

THE IMPLICATIONS OF LEGALISING PROSTITUTION IN NAMIBIA

By

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Submitted in accordance with the requirements for the degree of

BACHELORS IN LAW

Supervised by:

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In the subject Human Rights

At the

UNIVERSITY OF NAMIBIA

This dissertation is submitted in partial fulfilment of the requirement for the award of the Bachelors in Law Degree

DECLARATION

I, Umunavi Desire Kamboua, hereby declare that this dissertation titled “The Implications of Legalising Prostitution in Namibia” is my own work and has not been submitted to any other institution for higher learning.

Signed by _____ on this day _____

Of _____ 2011

SUPERVISOR CERTIFICATE

I, Professor J.N HORN certify that this research and writing of this dissertation was carried out under my supervision.

Signature _____

Date _____

ABSTRACT

Prostitution in Namibia is a legal problem that is at the table of parliamentarians and legal drafters in order to curb the rising levels of poverty and HIV/AIDS. Looking into the historical background and development of prostitution is imperative as it places foundation for the understanding of prostitution and the reasons behind it. However, it should be noted that prostitution in itself is not illegal but the law criminalises acts surrounding its commission. The paper will look into the rights of sex workers and into human violations and lack of safe and supportive working conditions rendering sex workers particularly vulnerable to HIV/AIDS. The predominant attitude in Namibia is that Namibia is a Christian society that needs to protect its morale and people from such acts, but nevertheless prostitution continues to grow in Namibia. The Author of the paper will look into the reasons why young women choose to sell their bodies instead of going to school and earning a living through what is considered as normal work and the gender inequalities regarding sex work, wherein the clients are not prosecuted, but merely the women who work as sex workers. Further the author will do a case study of other countries that have legalised prostitution and the impact thereof. Further consideration shall be given to what it would mean to legalise prostitution in Namibia and the legal implications looking into the Constitutional aspects and all international conventions that Namibia is signatory to. Prostitution in Namibia is not a result of freedom of choice rather a result of poverty and the women seeking to find a way to earn a living.

TABLE OF STATUTES

Children's Act (Act 33 of 1960)

Combating of Immoral Practices Act (Act 21 of 1980)

Combating of Rape Act (Act 33 of 1960)

INTERNATIONAL STATUTES

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

The Declaration on the Elimination of Violence Against Women 48/104

Optional Protocol to CEDAW ratified in 2000

TABLE OF CASES

Binga v Administrator-General South West Africa and Others 1984 (3) SA

Hendricks and Others v Attorney General of Namibia and Others 2002 NR 353 (HC)

S v Jordan 2001 10 BCLR 1055 (T)

S v H 1986 (4) SA 1095 (T)

LIST OF ABBREVIATIONS

ART	Antiretroviral therapy
ARV	Antiretroviral
BONELA	Botswana Network on Ethics, Law and HIV/AIDS
LAC	Legal Assistance Centre
LDC	Law Reform and Development Commission
MSM	Men who have sex with men
NDT	Namibia Development Trust
NAMRIGHTS	National Society for Human Rights-Namibia
NEPRU	Namibian Economic and Policy Research Unit
NGO	Non-governmental organization
OP	Office of the President
SADC	Southern African Development Community
SASF	semi-autonomous social fields
SWAPO	South West Africa People's Organization
SWEAT	Sex Worker Education and Advocacy Taskforce
STI	Sexually Transmitted illness
TAA	Traditional Authorities Act
UN	United Nations
UNDP	United Nations Development Programme
UNAM	University of Namibia
USAID	United States Agency for International Development
WHO	World Health Organization

ACKNOWLEDGEMENTS

I am lucky to work with people who are simply dedicated to education. Who have helped me through this phase of my life, and encouraged me when I thought all was in vain. To my mother Josephine Kamboua, I am a little nothing without you, you have shown me great strength, the strength of persevering, and that in the hands of God we shall prosper and we shall overcome all obstacles. I am forever indebted to my Dad, Oscar Kamboua, the helping hand he has always been to me and for being there when I needed him most and telling me to stick like a postage stamp and I will get there, I hope you are proud of me Pa.

My sisters are priceless to me, Nguri, Emmy, Caroline, Golda, Uschi, Macy and Vangii, all I know is a result of me being placed on the pedestal, but I have finally found my wings and am ready to fly, I am getting off the pedestal, although I will still remain the little sister to everyone.

The one that dearly holds my heart, Uzira Kamboua, my daughter, you have been my reason for living, for pushing harder when I thought I couldn't, you bring meaning to my world, I love you dearly.

Many thanks to every individual who made this paper a reality, especially the sex workers who assisted me by giving me books and making time to talk when all others thought I would simply be wasting their time.

With all my heart I trust the Lord and not in my own Judgement, I always let him lead so that he can clear the road ahead because I am not wise enough.

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CHAPTER 1

INTRODUCTION



Prostitution has been a problem in the Namibian society for a long time and is an issue at the table of parliament and legal drafters in Namibia. Deciding whether to keep the legal situation as is or change the laws relating to sex work, by decriminalising or legalising sex work in Namibia. The paper will deal with the legalising of prostitution and the implications of legalising prostitution with much emphasis on the rights of the individual sex workers.² Prostitution is an institution that has existed throughout the history of mankind; however through the years there have been attempts by governments to suppress the trade, because of what society's viewed it as to be public indecency.³

¹ Photo taken from, Leigh, C at www.sexworkerRights&culture.htm accessed on 4 March 2011.

² What is predominantly known as prostitution?

³ La Font, S.2008. Help Wanted: Sex Workers in Katutura, Namibia. John Meinert: Windhoek, p 3.

Many people prefer the term sex work to prostitution because it focuses on the act as a form of labour which is, like other forms of labour subject to exploitation.⁴ Adding that the term is a bit softer as opposed to the connotations attached to being a prostitute, which is that a prostitute is not a part of society and should not be afforded the same treatment as persons with other professions. This term turns attention away from the moral judgements and towards practical problems like unsafe and unfair working conditions. It also emphasizes the fact that sex work is an activity and not an identity of a person. Therefore, it has been argued that sex work is not very different from other kinds of work, since all work involves the sale of mental or manual labour involving different parts of the body.⁵

Arnott suggests that sex workers do not receive any form of protection from the law and the programmes aimed at the protection of sex workers, usually attempt to “rescue” them, without addressing their human rights issues.⁶ Therefore a call for their rights and not rescue is proposed by the author of this paper. The author further advocates for law reform and a programme to end violence and discrimination against sex workers. The paper will take a closer look at the legal implications of legalising sex work in Namibia and the consequences thereof. Sex work is regulated under several national and municipal laws and policies. Municipal regulations against loitering are most frequently used to arrest sex workers. National Laws against prostitution reinforce the illegality of prostitution by criminalising activities surrounding sexual trades these activities include the keeping of a brothel.⁷ It must be noted that prostitution as is, is not a crime but living from the proceeds of prostitution is a crime.

