whether we are forced to become prostitutes by lack of money or by housing or unemployment problems, or to escape from a family situation of rape or violence by a procurer, we would not lead the 'life' if we were in a position to leave it.”<sup>170</sup>

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<sup>168</sup> Article 11(1)(c) of CEDAW, United Nations General Assembly, 1979.

<sup>169</sup> Laura Reanda, “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions.” *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

<sup>170</sup> This testimony was given to the congress of Nice on September 8, 1981 and documented in the report of the Special Rapporteur, Jean Fernand-Laurent, “Activities for the Advancement of Women: Equality, Development and Peace,” 1st Sess., Agenda Item 12, at 7, U.N. Doc. E/1983/7 (1983).

The Vienna World Conference in 1993 and the Beijing Platform for Action in 1995 first used the language of forced prostitution and trafficking. This marked a decade of moving away from abolitionism into allowing alternative policy measures to be taken in consideration by states to combat prostitution.<sup>171</sup> These conferences provided great strides for women in recognizing women's rights as human rights as well as creating global awareness in understanding violence against women as a human rights violation. However, only recognizing forced prostitution as violence against women, allows for the causes and circumstances of women involved in prostitution to be overlooked and the practice to be upheld.

While CEDAW contains no distinction between forced and voluntary prostitution, in recent years comments made by CEDAW committee members and statements issued by special rapporteurs have taken stances that reflect a shift to only opposing the forced or exploited aspects of prostitution.<sup>172</sup> The UN's recent attempt to restrict prostitution to forced prostitution is defended as a necessary category as new forms of sexual exploitation emerge as violence against women.<sup>173</sup> General Recommendation 19 of CEDAW recognizes that, "*new forms of sexual exploitation, such as sex tourism,*" exist that increase the risk for human trafficking.<sup>174</sup> Radical feminists consider by only recognizing forced prostitution as exploitation of women it undermines the exploitation fundamental within the practice of prostitution itself. The UN only opposing forced prostitution is the societal approval of gendered inequality and advocating for prostitution as an acceptable cultural practice.<sup>175</sup>

General Recommendations 19 of CEDAW states that "*poverty and unemployment force many women into prostitution.*"<sup>176</sup> Even if a person is not being physically forced or coerced by another person into prostitution, circumstances alone are enough to question if there can be such term as voluntary prostitution for women. Women's socio-economic status, socio-cultural norms,

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<sup>171</sup> Joyce Outshoorn, "Political Debates on Prostitution and Trafficking of Women, Social Politics: International Studies in Gender, State and Society," Vol. 12(1): 141-155, 2005.

<sup>172</sup> Thomas W. Jacobson, "CEDAW Committee Rightly Pressures Nations on Trafficking and Forced Prostitution, But Favors Voluntary Prostitution," *Focus on the Family-International Government Affairs Department*, 2010. Available at: [http://www.idppcenter.com/CEDAW\\_Comm\\_Pressures\\_Nations\\_on\\_Prostitution.pdf](http://www.idppcenter.com/CEDAW_Comm_Pressures_Nations_on_Prostitution.pdf)

<sup>173</sup> Beverly Balos, "Privileging Consent in Sex Trafficking," *Harvard Women's Law Journal*, Vol. 27 (2004).

<sup>174</sup> General Recommendation No. 19 to CEDAW, 11<sup>th</sup> session, 1992.

<sup>175</sup> Shelia Jeffreys, "The Industrial Vagina: The Political Economy of the Global Sex Trade," 2009.

<sup>176</sup> General Recommendation No. 19 to CEDAW, 11<sup>th</sup> session, 1992.

and power relations between men and women are indirect forces that exploit women's existing vulnerability and position in society. Radical feminists view all forms of prostitution as forced prostitution involving some type of coercion.<sup>177</sup>

### **2.3. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949**

The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others provided the basis for the abolitionist stance towards prostitution. The Convention recognized all forms of trafficking and prostitution as harmful and compromising to an individual's human dignity and self worth. The Preamble to the Convention states:

“Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.”<sup>178</sup>

In support of the abolitionist position, the Convention's goal was to end legalization and regulatory policies relating to prostitution, as they were considered a violation of human rights.<sup>179</sup> States were criticized for handling trafficking as an issue of border control and illegal immigration rather than focusing on trafficking as an impingement on the well-being of women.<sup>180</sup> However, despite the prior intent to the 1949 Convention, it is revered for the part it played in advancing women's rights. The 1949 Convention was the first treaty to explicitly state that both prostitution and trafficking in persons are incompatible with human dignity.<sup>181</sup> Even though the 1949 Convention predates the most recent UN convention addressing trafficking in persons, the 1949 Convention is still referenced by feminist abolitionists to show how prostitution and trafficking are interlinked and form the basis of women's exploitation in society.

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<sup>177</sup> Laura Reanda, “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions.” *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

<sup>178</sup> Preamble to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949.

<sup>179</sup> Laura Reanda, “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions.” *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

<sup>180</sup> Sheila .Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>181</sup> Laura Reanda, “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions.” *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

Article 1 of the 1949 Convention states that:

“The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
2. Exploits the prostitution of another person, even with the consent of that person.”

The Convention’s progressive stance recognized that the consent of the person being trafficked or prostituted should not be a defense in determining if the crime of trafficking or prostitution had been committed.<sup>182</sup> A decade after this Convention was brought into force a UN study was conducted to determine its effectiveness. Study results indicated that in order to better understand the factors surrounding trafficking, states must address “*in its scope the problem of prostitution itself.*”<sup>183</sup> Initially, the UN secretariat proposed a program of action that focused states’ attention on prostitution that addressed the practice on multiple fronts. The information obtained from states was intended to aid in the prevention of all forms of prostitution, the rehabilitation of victims as well as the suppression of trafficking. However, state findings were not published and the UN chose not to follow up on the results of the study. Priorities began to shift and the study was considered the end to the UN’s alarm of this practice and the implications prostitution has on the lives of women. The Convention remains in force and until the 1990’s it was considered the most complete international human right instrument available.<sup>184</sup> However, the need for a new convention was raised due to the criticism of the abolitionist position and the terminology of prostitution and trafficking was considered too ambiguous and lacking explicit definitions.<sup>185</sup>

#### **2.4. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000 (Palermo Protocol)**

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<sup>182</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

<sup>183</sup> Beverly Balos, “Privileging Consent in Sex Trafficking,” *Harvard Women’s Law Journal*, Vol. 27 (2004).

<sup>184</sup> Laura Reanda, “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions.” *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

<sup>185</sup> Beverly Balos, “Privileging Consent in Sex Trafficking,” *Harvard Women’s Law Journal*, Vol. 27 (2004).

Since 1949, the globalizing economy has expanded human trafficking into a multi-billion dollar industry. Every country has experienced this international abuse in some form, as victims have been forced across every border.<sup>186</sup> Despite this gruesome fact, on July 14, 2014, President of UN General Assembly stated that human trafficking “*has no place in the modern world.*” The UN President, John W. Ashe, also confirmed the UN’s estimation of human trafficking as the third most profitable crime after drug and arms dealing.<sup>187</sup> The U.S. Department of Justice and the U.S. Department of Health and Human Services ranks human trafficking at the second most profitable industry and calls human trafficking the fastest growing criminal enterprise of the 21<sup>st</sup> century.<sup>188</sup> Human trafficking is considered a modern day form of slavery.

A new convention was formed in 2000 in Palermo, Italy to address the epidemic of millions of people, especially women and girls, trafficked worldwide.<sup>189</sup> The UN’s 2012 Trafficking in Persons report stated that of the 2.4 million people trafficked, women and girls account for 75% of all victims. Trafficking for the purpose of sexual exploitation, also known as sex trafficking is the most predominant form of trafficking.<sup>190</sup> The International Labour Organization (ILO) also published findings in 2012 estimating an even greater number of victims held captive to the slave trade. The ILO estimated 20.9 million people are victims of forced labor and/or human trafficking and of those 20.9 million; 11.4 million are women and girls. The ILO documented that of the 11.4 million women and girls trafficked, 98% are trafficked for the purpose of sexual exploitation.<sup>191</sup> Even though human trafficking covers numerous ways human beings are exploited for profit, the gendered element<sup>192</sup> of this industry and its connection to exploitation are the primary topics addressed within this protocol.

In order to combat trafficking a universal instrument was demanded to address all aspects of trafficking, including prevention, prosecution, and protection of victims. The Protocol to Prevent,

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<sup>186</sup> United Nations Office on Drugs and Crime, “Human Trafficking and Migrant Smuggling,” 2014. Available at: <http://www.unodc.org/unodc/en/human-trafficking/index.html>.

<sup>187</sup> UN News Centre, “Human trafficking has no place in modern world, General Assembly President says.” Available at: <http://www.un.org/apps/news/story.asp?NewsID=48271#.VBXOif2vtSU>.

<sup>188</sup> State of California Department of Justice, Office of the Attorney General, “Human Trafficking,” 2014. Available at: <http://oag.ca.gov/human-trafficking>.

<sup>189</sup> Janice Raymond, “Guide to the New UN Trafficking Protocol,” *Coalition Against Trafficking in Women*, 2001.

<sup>190</sup> United Nations Office on Drugs and Crime, “Global Report on Trafficking in Persons,” 2012.

<sup>191</sup> International Labour Organization, “ILO Global Estimate of Forced Labour: Results and Methodology,” 2012.

<sup>192</sup> Melissa Farley, “Theory verses reality: Commentary on four articles about trafficking for prostitution,” *Women’s Study International Forum*, Vol. 32 (2009): 311-315.

Suppress and Punish Trafficking in Persons, Especially Women and Children, was an attempt to take a proactive approach to trafficking since the UN's 1957 treaty.<sup>193</sup> The Protocol entered into force in 2003 and was the first UN document to address the demand side of trafficking and sexual exploitation.<sup>194</sup> The definition of trafficking in persons was a point of contention due to its intrinsic yet debated link to prostitution.<sup>195</sup> However, a universal definition was intended to offer cohesiveness and clarity to the UN's position on trafficking within international law. The Palermo Protocol defines "*trafficking in persons*" as:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."<sup>196</sup>

The definition recognizes trafficking in persons as victims of an international crime and a global injustice. Trafficking in persons is often addressed as an issue of transportation and migration even though the primary concern of trafficking is one of exploitation and not the movement across borders.<sup>197</sup> Even as both UN and ILO reports document the sexual exploitation of women and girls as accounting for majority of all trafficking victims, NGOs and policy groups ignored the attack on women and lobbied for the removal of any reference of 'for prostitution' and 'sexual exploitation' from the definition of trafficking in persons.<sup>198</sup>

As NGOs and policy groups attempted to separate the foundational practice of prostitution from its relationship to trafficking, questions were raised to understand this assumed distinction as to when prostitution should be considered exploitation. One question asked, "*If a woman would*

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<sup>193</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000.

<sup>194</sup> Beverly Balos, "Privileging Consent in Sex Trafficking," *Harvard Women's Law Journal*, Vol. 27 (2004).

<sup>195</sup> Janice Raymond, "The New UN Trafficking Protocol," *Women's Studies International Forum*, Vol. 25(5) (2002): 491–502.

<sup>196</sup> Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000.

<sup>197</sup> Janice Raymond, "The New UN Trafficking Protocol," *Women's Studies International Forum*, Vol. 25(5) (2002): 491–502.

<sup>198</sup> Janice Raymond, "Guide to the New UN Trafficking Protocol," Coalition Against Trafficking in Women, 2001.

*still be considered a victim once she arrived at the destination of the trafficker and began to work as a prostitute?*”<sup>199</sup> Other questions addressed consent such as, if a woman agreed to prostitution and to being transported from one country into another, could this be defined as trafficking? Trafficking in persons is recognized as human rights violation and harmful to women regardless of the victim’s consent. However, the line between prostitution and trafficking is easily blurred. The Protocol is criticized as it “*straddles the issue of choice while attempting to draw the line between coercion and consent.*”<sup>200</sup> The Protocol only recognizes trafficking for the purpose of prostitution as exploitative, not the practice of prostitution itself. Exploitation is defined as follows:

“Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, (or) servitude.”<sup>201</sup>

The Protocol recognizes exploitation not only by means of force and coercion, but also by exploiting the vulnerability of a victim.<sup>202</sup> The Protocol’s view of trafficking does take into account the multiple tactics traffickers’ use, such as power and control, to entrap and enslave victims. However, just as prostitution became an issue to prove force in order for international treaties to recognize the practice of prostitution as a women’s human rights violation, there was lobbying for the definition of trafficking to be limited to ‘forced’ or ‘coerced’ trafficking.<sup>203</sup> Realizing that a definition that places the burden of proof on one victim, limits the protection guaranteed to all victims, allowed the definition to remain. All victims of trafficking are protected not only the victims able to prove force.<sup>204</sup>

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<sup>199</sup> Nora V. Demleitner, “Forced Prostitution: Naming an International Offense,” *Fordham International Law Journal*, Vol. 18 (1994): 163-197.

<sup>200</sup> Beverly Balos, “Privileging Consent in Sex Trafficking,” *Harvard Women’s Law Journal*, Vol. 27 (2004).

<sup>201</sup> Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000.

<sup>202</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000.

<sup>203</sup> Janice Raymond, “Guide to the New UN Trafficking Protocol,” *Coalition Against Trafficking in Women*, 2001.

<sup>204</sup> Janice Raymond, “The New UN Trafficking Protocol,” *Women’s Studies International Forum*, Vol. 25(5) (2002): 491–502.

Despite the protocol's stance on prostitution, Sigma Huda, former UN Special Rapporteur on Trafficking, argues that prostitution does fit the criteria for trafficking. She states that the path that leads to prostitution is not one of "empowerment" or one marked with "adequate options."<sup>205</sup> Sigma Huda highlights the abuse of power and vulnerability that are inflicted against a trafficking victim are the same abuses used against a prostituted individual. The following conclusions were from her 2005 report:

"Prostitution as it is actually practiced in the world does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experience does not involve, at the very least an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty."<sup>206</sup>

The remarks made by the former UN Special Rapporteur on Trafficking shows the double standard that has been made allowing the underlying inequality and exploitation of women to be recognized within one group and not the other. The refusal to recognize prostitution as sexual exploitation allows an institution to stand that upholds gender inequality and violates the international protections for women.<sup>207</sup>

Attempts to disassociate prostitution from trafficking in persons have been made by groups supporting prostitution as sex work. These groups and NGOs have argued that if trafficking can occur regardless of a victim's consent, then countries where prostitution is already legalized or regulated would need to adapt their legislation. These groups are concerned that potential changes in legislation would restrict women's ability to 'migrate' for sex work and could result in men who buy women's sexual labor, being charged as traffickers.<sup>208</sup> Sheila Jeffrey's commented that society's denial of female exploitation and the connection of prostitution to human trafficking has led to the overnight success of the sex industry. Jeffrey's stated that:

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<sup>205</sup> Special Rapporteur on Trafficking from 2004 to 2008, "Integration of the human rights of women and a gender perspective," United Nations. E/CN.4/2006/62.

<sup>206</sup> Special Rapporteur on Trafficking from 2004 to 2008, "Integration of the human rights of women and a gender perspective," United Nations. E/CN.4/2006/62.