Shangala in his thesis looks at the works of Martin Luther King and states that “the strict moralistic regulation of sex work traces its origins from the Reforms of Martin Luther King and John Calvin who argued that sex work was immoral and suggested the suppression of the profession”.⁸ The position of St Augustine in the fourth century AD somewhat differed, stating that, “what can be called more sordid, more void of modesty, more full of shame

⁴ In its simplest form, sex work may be understood as a monetary transaction in exchange for sex between women who work from the streets or brothels and men whom they usually do not know.

⁵ Hjorth, C.2005. *Policing Prostitution in the early United States: Sexual equality and discretionarity*. Available at www.internetjournalofcriminology.com last accessed on 5 April 2011.

⁶ Arnott, J and Crago, A L.2009. *Rights Not Rescue*. South Africa; Open Society Institute, p19.

⁷ Shangala, S.E. 2000. *The Legalization of the profession of commercial sex workers in Namibia*, p9.

⁸ Shangala, S.E. 2000. *The Legalization of the profession of commercial sex workers in Namibia*, p5.

than prostitutes, brothels and every evil of this kind? Yet remove prostitution from human affairs and you will pollute all things with lust..." St Thomas Aquinas also made similar remarks adding that "prostitution is like the filth in the sea or a sewer in a palace. Take away the sewer and you will fill the palace with pollution, take away prostitution from the world and you will fill it with sodomy".⁹ The above statements only illustrate that although people do not want sex work to be done and will suppress it in any way; it will still remain and will strive under the great oppression it has been receiving over the decades. The only way to assist the situation is through law reform. Although there has been significant legal reform in most areas of law, the Combating of Immoral Practices Act¹⁰ which was enacted during the colonial times still remains unchanged in regards to sex work. The Act criminalises sex related activities such as soliciting sex in public, pandering and keeping a brothel. The Act is gender biased, mentioning women but not men as those who potentially sell sex.¹¹

The Legal Assistance Centre has been at the forefront of the efforts to decriminalise sex work. Research by the Legal Assistance Centre has proven that Namibian sex workers are at greater risk of contracting HIV/AIDS, as they are often forced to have unsafe sex and suffer from sexual violence at the hands of the police. It should be noted that decriminalising sex work will not only empower sex workers but will help them negotiate safer sex practices and protect their human rights. This however has not received much support from the government, church organisations and the general public and remains a controversial issue. The Legal Assistance Centre's research department conducted research in 2001 and published a report titled *Whose Body is it?: Commercial Sex Work and the Law in Namibia*. The book gives a comprehensive overview into the lives of sex workers in Namibia and will be greatly used by the author.

The National Council has addressed the issue of sex work on various occasions, such as in 2005 the Standing Committee on Gender, Youth and Information investigated the plight of sex workers. The Committee's report pointed to some of the advantages of decriminalisation saying that "Many social scientists and reputed academics across the globe

⁹ Shanghala, S.E.2000. *The Legalization of the profession of sex work in Namibia*, p4.

¹⁰ Act 21 of 1980.

¹¹ La Font, S.2008. *Help Wanted: Sex Workers in Katutura*, Namibia. John Meinert: Windhoek, p 2

believe that sex work should be legalised. Highly respected British philosopher, late Sir Bertrand Russell in his “Marriage and Morals” suggested legalising and treating commercial sex-work as an important institution in the modern society. When this trade practices as an underground trade, it violates the right to life of vulnerable women who sell their flesh to survive. If it were legalised, the health authorities would monitor the health of sex-workers and protect their health and that of their clients. This would help mothers feed their children and could possibly contribute to the country’s economy by paying tax. Moreover, this is a critical step to minimise the spread and impact of HIV/AIDS and reduction in poverty”.¹²

As a result it can be added that independence has not resulted into significant gains for most Namibians, it has merely marginalised the poor and powerless and it has rather resulted in increased urban migration resulting in decreased support from the extended family.¹³ Therefore there are a lot of grey areas regarding why Namibians have sex for goods and money. It should be noted that the ideas of sexuality and the relationships between sex, women’s bodies and economic transactions are far more complex than this simple understanding. One needs to be placed in the situation that the sex workers are faced with on a daily basis in order to take an informed decision whether to decriminalise sex work or legalise sex work.

1.1 AIM OF THE DISSERTATION

The aim of the research is to review the current research surrounding prostitution and if there is any way that it can be policed, while adding a systematic approach that has not been adequately done by previous research done in Namibia on the topic. The systematic approach involves the organization of several key issues, including legalization, gender inequalities, violence, health and perceptions.¹⁴

Namibia, like many other countries had its fair share of attempting to suppress sex work in the country, however the paper advocates for the legalization of sex work in order to protect the sex workers from human right violations and gender inequalities. The

¹² National Council 2005:31

¹³ La Font, S.2008. *Help Wanted: Sex Workers in Katutura, Namibia*. John Meinert: Windhoek, p13

¹⁴ Arnott, J and Crago, A L.2009. *Rights Not Rescue*. South Africa; Open Society Institute, p20

dissertation seeks further to illustrate that there can be no getting rid of prostitution and the government should rather look at ways to protect sex workers rather than oppress them with the laws that result in them being unprotected by the laws of their country.

A further aim of the dissertation is to raise awareness among legal scholars about the legal status of prostitution in the country. The author further seeks to look at ways in which the government of the Namibia can protect its citizens including sex workers that are not afforded protection while on the streets. The dissertation seeks to bring closer, the reasons why the sex workers choose to become prostitutes. The dissertations most important aim is to advise the government accordingly and make recommendations with regard to legalising prostitution in the country taking into account the various recommendations by various authors regarding the way forward with sex work.