<sup>207</sup> Melissa Farley, "Theory verses reality: Commentary on four articles about trafficking for prostitution," *Women's Study International Forum*, Vol. 32 (2009): 311-315.

<sup>208</sup> Joyce Outshoorn, "Political Debates on Prostitution and Trafficking of Women, Social Politics: International Studies in Gender, State and Society," Vol. 12(1): 141-155, 2005.

“Prostitution has been transformed from an illegal, small scale, largely local and socially despised form of abuse of women into a hugely profitable and either legal or tolerated international industry.”<sup>209</sup>

The impossibility of separating the exploitation of women in local prostitution and the exploitation of women trafficked across borders has been established by radical feminists, as both are fundamentally exploitative to women. The effects of prostitution are consistent with women trafficked through local neighborhoods and women trafficked internationally. Both groups of women are exploited and made vulnerable from society’s inequalities. Prostituted women and trafficking victims share experiences involving health risks, violence<sup>210</sup>, mental and physical abuse, and homelessness. However, women in trafficking are further subjected to acts of violence and abuse by traffickers.<sup>211</sup> Trafficking not only becomes the supply chain for prostitution, but it expands the sexual exploitation of women and their subordination to men into the global market.<sup>212</sup> Trafficking of women is not only exploitation, but also the extreme representation of a human right’s abuse as modern day slavery.

### **3. International Human Rights Declarations**

United Nations declarations, resolutions, and world conferences are not legally binding but are an effective tool in generating change and bringing attention to women’s human rights and discrimination against women worldwide. The following declarations address discrimination against women and prostitution in the following ways.

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<sup>209</sup> Sheila Jeffreys, “The Industrial Vagina: The Political Economy of the Global Sex Trade,” 2009.

<sup>210</sup> Janice Raymond, “The New UN Trafficking Protocol,” *Women’s Studies International Forum*, Vol. 25(5) (2002): 491–502.

<sup>211</sup> Beverly Balos, “Privileging Consent in Sex Trafficking,” *Harvard Women’s Law Journal*, Vol. 27 (2004).

<sup>212</sup> Melissa Farley, “Theory verses reality: Commentary on four articles about trafficking for prostitution,” *Women’s Study International Forum*, Vol. 32 (2009): 311-315.

### **3.1. Declaration on the Elimination of Violence Against Women of 1993 (DEVAW)**

Violence against women is considered to be the most pervasive violation of human rights<sup>213</sup> as well as the most extreme form of discrimination against women.<sup>214</sup> Prostitution, as a form of violence against women, is viewed as a consequence of unequal power relations between men and women. The Declaration on the Elimination of Violence Against Women states that:

“[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>215</sup>

Radical feminist, Catharine MacKinnon recalled how not long ago liberal feminists denied that any harm was involved in prostitution. However, after hearing testimonials from prostituted women, it was found that prostituted women were subject to more violence in comparison to any other group of women worldwide.<sup>216</sup> Prostituted women suffer from verbal and physical assaults as men use prostitution as way to exert power and control over women. Prostituted women are bought, beaten, raped and murdered at the hands of men as 50% of women have lost their lives once they entered into the sex industry.<sup>217</sup>

## **4. Regional Law**

### **4.1. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2003 (Maputo Protocol)**

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<sup>213</sup> Charlotte Bunch, “Women’s Rights as Human Rights: Towards a Re-Vision of Human Rights.” *Human Rights Quarterly*, Vol. 12(4) (1990): 486-498.

<sup>214</sup> Office of the High Commissioner for Human Rights, “Commitments for women’s rights: time to turn empty promises into concrete changes for women,” 2012. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13097&LangID=E>

<sup>215</sup> Declaration on the Elimination of Violence Against Women, United Nations General Assembly, 1993.

<sup>216</sup> Catharine MacKinnon, “Trafficking, Prostitution, and Inequality,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>217</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted on July 11, 2003 in Mozambique. This charter is commonly referred to the Maputo Protocol or the African Women's Protocol. The Maputo Protocol went into effect in 2005 after it was ratified by 15 of 53 member states to the African Union.<sup>218</sup> As women in Africa struggled to have their rights recognized, the Maputo Protocol was the demanded addendum to the African Charter. It was used to strengthen women's rights by explicitly stating the protections entitled to women that were not directly addressed in the African Charter.<sup>219</sup> Despite the human rights provisions in the African Charter, the Maputo Protocol was designed to further represent and protect women's human rights by requiring Africa to integrate a gender perspective in policy, legislation, and development initiatives. The Maputo Protocol is a commitment to eliminate all forms of discrimination and harmful practices against women in the country.<sup>220</sup> Article 1 (g) in the Maputo Protocol defines "*harmful practices*" as:

“...all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.”<sup>221</sup>

After ratification, states are no longer allowed to remain complacent, but are required to take an active role in identifying the causes and consequences of violence and the exploitation of women. The Maputo Protocol reinforces CEDAW, by requiring states to take all necessary means to prevent and eliminate these harms. Article 3 (3) and Article 4 (g) require state parties to take an active role in the following ways:

“Article 3 (3) States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.”<sup>222</sup>

“Article 4 (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and

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<sup>218</sup> African Commission on Human and People's Rights, “Report from the Government of the Republic of Mozambique submitted in terms of the Article 62 of the African Charter on Human and People's Rights (Combined Report 1999-2010),” 2012.

<sup>219</sup> Danwood Chirwa, “Reclaiming (WO)MANITY: The Merits and Demerits of the African Protocol on Women's Rights,” *NILR*, (2006): 63-96.

<sup>220</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003.

<sup>221</sup> Article 1(g) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003.

<sup>222</sup> Article 3(3) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003.

protect those women most at risk.”<sup>223</sup>

Even though prostitution is not specified in the Maputo Protocol, when prostitution is understood as the exploitation of women, the state is required to ensure this treatment of women is no longer present in society. The Maputo Protocol guarantees women the right to choose their form of work. However, the Protocol also recognizes when the ‘choice’ is in violation of a women’s personhood the state is obligated to protect women from the exploitation of their basic human rights. The Maputo Protocol recognizes the right to work, but not the right to be exploited by a profession or a harmful practice. Article 13 requires states to provide equal economic opportunities for women. The following economic and social welfare rights in Article 13 (d) include:

“...women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force.”<sup>224</sup>

## **5. Domestic Legislation**

### **5.1. Constitution of the Republic of South Africa (No. 108 of 1996)**

In addition to being held accountable to international conventions, the Constitution of the Republic of South Africa of 1996 specifies that international law should be taken into account when interpreting domestic legislation. Section 233 of the South African Constitution Act states that:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>225</sup>

This section of the South African Constitution shows how the country is aligning with international law and international standards of human rights. When women’s rights to equality and non-discrimination are inconsistent within domestic legislation, the country must look to

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<sup>223</sup> Article 4(g) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa of 2003.

<sup>224</sup> Article 13(d) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa of 2003.

<sup>225</sup> Section 233 of the Constitution Act 108 of 1996.

international law as the standard to follow.

## 5.2. Sexual Offences Act 23 of 1957

The Sexual Offences Act 23 of 1957 did not originally prohibit the buying and selling of sex, but made certain acts associated with prostitution illegal activities.<sup>226</sup> Under the Sexual Offences Act, section 2 criminalized the operation of a brothel.<sup>227</sup> Section 10 criminalized pimps, specifically “*to procure any female to have unlawful carnal intercourse.*”<sup>228</sup> Additionally, “*persons living on earnings of prostitution or committing or assisting in commission of indecent acts*” was criminalized in section 20.<sup>229</sup> In 1988 an amendment was made to the Sexual Offences Act, which made it unlawful for any person to receive an award from a sexual act.<sup>230</sup> The amendment, section 20(1A)(a) of the Sexual Offences Act 23 of 1957 ‘criminalizes the selling’ of sex. Section 20(1A)(a) states that:

“(1) (A) Any person 18 years or older who— (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or (b) in public commits any act of indecency with another person, shall be guilty of an offence.”<sup>231</sup>

## 5.3. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Section 11 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA) prohibits engaging in sexual services for reward. This section therefore ‘criminalizes the buying’ of sex in South Africa. Section 11 states that:

“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

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<sup>226</sup> Rufaro Gweshe and Omowamiwa Kolawole, “Chapter 6, Section 11: Engaging sexual services of person 18 years or older,” Dee Smythe and Bronwyn Pithey (eds.), *Sexual Offences Commentary*, Cape Town: Juta (2011, 2014 revised).

<sup>227</sup> Section 2 of the Sexual Offences Act 23 of 1957.

<sup>228</sup> Section 10 of the Sexual Offences Act 23 of 1957.

<sup>229</sup> Section 20 of the Sexual Offences Act 23 of 1957.

<sup>230</sup> Rufaro Gweshe and Omowamiwa Kolawole, “Chapter 6, Section 11: Engaging sexual services of person 18 years or older,” Dee Smythe and Bronwyn Pithey (eds.), *Sexual Offences Commentary*, Cape Town: Juta (2011, 2014 revised).

<sup>231</sup> Section 20(1A)(a) of the Sexual Offences Act 23 of 1957.

- 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.”<sup>232</sup>

Both laws, Section 11 of SORMA and 20(1A)(a) of the Sexual Offences Act 23 of 1957, are used in conjunction with one another to prohibit the buying and selling of sex in South Africa.<sup>233</sup>

#### **5.4. The Prevention and Combating of Trafficking in Persons Act 7 of 2013 (The Trafficking Act)**

The Prevention and Combating of Trafficking in Persons Act 7 of 2013 is South Africa’s recognition and response to the global injustice of human trafficking. The Trafficking Act established as a way to domesticated international legislation and fulfill South Africa’s obligations to the UN’s Palermo Protocol. The Trafficking Act offers an effective enforcement method in addition to prevention efforts against further abuse occurring in the country. The objectives of this Act include identifying and persecuting the crime of human trafficking and the perpetrators involved. The Trafficking Act is also designed to protect victims and offer services to displaced persons. Section 4 (1) of the Trafficking Act defines “*trafficking in persons*” to include but not limited to the following:

- “4. (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—
- (a) a threat of harm;
  - (b) the threat or use of force or other forms of coercion;
  - (c) the abuse of vulnerability;
  - (d) fraud;
  - (e) deception;
  - (f) abduction;
  - (g) kidnapping;
  - (h) the abuse of power.”<sup>234</sup>

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<sup>232</sup> Section 11 of Sexual Offences and Related Matters Amendment Act 32 of 2007.

<sup>233</sup> Rufaro Gweshe and Omowamiwa Kolawole, “Chapter 6, Section 11: Engaging sexual services of person 18 years or older,” Dee Smythe and Bronwyn Pithey (eds.), *Sexual Offences Commentary*, Cape Town: Juta (2011, 2014 revised).

<sup>234</sup> Chapter 2, Section 4(1) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

The Trafficking Act recognizes how the abuse of power and vulnerability are used against women as a means of exploitation. The Act defines, “*abuse of vulnerability*” as any type of abuse that causes a person to believe that he or she has no practical alternative but to accept the exploitation.<sup>235</sup> The Act defines, “*exploitation*” to include but not limited to such acts as slavery, practices similar to slavery, sexual exploitation, servitude, and forced labor.<sup>236</sup>

## 6. South African Jurisprudence

### 6.1. The State v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)

The case, *S v Jordan*,<sup>237</sup> is considered a landmark court decision in South Africa regarding prostitution. However, it also criticized as a “*missed opportunity*” to ensure gender equality for women on behalf of the state.<sup>238</sup> In 2002, the case challenged the constitutionality of certain provisions within the Sexual Offences Act 23 of 1957. Section 20(1)(aA) of the Sexual Offences Act was challenged based on the violation to equality before the law. This section of the law was considered to unfairly discriminate against women, as the seller is the primary offender and the majority of sellers in prostitution are women.<sup>239</sup> The constitutional court judges were divided six to five over the decision of discrimination. In the end, the High Court upheld the law and the grounds for discrimination were considered unjustified. Despite the majority ruling, the minority judgment found section 20(1)(aA) discriminatory towards women and in opposition to section 8 and 13 of the Constitution. Judges, O’Regan and Sachs, wrote the minority judgment and stated that:

“[T]he effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact

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<sup>235</sup> Chapter 1 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

<sup>236</sup> Chapter 1, Definitions of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

<sup>237</sup> *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC)

<sup>238</sup> Department of Justice and Constitutional Development, “Women and the Law in South Africa: Gender Equality Jurisprudence in Landmark Court Decisions,” (2004): 1-71.

<sup>239</sup> Rosaan Kruger, “Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case.” *SAJHR*, Vol. 20 (2004): 138-150.

between prostitute and client is therefore directly linked to a pattern of gender disadvantage, which our Constitution is committed to eradicating...<sup>240</sup>

The majority of the Constitutional Court ruled that section 20(1)(aA) did not discriminate unfairly to women on the basis of sex. The court insisted the law remains gender-neutral to the actions of the seller and buyer, as both parties are criminalized and both parties are equally penalized.<sup>241</sup> However, gender neutrality in the law does not guarantee a gender-neutral application of the law. Gender neutrality remains insufficient in ensuring gender equality, as it is unable to recognize the subordinate status of women to men, which results in a biased application of the law. Men cannot be the standard of measurement to determine the treatment of women. Gender neutrality lacks the ability to address a gender specific abuse or a gender-specific failure from a state to provide equal protection to women.<sup>242</sup>

Even though both parties were held liable, and little difference between ‘the principle offender’ and ‘the accomplice’ was found evident in the law. The judges argued that the stigma is prejudicial to women.<sup>243</sup> Labeling the seller as ‘the primary offender’ in prostitution reinforces a social stigma of male and female sexuality. The minority judgment considers the ruling unjust as it perpetuates inequality by adhering to archetypal stereotypes. Society places greater blame and guilt on women that offer sex for a reward, rather than the men that purchase it. The minority judgment stated that:

“We do not agree with Ngcobo J that the stigma attaching to prostitutes arises not from the law but only from social attitudes. The law must be conscientiously developed to foster values consistent with our Constitution. [When] the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore,

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<sup>240</sup> Gretchen Carpenter, “Of prostitutes, pimps and patrons - some still more equal than others?” *South African Public Law*, Vol. 19(1) (2004): 231-249.

<sup>241</sup> *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC)

<sup>242</sup> Dorothy Thomas and Michele E. Beasley, Esq. “Domestic Violence as a human rights issue,” *Human Rights Quarterly*, Vol. 15(1) (1993): 36-62.

<sup>243</sup> *Minority Judgement, S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC)

has the potential to impair the fundamental human dignity and personhood of women.”<sup>244</sup>

The law cannot operate on the assumption that men and women experience equal treatment in society. Instead, the law must acknowledge that disparity and discrimination exist, or else the law remains complicit with injustice. The law must act in a positive manner to prevent gender stereotyping and prohibit further discrimination from occurring in society. A proactive approach to the law is the only chance to ensure that gender equality can and will be achieved and realized in the lives of men and women.