These are the key recommendations:

It is imperative that Namibia implement legislative reform to repeal the Combating of Immoral Practices Act of 1980. Sex work should be decriminalised and a public education campaign needs to be underway to educate the public and sex workers on the legal reform.¹⁵ This is in order to assist the poor and marginalised sex workers.

1. Decriminalise sex work: The Namibian government should recognise and address the relationship between laws criminalising sex work and the human rights violations that result from these laws and policies. Law reform must include repealing national and local laws against sex work and activities surrounding sex work.¹⁶
2. Ensure that sex workers have access to police protection. Sex workers should have the same protection as others in the country in order to address crimes committed against them. Ensure that there are alternative measures that sex workers can take if they are abused by the police.
3. Police and healthcare workers need to be sensitised to the rights and needs of the sex workers, that they are individuals like all people and should be afforded the same rights and treatment as any other people in the country that they render services to.

¹⁵ La Font, S.2008. *Help Wanted: Sex Workers in Katutura*, Namibia. John Meinert: Windhoek, p14.

¹⁶ Arnott, J and Crago, A.L .2009. *Rights Not Rescue*. South Africa; Open Society Institute, p80.

4. And finally, women who want to quit sex work should have access to vocational training or further schooling. A support system should be developed by the government to assist them with finding employment after they have obtained new skills or levels or education.¹⁷ This alternative should be a matter of choice and sex workers who opt to stay in the profession should be educated about the risks of prostitution in the community.

The criminalization of sex work in Namibia leaves sex workers vulnerable to sexual and physical abuse, as well as extortion, from the law enforcement officers. These are human right violations, perpetrated by the law enforcement agents, who are suppose to protect the citizens. Sex work is presently illegal in Namibia and the dissertation will look at why Namibia should legalise prostitution.¹⁸ The author will further take a look implication of legalising prostitution, namely the benefits that accrue from legalising sex work.

1.2 THE PROBLEM STATEMENT

It should be noted that whether Namibia decides to legalise prostitution or not the profession will still strive although under harsh conditions, poverty will rise and HIV/AIDS will continue to rise. However all pointers indicate that prostitution in the country is becoming wide spread and regulatory means around it should be enforced by law, decriminalization with controls, which is called legalization in order to protect the victims of the profession. The legalization of sex work would reduce poverty and crime, as these are among the Namibian government's concerns. A further problem that arises is that of the fact that the males, who buy sex from the prostitutes, are not prosecuted and this leads to the gender inequalities.¹⁹ However, it should be borne in mind that the legalisation of sex work will not benefit all the sex workers as the foreign sex workers will be required to operate with official permits and this group is likely to be disadvantaged by the legalisation of sex work and cause it to go underground. Therefore full protection can never be achieved regarding prostitution.

¹⁷ Arnott, J and Crago, A. 2009. *Rights Not Rescue*. South Africa; Open Society Institute, p80.

¹⁸ Arnott, J and Crago ,A. 2009. *Rights Not Rescue*. South Africa; Open Society Institute, p25.

¹⁹ Bonthuys, E and Albertyn, C. 2007. *Gender, Law and Justice*. Johannesburg; JUTA, p353.

It can therefore be submitted that society should acknowledge that prostitution is an inevitable consequence of our society. As a result of the non-support from the government, sex workers are prone to abusive customers while trying to make a living and are afforded no legal protection under Namibian law.²⁰

It further should be suggested that Namibia too²¹ ought to take similar approach and legalize the long standing profession. The laws to be implemented should only regulate the living off the proceeds for those practicing as practitioners or sex workers in the industry. Further that if brothels are legalised these should be subject to tax levies as may be determined. Whether prostitution has now been elevated to the status of being legalised is still debatable and whether Namibia will accept prostitution as a form of employment is another challenge.

As Namibia takes the prohibitionist approach regarding sex work which punishes all persons involved in sex work, including the sex worker, the client and any third parties involved. All the sex work is considered to be inappropriate and most aspects of prostitution are criminalised.²² The problems brought about by this type of approach are that the female prostitute is the one targeted for punishment, with laws against clients and traffickers being rarely enforced. The illegality of prostitution under this type of system encourages fraud and unseemly behaviour, making the prostitute vulnerable to abuse and violence.²³

1.2 STRUCTURE OF THE DISSERTATION

The starting point for the dissertation is the historical background and development of prostitution as it came with colonialism and western culture into the African continent. The author shall compare and critique the much praised Namibian constitution for its failure in protecting the rights of the women on the streets. **Chapter one** will give a brief but thorough introduction on the topic of prostitution and why it imperative to look at the topic and further give a brief overview of what the intention of the author is. Looking at the aim of the dissertation, the problem statement and the research methodology used and a

²⁰ LA Font, S .2008. Help Wanted; Sex worker in Katutura, Namibia. Windhoek; John Meinert, p15.

²¹ Like the United Kingdom and the Netherlands.

²² Legal Assistance Centre. 2002. Whose Body is it? Available at www.lac.org.na; last accessed on 4 March 2011.

²³ Legal Assistance Centre. 2002. Whose Body Is It, Available at www.lac.org.na; last accessed on 4 March 2011.

comprehensive literature review will be done. **Chapter two** will consist of the historical background of Namibia including its neighbouring countries such as South Africa and Botswana, including the western countries that have legalised prostitution such as the Netherlands which is known for its red light district. **Chapter three** will look at the field work that was carried out by the author, giving insight on the life of the prostitutes in Namibia and experiences, the findings shall be tabular form. **Chapter four** will look at Namibia and the legal implications of legalising prostitution, looking at all the international conventions that the country has acceded to and finally look at the constitution with regards to legalising prostitution. In **Chapter 5** the author will make key recommendations, looking at the pros and cons of legalising prostitution in Namibia. Taking a closer look at why it would be beneficial to not only the Namibian government to legalise prostitution but the benefits that would accrue to the nation at large.

1.4 RESEARCH METHODOLOGY AND LITERATURE REVIEW

The methods that are employed are desktop research, library research and field research through interviews. The research further deployed qualitative methodologies to produce a rich data in order to illustrate the complexities of the issues confronted by the Namibian legal system and the sex workers at large. Fieldwork was carried out in Windhoek over a period of a week on 23 June – 2 July 2011. All of the women that were interviewed were all women 10% of who were underage. The majority of the women interviewed were street based sex workers and mostly worked near the famous Kalahari Sands Hotel in Windhoek. Almost all the women working as sex workers in Windhoek were Zimbabweans. Unfortunately due to time constraints no interviews were done with government departments due to time limitation and financial constraints. It is imperative to meet sex workers in an environment where they felt comfortable and not threatened to talk. As a consequence, interviews were conducted in night clubs and bars where they come and look for clients. All of these environments were not conducive to structured interviewing and note taking, limiting the amount of information the author could gather.

The methodology involves several different steps for acquiring the data collected by the Author. A questionnaire will be used to make information gathering efficient. Further the author of the paper will make consultations with the LAC (Legal assistance centre) and other

human rights organisation in and around the capita such as NamRights. The LAC's research conducted by their Gender Research and Advocacy projects in 2001 published several reports and forms part of the largest and most comprehensive study of commercial sex work done in Namibia.

The subject matter of legalising prostitution has received increasing attention all over the world. Authors like Boschoff and Lopez writes on legalising prostitution and the factors to consider before making such a decision. A number of internet sources will be consulted with and the author will further look at Newspaper articles so as to enhance the information gathered. Here under is a list of the books to be used while carrying out this research:

1. Boshoff, N. 1997. Facts to consider before making of a decision on the legalising of prostitution: Child Care Centre; South Africa
2. Lopez-Jones, A. 1992. Legalising Brothels: News Law Journal vol 142 no. 6550
3. Milton, J.R .L. 1995. Women under the Criminal Justice System. JUTA; South Africa.
4. Shrage, L. 1994. Moral dilemmas of feminism: Prostitution adultery and abortion: Routledge; New York.
5. Stanton, S. 1999. Work in Progress: A critique of feminist discourses in sex work/prostitution. Juta; South Africa.
6. Rakgoadi, S. 1994.Policing sex work in S.A (Working document)
7. Rook, P.F.G and Ward, R. 1990. Rook and Ward on sexual offences No 8; Water low: London.

Other authors have simply written on the subject, because the legislation has been changed so as to decriminalize sex work or legalise sex work, are too incorporated in the new systems of countries and their operation of law.

Namibia is renowned for its outstanding human rights-centred constitution. Its bill of Rights which endeavours to introduce a gender neutral language and which forbids sex-based discrimination, provides and grants its citizens wide ranging constitutional rights. Through the National Affirmative Action Programmes Namibia has also incorporated the promotion of women.

Shanghala argues that the illegality of prostitution in Namibia is contrary to the Namibian constitution and its enshrined Bill of Rights, which guarantees equal treatment and protection to all Namibian citizens.²⁴ La Font adds that the illegality of sex work in Namibia has marginalised sex workers, putting them at risk of beating, harassment and prone to HIV infections by clients who refuse to use condoms. She further adds that decriminalisation could empower sex workers to seek legal redress when forced to engage in activities she does not wish to interact in.²⁵

In the regional context on human rights, Namibia has ratified the African charter on Human Rights and Peoples Rights, the African charter on the Rights of the People and Welfare of Children and the Protocol on the Rights of Women in Africa. While, internationally Namibia is signatory to both the UN Convention on the Elimination of all forms of discrimination against women.²⁶

Laws and policies against sex workers have resulted in the widespread human rights abuses. In Namibia sex workers are subjected to routine extortion, rape, and beatings by the police. These abuses and a lack of safe working conditions render sex workers particularly vulnerable to HIV. The chapter will further analyse amongst other cases, *Hendricks & others v Attorney General of Namibia & others*.²⁷

To illustrate the relevance of the above case, I shall briefly mention the facts; the relevance of this case is to illustrate how women have been degraded and treated as a result of the profession being illegal. In this case Ms Hendricks and two other females and a man. The four ran a brothel and lived from the proceeds of the business. As a result the four of them were charged and detained on charges of having contravened the Combating of Immoral Practices Act²⁸ on account of having kept a brothel and lived of the proceeds of prostitution. According to the facts of the case, police officers appeared on large numbers at the rural residence and searched the premises without a search warrant. Items were confiscated and the accused were subsequently charged on account of having contravened section 2 (1) and 10 (a) of the act.

²⁴ Shanghala, S.E.2000. The Legalization of the profession of commercial sex workers in Namibia, p 20.

²⁵ La Font, S. 2008. Help wanted: Sex workers in Katutura, Namibia. Windhoek; John Meinert, p15.

²⁶ CEDAW.

²⁷ *Hendricks and Others v Attorney General of Namibia and Others* 2002 NR 353 (HC).

²⁸ Act no 21 of 1980.

The accused lodged motion proceeding in the High Court of Namibia for the declaration of section 1(1), 2 (1) and 12 if the combating of Immoral Practices Act to be unconstitutional in terms of article 25 (1) (b) of the constitution. It was to be held unconstitutional on the basis that it was impinging on the accused's right to carry on any profession²⁹, to equality and freedom from discrimination.³⁰

In this paper the author would like to peruse reasons as to what can be construed so as to include protection of sex workers under the constitution. And the reasons behind why the Namibian Constitution does not have the term 'sexual orientation' as the South African Constitution. And further look into whether it is not possible include sex work under the concept of sexual orientation.³¹ The chapter shall further look into the rights and freedoms enshrined in the constitution, and what protection the constitution offers or does not offer to the sex workers at large. Many arguments for the decriminalization of prostitution all point at the following:

The advancement of the process of democratization by affording sex workers their human rights and equality for by giving them equal treatment in all aspects. The eradication of the stigmatization and marginalization effects of the criminalization of sex work. Further, equal protection and benefit from the law, commercial and personal autonomy and control of sex workers over their lives; improvement of sex working conditions for sex work; protection of sex workers from crimes perpetrated by law enforcement agencies and their abusive clients.³²

This research is based mainly on desk research and some general observations that have been different civic groups including the church

²⁹ Article 27 (1) (g).

³⁰ Article 10, for having violated the privacy of the accused's and for unreasonably and unjustifiably violated the applicant's rights to be presumed innocent and rights to a fair trial.

³¹ Whether sexual orientation can be widely interpreted to include sex work.

³² Arnott, J and Crago A. 2009. Rights Not Rescue, p 34.