## **7. Conclusion**

International human rights frameworks set the standard of equality and non-discrimination that is guaranteed to every individual for no other reason than for being human. Implementing these international standards into domestic legislation ensures that these rights can be fulfilled. However, these standards and ideals are often in conflict with preexisting sociocultural norms present in society. In South African legislation, it is not enough for both the buyer and seller to be criminalized in prostitution. South Africa will need a legal model that goes one step further to ensure equality for women. A new approach is needed that no longer reinforces gendered stereotypes, but is able to foster change in how society views women. The law will only begin to achieve equality when the buyer is held accountable for his actions and the woman no longer carries the stigma of criminal.<sup>245</sup>

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<sup>244</sup> *Minority Judgement, S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC)

<sup>245</sup> Catharine MacKinnon, "Trafficking, Prostitution, and Inequality," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

## CHAPTER 4: THE RELATIONSHIP BETWEEN PROSTITUTION AND SOCIOCULTURAL NORMS

### 1. Introduction

“Prostitution is colonization of women.”<sup>246</sup>

South African culture will be addressed in this chapter to show how regional sociocultural gender norms are connected to a culture at large that enables men to buy sex. Excerpts from men and women’s narratives of violence will be used to depict the dominant gendered attitudes and practices around ideas of masculinity and female sexuality. This section will demonstrate how prostitution is a harmful cultural practice that is inherently violent towards women.

### 2. The Demand of Prostitution

“If prostitution is something that is done to women, as conveyed by the term *prostituted women*, then it is the buyers who more accurately can be said to practice prostitution.”<sup>247</sup>

Janice Raymond, Ph.D.

Over the past few decades, UN agencies, state governments, along with non-governmental organizations have focused their research on additional factors surrounding prostitution rather than the men that purchase sex.<sup>248</sup> However, without the market demand for women’s sexual labor, prostitution would not exist.<sup>249</sup> The demand for women’s sexual labor is the primary cause for the expansion of the sex industry. Buyers have been able to avoid scrutiny, examination, and accountability for their involvement in sustaining and escalating this harmful cultural practice.<sup>250</sup>

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<sup>246</sup> Gunilla Eckberg, “Argument: Should prostitution be legalized?” *New Internationalist Magazine*, 2013. Available at: <http://newint.org/features/2013/04/01/should-prostitution-be-legalized-argument/>.

<sup>247</sup> Janice Raymond, “Prostitution on Demand: Legalizing the Buyer as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

<sup>248</sup> Janice Raymond, “Prostitution on Demand: Legalizing the Buyer as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

<sup>249</sup> Kathleen Barry, “Prostitution of Sexuality: The Global Exploitation of Women,” 1995.

<sup>250</sup> Janice Raymond, “Prostitution on Demand: Legalizing the Buyer as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

The minority dissent of *S v. Jordan*<sup>251</sup> made the following conclusion regarding the difference in social stigma towards the buyer. South African judges, O'Regan and Sachs, stated:

“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.”<sup>252</sup>

A man's ability to engage in sexual relations whenever he desires became an attribute associated with masculinity. As women were seen as the cause of men's deviant behavior, men's purchasing power remained invisible. Patriarchy and gender norms in society have allowed a man's assumed right to a woman's body to go unquestioned. As a result, men's control of women's sexuality has become normalized. Research has indicated that prostitution is prevalent in cultures where women are oppressed, lacking in resources, economic opportunities, as well as access to viable means of employment. Even as feminist groups debate a woman's consent in prostitution the man's consent is indisputable.<sup>253</sup> Men consent to the prostitution of women out of their own entitlement; free from coercion and restraint. It is men's consensus that subjugates women and drives the demand for prostitution. Most men that paid for sex were cognizant of the coercion, exploitation, and trafficking of persons involved within prostitution, however men continued to purchase women's sexual labor.<sup>254</sup>

### 3. The Risk of Prostitution

Janice Raymond shows how men are not only the demand but also the risk within prostitution.<sup>255</sup> Prostituted women have the highest rates of murders than any other population of women in the

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<sup>251</sup> *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC)

<sup>252</sup> Section 64 of *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC), O'Regan and Sachs.

<sup>253</sup> Martin A. Monto, “Female Prostitution, Consumers, and Violence.” *Violence Against Women*, Vol. 10(2) (2004): 160-188.

<sup>254</sup> Melissa Farley, “Theory verses reality: Commentary on four articles about trafficking for prostitution,” *Women's Study International Forum*, Vol. 32 (2009): 311-315.

<sup>255</sup> Raymond, Janice. *Prostitution: Not a Job, Not a Choice*, recorded talk on November 30, 2013 part of the annual Montreal Massacre Memorial event organized by Vancouver Rape Relief & Women's Shelter. Available at: <http://feministcurrent.com/8263/podcast-prostitution-not-a-job-not-a-choice-a-talk-by-janice-raymond/>.

world. The death toll for prostituted women has skyrocketed and evidence has recorded that 50% of prostituted women are victims of homicide.<sup>256</sup>

Some professions have higher risk factors in the workplace as individuals place the health, well-being, and safety of others ahead of their own. These service professions are demonstrated as a fire fighter protects a community from a disaster, a soldier going to war to defend his/or her country, or an international aid worker assisting in a conflict zone. These professions involve a certain level of risk due to the extreme circumstances involved. However, prostituted women are at risk for no other reason than for being a woman. Professions that require manual labor offer ways to avoid injury on the job. However, unlike prostitution these professions do not have to fear that the potential injuries will be caused from a crime, especially a crime that leads to assault, battery, and homicide.<sup>257</sup> The lives of prostituted women are considered expendable after a man has purchased a woman's body and the rights to her sexuality. Social and cultural norms have determined a woman's worth and status in society and have allowed for a woman to be seen as less than a man.

#### **4. Rape Myths, Prostitution and the Attitudes of Buyers**

The Human Rights Watch labeled South Africa as the “*rape capital of the world*”<sup>258</sup> and since then that title has been nearly impossible for the country to remove. When the United Nations Special Rapporteur on Violence Against Women reported that South Africa had the highest rape statistics in the world for a country not at war<sup>259</sup>, the pervasive culture of sexual violence had to be addressed and could no longer be ignored. Rape and sexual violence were linked to a broader continuum of gender violence and inequality within South African society.<sup>260</sup>

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<sup>256</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

<sup>257</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

<sup>258</sup> Human Rights Watch, “The State Response to Domestic Violence and Rape,” 1995. Available at: <http://www.hrw.org/reports/1995/Safricawm-02.htm>.

<sup>259</sup> Janet Wojcicki, “‘She Drank His Money’: Survival Sex and the Problem of Violence in Taverns in Gauteng Province, South Africa,” *Medical Anthropology Quarterly*, Vol. 16(3) (2002): 267-293.

<sup>260</sup> Rachel Jewkes and Naeema Abrahams, “The epidemiology of rape and sexual coercion in South Africa: an overview,” *Social Science and Medicine*, Vol. 55 (2002): 1231-1244.

Rape myths are an example of how violence is normalized through societal attitudes. These false beliefs place blame on the victim and excuse the behavior of perpetrators.<sup>261</sup> The Prostitution Offender Program in British Columbia conducted a study to expose the attitudes of buyers towards prostitution from the men enrolled in the program. The study discovered four rape myths buyers of sex believed to be true. The following four rape myths were found in common from offenders 1.) Prostitutes are unable to be raped. 2.) Prostitutes are not harmed when they are assaulted or harassed. 3.) Prostitutes deserve to be assaulted and raped. 4.) All prostitutes are considered to be the same, they are dehumanized and not seen as an individual. The research gathered from the participants was a way to gain access to the thought patterns from buyers that contribute to violence against women in an effort to prevent further victimization of women involved in prostitution and the sex trade. Several studies, along with this one have found rape myth acceptance and perpetrating sexual violence to be connected. Interviewing offenders in this program revealed that the violence exhibited towards women in prostitution were not only a reflection of the buyers but a reflection of the widespread attitudes held by society towards women in the sex industry. Public opinion believed that the women involved in prostitution as deserving of exploitation and abuse because like the offenders, society considered prostituted women as different from other women.<sup>262</sup> Studies have found that societies that normalize violence and perpetuate rape myths, will most likely consider the buying and selling of sex an acceptable practice.<sup>263</sup>

## **5. Poverty, Unemployment, and Gender Violence**

When prostitution is argued as sex work and a commercial contract between two equal parties, the right to equality comes into question as young girls in South Africa suffer from high rates of sexual harassment, gender-based violence, rape, assault and negative traditional and cultural

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<sup>261</sup> Niklas Jakobsson and Andreas Kotsadam, "Gender Equity and Prostitution: An Investigation of Attitudes in Norway and Sweden," *Feminist Economics*, Vol. 17(1) (2011): 31-58.

<sup>262</sup> Caroline Klein, M. Alexis Kennedy, and Boris B. Gorzalka, "Rape Myth Acceptance in Men Who Completed the Prostitution Offender Program of British Columbia." *International Journal of Offender Therapy and Comparative Criminology*, Vol. 53(3) (2009): 305-315.

<sup>263</sup> Niklas Jakobsson and Andreas Kotsadam, "Do Laws Affect Attitudes? An assessment of the Norwegian prostitution law using longitudinal data," *International Review of Law and Economics*, Vol. 31 (2011): 103-115.

practices as compared to men.<sup>264</sup> High rates of poverty and unemployment provide a harsh economic climate for the citizens of South Africa, particularly in rural areas and townships. A study conducted in 2011 reflected that the majority of individuals between the ages of 15-24 were neither educated nor employed and unemployment rates were highest among black females in South Africa rising to 67%.<sup>265</sup> South African women are not only disproportionately affected by poverty but are equally the intended targets of violence and abuse in the country.

Recent studies have focused on analyzing the influence of the historical context of South Africa and how the social, cultural, and economic background intersect to impact gender violence in this region.<sup>266</sup> The state sanctioned violence of apartheid led to a ‘culture of violence’ that remains dominant within South African society.<sup>267</sup> At one point, the South African police documented that 80% of women living in rural areas surrounding Cape Town, Johannesburg, and Durban were victims of gender violence.<sup>268</sup> Even though several factors have contributed to the present culture of violence in South Africa, male power is primal factor that is found throughout the generations of violence inflicted on women.

Gender violence is the physical manifestation of gendered attitudes and a representation of societal views of women. The objectification of women and allowing women’s sexuality to be bought and sold as commodities in the sex industry is not a new phenomenon, but rather escalation of oppressive sociocultural attitudes and practices.<sup>269</sup> The growth of the sex industry

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<sup>264</sup> Vuyokazi Nomlomo, Alawia Farag and Halla Holmarsdottir, “Challenges to gender equality and access in education: Perspectives from South Africa and Sudan,” *Southern African Comparative and History of Education Society*, 2012. Available at: [http://reference.sabinet.co.za/webx/access/electronic\\_journals/sare/sare\\_v18\\_n2\\_a4.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/sare/sare_v18_n2_a4.pdf)

<sup>265</sup> Vuyokazi Nomlomo, Alawia Farag and Halla Holmarsdottir, “Challenges to gender equality and access in education: Perspectives from South Africa and Sudan,” *Southern African Comparative and History of Education Society*, 2012. Available at: [http://reference.sabinet.co.za/webx/access/electronic\\_journals/sare/sare\\_v18\\_n2\\_a4.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/sare/sare_v18_n2_a4.pdf).

<sup>266</sup> Floretta Boonzaier and Cheryl De La Ray, “‘He’s a man and I’m a Woman’ Cultural Constructions of Masculinity and Femininity in South African Women’s Narratives of Violence,” *Violence Against Women*, Vol. 9(8) (2003): 1003-1029.

<sup>267</sup> Rachel Jewkes and Naeema Abrahams, “The epidemiology of rape and sexual coercion in South Africa: an overview,” *Social Science and Medicine*, Vol. 55 (2002): 1231-1244.

<sup>268</sup> Floretta Boonzaier and Cheryl De La Ray, “‘He’s a man and I’m a Woman’ Cultural Constructions of Masculinity and Femininity in South African Women’s Narratives of Violence,” *Violence Against Women*, Vol. 9(8) (2003): 1003-1029.

<sup>269</sup> Elsje Bonthuys and Carla Monteiro, “Sex for Sale: The Prostitute as Business Woman,” *South African Law Journal*, Vol. 121(3) (2004): 659-676.

and treatment of women involved is not an isolated discourse but one that is rooted in, and a reflection of, social norms and cultural perceptions of male and female sexuality.

## **6. South African Sociocultural Norms: Ideas of Masculinity**

### **6.1. Hegemonic Masculinity**

### **6.2. Definition and Characteristics**

Hegemonic masculinity is the gender ideology reflected and reinforced in a culture that defines manhood in a way that subjugates women by promoting the “*macho man*”<sup>270</sup> image to society as true masculinity. Hegemonic masculinity considers men superior in society and dominant in relationship to women. The characteristics depicted of hegemonic masculinity have been defined in western culture as possessing five distinct traits: 1.) physical force and control, 2.) occupational achievement, 3.) familial patriarchy, 4.) frontiersmanship, and 5.) heterosexuality.<sup>271</sup> Other than the image of the frontiersman, which is unique to the western world, the remaining traits were found present among South African males that perpetuated violence against women<sup>272</sup> and partook in transactional relationships<sup>273</sup> in order to restore and reaffirm hegemonic masculinity. The first three characteristics of hegemonic masculinity will be addressed within South African culture.

#### **6.2.1. Physical Force and Control**

Violence is often the first indication when a man feels his hegemonic status is being challenged and or in jeopardy. A study conducted by Lau and Stevens in Johannesburg, South Africa on violent behaviors within intimate partner relationships reflected how sociocultural constructs of masculinity and the hegemonic image of man led to gender violence. Throughout the study’s

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<sup>270</sup> Ursula Lau and Garth Stevens, “Textual Transformations of Subjectivity in Men’s Talk of Gender-based Violence,” *Feminism and Psychology*, Vol. 22(4) (2012): 423-442.

<sup>271</sup> Jeffery Dale Hobbs, Piengpen Na Pattalung, and Robert C Chandler, “Advertising Phuket’s Nightlife on the Internet: A Case Study of Double Binds and Hegemonic Masculinity in Sex Tourism,” *SOJOURN: Journal of Social Issues in Southeast Asia*, Vol. 26 (1) (2011): 80-104.

<sup>272</sup> Floretta Boonzaier, “‘If the Man Says You Must Sit, Then You Must Sit’: The Relational Construction of Woman Abuse: Gender, Subjectivity and Violence,” *Feminism and Psychology*, Vol. 18(2) (2008): 183-206.

<sup>273</sup> Ursula Lau and Garth Stevens, “Textual Transformations of Subjectivity in Men’s Talk of Gender-based Violence,” *Feminism and Psychology*, Vol. 22(4) (2012): 423-442.

narratives of violence, common themes were present throughout the men's dialogues, such as thoughts of patriarchal order, necessary gendered roles, heterosexual identity, and male ownership.