CHAPTER TWO

HISTORICAL BACKGROUND AND DEVELOPMENT OF PROSTITUTION IN NAMIBIA

Prostitution is probably the world's oldest profession and laws prohibiting prostitution may well be the oldest form of government regulation and discrimination. In a free society, however, all such laws are inappropriate because they violate the basic rights and liberties of the individual involved.³³

The historical evidence suggests that some women have been forced by the circumstances they live in to use their sexuality as a survival mechanism. Historical records further demonstrate the impact of colonialism on prostitution. There was massive gender imbalance during the colonial times because of the policies that were implemented during this era. The extreme shortages of European women during the German colonial period led to the engagement of a lot of German males in sex with indigenous women, some of whom had stable relationships and even got married.³⁴

In 1905 Namibia the German Administration banned "mixed marriages" because of concerns about the legal status of children of mixed ancestry. There were a number of efforts by the administration to prevent cross-racial sexual relationships. Another factor which influenced the historical development of prostitution in Namibia was the changing gender roles which resulted from the colonial influence. It is further submitted that sex was a commodity which was sometimes used in complex systems of social exchange.³⁵

There were white prostitutes too and the first ever report on white prostitution can be found in Swakopmund.³⁶ The legal assistance centre's research points out that in 1904 there was a regulation passed, to control brothels staffed by white women. This served as a model for other towns. It is likely that the white women brought into these brothels were part of the emerging trafficking in women which brought about an international treaty on

³³ Arnott, J and Crago, A. 2009. *Rights Not Rescue*. Open Society Institute; South Africa, p 25.

³⁴ Legal Assistance Centre.2002. *Whose Body Is It*. Available at www.lac.org.na; last accessed on 4 March 2011.

³⁵ For example, some local women became concubines of European traders, with the active involvement of the kin, to facilitate access to goods and services.

³⁶ Legal Assistance Centre.2002. *Whose Body Is It?* Available at www.lac.org.na; last accessed on 4 March 2011.

trafficking in 1904. The German administration at the time encouraged white prostitution in order to discourage sexual relations between white men and African women.³⁷

After the war in 1904-07, some Herero women were forced to work in brothels opened by the German military in Windhoek. With the harsh times that the indigenous women of the country faced, some voluntarily opted for prostitution as a source of income to become independent of their men who were working in Windhoek as contract labourers.³⁸

Colonial administration believed that the indigenous prostitute were disrupting the labour supply due to the fact that some African families were reluctant to engage in wage labour, preferring to live off the earnings of a few prostitutes in the family. The white administration, believed that the unregulated African prostitution was the leading cause of the massive increase in the venereal disease. This led to the sanctioned creation of brothels staffed by white women, where a degree of medical and legal control could be exercised, in Swakopmund, Okahandja, Karibib, Windhoek, and Luderitz.³⁹

After the South African Administration took over from the German Administration they further looked at ways by which they would prohibit interaction and relations between the white men and the black women. Amongst the first Proclamations in 1919 was the one prohibiting Europeans from entering Native locations without a permit between dusk and dawn. Further effort aimed at reducing inter-racial sex was the Undesirable Removal proclamation, which was the basis for the repatriation of most European prostitutes and brothels back to Germany.⁴⁰ At the time prostitution was not criminalised per se.

A further control measure was the Police Offences Proclamation⁴¹ which criminalised loitering and solicitation for the purposes of prostitution and the Girl's and Mentally Defective Women's Protection Proclamation⁴² which made unlawful carnal connection with a girl under the age of 16 or an idiot an offence along with the detention of any girl or

³⁷ Legal Assistance Centre. 2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

³⁸ Legal Assistance Centre. 2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

³⁹ Legal Assistance Centre. 2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

⁴⁰ Legal Assistance Centre. 2002. Whose Body Is It, Available at www.lac.org.na; last accessed on 4 March 2011, p 13.

⁴¹ Police Offences Proclamation 20 of 1920.

⁴² Girls' and Mentally Defective Women's Protection Proclamation 28 of 1921.

women against her will in a brothel. Prostitution was considered to be a prime motive for African female migration to urban areas and there were periodic requests to the administration to control the Native women. The Immorality Proclamation 19 of 1934 applied the main provisions of the South African Immorality Act⁴³ to South West Africa which expressly prohibited carnal interaction between European males and black females. In 1938 it was required that every native female in Windhoek between the ages of 18-60⁴⁴ to undergo a compulsory medical examination every six months. In March 1939 about 100 women staged a violent protest against the new regulation with the end result that the mass examinations were not implemented.⁴⁵

This era earmarked an increase in marital infidelity and venereal disease. Concerns were expressed in the 1930's about child marriage and child prostitution and by the 1950's; the line between casual relationships and professional prostitution became blurred.⁴⁶ Studies have shown that prostitution was quite widespread in traditional societies in Africa. The major concern of the colonial administration was the inter-racial sex as prostitution among Africans was tolerated and informally encouraged.⁴⁷

The gender imbalances created by the labour policies at the time promoted the profession and the colonial administration lacked the resources to police and control prostitution. While some women were forced into prostitution by their poverty and circumstances some opted for it as it has better wages. The influence of globalization was a key factor in influencing and shaping sexual behaviour in Namibia.⁴⁸

On the other hand, Namibia's sex work legislation dates back to when the country was under the German and South African rule.⁴⁹ The Combating of Immoral Practices Act of 1980 is therefore similar to South African legislation.

⁴³ Immorality Act of 1927.

⁴⁴ Unless legally married women living with their husbands.

⁴⁵ Legal Assistance Centre. 2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

⁴⁶ Legal Assistance Centre. 2002. Whose Body is it? Available at www.lac.org.na; last accessed on 4 March 2011, p 13.

⁴⁷ Arnott, J and Crago, A. L. 2009. Rights Not Rescue. South Africa; Open Society Institute, p 25.

⁴⁸ Arnott, J and Crago, A. L. 2009. Rights Not Rescue. South Africa; Open Society Institute, p26.

⁴⁹ Arnott, J and Crago, A.L. 2009. Rights Not Rescue. South Africa; Open Society Institute, p25.

Legislation in Namibia does not criminalise the selling or buying of sexual services per se. Similarly, sex work is in effect criminalised by provisions that prohibit a wide range of activities that are associated with the act of prostitution. However in 1998 sex shops in Windhoek, Walvis Bay and Swakopmund were raided by the police. The police confiscated videos and magazines and the owners of the sex shops challenged the constitutionality of section 17 (1) of the Combating of Immoral Practices Act⁵⁰ as the material was considered to be 'indecent photographic material' in terms of section 17 of the Act.⁵¹ The High court found that this section of the Combating of Immoral Practices Act, which prohibited the manufacture, sale or supply of any item that is intended to be used to perform 'unnatural sexual acts' was vague and broad that it violated the applicants constitutionally protected freedom to engage in trade or business.⁵²

2.1 PROSTITUTION IN SOUTH AFRICA AND BOTSWANA

Sex work is illegal in South Africa under the Sexual Offences Act of 1957 that criminalises soliciting, brothel keeping, and living off the earnings of a sex worker. In 1988, the Sexual Offences Act was amended to criminalise persons who repeatedly sell sex for compensation or reward.⁵³

In 1994 after the South African independence the South African Law Reform Commission⁵⁴ was instructed by the government to review the Sexual Offences Act. Sex work was a subject matter for review seeing the violations that the prohibition is causing on adult sex work. The commission published a paper in 2002, on sex work that presented legislative frameworks such as legalization and criminalization. What ensued then was a discussion paper issued in May 2009, in order to facilitate the need for adult prostitution.

Sex work in South Africa is prohibited by national legislation unlike in Namibia where only the acts associated with prostitution are criminalized. However, like in most countries the police find it extremely difficult to secure convictions under the South African Offences Act. Municipal by-laws are utilized to arrest and prosecute sex workers working on the street

⁵⁰ Combating of Immoral Practices Act 21 of 1980.

⁵¹ Arnott, J and Crago, A. L. 2009. Rights Not Rescue. South Africa; Open Society Institute, p26.

⁵² Legal Assistance Centre. 2010. Key Judgements 1990-2000. Available at <http://www.lac.org.na/cases/keyjudgements.html>; accessed on 8 April 2011.

⁵³ Arnott, J and Crago, A.L.2009. Rights Not Rescue. Open Society Institute; South Africa, p 21

⁵⁴ SALRC.

and in public. Under the South African law, a police may detain an accused for up to 48 hours without filing a charge against the person. In 2004 South Africa ratified both the United Nations Convention against Transnational Organized Crime.

In the case of *S v Jordan and Others*⁵⁵, the High Court ruled that the legal provision which criminalises sex for reward is an unconstitutional violation of the right to equality, because it criminalises the actions of sex workers but not their clients. The Jordan case also found that the right to privacy was implicated, as a result holding that the provisions of the act on brothel keeping can withstand Constitutional scrutiny as they form part of the public face of sex work.⁵⁶

Feminist and health organisations in South Africa are pursuing the option of decriminalisation and they advance the following arguments in favour of decriminalisation; that criminalisation does not prevent or deter prostitution and makes women more vulnerable to exploitation by pimps and the police and this prevent women from accessing health care services effectively.⁵⁷

The legislation in Namibia, Botswana and South Africa does not criminalize the selling or buying of sexual services what is in fact criminalised is the wide range of acts that are associated with prostitution. The Botswana penal code that prohibits acts that are associated with prostitution “criminalizes solicitation and knowingly living on the earnings of prostitution”.⁵⁸ The law goes further and specifies that “in the case of a second or subsequent conviction under this section the court may in addition to any term of imprisonment awarded, sentence the offender to corporal punishment.” This penal code criminalizes the procuring a person for prostitution, detention of someone against his/her will in a brothel, brothel keeping and living on the earnings of a prostitute. Brothel keeping is defined very broadly and even criminalises landlords who rent out their premises to be used as brothels.⁵⁹

⁵⁵ *S v Jordan* 2001 10 BCLR 1055 (T).

⁵⁶ Bonthuys, E and Albertyn, A. 2007. *Gender, Law and Justice*. Johannesburg; JUTA, p354.

⁵⁷ Bonthuys, E and Albertyn, A. 2007. *Gender, Law and Justice*. Johannesburg; JUTA, p 362.

⁵⁸ Arnott, J and Crago, A.L. 2009. *Rights Not Rescue*. Open Society Institute; South Africa, p 27.

⁵⁹ Arnott, J and Crago, A.L.2009. *Rights Not Rescue*. Open Society Institute; South Africa, p 21

Section 179 of the Penal Code criminalizes “idle and disorderly persons,” this includes the “common prostitute” who behaves in a disorderly or indecent manner and any person who without lawful excuse engages in an indecent act or solicits for immoral purposes”. These are the restriction against loitering which has direct reference to sex workers.

It has been difficult for the Botswana police and prosecutors to enforce the relevant sections of the penal code, which criminalize solicitation and living on the earnings of prostitution.⁶⁰ This is so because in order to successfully convict sex workers under the penal code they would have to be caught in the act or convince a client to testify against a sex worker. As a result since 1998, when the penal code was introduced no one has been convicted for prostitution related offences. The police have rather charged sex workers of idling for immoral purposes and public indecency.⁶¹

Lawyers acknowledge that sex workers will often admit to charges even if they have not actually committed any crime and this is in order to simply go back to work on the streets again as soon as possible.⁶² The clients of sex workers are never charged, fined or arrested.⁶³

Customary courts in Botswana have played a minor but influential role in the prosecution of sex workers. Customary courts deal with a large volume of cases in the country and traditional leaders serve as judges. In 2006, traditional leader⁶⁴ sentenced 10 Zimbabwean sex workers to a year in prison despite the fact that prostitution in itself is not a crime under the penal code or in the country.⁶⁵

Other pertinent legislation is Botswana’s Immigration Act prohibits “any prostitute, or any person, male or female who lives or has lived on.... the earning of prostitution” from entering the country. Botswana law criminalizes sex between same sex male partners as

⁶⁰ Arnott, J and Crago, A.L. 2009. Rights Not Rescue. Open Society Institute; South Africa, p 27.

⁶¹ Arnott, J and Crago, A.L. 2009. Rights Not Rescue. Open Society Institute; South Africa, p 28.

⁶² Legal Assistance Centre.2002. Whose Body Is It? Available on www.lac/org.na; last accessed on 4 March 2011.

⁶³ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice. Johannesburg, 356.

⁶⁴ At the time considered as a judge.

⁶⁵ Arnott, J and Crago, A.L. 2009. Rights Not Rescue. Open Society Institute; South Africa, p 29.