The aftermath of apartheid has influenced men's constructions of violence. Physical violence was considered the primary approach to solve conflict and command respect. Violence against women became a cultural trait of masculinity.<sup>274</sup> One participant stated, "*It's my culture...If you don't beat a woman up, you're not a man.*" While most participants spoke of culture in general terms, one participant attributed the influence of the Zulu culture to his violent behavior by stating, "*like our culture, we are abusive.*" How men were perceived amid their peers meant a great deal in securing social capital and affirming their masculinity within the group. Another participant stated, "*It was important that they must see me as a person who has control over my love affair...It's just this peer thing. That is why I was beating her for things that she was not doing, because I was trying to maintain that status that I must not be a joke.*"<sup>275</sup>

Sociocultural norms allow men to remain the dominant aggressors with an active sexuality. The 'male sexual drive' discourse is a heterosexual discourse that argues that a man's sexuality and promiscuity is tied to an increased biological need to procreate. The woman is seen as the object of a man's desire and male sexuality is assumed to be more difficult to restrain compared to a woman's.<sup>276</sup> In the townships, one woman supported this mentality by stating, "*They say you are attracting them, they are men, they can't hold their feelings, they'll grab you and go rape you.*"<sup>277</sup> This discourse is often used to validate men's behavior and excuse men's actions of rape and infidelity.<sup>278</sup> While men's sexual urges are argued to be out of their control, society gives men the power to control and violate women's sexuality and personhood.

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<sup>274</sup> Floretta Boonzaier, "Woman Abuse in South Africa: A Brief Contextual Analysis," *Feminism and Psychology*, Vol. 15(1) (2005): 99–103.

<sup>275</sup> Ursula Lau and Garth Stevens, "Transformations of Subjectivity in Men's Talk of Gender-based Violence," *Feminism and Psychology*, Vol. 22(4) (2012): 423-442.

<sup>276</sup> Hollway, Wendy, "Gender Difference and the Production of Subjectivity," *Changing the Subject: Psychology, Social Regulation and Subjectivity*, Julian Henriques, Wendy Hollway, Cathy Urwin, Couze Venn, and Valerie Walkerdine (eds), (1984): 227-263.

<sup>277</sup> Janet Wojcicki, "'She Drank His Money': Survival Sex and the Problem of Violence in Taverns in Gauteng Province, South Africa," *Medical Anthropology Quarterly*, Vol. 16(3) (2002): 267-293.

<sup>278</sup> Viven Bur, "Social Constructionism," 2<sup>nd</sup> ed., 2004.

## 6.2.2. Occupational Achievement

### 6.2.2.1. The Provider Role

The desire for occupational achievement is presented as the provider role within the context of South Africa. The high rates of poverty and unemployment in South Africa have prevented men from assuming the “*provider role*”<sup>279</sup> and having economic control in and outside intimate partner relationships. Therefore, violence, sexual coercion, and infidelity are ways hegemonic men attempt to prove that they still have power and control in their relationships and over women.<sup>280</sup> The effect of living in poverty inhibits men from achieving the culture standard of hegemonic masculinity. When a man loses his provider status, violence becomes the primary means to affirm his gender ideals of being a man, especially when he is marginalized in society and unable to maintain a source of income.<sup>281</sup> Men as providers is standard cultural norm endorsed by society, however the motivations of men behind this role and the lengths men go to ensure this status prove harmful to the livelihood of women.

### 6.2.2.2. Transactional Relationships

Transactional sexual relationships between men and women support the hegemonic construct of masculinity allowing men to maintain economic and sexual control.<sup>282</sup> Financial compensation or resources gained for the exchange of sex is not an uncommon practice in sub-Saharan Africa.<sup>283</sup> While stigmatized by Western traditions, the economic exchange within sexual relations has been argued to be a fundamental aspect of African culture with an example being

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<sup>279</sup> Rachel Jewkes, Robert Morrell, Yandisa Sikweyiya, Kristen Dunkle, and Loveday Penn-Kekana, “Men, Prostitution and the Provider Role: Understanding the intersections of Economic Exchange, Sex, Crime and Violence in South Africa,” *PLoS ONE*, Vol. 7 (12) (2012): 1-10

<sup>280</sup> Floretta Boonzaier, “Woman Abuse in South Africa: A Brief Contextual Analysis.” *Feminism and Psychology*, Vol. 15(1) (2005): 99–103.

<sup>281</sup> Floretta Boonzaier, “‘If the Man Says You Must Sit, Then You Must Sit’: The Relational Construction of Woman Abuse: Gender, Subjectivity and Violence,” *Feminism and Psychology*, Vol. 18(2) (2008): 183-206.

<sup>282</sup> Rachel Jewkes, Robert Morrell, Yandisa Sikweyiya, Kristen Dunkle, and Loveday Penn-Kekana, “Men, Prostitution and the Provider Role: Understanding the intersections of Economic Exchange, Sex, Crime and Violence in South Africa,” *PLoS ONE*, Vol. 7 (12) (2012): 1-10

<sup>283</sup> K. Dunkle, R. Jewkes, H. Brown, G. Gray, J. McIntryre, and S. Harlow, “Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection,” *Social Science & Medicine*, Vol. 59 (2004): 1581-1592.

*lobola* or bride price.<sup>284</sup> However, when sex is based on a women's need to survive or a man's sexual entitlement a power imbalance is formed within sexual relations.

### **6.2.2.3. Sexual Entitlement**

Policy makers in South Africa requested a study to show the correlation between transactional sex, prostitution, and the attitudes and behaviors of the men involved. The study showed that of the 1,645 men selected at random from various social backgrounds, 66% identified with the image of the hegemonic male. The 66% all had provider relationships with women and believed if they were to provide for a woman then they were entitled to sex. Hegemonic masculinity translates the provider role into sexual entitlement.<sup>285</sup> Just as men feel they are entitled to sex after finances or resources are exchanged, men also feel entitled to sex under their conditions. Men are reported as being violent when women suggest condom use, and power dynamics make it almost impossible for women to demand safer sexual practices within transactional relationships. The South African Ministry of Health reported in 2000 that HIV infection rates were highest in women between the ages of 20 and 30 years, while adolescent girls were affected with the greatest increase of HIV over any other age group in South Africa.<sup>286</sup>

### **6.2.2.4. Violent Behavior**

The study revealed similarities of the male psyche with men in provider relationships and with men that had sex with women in prostitution. Both groups of men perceived women in a subjugated role, while the men that had never been involved in either type of relationship were reported having less gendered attitudes and less aggressive behavior towards women. Over half (54%) of the men that committed rape also had provider relationships and sex with women in prostitution, and two thirds (59%) of the men that participated in both of these relationships also admitted to the possession of a weapon. The study documented how the transactional relationships of rural men in South Africa placed men at a higher risk towards violence and

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<sup>284</sup> Robert Morrell, Rachel Jewkes, and Graham Lindegger, "Hegemonic Masculinity/Masculinities in South Africa: Culture, Power, and Gender Politics," *Men and Masculinities*, Vol. 15(1) 2012.

<sup>285</sup> Rachel Jewkes, Robert Morrell, Yandisa Sikweyiya, Kristen Dunkle, and Loveday Penn-Kekana, "Men, Prostitution and the Provider Role: Understanding the intersections of Economic Exchange, Sex, Crime and Violence in South Africa," *PLoS ONE*, Vol. 7(12) (2012): 1-10.

<sup>286</sup> Janet Wojcicki, "'She Drank His Money': Survival Sex and the Problem of Violence in Taverns in Gauteng Province, South Africa," *Medical Anthropology Quarterly*, Vol. 16(3) (2002): 267-293.

abuse over men that had never had transactional sex. Transactional sex not only was connected to gendered attitudes and stereotypes, but it intensified the likelihood of violence against women.

The study concluded that prostituted women in South Africa encountered alarming rates of violence due to the fact that 75% of the men that had sex with women in prostitution exhibited ‘very violent’ criminal behavior and their psychological state when examined closely would not be considered ‘normal’ by societal standards. Therefore, the men that practice prostitution provide a greater threat to women in prostitution because these men are in fact more violent and perceive women being unequal to men.<sup>287</sup>

#### **6.2.2.5. Gender Inequality**

The study by Dunkle et al used transactional sex to show how gender inequality not only exists within this arrangement, but used this relationship to magnify the preexisting inequality within the society. The study created three hypotheses. The first hypothesis stated if transactional relationships are a normative aspect of relationships in South Africa, then gender based violence should not fluctuate within those relationships. The second hypothesis stated if transactional relationships were used as a tactic to control women and their sexuality, then men who provide resources to either intimate or casual female partners would display other controlling behaviors. The last hypothesis stated if it is the act of providing resources that establishes power, then men should display less controlling behavior when they receive resources from intimate or casual female partners.

The study results showed that even though transactional relationships were considered normative, relationships that were transaction motivated led an increase of gender based violence. Men were reported as being controlling and violent whether they gave resources or received resources from women.<sup>288</sup> Transactional relationships are simply one way that men use

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<sup>287</sup> Rachel Jewkes, Robert Morrell, Yandisa Sikweyiya, Kristen Dunkle, and Loveday Penn-Kekana, “Men, Prostitution and the Provider Role: Understanding the intersections of Economic Exchange, Sex, Crime and Violence in South Africa,” *PLoS ONE*, Vol. 7(12) (2012): 1-10.

<sup>288</sup> Kristin Dunkle, Rachel Jewkes, Mzikazi Nduna, Nwabisa Jama, Jonathan Levin, Yandisa Sikweyiya, and Mary Koss, “Transactional sex with casual and main partners among young South African men in the rural Eastern Cape: Prevalence, predictors, and associations with gender-based violence,” *Social Science & Medicine*, Vol. 65 (2007): 1235-1248.

to acquire and maintain sexual relations. However, it was the gendered dynamic that proved to be constant and the underlying force of power in transactional relationships, not the resources.

### 6.2.3. Familial Patriarchy

South African households follow a traditional patriarchal structure. Men are considered to be the dominant leader and the head of the home with the female playing the subordinate role. In the study conducted by Boonzaier and Rey on intimate partner violence, religion was used to perpetuate gender roles, which established a hierarchy within household dynamics. One participant stated, "...the word of the Lord also tells us that the man is the head of the household. We must serve the man." Religion is a prime example of how societal institutions are repressive of women by endorsing male sovereignty. Violence and abuse in the home are often overlooked due to the man's authoritarian role.<sup>289</sup>

In the study conducted by Lau and Stevens, one participant spoke on what it meant to be a black man in his community and stated, "*If you are a man they give you the power. A man is something so precious according to our culture.*"<sup>290</sup> In addition to power given by birth, men achieve 'status' through sexual conquests, which contribute to the demand for sex. Two different words are used to describe a man with multiple sex partners and a man without partners, within the language of isiZulu. A man with multiple sex partners is praised and admired by being called *isoka*, while the man lacking in partners is called *isishimane*, an insult in the Zulu culture.<sup>291</sup>

Men are considered the moral authority in the home and within sexual relations. From an early age boys are allowed to ignore and discredit women's right to refuse sex, both in the home and in school environments.<sup>292</sup> Instead, women are seen as possessions and something to be owned. One participant stated, "*They say you must have sex with her. Then she's 'registered'. That's why*

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<sup>289</sup> Floretta Boonzaier and Cheryl De La Ray, "'He's a man and I'm a Woman' Cultural Constructions of Masculinity and Femininity in South African Women's Narratives of Violence," *Violence Against Women*, Vol. 9(8) (2003): 1003-1029.

<sup>290</sup> Ursula Lau and Garth Stevens, "Textual Transformations of Subjectivity in Men's Talk of Gender-based Violence," *Feminism and Psychology*, Vol. 22(4) (2012): 423-442.

<sup>291</sup> Janet Wojcicki, "'She Drank His Money': Survival Sex and the Problem of Violence in Taverns in Gauteng Province, South Africa," *Medical Anthropology Quarterly*, Vol. 16(3) (2002): 267-293.

<sup>292</sup> Rachel Jewkes and Naeema Abrahams, "The epidemiology of rape and sexual coercion in South Africa: an overview," *Social Science and Medicine*, Vol. 55 (2002): 1231-1244.

*after having sex, she's mine.*"<sup>293</sup> Men use titles such as 'wife' and 'girlfriend' to show affection but they are also used to reinforce ownership and stake their claim of women in society. These titles offer reassurance that a man will provide protection, however, the ability to protect allows the right to punish. This dualism of man being the protector and punisher is a function evident of a patriarchal society.

## **7. South African Sociocultural Norms: The Influence of the Masculine Ideals on Female Sexuality**

### **7.1. The Madonna-Whore Contradiction**

In South Africa, religious constructs have influenced societal views on femininity in comparison to biblical archetypes. As the result of subscribing to a higher power, South African women have reported that society sees their gender in extremes. Women's sexuality is placed in one of two categories, the 'sexually pure' or the 'sexually impure'.<sup>294</sup> Women are either considered to possess qualities that are innocent, pure and holy, resembling the Virgin Mary or they are told they are a *whore*: a status that is seen as unworthy and considered blameworthy.<sup>295</sup> Religion creates an impossible line for women to walk that allows men to require immaculate perfection from women or render them as the lowest form of humanity. In a patriarchal culture that is dominated by male order "*women are judged by a masculine standard, and by that standard they lose, whether they claim difference or similarity.*"<sup>296</sup> In a South African narrative one woman stated she was given the title of a "*good wife*" when fulfilling certain duties, while another woman reported being called "*a whore in front of the children*" when a mistake was made.<sup>297</sup> The term *whore* is deeply rooted in religious hypocrisy and it is a manipulative tactic that allows men to feel superior while placing shame and guilt onto women. The 'male sexual drive' discourse in

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<sup>293</sup> Ursula Lau and Garth Stevens, "Textual Transformations of Subjectivity in Men's Talk of Gender-based Violence," *Feminism and Psychology*, Vol. 22(4) (2012): 423-442.

<sup>294</sup> Floretta Boonzaier and Cheryl de la Rey, "Woman abuse: The construction of gender in women and men's narratives of violence," *South African Journal of Psychology*, Vol. 34(3) (2004): 443-464.

<sup>295</sup> Floretta Boonzaier and Cheryl De La Ray, "'He's a man and I'm a Woman' Cultural Constructions of Masculinity and Femininity in South African Women's Narratives of Violence," *Violence Against Women*, Vol. 9(8) (2003): 1003-1029.

<sup>296</sup> Kathleen Hall Jamieson, "Beyond the Double Bind: Women and Leadership," 1995: 18.