“carnal knowledge....against the order of nature” and “acts of gross indecency”.⁶⁶ These legislations have led to repercussions for male and Trans sex workers similar to those in Namibia. In 2007 the Botswana government denied a registration request from the NGO Lesbians, Gays and Bisexuals of Botswana because the organization may be unlawful. The decision is being challenged by the Botswana Network on Ethics, Law and HIV/AIDS.

2.2 PROSTITUTION IN NETHERLANDS, GERMANY AND SWEDEN

2.2.1 NETHERLANDS

The Netherlands is internationally known for its red light district, an area where there are sex shops, brothels and anything related to sex work.⁶⁷ Sex work in the Netherlands has never been illegal yet it is only recently that brothels were legalised, even though it was widely tolerated.⁶⁸

In October 2000, brothels were formally legalised and placed on the same footing as any other business in the country.⁶⁹ The brothels however are subjected to a wide range of regulatory mechanisms in order to provide protection for the sex workers. Sex work in the Netherlands is regulated and there are now safeguards against long working hours, unsanitary working conditions, sex workers can refuse their customers and have are entitled to police protection. There is however still a public stigma against sex work and many sex workers are opposed to the new requirement that they register with their local chambers of commerce.

Due to the regulated sex work, there is a reduction in sex work in the Netherlands and this regulatory means weed out child prostitutes and illegal migrant workers.⁷⁰ As a result an estimated 35% of the brothels in the country have closed due to the fact that they don't want to pay taxes or adhere to the new regulations. Sex workers in legitimate brothels now

⁶⁶ DeLuca, C. 2011. The Stories of Women: A Comparative Analysis of the Legal Framework and Treatment of Gender violence in Botswana and Namibia. Available at www.Sexworkersrights.co.htm; last accessed on 8 April 2011.

⁶⁷ Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac/org.na; last accessed on 4 March 2011.

⁶⁸ Cook, R.J.1995. Human Rights of Women. University of Pennsylvania press; Philadelphia, p 553.

⁶⁹ A recent case involving the Netherlands in the European Court of Justice held that self-employed sex work must be treated like any other business, with respect to the rights of citizens of countries outside the EU to establish business inside European Union nations.

⁷⁰ Cook, R.J.1995. Human Rights of Women. University of Pennsylvania press; Philadelphia, p 553.

have better access to health care and promotion however there are fears that a large amount of sex workers are working illegally to avoid the regulation and taxes to be paid.⁷¹

2.2.2 GERMANY

Germany like the Netherlands is another example of regulated sex work. Sex workers can however be prosecuted for participating in an exchange for sexual services outside the allowed times and places. Germany further prohibits public advertisement of sexual services and soliciting near or at the vicinity of schools or other places where there is likely to be children.⁷²

In 2001 prostitution was recognized as a legitimate form of employment and a new law was enacted to this effect. The new law makes changes to contract law, so that sex workers will be able to sue clients who fail to pay for their services using all principles of contract. This further implies that sex workers in Germany are entitled to the same benefits, such as social security, pensions, unemployment benefits and health insurance. Health checks are offered by street social workers and health centres, however these health checks are not imposed on the individual sex workers.⁷³

Most Germans find sex work normal and believe that it should be recognized as any other job. As a result most sex workers groups welcomed the new law adding that this would just be the first step to removing the stigma surrounding sex work and allowing for greater protection to the sex workers. However critics suggest that the new law could create a two-tier market of legal sex workers and an illegal underclass of illegal immigrants and drug addicts which would be of no benefit to the country.

⁷¹ Cook, R.J.1995. Human Rights of Women. University of Pennsylvania press; Philadelphia, p 553.

⁷² Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

⁷³ Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

2.2.3 SWEDEN

Swedish legislation prohibits sex work, by making the purchase of sexual services and not the sale of such services a crime. As a result only the actions of the client are criminalized and not those of the sex worker.⁷⁴

Before 1990 Swedish legislation on sex work punished pimping and pandering activities, while making the prostitute transaction illegal. The Swedish legislation now prohibits sex work, but however does not punish the prostitutes who are seen as victims of the crime. Criminalization was due to an increase in migrant sex workers from developing countries especially in Africa.⁷⁵ Sweden is seen as taking form of an abolitionist approach in attempting to combine moral disapproval of sex work but with sympathy to the sex workers.⁷⁶

As a result of the new law prosecutors and government officials say that the law is difficult to enforce, but there have been only a few arrests and convictions of the clients. The new law has also resulted in the visible decrease on sex work on the streets and much more hidden in urban areas. The fact that the law protects sex workers provides them with the ability to contact the police with ease. However sex workers are not protected by Swedish Labour legislation.⁷⁷ Albertyn adds that the Swedish model has not shown to be effective and argues that this drives sex work underground and enhances the vulnerability of women.⁷⁸

⁷⁴ DeLuca, C. 2011. The Stories of Women: A Comparative Analysis of the Legal Framework and Treatment of Gender violence in Botswana and Namibia. Available at www.Sexworkersrights.co.htm; last accessed on 8 April 2011.

⁷⁵ Armanetano, P.1993. The Case for Legalized Prostitution. Available at www.org/freedom/129e.asp; last accessed on 4 March 2011.

⁷⁶ Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac/org.na; last accessed on 4 March 2011.

⁷⁷ Leigh, C. 2005. Critiques of Swedish Prostitution law. Available at www.sexworkerrights.com.za; last accessed on 4 March 2011.

⁷⁸ ⁷⁸ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice, Johannesburg; JUTA, p 361.

CHAPTER 3

HUMAN RIGHTS

3.1 PROSTITUTION AND HUMAN RIGHTS

The government of the Republic of Namibia has failed to protect sex workers from violations of their fundamental human rights and as a result have not created conditions where sex workers can live freely and enjoy their basic human rights. The government has further failed to address the discriminatory attitudes that lead many in the society to believe that sex workers are not deserving of basic human rights.