<sup>297</sup> Floretta Boonzaier and Cheryl De La Ray, "'He's a man and I'm a Woman' Cultural Constructions of Masculinity and Femininity in South African Women's Narratives of Violence," *Violence Against Women*, Vol. 9(8) (2003): 1003-1029.

conjunction with the religious Madonna-whore dichotomy further exemplifies societal double standards towards men and women. Women are to remain pure and are not to be seen as sexually promiscuous while men aren't considered a 'man' unless they have multiple sexual encounters with different women.<sup>298</sup> Societal norms allow men to have power over women and the right to control a women's body, while the sex industry tells men a women's sexuality can be bought. However when a woman denies a man access to her body or when a woman is viewed as selling her sexuality, the woman is blamed within society and considered the guilty party under the law.<sup>299</sup>

## 7.2. Women as Gatekeeper

Violence against women is normalized at an early age among the youth in South Africa as gendered attitudes towards men and women are embedded in the culture.<sup>300</sup> The sociocultural norms that label female sexuality as passive and submissive allow the notion of men being the dominant, sexual aggressors to go unchallenged. Young females are harassed and assaulted with the justification that 'boys will be boys.'<sup>301</sup> Girls are warned that a man's sex drive and sexual desires are uncontrollable and it is up to the women and girls to thwart any unwanted sexual advances. Societal norms hold the female to the position of *gatekeeper* within sexual interactions and it is acceptable for a man to harass, coerce, and assault until a woman says otherwise. However, even when young girls and women refuse a man's sexual advances the woman is held accountable to her actions or inactions. Society finds a reason to justify why a man acted inappropriately and assumes that the woman either dressed or looked a certain way that invited this so called 'normative male behavior'.<sup>302</sup> When the female role is gatekeeper, females are held responsible for a man's coercive behavior and "women learn, often at a very early age, that their

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<sup>298</sup> Floretta Boonzaier and Cheryl de la Rey, "Woman abuse: The construction of gender in women and men's narratives of violence," *South African Journal of Psychology*, Vol. 34(3) (2004): 443-464.

<sup>299</sup> Elsje Bonthuys and Carla Monteiro, "Sex for Sale: The Prostitute as Business Woman," *South African Law Journal*, Vol. 121(3) (2004): 659-676.

<sup>300</sup> Rachel Jewkes and Naeema Abrahams, "The epidemiology of rape and sexual coercion in South Africa: an overview," *Social Science and Medicine*, Vol. 55(2002): 1231-1244.

<sup>301</sup> Heather Hlavka, "Normalizing Sexual Violence: Young Women Account for Harassment and Abuse," *Gender and Society*, Vol. 20(10) (2014): 1-22.

<sup>302</sup> Elsje Bonthuys and Carla Monteiro, "Sex for Sale: The Prostitute as Business Woman," *South African Law Journal*, Vol. 121(3) (2004): 659-676.

*sexuality is not their own and that maleness can at any point intrude into it.*"<sup>303</sup> Societal constructs of femininity are deeply impressed upon young girls and act as a barrier for females in having equality with males. The violence perpetrated against females goes unquestioned to adolescent girls, as most girls have never lived in a culture that prevented or discouraged male power and aggression.<sup>304</sup> Women begin to believe they do not have control over their sexuality, and because of a man's sex drive they have to remain on the defensive and find ways to prevent his advances, attacks, and abuse. Sociocultural norms affect the way women view themselves and their sexuality. When women see their sexuality as not their own but belonging to a man, the harm is experienced by all women regardless if they are titled as 'girlfriend', 'wife', or 'sex worker'.

### **7.3. Survival Sex**

Even though transactional sex is considered a common practice in South Africa, the majority of women that engage in transactional relationships would not consider their behavior as 'sex work'.<sup>305</sup> Women of Mozambique and surrounding sub-Saharan countries recognized that poverty and their dependency on men to fulfill the provider role led to selling sex as a means of survival. Gender and societal inequalities leave women with minimal education and lacking financial opportunities. In a female-headed household women are forced to be the sole provider for their families and selling sex becomes the only alternative.<sup>306</sup>

#### **7.3.1. University Campuses**

Transactional sex is a widely accepted practice that takes place on university campuses in South Africa. A South African university conducted a qualitative study to understand the gender

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<sup>303</sup> Heather Hlavka, "Normalizing Sexual Violence: Young Women Account for Harassment and Abuse," *Gender and Society*, Vol. 20(10) (2014): 1-22.

<sup>304</sup> Floretta Boonzaier and Cheryl De La Ray, "'He's a man and I'm a Woman' Cultural Constructions of Masculinity and Femininity in South African Women's Narratives of Violence," *Violence Against Women*, Vol. 9(8) (2003): 1003-1029.

<sup>305</sup> K. Dunkle, R. Jewkes, H. Brown, G. Gray, J. McIntyre, and S. Harlow, "Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection," *Social Science & Medicine*, Vol. 59 (2004): 1581-1592.

<sup>306</sup> Sarah Bandali, "Exchange of sex for resources: HIV risk and gender norms in Cabo Delgado, Mozambique," *Culture, Health & Sexuality*, Vol. 13(5) (2011): 575-588.

dynamics and sexual inequality existing within transactional relationships on university campuses. It was discovered that female students are easily approached and targeted by older male students with seniority status as well as wealthier older men in the surrounding neighborhoods looking to take advantage of this innocence. Zulfa, a 23-year old student commented on the young first-year females arriving on the university campus. She stated, “...these kids come, they’re vulnerable. A lot of seniors and people from off campus...are like lions they come to our residence. And so they use the girls.”

Most students are leaving their families and small towns for the first time and have access to a new found freedom and independence with living on their own. Students find themselves in an environment where status and possessions matter and they are eager to fit in to the material world presented in university life. Nosipho, a 22-year old student stated, “...girls from campus, they tend to, sort of not, sell themselves, but sell themselves because, I mean, they’re living on res, they need stuff.” The economic privileged male can offer the female student resources that she could not otherwise afford. Men assume the hegemonic provider role and are considered ‘sugar daddies’ to the students. The young girls expect that the men will look after them and take care of them and the men exploit the girls trusting nature and underprivileged status on campus. As female students became reliant on the transactional relationships with men, violence and abuse was often endured so material benefits would not be taken away.<sup>307</sup> Some females were lured into these relationships out of youthful naivety, while some females that experienced a history of violence in prior relationships consider this to be a more practical alternative.

### **7.3.2. Bars and Taverns**

Survival sex is a term used to describe the perceptions of transactional sex among the women and community members of Soweto. Soweto is a township outside Hammanskraai in South Africa where transactional sex is considered a socially acceptable practice. Transactional sex is not considered prostitution in this community, but rather an informal sexual arrangement. Janet Wojcicki from the Center for AIDS Prevention Studies, interviewed women that frequently visit

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<sup>307</sup> Tamara Shefer, Lindsay Clowes, Tania Vergnani, “Narratives of transactional sex on a university campus,” *Culture, Health and Sexuality*, Vol. 14(4) (2012): 435-447.

the local drinking establishments and taverns in Soweto to disclose how gender, culture, and violence interconnect and contribute to survival sex. The community showed sympathy towards the women in these situations and used the phrase *bayaphandela* which translated to “*they are trying to help themselves to get money*” to describe their behavior.

Women that participated in survival sex perceived the women in prostitution with the ability to control their surroundings and the money they made. One woman stated, “...*girls who go to taverns like us meet a guy, he buys me a beer, gives me R10, and then go to sleep together. With prostitutes, it's different because she has a set price for sex and she gets the money that she wants.*” The fact that no set price was decided prior to a sexual arrangement was important to the women in separating their actions outside of prostitution. Survival sex was considered a more natural and gradual process. The women go into each situation not knowing how much they will make, what resources they will acquire, or how long they will stay with a man. Impoverished women use transactional relations for array of needs, such as food, shelter, clothing, or household goods and services. Often finances aren't even involved in the sexual exchange. One woman lost the power and electricity in her home and used transactional sex as a way to solve the problem. She stated, “*When I see some young man, I go to him and say, 'Look, I have lost money for electricity units. So how about you giving me some money to buy those?'*” Women were comfortable enough to tell men their financial hardships in hopes that if they agreed to a sexual encounter they would be alleviated from their destitution.

Women remarked on the importance of not accepting a drink from a man, if a woman did not plan on sleeping him. One woman stated, “*It's, like, if you accept the beer, you are his.*” Men are allowed to require sex after a woman was considered to have “*drunk his money.*” Accepting a drink from a man was understood to be agreeing to a sexual encounter. Another woman commented on how she “*fell into a trap*” in regards to this unspoken but understood rule in the taverns. While this woman went to the tavern to only meet and drink with a girlfriend she was placed in a compromising situation that forced her to have sex with a man. She stated, “*This girl disappears. This other [man] says if you don't go with me, all these guys are going to sleep with you. I had no choice. I had to go with him.*” If women refused sex after a drink was provided, women were often raped and abused. Violence against women seemed inevitable in a community

where men were allowed to act on their sexual desires and where women could not dress a certain way without a fear of being attacked. Women in taverns dressed modestly knowing they would be blamed for an assault if their clothes were considered revealing. The study depicted how men were believed to be doing the women a favor in the community, not the other way around. The socio-cultural norms of the community saw women as helpless in a man's world where violence against women was excused when women did not abide by patriarchal rules.<sup>308</sup>

## 8. Conclusion

The research conducted in South Africa has indicated how ideas of masculinity have propagated gender ideals, which has led to the unequal treatment of men and women. The image of the hegemonic male furthered gender injustice as it is the embodiment of power, control and violence against women in South African society. A patriarchal society has disempowered women by limiting their options and forcing them to choose alternative means to survive. Dunkle et al concluded that even though women entered transactional relationships due to poverty and as survival method, the economic empowerment of women would not be enough to shift sociocultural norms and impact violence against women. The study suggested the most effective way to influence gender power dynamics was to change the way society sees men and women. Risk reduction strategies for those that engaged in transactional sex and gender-based violence proved insufficient in changing foundational aspects of inequality. Rather, hegemonic ideas of masculinity would need to be challenged and transformed in order to eliminate men's power and control of women.<sup>309</sup>

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<sup>308</sup> Janet Wojcicki, "'She Drank His Money': Survival Sex and the Problem of Violence in Taverns in Gauteng Province, South Africa," *Medical Anthropology Quarterly*, Vol. 16(3) (2002): 267-293.

<sup>309</sup> Kristin Dunkle, Rachel Jewkes, Mzikazi Nduna, Nwabisa Jama, Jonathan Levin, Yandisa Sikweyiya, and Mary Koss, "Transactional sex with casual and main partners among young South African men in the rural Eastern Cape: Prevalence, predictors, and associations with gender-based violence," *Social Science & Medicine*, Vol. 65 (2007): 1235-1248.

## **CHAPTER 5: THE PROPOSED LEGAL MODELS ON PROSTITUTION**

### **1. Introduction**

This chapter will address the following legal models that are up for review to be either adopted or reinstated in South Africa. In efforts to comply with human rights standards South Africa will need to enact new legislation that upholds women's human rights and supports gender equality. Legalization, decriminalization, and partial-decriminalization are all argued by feminists to exist within a human rights framework. However, only one model will be recognized to fulfill the criteria. The abolitionist model will be argued as the best choice for proposed legislation in South Africa, as it is the only model that has recognized the gendered nature of prostitution. The abolitionist model represents progressive legislation that has been spearheaded in other countries for targeting the root cause of prostitution, as well as the attitudes and practices that contribute to the sexual exploitation of women.

### **2. The Criminalization of Prostitution**

The criminalization of prostitution is recognized as a human rights violation in both liberal and radical feminist positions. Liberal feminists considered it a denial of a women's right to work while radical feminists consider it a fundamental act of discrimination, inequality, and exploitation. Criminalization restricts women's access to protection from law enforcement as the law recognizes prostituted women as criminals. It is argued that criminalization drives prostitution underground making it even more dangerous for women involved in prostitution.<sup>310</sup> Women not only experience violence from buyers and pimps within prostitution, but also from police under a criminalized system. When women are criminalized they are stigmatized in society and denied benefits, health care, and support services that otherwise would be afforded to them by the state. Since criminalization is undisputed by both feminists groups as an outdated policy unable to exist within a human rights framework, the preceding models will be assessed to evaluate state's ability to ensure the human rights of women.

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<sup>310</sup> John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as the Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

### 3. The Legalization of Prostitution a Model of Regulation

“Legalized prostitution cannot exist alongside the true equality of women. The idea that one group of women should be available for men’s sexual access is founded on structural inequality by gender, class and race.”<sup>311</sup>

Legalization is a state response to manage the terms and conditions under which prostitution can operate. Those that claim sex work as a profession support legalization and the women involved as deserving of the same rights as any other recognized profession. Since prostitution is often associated with criminal activity, legalization becomes a method for the state to exercise control and police the sex industry rather than promote the profession of sex worker.<sup>312</sup> The legalization of prostitution not only legalizes prostituted women as sex workers, it also legalizes the behavior of the buyers, pimps, and brothel owners.<sup>313</sup> Legalization acts as a double edge sword where any progress that is considered to raise the status for sex workers also increases the power of those controlling the sex industry. Legalization provides the state with authority to adopt the role of pimp and decide the conditions in which sexual exploitation should occur.<sup>314</sup> Legalization not only perpetuates a model of sustainable prostitution, but it also allows prostitution to become “normalized as a suitable option to the poor.”<sup>315</sup>

#### 3.1. The Implications of Regulation

“...there was the naïve belief that legalized prostitution would improve life for prostitutes, eliminate prostitution in areas where it remained illegal and remove organized crime from business...Like all fairy tales, this turns out to be sheer fantasy.”<sup>316</sup>

Carolyn Maloney (Co-Chair of the U.S Congressional Human Trafficking Caucus)

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<sup>311</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

<sup>312</sup> Chris Bruckert and Stacey Hannem, “Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work,” *Canadian Journal of Law and Society*, Vol. 28(1) (2013): 43-63.

<sup>313</sup> Marjorie Griffin Cohen and Jane Pulkingham, “Public Policy for Women: The State, Income Security, and Labour Market Issues,” 2009.

<sup>314</sup> John M. Luiz and Leon Roets, “On Prostitution, STDs and the Law in South Africa: The State as the Pimp,” *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>315</sup> Janice Raymond, “Prostitution on Demand: Legalizing the Buyer as Sexual Consumers,” *Violence Against Women*, Vol. 10(10) (2004): 1156-1186.

<sup>316</sup> Melissa Farley, “Theory verses reality: Commentary on four articles about trafficking for prostitution,” *Women’s Study International Forum*, Vol. 32 (2009): 311-315.

Even when prostitution is legalized and the right to become a sex worker is advocated for, advocacy efforts begin to fade with the realization that prostitution could take place in a person's neighborhood becomes a state sanctioned possibility. The legalization of prostitution is rarely the result of a human rights concern, but rather the way to regulate what is considered a 'public nuisance' as stated for certain regions of Nevada in the United States. Since legalization considers prostitution inevitable and a way to control necessary harms, it makes this model a method of containment.<sup>317</sup> Strict zoning regulations are put in place to make sure prostitution is only being practiced in authorized areas and districts. Legalization requires registration, usually subject to a fee. If anyone participating in the industry is found without documentation, the state can hold him or her responsible for acting outside the law and criminalize the guilty party. Sex workers must have a license in order to practice and brothel owners must have a license in order to operate an establishment.<sup>318</sup> Legalization is also positioned as a concern over public health and safety. However, the mandatory health checks and HIV testing that are required of women are for the benefit of the buyers rather than the women. Women are forced to undergo testing, while the buyers are not asked to show a clean bill of health when they purchase sex. Men's continual refusals to use condoms for protection make women vulnerable to infection. Despite the buyer's violation and neglect, if the woman is found infected she is penalized under the law for not taking the proper precautions. The woman is considered compromised and no longer permitted to work until a fine is paid or the problem is resolved.<sup>319</sup> The healthcare of women goes far behind health checks, pamphlets, and condom distribution. Until the welfare of women is addressed, her vulnerable status in society recognized, and all aspects of her well-being is taken into consideration under the law, the narrow definition of health services will fall short in advancing women's quality of life.<sup>320</sup>

#### **4. The Decriminalization of Prostitution a Model of 'Laissez faire' Prostitution**

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<sup>317</sup> Chris Bruckert and Stacey Hannem, "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work," *Canadian Journal of Law and Society*, Vol. 28(1) (2013): 43-63.

<sup>318</sup> Carol Harrington, "Prostitution Policy Models and Feminist Knowledge Politics in New Zealand and Sweden," *Sex Res Soc Policy*, Vol. 9 (2012): 337-349.

<sup>319</sup> Melissa Farley, "Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly," *Yale Journal of Law and Feminism*, (2006): 1-33.

<sup>320</sup> Judith Kilvington, Sophie Day and Helen Ward, "Prostitution Policy in Europe: A Time of Change," *Feminist Review*, Vol. 67 (2001): 78-93.

Decriminalization is considered a “*more extreme measure*”<sup>321</sup> than legalization, as it applies the ‘laissez faire’ doctrine of economics towards prostitution. This French term translates to “*allowed to do*” and describes a hands-off approach from the state towards the business concerns and private affairs of individuals and society.<sup>322</sup> The doctrine of laissez faire laid the foundation of the free market economy and was first described in Adam Smith’s *Wealth of Nations*.<sup>323</sup> This theory suggests that without the interference from the state, the economy will naturally self-regulate. Supply and demand determines what products are produced as the seller automatically responds to the demand of the buyers.<sup>324</sup> The demand holds the power and leads the market while the seller is left to respond, fulfill, and meet the wants and needs of the buyer. In prostitution men create the demand and when men are allowed to dictate what products are produced, women will continue to be the economic good that is bought and sold. The idea of the state taking a laissez approach when the demand is for women and girls, translates to the state ignoring women’s exploitation and denying women of their basic human rights to live free from oppression.

#### **4.1. The Implications of ‘Laissez faire’ Prostitution**

The implications of prostitution within the model of decriminalization are less certain, as this model is less defined. In 2003, New Zealand became the first country to instate a complete decriminalization model of prostitution.<sup>325</sup> The Prostitution Reform Act in New Zealand states that it does not endorse prostitution but instead has tried to establish a framework to protect sex workers from exploitation.<sup>326</sup> Decriminalization should have less invasive requirements of sex workers and offer more autonomy than regulation; however, the Prostitution Reform Act still issues fines when health and safety requirements are not met. Brothels are also required to abide

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<sup>321</sup> Donna Hughes, “Women’s Wrongs: Decriminalization of Prostitution in Berkeley,” *National Review Online*, 2004. Available at: [http://www.uri.edu/artsci/wms/hughes/womens\\_wrongs.pdf](http://www.uri.edu/artsci/wms/hughes/womens_wrongs.pdf).

<sup>322</sup> Laissez- faire defined by Encyclopedia Britannica, 2014. Available at: <http://www.britannica.com/EBchecked/topic/328028/laissez-faire>.

<sup>323</sup> Adam Smith, “An Inquiry into the Nature and Causes of The Wealth of Nations,” 1776.

<sup>324</sup> Robert Kuttner, “The End of Laissez-faire: National Purpose and the Global Economy After the Cold War,” 1992.

<sup>325</sup> Chris Bruckert and Stacey Hannem, “Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work,” *Canadian Journal of Law and Society*, Vol. 28(1) (2013): 43-63.

<sup>326</sup> Section 3(a)(b)(c) of the Prostitution Reform Act, 2003, New Zealand.

by regulations and hold a certificate.<sup>327</sup> When prostitution is decriminalized the police are limited and no longer have the authority to execute raids on brothels or investigate criminal activity connected to prostitution. Women have less accessibility to law enforcement in receiving the protection they need from pimps and traffickers.<sup>328</sup>

Supporters of decriminalization consider the removal of all laws pertaining to prostitution the most effective way to reduce the stigma for sex workers in the industry. Decriminalization is considered the favorable choice of sex workers opposed to legalization, since decriminalization removes the regulatory requirements and the stigma associated with registration. The privacy of women is argued to be better protected under decriminalization, as sex workers are not required to register or provide documentation in order to work. Proponents of decriminalization believe this system will make it easier on women to enter and exit the sex industry whenever they choose and throughout their lifetime.<sup>329</sup> However, with the knowledge that a women's life expectancy from the date she enters prostitution is four years,<sup>330</sup> this presumed favor is more accurately considered a death sentence.

## **5. How Legalization and Decriminalization Contribute to the Following**

### **5.1. The Expansion of the Sex Industry**

#### **5.1.1. The Increase in the Supply and Demand**

Legalization and/or decriminalization affect the supply and demand of prostitution establishing an ideal marketplace for potential buyers.<sup>331</sup> When prostitution activities are no longer illegal and restrictions are removed, buyers no longer have the fear of being caught or facing penalties under

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<sup>327</sup> Chris Bruckert and Stacey Hannem, "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work," *Canadian Journal of Law and Society*, Vol. 28(1) (2013): 43-63.

<sup>328</sup> E. Naidoo, A. Kariem, M. Ballin, T. Hodgson, S. and Ndlovu, "Why Prostitution Must Not Be Decriminalised or Legalised in South Africa," *Family Policy Institute*, 2007.

<sup>329</sup> Marjorie Griffin Cohen and Jane Pulkingham, "Public Policy for Women: The State, Income Security, and Labour Market Issues," 2009.

<sup>330</sup> Dianne Post, "Legalization of Prostitution is a Violation of Human Rights." *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

<sup>331</sup> E. Naidoo, A. Kariem, M. Ballin, T. Hodgson, S. and Ndlovu, "Why Prostitution Must Not Be Decriminalised or Legalised in South Africa," *Family Policy Institute*, 2007.

the law. Men reported a preference towards the decriminalized system.<sup>332</sup> Prostitution increases when the state chooses to accommodate the desires of clientele over protection of women. Whether prostitution is legalized or decriminalized, taxing prostitution is a way for states to affect the supply and demand. Taxing prostitution can be seen as an attempt to diminish the supply and demand by making operations within the sex industry a more costly endeavor. However, if the state taxes in excess, the plan backfires and prostitution once again reverts back to operating outside the legal limits.<sup>333</sup> Legalization was proposed as a solution to transfer prostitution activities indoors by providing women with more protection than on the street. However, women that do not wish to register as a prostitute, submit to regular health screenings, or be controlled by a state system, return to street prostitution as their only option. Legalization increases not only legal prostitution but also illegal prostitution endeavors.<sup>334</sup> Even when this fact is considered conjecture, the University of Queensland in Australia reported that legalized prostitution was considered non-existent in the country due to 90% of sex industry that functioned in an illegal capacity within their legalized system.<sup>335</sup>

In 2012, the legalization of prostitution in Germany had drastically increased the number of prostituted women making the country one of the top, if not the top marketplace for sexual labor in Europe.<sup>336</sup> From the time prostitution was decriminalized in 2003, New Zealand reported a 200-400% increase in street prostitution. In 2008, a director of a local NGO called Streetreach New Zealand remarked that decriminalization had doubled the demand and the visibility of buyers. Men were reported perusing the streets looking for women since buyer behavior was no longer considered an offence by the government. Streetreach is an organization dedicated to helping women exit prostitution. However, 25% of New Zealand women involved in street prostitution reported to have entered prostitution because of the change in legislation. Even

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<sup>332</sup> Rachel Jewkes, Robert Morrell, Yandisa Sikweyiya, Kristen Dunkle, and Loveday Penn-Kekana, "Men, Prostitution and the Provider Role: Understanding the intersections of Economic Exchange, Sex, Crime and Violence in South Africa," *PLoS ONE*, Vol. 7 (12) (2012): 1-10.

<sup>333</sup> John M. Luiz and Leon Roets, "On Prostitution, STDs and the Law in South Africa: The State as the Pimp," *Journal of Contemporary African Studies*, Vol. 18(1) (2000): 21-38.

<sup>334</sup> Janice G. Raymond, "Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution," 2003.

<sup>335</sup> Andreas Shloelandt & Human Trafficking Working Group, "Happy Birthday, Brothels! Ten Years of Prostitution Regulation in Queensland," *The University of Queensland, TC Beirne School of Law*, 2009.

<sup>336</sup> Seo-Young Cho, Axel Dreher, and Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" *World Development*, Vol. 41 (2013): 67-82.

though decriminalization greatly increased the demand, the less red tape and restrictions involved was considered a pull factor for both buyers and sellers.<sup>337</sup>

### 5.1.2. The Increase in Human Trafficking

Human trafficking is a dominant criminal enterprise within the global black market with a profit margin as high as 36 million in annual revenue.<sup>338</sup> Since human trafficking is motivated by profit and demand, traffickers operate throughout countries where state prostitution laws can be used to their advantage. The German Institute for Economic Research, Heidelberg University, and the London School of Economics published findings in a 2012 World Development report stating that human trafficking is greater in countries where prostitution is sanctioned, than in countries where it is banned.<sup>339</sup> Therefore, any government attempt to prevent human trafficking becomes an ineffective pursuit as long as prostitution is permitted by the state.<sup>340</sup> In 2006 the German population was estimated to be only 10% higher than Sweden, however, the number of prostituted women was 60% higher in the legalized country in comparison to its Nordic neighbor. Germany also reported a 62% higher increase in human trafficking victims than Sweden.<sup>341</sup>

Traffickers can further exploit women in countries where a thriving prostitution market already exists, despite governments belief regulation has prostitution and under control. Traffickers are able to go undetected, as they can appear as any other businessman, pimp or brothel owner in a legalized or decriminalized environment. Information gathered from victims within the European Union affirm that human trafficking is less evident within countries when the buyer is criminalized, and highest within countries when prostitution is legalized. When prostitution is

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<sup>337</sup> Melissa Farley, "Theory verses reality: Commentary on four articles about trafficking for prostitution," *Women's Study International Forum*, Vol. 32 (2009): 311-315.

<sup>338</sup> UN News Centre, "Human trafficking has no place in modern world, General Assembly President says," Available at: <http://www.un.org/apps/news/story.asp?NewsID=48271#.VBXOif2vtSU>.

<sup>339</sup> Seo-Young Cho, Axel Dreher, and Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" *World Development*, Vol. 41 (2013): 67-82.

<sup>340</sup> Niklas Jakobsson and Andreas Kotsadamn, "The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation." *European Journal Law Economics*, Vol. 35 (1)(2013): 87-107.

<sup>341</sup> Seo-Young Cho, Axel Dreher, and Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" *World Development*, Vol. 41 (2013): 67-82.

legalized, and third party involvement is prohibited, such as pimps and brothels, trafficking is found to fluctuate in the middle of both policies.<sup>342</sup>

### 5.1.3. The Violation of the Due Diligence Standard

The due diligence standard is a positive obligation under international law that requires the state to take a preventative approach when addressing the systemic acts of violence against women. General Recommendation No. 19(9) of the Convention on the Elimination of ALL Forms of Discrimination against Women (CEDAW) states:

“Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>343</sup>

The difficult task regarding the due diligence standard is determining how state compliance is recognized. Should states only be held accountable to the measures taken preemptively in pursuing this mandate to “*respect, protect, promote and fulfill*”<sup>344</sup> women’s human rights or should state compliance be recognized by the outcomes achieved. Regardless, states are ordered to act proactively to eliminate discriminatory practices of women and in order to do that they agree, “*to pursue by all appropriate means and without delay.*”<sup>345</sup> The expansive nature of due diligence allows states to continue to develop best practices to achieve equality and non-discrimination.

In addition to Sigma Huda’s recognition of prostitution meeting the criteria for human trafficking, the UN Special Rapporteur warns states of their responsibility to act with due diligence when operating within a legalized government to not enable an environment that

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<sup>342</sup> Niklas Jakobsson and Andreas Kotsadamn, “The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation.” *European Journal Law Economics*, Vol. 35 (1)(2013): 87-107.

<sup>343</sup> General Recommendation Number 19 of the Convention of Elimination of Discrimination Against Women, 11<sup>th</sup> Session, 1992.

<sup>344</sup> Yakin Ertürk, Special Rapporteur on violence against women, its causes and consequences, “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women the Due Diligence Standard as a Tool for the Elimination of Violence Against Women,” *United Nations Economic and Social Council*, 2006. Available at: <http://www.refworld.org/pdfid/45377afb0.pdf>

<sup>345</sup> Article 2 of CEDAW, United Nations General Assembly, 1979.

increases the magnitude of human trafficking. The UN Special Rapporteur issued the following statement:

“Thus, State parties with legalized prostitution industries have a heavy responsibility to ensure that the conditions which actually pertain to the practice of prostitution within their borders are free from the illicit means... as to ensure that their legalized prostitution regimes are not simply perpetuating widespread and systematic trafficking. As current conditions throughout the world attest, State parties that maintain legalized prostitution are far from satisfying this obligation.”<sup>346</sup>

Even though the UN does not prohibit the legalization of prostitution, legalization is in violation of international law if it is found to contribute to human trafficking or if it is responsible for the expansion of this injustice. States will be held accountable for not fulfilling their obligations and taking an active measure to prevent this crime. States are cautioned with realization that unless power dynamics and gender inequalities are addressed by the government, the number of human trafficking and prostitution victims will continue to rise.

## **5.2. The Violence and Vulnerability of Women**

### **5.2.1. The Failed Attempt of Ethical Consumerism**

Pro-sex work groups promote the notion that ethical buying habits or conscious consumerism can take place within prostitution. They insist if men were aware of the treatment and conditions women were subjected to then they would not purchase sex. These groups advocate that men should ask women whether or not they have been exploited and if they have been forced into prostitution before purchasing sexual services.<sup>347</sup> However, men are aware of the treatment of women in prostitution, since men are the perpetrators of abuse and the violent culprits.<sup>348</sup>

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<sup>346</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

<sup>347</sup> Janice Raymond, “Prostitution: Not a Job, Not a Choice,” recorded talk on November 30, 2013 part of the annual Montreal Massacre Memorial event organized by Vancouver Rape Relief & Women’s Shelter. <http://feministcurrent.com/8263/podcast-prostitution-not-a-job-not-a-choice-a-talk-by-janice-raymond/>

<sup>348</sup> Melissa Farley, “Theory verses reality: Commentary on four articles about trafficking for prostitution,” *Women’s Study International Forum*, Vol. 32 (2009): 311-315.

Evidence has suggested that violence against women is more likely to occur in the legal brothels of Germany, Australia, and the Netherlands than in the countries that have laws in place against the buyers. In countries where prostitution is legal, violence is recognized and undisputed as an occupational hazard. However, in the attempt to reduce the harm women face in prostitution, pro sex-work groups have produced self-help manuals that offer tips and best practices to staying alive in the sex industry.<sup>349</sup> The South African organization, Sex Work-ers' Education and Advocacy Taskforce (SWEAT), issued safety tips for women. They suggested that kicking a shoe under the bed and fluffing the pillow could be used as opportunities to check for weapons, hand-cuffs, or anything else that could be used against their will to put their life in danger.<sup>350</sup> Radical Feminist, Janice Raymond, questions how any workplace that would suggest a sex worker to keep a knife under the bed or to remove a pillow in case the buyer is tempted to strangle her, would be considered anything other than "*crisis management in hostage situations*."<sup>351</sup> Australia is one example of a country that recognizes violence within prostitution. The Australia Occupational and Safety Codes, which monitor prostitution activities, suggest that women protect themselves by taking classes in self-defense. As Janice Raymond mocks the absurdity of a having a job that intentionally inflicts harm and prepares women in prostitution for the possibility of being held hostage, The Australian Occupational and Safety Codes does in fact suggest that women be trained and acquire hostage negotiation skills.<sup>352</sup> Women involved in prostitution are left with no choice but to be their own negotiator and advocate for their own existence.

### **5.2.2. The Continuance of Criminal Activity**

Supporters of legalization have proclaimed this method as the most efficient way to control and therefore reduce the violence associated with prostitution. However, the German federal government reported that there was no evidence to support that a reduction in crime has occurred

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<sup>350</sup> Melissa Farley, "Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized," *Violence Against Women*, Vol. 10(10) (2004): 1087-1125.

<sup>351</sup> Janice Raymond, "Prostitution: Not a Job, Not a Choice," recorded talk on November 30, 2013 part of the annual Montreal Massacre Memorial event organized by Vancouver Rape Relief & Women's Shelter. <http://feministcurrent.com/8263/podcast-prostitution-not-a-job-not-a-choice-a-talk-by-janice-raymond/>

<sup>352</sup> Dianne Post, "Legalization of Prostitution is a Violation of Human Rights," *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

in the five years following the legalization of prostitution in the state.<sup>353</sup> The 2007 report by Federal Ministry for Family Affairs, Senior Citizens, Women and Youth stated:

“The Prostitution Act has... up until now...not been able to make actual, measureable improvements to prostitutes’ social protection. As regards improving [their] working conditions, hardly any measurable, positive impact has been observed in practice...The Prostitution Act has not recognisably improved the prostitutes’ means for leaving prostitution. There are as yet no viable indications that [it] has reduced crime [or] contributed...transparency in the world of prostitution...”<sup>354</sup>

In addition to the German government, the Netherlands reported that legalization did not reduce crime, but rather crime escalated under this system and women were subject to the same harms as when prostitution was criminalized in the country.<sup>355</sup> In 2003, the Mayor of Amsterdam stated, “*it appeared impossible to create a safe and controllable zone for women that was not open to abuse by organized crime.*”<sup>356</sup> In 2008, the New Zealand government reported that sex workers did not consider decriminalization a deterrent to the violence experienced in prostitution or option that could guarantee their safety.<sup>357</sup>

The preceding models have proven insufficient in reducing violence, as violence and abuse are often the primary reason women have entered into prostitution.<sup>358</sup> Mental, physical and emotional violence are effects of prostitution and the only way to eliminate violence against women is to remove the institution that supports and promotes this treatment of women. Feminist scholar, Melissa Farley explains how the sex work approach for pro-legalization or decriminalization is misguided and misses the mark to the heart of the feminist struggle and the prostitution debate.

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<sup>353</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, “Report by the Federal Government of the Act Regulating the Legal Situation of Prostitutes (Prostitute Act),” (2007): 1-84. Available at Publikationsverstand der Bundesregierung, [www.bmfsfj.de](http://www.bmfsfj.de).

<sup>354</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, “Report by the Federal Government of the Act Regulating the Legal Situation of Prostitutes (Prostitute Act),” (2007): 1-84, 79. Available at Publikationsverstand der Bundesregierung, [www.bmfsfj.de](http://www.bmfsfj.de).

<sup>355</sup> Melissa Farley, “Theory verses reality: Commentary on four articles about trafficking for prostitution,” *Women’s Study International Forum*, Vol. 32 (2009): 311-315.

<sup>356</sup> Equality Now, “Does Legalizing Prostitution Protect Women and Girls? Findings from countries and states where Prostitution is legal,” 2012. Available at: [http://www.equalitynow.org/sites/default/files/Does\\_Legalizing\\_Prostitution\\_Protect\\_Women\\_and\\_Girls\\_EN.pdf](http://www.equalitynow.org/sites/default/files/Does_Legalizing_Prostitution_Protect_Women_and_Girls_EN.pdf).

<sup>357</sup> New Zealand Ministry of Justice, “Report of the Prostitution Law Committee on the Operation of the Prostitution Reform Act 2003,” 2008.

<sup>358</sup> Dianne Post, “Legalization of Prostitution is a Violation of Human Rights,” *National Lawyers Guild Review*, Vol. 68(2) (2011): 65-108.

The attention should be shifted from serving men as a means of employment and directed to providing women with a means of escape. Farley concludes that when prostitution is understood as violence against women, advocating for the unionizing of prostituted women would be seen as the equivalent to the unionizing of battered women.<sup>359</sup> The struggle is not in finding a solution to regulate the violence but in eliminating the violence altogether.

## **6. The Abolition of Prostitution a Model of Partial Decriminalization**

### **6.1. The Nordic Model**

“Prostitution and human trafficking for sexual purposes represent a serious obstacle to both social equality and gender equality. Victims...lose power over their lives and their bodies. They are robbed of the chance to enjoy their human rights.”<sup>360</sup>

Nyamko Sabuni, Minister for Gender Equality 2006-2013

The Nordic model, also known as the Swedish model, is an abolitionist stance towards prostitution that was founded on the principle of equality and human dignity. Sweden has been a prime example of a country that has placed gender equality central to human flourishing and societal development.<sup>361</sup> Gender equality has been the driving force of Sweden’s policy reforms, and prostitution is no exception. When Sweden pioneered new legislation, one that no country embarked on before, virtually 50% of the Swedish Parliament were women.<sup>362</sup> Sweden believes until the purchasing and procurement of women ceases, gender equality will be out of reach. Instead of viewing prostitution from a male perspective, Sweden took a radical feminist perspective to the law and the age-old patriarchal institution. The Nordic model was the only model conceptualized with the rights and well-being of women in mind.

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<sup>359</sup> Melissa Farley, “Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized,” *Violence Against Women*, Vol. 10(10) (2004): 1087-1125.

<sup>360</sup> Ministry of Integration and Gender Equality, “Against Prostitution and Human Trafficking in Persons,” (2009): 1-24.

<sup>361</sup> Ministry of Integration and Gender Equality, “The Swedish Government’s Gender Equality Policy,” (2009). Available at: <http://www.government.se/content/1/c6/13/07/15/8a48ffb6.pdf>

<sup>362</sup> E. Naidoo, A. Kariem, M. Ballin, T. Hodgson, S. and Ndlovu, “Why Prostitution Must Not Be Decriminalised or Legalised in South Africa,” *Family Policy Institute*, 2007.

## 6.2. The Background of the Law

In 1990, American feminists, Catharine Mackinnon and Andrea Dworkin, helped Swedish feminists put long awaited equality efforts into motion. Catharine MacKinnon argued in a speech to the Swedish Organization for Women's and Girls Shelters, "*in an unequal world, a law against men purchasing women is called for.*"<sup>363</sup> The Nordic model addresses the power imbalances between men and women in society and Mackinnon goes on to state that sex equality can only be achieved by ending the demand for prostitution.<sup>364</sup> She later points out that criminalizing the buyer lowers a man's privilege, while de-criminalizing the seller raises a women's status in society and before the law.<sup>365</sup> Like the socio-cultural attitudes evident in South Africa, Sweden discovered in a 1993 study on prostitution that some buyers believed the payment for sex gave them the right to treat a prostituted woman however they pleased.<sup>366</sup> This model becomes a model of prevention as it begins to shift societal attitudes to no longer seeing the woman as the criminal and but rather the predatory behaviors of the man.

## 6.3. The Law That Prohibits The Purchase of Sexual Services

Prostitution is regarded as an undesirable phenomenon<sup>367</sup> in Sweden, and the government considers all forms of prostitution and trafficking in persons an unacceptable practice and a form of violence against women.<sup>368</sup> The Kvinnofrid bill, translating to the Women's Peace bill<sup>369</sup> or Women's Safety bill<sup>370</sup>, was introduced in parliament in 1998<sup>371</sup> stating that:

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<sup>363</sup> Max Waltman, "Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential," *Women's Studies International Forum*, Vol. 34 (2011): 449-474.

<sup>364</sup> Catharine MacKinnon, "On Sex and Violence: Introducing the Anti-Pornography Civil Rights Law in Sweden," *Are Women Human? And Other International Dialogues*, 2006.

<sup>365</sup> Catharine MacKinnon, "Trafficking, Prostitution, and Inequality," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 271-309.

<sup>366</sup> Max Waltman, "Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential," *Women's Studies International Forum*, Vol. 34 (2011): 449-474.

<sup>367</sup> Judith Kilvington, Sophie Day and Helen Ward, "Prostitution Policy in Europe: A Time of Change," *Feminist Review*, Vol. 67 (2001): 78-93.

<sup>368</sup> Swedish Institute, "Selected extracts of the Swedish government report SOU 2010:49:—The Ban against the Purchase of Sexual Services. An evaluation 1999-2008," (2010): 1-56.

<sup>369</sup> Max Waltman, "Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential," *Women's Studies International Forum*, Vol. 34 (2011): 449-474.

<sup>370</sup> National Board of Health and Welfare, "Prostitution in Sweden 2007," (2007): 1-72.

<sup>371</sup> Max Waltman, "Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential," *Women's Studies International Forum*, Vol. 34 (2011): 449-474.

“Both the Commission on Violence Against Women and the Prostitution Inquiry thus raise issues that in major parts pertain to relationships between men and women—relationships that have significance for sex equality, in the particular case as well as in the community at large. In this way the issues can be said to be related with each other. Men’s violence against women is not consonant with the aspirations toward a gender equal society, and has to be fought against with all means. In such a society it is also undignified and unacceptable that men obtain casual sex with women against remuneration.”<sup>372</sup>

Sweden became the first country to draft legislation with the intent to eradicate the practice of prostitution by solely addressing the demand for sex.<sup>373</sup> In 1999, legislation was in full force and it became a criminal offense to purchase sex within the country.<sup>374</sup> The “Law that Prohibits the Purchase of Sexual Services”, Chapter 6, Section 11 of the Swedish Penal code states:

“A person who, in other cases than previously stated in this chapter, obtains a casual sexual relation in exchange for payment shall be sentenced for the purchase of a sexual service to a fine or imprisonment for at most six months.”<sup>375</sup>

In 2011, the maximum punishment for violating the law was increased to imprisonment for one year to allow the court discretion toward the severity of the crime. The law does not limit payment to solely a financial incentive, but resources are also considered a form of payment.<sup>376</sup> The Swedish Penal Code covers the criminal provisions and sentencing procedures for the buyer of sexual services, while the Social Services Act ensures that prostituted persons and/or victims of human trafficking receive the assistance they deserve.<sup>377</sup> Sweden has submitted country reports to CEDAW showing how the new legislation of criminalizing the buyer is evidence of state compliance with Article 6 of international law.<sup>378</sup> The Swedish law was not only a solution to end the demand but an opportunity to provide women with attainable solutions to exit

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<sup>372</sup> Prop. (Proposition) 1997/98:55 Kvinnofrid [Women’s Sanctuary (alt. Women’s Peace)] [government bill] (Swed.)

<sup>373</sup> Swedish Institute, “Selected extracts of the Swedish government report SOU 2010:49:—The Ban against the Purchase of Sexual Services. An evaluation 1999-2008,” (2010): 1-56.

<sup>374</sup> Ministry of Integration and Gender Equality, “Against Prostitution and Human Trafficking in Persons,” (2009): 1-24.

<sup>375</sup> Ministry of Industry, Employment and Communications, Article No. N5029, “Prostitution and trafficking in Human Beings,” (2005): 1-4.

<sup>376</sup> Government Offices of Sweden, “Legalisation on the Purchase of Sexual Services,” 2009. Available at: <http://www.government.se/sb/d/4096/a/119861>

<sup>377</sup> Social Board of Sweden, “Individual and Family Progress Report,” 2005. Available at: <http://www.socialstyrelsen.se/publikationer2005/2005-131-4>

<sup>378</sup> Catharine Mackinnon, “*Are Women Human?*,” 2007.

prostitution's cycle of poverty, abuse, and entrapment. The Swedish Ministries of Labour, Justice and Health and Social Affairs issued the following statement:

“The government considers...that it is not reasonable to punish the person who sells a sexual service. In the majority of cases at least, this person is a weaker partner who is exploited by those who want only to satisfy their sexual drives. It is also important to motivate prostitutes to seek help to leave their way of life. They should not run the risk of punishment because they have been active as prostitutes.”<sup>379</sup>

#### **6.4. The Government's Plan for Action and Awareness**

The government adopted an action plan on July 10, 2008 to combat prostitution and human trafficking and declared that a clear relation between the two does exist.<sup>380</sup> The government states that alongside human rights principles, the implementation of this plan must consist of a “legal, social, and gender equality” standpoint. The designated five areas of priority and concentration are:

- . Greater protection and support for vulnerable groups,
- . Strengthened preventive efforts,
- . Enhanced quality and efficiency in the justice system,
- . Greater national and international cooperation,
- . Increased knowledge and awareness.<sup>381</sup>

The government recognized that the effects of prostitution remain long after a victim has left prostitution. With that knowledge special attention has been dedicated towards outreach for those at risk as well as offering treatment, rehabilitation and any additional services that could offer support and protection to women. Prevention efforts and education reforms directed at buyers

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<sup>379</sup> Judith Kilvington, Sophie Day and Helen Ward, “Prostitution Policy in Europe: A Time of Change,” *Feminist Review*, Vol. 67 (2001): 78-93.

<sup>380</sup> Ministry of Integration and Gender Equality, “Action Plan Against Prostitution and Human Trafficking for Sexual Purposes,” 2008. Available at: [http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Sweden\\_Infosheet\\_National\\_Action\\_Plan\\_Against\\_Human\\_Trafficking\\_en.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Sweden_Infosheet_National_Action_Plan_Against_Human_Trafficking_en.pdf).

<sup>381</sup> Government Offices of Sweden, “Combatting prostitution and human trafficking for sexual purposes,” 2013. Available at: <http://www.government.se/sb/d/4096/a/121029>.

have also been utilized to advance human rights and generate change in societal attitudes towards male and female sexuality.<sup>382</sup>

## 6.5. The Evaluation of the Ban

In addition to the government's action plan, the Committee of Inquiry to Evaluate the Ban against the Purchase of Sexual Services was formed to monitor the application of the law by police and the courts as well as measure the effect of the ban on society. A report was released in 2010 that evaluated the result of the legislation from a period spanning 1999-2008. The report found no increase in prostitution since the ban was introduced.<sup>383</sup> In the most recent study by the National Board of Health and Welfare, street prostitution was reported to be less prominent than before the Act Prohibiting the Purchase of Sexual Services.<sup>384</sup> A year prior to the law, social workers in the city of Malmo reported offering services to 200 women. In 1999, when the law was in force, Malmo social workers documented a reduction to 130 women, and in 2006 the number of encounters with women in prostitution dropped to 66. In 2007 social workers in Stockholm saw a decrease of 15 to 20 women a night verses up to 60 women a night before the law was in motion.<sup>385</sup> If a fluctuation in indoor prostitution has occurred it has been harder to detect, as this form remains unseen. Since there are fewer reports of women on the streets, critics have suggested the smaller population places women at a greater risk of dangerous encounters from buyers. However, beside the fact that the men who buy sex are considered the most dangerous of men, police have found no evidence that violence has increased since the ban.<sup>386</sup> Both social workers and police officers have reported that the consequences now associated with purchasing sex has reduced the demand for sex. Sweden documented the least number of buyers of any country in the Nordic region.<sup>387</sup> The estimate for the demand in Sweden consisted of

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<sup>382</sup> Ministry of Integration and Gender Equality, "Action Plan Against Prostitution and Human Trafficking for Sexual Purposes," 2008. Available at: [http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Sweden\\_Infosheet\\_National\\_Action\\_Plan\\_Against\\_Human\\_Trafficking\\_en.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Sweden_Infosheet_National_Action_Plan_Against_Human_Trafficking_en.pdf)

<sup>383</sup> Swedish Institute, "Selected extracts of the Swedish government report SOU 2010:49:—The Ban against the Purchase of Sexual Services. An evaluation 1999-2008," (2010): 1-56.

<sup>384</sup> National Board of Health and Welfare, "Prostitution in Sweden Report 2007," (2007): 1-72.

<sup>385</sup> Max Waltman, "Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential," *Women's Studies International Forum*, Vol. 34 (2011): 449-474.

<sup>386</sup> National Board of Health and Welfare, "Prostitution in Sweden: Knowledge, Beliefs & Attitudes Of Key Informants," (2003): 1-82.

<sup>387</sup> Swedish Institute, "Selected extracts of the Swedish government report SOU 2010:49:—The Ban against the Purchase of Sexual Services. An evaluation 1999-2008," (2010): 1-56.

approximately 125,000 men that purchased 2,500 women the year the law came into affect. Since then, street prostitution has decreased anywhere from 30% to 50%. The progression of new women entering prostitution has been reduced to nearly half than prior to enforcement of the ban.<sup>388</sup> The reform efforts made by the Swedish government, afford women exit strategies and opportunities so they no longer have to consider prostitution as the only viable means of survival. All government and affiliate reports remain unanimous in their recommendation that the ban should remain in effect and are hopeful that the demand for prostitution will only continue in its decline.

## 6.6. The Nordic Model in Norway

Norway followed Sweden's lead and became the second country to pass new legislation prohibiting the purchase of sex on January 1, 2009. Minister of Justice Knut Storberget issued the following statement in response to the new law to show Norway's dedication to reducing the demand along with the trafficking of women in the county.

“[h]uman beings are not a commodity and criminalizing the purchasing of a sexual act will make Norway less attractive for the traffickers. Our goal is to change attitudes, reduce the demand and thus reduce the potential market for the traffickers. Criminalizing shall not make the situation for women in prostitution worse; therefore the government will develop other alternatives of livelihood for women than prostitution.”<sup>389</sup>

Like with Sweden, Norway's adaptation of the Nordic model perpetuates an all-inclusive approach to the sexual exploitation of women while addressing the commodification of women on multiple fronts. In the Global Gender 2013 report, gender equality was analyzed in over 136 countries measuring gaps in education, health, politics, and economics. Iceland was titled the reigning champion in gender equality. However, the following countries were, Finland, Norway,

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<sup>388</sup> Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004): 1187-1218.

<sup>389</sup> Agnete Strøm. “A glimpse into 30 years of struggle against prostitution by the women's liberation movement in Norway.” *Reproductive Health Matters*, Vol. 17 (34) (2009): 29–37.

and Sweden. Out of the top 4 countries that were recognized as the leaders in gender equality, the final 3 have successfully adopted and implemented the Nordic Model.<sup>390</sup>

## 6.7. The Effect of the Law on Attitudes and Behaviors

### 6.7.1. Attitudes

In Norway, a study by Kotsdam and Jakobsson was conducted to see if the new legislation did in fact have an impact on societal attitudes towards the purchasing of sex. The study concluded in areas where prostitution was prominent and observable to society, such as around the Norwegian capital, buying sex was reported to have a negative response from citizens.<sup>391</sup> An increase in negativity towards the buying sex was reported as being greater in Sweden than prior to legislation. Norway, also reported an increase in negativity, but the greater increase was reported from Sweden. The greater increase in Sweden was the result of over a decade of awareness rather than more effective implementation in Sweden over Norway.

Both countries reported higher education as the predominant trait associated with recognizing the payment for sex immoral and prostitution as gender inequality. However, as predicted more men than women reported that buying sex was morally justifiable. The study also indicated that those that believed that buying sex was acceptable coincided with citizens that shared anti-immigration attitudes. This reflects back to how prostituted women are considered “others” and not members of society.<sup>392</sup> The Nordic model is a demonstration of how the law can serve a “normative function” by recreating a new normal in society, one that rejects stereotypes and disseminates positive gender ideals. The law reinforces a paradigm of equality by stating that women and girls cannot be bought and men cannot act on their sexual desires whenever they choose.<sup>393</sup>

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<sup>390</sup> World Economic Forum, “The Global Gender Gap Report 2013,” Available at: <http://www.weforum.org/issues/global-gender-gap>

<sup>391</sup> Andreas Kotsadam and Niklas Jakobsson, “Do Laws Affect Attitudes? An assessment of the Norwegian prostitution law using longitudinal data.” *International Review of Law and Economics*, Vol. 31 (2011): 103-115.

<sup>392</sup> Niklas Jakobsson and Andreas Kotsadam, “Gender Equity and Prostitution: An Investigation of Attitudes in Norway and Sweden,” *Feminist Economics*, Vol. 17(1) (2011): 31-58.

<sup>393</sup> Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services – Best Practices for Prevention of Prostitution and Trafficking in Human Beings,” *Violence Against Women*, Vol. 10:10 (2004): 1187-1218.

### 6.7.2. Behaviors

In 2012, three years after the ban was in place Norway, the city of Oslo issued a report on violence against women in prostitution. These findings were compared with the 2008 findings before the law was instated. In 2008 any and all violence was reported at 52% from prostituted women, and in 2012 violence increased to 59%. The 7% increase in overall violence is an issue the Norwegian government has planned to investigate, in order to reduce the amount violence, prior to their next report. However, the 2012 report showed a dramatic improvement in the 50% reduction in rapes, sexual acts not agreed to with a customer, in addition to violence perpetrated by pimps. The regulation of prostitution is considered to offer better safety and security for women indoors, however the Oslo report depicted a more accurate account of men's behaviors. Even though women involved in street prostitution encountered higher rates of verbal abuse, which contributed to the increase in overall violence found in the report. Women involved in indoor prostitution encountered the highest rates of sexual assault. This affirms that by allowing men to have regulatory power over the sex industry and by placing women behind closed doors will not reduce prostitution harms, but will only lead to a greater violation of a woman's dignity and human rights.<sup>394</sup>

## 7. The Global Influence of the Nordic Model in The United States and The United Kingdom

“There needs to be, as there has been in Sweden, a real strategic targeted effort to actually shift the ideas that people have about the acceptability of the purchase of sex.”<sup>395</sup>

-Helen Easton, London Southbank University, Oral Evidence

In March 2014, the UK's All Party Group on Prostitution and the Global Sex Trade (APPG) launched an inquiry into prostitution policy reform to assist the government in evaluating current legislation in England and Wales. In addition to evaluating the impact of current legislation the APPG was asked to offer solutions that could more effectively reduce the demand and the harms

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<sup>394</sup> Ulla Bjørndahl Oslo, *Dangerous Liaisons A report on the violence women in prostitution in Oslo are exposed to*, This report was written on commission by the municipality of Oslo and with support by the Ministry of Justice and Public Safety, 2012.

<sup>395</sup> All Party Parliamentary Group on Prostitution and the Global Sex Trade, “Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales,” (2014): 1-59, 4.

of prostitution in these countries. The findings were reported from NGO's, policy organizations, police departments, and individuals that were personally involved with prostitution. Prostitution laws were and reported as confusing and incoherent, since prostitution is legalized while most activities associated with prostitution remain criminalized. When individuals and organizations were asked if they considered the current laws effective in protecting women only 7% believed that to be true. The report showed the current law as unable to effectively address the gendered element of prostitution. Women were considered the most vulnerable, but were still victim to greater stigma over men and carried the burden of criminal in society. The law was unable to target perpetrators and only escalated human trafficking in the countries. The report suggested that the government must establish a clear stance that prostitution is caused by the male demand and penalties should fall heaviest on the buyer of sexual services. Prostitution should be recognized as violence against women and a practice that should no longer be tolerated in society.<sup>396</sup>

On May 5, 2014 former United States president Jimmy Carter wrote a letter to Amnesty International addressing the harms of prostitution saying, "*this line between consensual and exploitative sex work has become almost meaningless, and too many people are lured and trapped into this way of life.*" The former president urged the internal human rights organization not to support the legalization of prostitution but rather the Nordic model. He stressed the importance of holding consumers of sexual services and pimps accountable while ensuring victims and survivors are not penalized and receive the assistance they deserve.<sup>397</sup> In an exclusive interview with Robin Morgan from Women's Media Center Jimmy Carter states, "*in the United States there are 50 girls who are arrested for every one brothel owner or pimp or male customer.*" The former president established the Carter Center in 1982, which has worked with over 80 countries addressing human rights and injustices. Carter calls the Nordic model

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<sup>396</sup> All Party Parliamentary Group on Prostitution and the Global Sex Trade, "Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales," (2014): 1-59.

<sup>397</sup> Prostitution Research and Education, "Jimmy Carter supports Nordic model & challenges Amnesty's support of legal prostitution," 2014. Available at: <http://prostitutionresearch.com>.

“*enlightened*” and insists it should be implemented in the United States since it is the most effective policy measure to protect women’s human rights.<sup>398</sup>

## **8. Conclusion**

Legalization and decriminalization are the two legal models that are considered to fall under a human rights framework by liberal feminists. This chapter reported on the effectiveness of the implementation of these models in other countries. Despite the alternatives to criminalization, these models have not proven to be successful in addressing the human rights of women or improving women’s quality of life. These models should not be considered a solution to prostitution reform in South Africa. Legalization and decriminalization have been unable to reduce violence inflicted on women and have escalated human trafficking criminal activity. Since these models neglect to target the demand of the sex industry, legal and illegal prostitution have only increased under these systems. These models support a practice that is inherently harmful to women and as long as state legislation sustains prostitution, women’s equality will remain in jeopardy. The model of partial decriminalization, the Nordic model, has been a proven success in diminishing the harms of prostitution on women and within society. Unlike its predecessors, the Nordic model shines a light on the true perpetrators of prostitution and has the intent to eliminate this patriarchal institution altogether.

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<sup>398</sup> Women’s Media Center, “Exclusive Interview with President Carter on Women’s Media Center Live with Robin Morgan,” 2014. Available at: <http://www.womensmediacenter.com/press/entry/exclusive-interview-with-president-carter-on-womens-media-center-live-with>.

## CHAPTER 6: CONCLUSION

“The weaknesses, problems, and slow progress of the efforts described in the preceding pages are not merely the result of inadequate international standards or of the difficulty of developing focused action by a complex bureaucracy on a complex issue. The problem lies in the stark fact that, in most societies and for most national administrations, prostitution and the accompanying sexual abuse of women is by and large considered an accepted fact of life perhaps to be regulated and restricted, but not a grave enough problem to be treated as a priority issue requiring large scale effort and expenditure.”<sup>399</sup>

One of the greatest hesitations to implementing the Nordic model in South Africa has been due to the different sociocultural contexts evident in both countries. At first glance, the demographics within these countries couldn't be more different. Sweden is established as a world leader in gender equality with the majority of the population experiencing a high standard of living. Sweden reported 99% of its inhabitants as literate and only 7% of the population living below the poverty line.<sup>400</sup> Unfortunately, South Africa's statistics are much more extreme. The country still struggles with poverty, unemployment, and remains effected by the legacy of Apartheid.

Even as the disparity in statistics continues between these vastly different states, these countries remain united on one front, and that is ending a sociocultural context of violence against women. When the practice of prostitution is recognized as exploitation and inherently harmful to women, the Nordic model is the only legislation that is able to address the gender inequalities and power imbalances between men and women. Women's subordinate status to men is evident not only in both societies but across the world. Since South Africa experiences higher rates of gender inequality and gender violence, the better argument is the model that strives to eradicate these injustices is the one to replicate. The Nordic Model was founded on international human rights

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<sup>399</sup> Laura Reanda, “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Actions.” *Human Rights Quarterly*, Vol. 13 (1991): 202-228.

<sup>400</sup>World Population Review, Sweden Population 2014 available at: <http://worldpopulationreview.com/countries/sweden-population/>

principles of equality and non-discrimination of women. This should remain the focal point of the debate and it is why this legal model has been revered as an international best practice.

The Nordic model remains the only example of prostitution legislation able to fulfill positive obligations under international law. International law requires states not only to hold perpetrators accountable, but also requires states to secure the fundamental rights and freedoms of individuals. International law is clear that state legislation must “*respect, protect, promote and fulfill*”<sup>401</sup> women’s human rights. States have to take an active role in preventing the exploitation of women, because regulating the abuse will no longer suffice. Only when the law addresses the root cause of gendered attitudes, stereotypes, and social norms, will discrimination, inequality, and violent behavior begin to change towards women. Legalization and Decriminalization have proven to violate the due diligence standard under international law by allowing human trafficking and sexual exploitation to increase. These models have merely been an attempt to manage the harms of prostitution rather than eliminating the harm altogether.

The Nordic model provides a way to correct the preexisting sociocultural conditions in society towards male and female sexuality. It is not enough to change societal perceptions when the selling of sex is no longer a criminal offense, as with legalization or decriminalization. The law must also criminalize male behavior of purchasing women. The Nordic model attacks both angles that attribute to a sociocultural context of inequality. The law first increases the stigma of purchasing sex, which reduces male power and privilege. Then the law decreases the stigma towards women by removing the criminalization of selling sex. If a prostituted woman remains to be seen as a criminal, then she will continue to be treated as such.

Women’s human rights have to be made a priority in prostitution legislation in order to ensure equality for women. Sweden was the first country to take a stand for the rights and well-being of women, while holding men accountable for their behavior. Prostitution policy reforms are a response to how women are perceived in society. The positive effects of the Nordic model can be

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<sup>401</sup> Yakin Ertürk, Special Rapporteur on violence against women, its causes and consequences, “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women the Due Diligence Standard as a Tool for the Elimination of Violence Against Women,” *United Nations Economic and Social Council*, 2006. Available at: <http://www.refworld.org/pdfid/45377afb0.pdf>

achieved in South Africa. However, South Africa has to decide if they are willing to hold men accountable in order to change the sociocultural context of pervasive exploitation of women. When the country decides that female sexual labor can no longer be purchased, the impact of the new legal reform will become evident in society. A model of partial-decriminalization is the only model that fulfills human rights obligations and empowers the law to positively impact the way society view women.

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