Sex workers have little or no recourse, they can never call on the police for help hence they are the violators of their rights.⁷⁹ Representatives of the state, especially the police are the people that violate the rights of the sex workers. Furthermore the sex workers do not have access to facilities such as health care, reproductive health care and social support networks. The sex workers are often discriminated against when they attempt to access these facilities. As a result, sex workers in Namibia cannot enjoy safe and healthy working conditions because the current law and policy undermines the sex workers safety.⁸⁰

A look at sex work and associated violence as a human rights concern has the most theoretical difficulties and a way forward is hard to achieve as the issues surrounding the problems associated with sex work are complex. The earliest feminist efforts wanted to raise human rights concerns in relation to prostitution and attempted to repeal national laws that subjected sex workers to invasive inspection procedures. The feminist wanted to empower and to protect the dignity of prostitutes.⁸¹

3.2 GENDER INEQUALITIES

Looking at section 2 (2) (f) of the Immoral practices act which states that, 'any women found in a brothel, who refuses to disclose the name and identity of the keeper or manager

⁷⁹ Cook, R.J.1995. Human Rights of Women. University of Pennsylvania press; Philadelphia, p 553.

⁸⁰ Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac/org.na; last accessed on 4 March 2011.

⁸¹ Cook, R.J.1995. Human Rights of Women. University of Pennsylvania press; Philadelphia, p 553.

thereof...'⁸² This piece of legislation clearly targets women only and seeks to single out women only, whereas the male counterpart, if so found is not explicitly mentioned in the act. This victimises and discriminates against women and is in direct contradiction to the Namibian Constitution.⁸³ From this it can be detracted that the act singles out the women who can be brought before a court and the client goes free. The client who offers to give reward for sex is left unpunished.

Namibia takes on the prohibition approach to sex work, which punishes all persons involved, including the client and any other third parties such as pimps. This approach considers all form of prostitution to be unacceptable and most aspects of prostitution are criminalised.⁸⁴ This approach however creates a problem as the female prostitutes are usually the target for punishment despite provision for the punishment of clients and pimps.⁸⁵

The Act Criminalisation of a range of activities associated with prostitution makes the women targets, when they offer their bodies for sex and not the men who purchase or solicit the service. The nature of the criminalisation according to Catherine Albertyn is deeply implicated in unequal gender relations across the world.⁸⁶

Sex work is also located within gendered patterns of fault and control of women's sexuality. The norms of appropriate sexual behaviour in many societies require that women be faithful, passive and engage in sex for procreation rather than for their own benefits and pleasure.⁸⁷ Men on the other hand are not at fault when and not reprimanded but are rather encouraged to be sexually active, to have more than one partner and 'sow their wild oats'. Albertyn points out that in this context woman who engage in sexual activities for

⁸² Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

⁸³ Article 10 of the Namibian Constitution which provides that all people shall be equal before the law and no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social economic status.

⁸⁴ Legal Assistance Centre. 2002. Whose Body is it? Available at www.lac.org.na; last accessed on 4 March 2011 24.

⁸⁵ Legal Assistance Centre.2002. Whose Body Is It? Available at www.lac.org.na; last accessed on 4 March 2011.

⁸⁶ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice. Johannesburg; JUTA, p 353.

⁸⁷ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice. Johannesburg; JUTA, p 354.

their own benefits and pleasures may be labelled as prostitutes for the same behaviour that might be accepted and affirmed if engaged in by men.⁸⁸

If one takes a closer look at the patterns in the Namibian society, we see that it is usually the women sex worker who is stigmatised, rather than the client that buys the sex. Stigmatisation takes place legally and socially. As pointed in the case of *S v Jordan*⁸⁹ wherein the Judge points out that; *'A man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women.... The stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality.'*⁹⁰

Therefore sex work and society's responses to it reflect and reinforce the gendered power relations in our society. Sex work as work means that women have the right to choose sex work as work and should have the same legal protections as any other worker.

Looking at various feminist approaches to sex work, one of the fundamental divides is one that corresponds to the differences between liberal and radical feminism and between sex 'work' and as 'exploitation'. Those who argue that sex work should be viewed as a legitimate form of work generally argue that women exercise a choice to become sex workers in order to benefit economically.⁹¹ And opposition that is in contrast to this argument is the radical feminist that argue that prostitution is an extreme form of exploitation and degrading to the women by men.

Sex worker organisations have advocated for women to have the right to choose sex work as work and should be afforded the same legal protections as any other worker.⁹² This position has been put forward by a set of sex worker organisations such as the South African Sex Worker Organisation and the Legal Assistance Centre of Namibia. These organisations

⁸⁸ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice. Johannesburg; JUTA, p 356.

⁸⁹ *S v Jordan* 2001 10 BCLR 1055 (T).

⁹⁰ *S v Jordan* 2001 10 BCLR 1055, at paragraphs 64-65.

⁹¹ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice, Johannesburg; JUTA, p 355.

⁹² Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice. Johannesburg; JUTA, p 355.

argue that women are able freely to choose work, although it is recognised that some sex work is indeed coerced.

Radical and critical feminist analyses are particularly concerned with the question of the power that underlies these social and economic relations in the society. The radical feminists will normally deny that sex workers have power, arguing that prostitution merely subordinates the sex worker to the client's will, that it involves inhumane and degrading treatment to the individual sex worker. Critical feminists on the other hand suggest that the power relations in prostitution are more complex and should be understood within 'a particular set of social relations who produce a series of variable and interlocking constraints upon action.'⁹³

Feminist groups which submitted a brief in the case of *S v Jordan* argued for the idea of 'constraint of choice' that the agency of sex workers need to be acknowledged, but within the constraints of their social and economic circumstances.⁹⁴

Both radical and critical feminists focus on addressing the decriminalisation of sex work as well as the rights violations suffered by sex workers, especially their rights to bodily integrity and economic exploitation. The two feminist groups also agree that real change can only take place within a broader idea of changing society.

3.3 INTERNATIONAL OBLIGATIONS

International attention to sex work was first directed at the phenomenon called slavery, in which women and girls were coerced or tricked into prostitution in colonial territories and foreign countries.⁹⁵ The Namibian Government is party to many international conventions and protocols that can be used as support for the legalization of sex work in the country.

Namibia has ratified several international human rights instruments that have direct bearing on sex workers' human rights.⁹⁶ Amongst others this include: The International Covenant on Civil and Political rights⁹⁷; the African Charter on Human and People's Rights⁹⁸; the

⁹³ Bonthuys, E and Albertyn. 2007. *Gender, Law and Justice*. Johannesburg; JUTA, p 357.

⁹⁴ *S v Jordan* 2001 10 BCLR 1055 (T).

⁹⁵ Cook, J.R.1995. *Human Rights of Women*. Philadelphia; University of Pennsylvania press.

⁹⁶ Shanghala, S.E 2000 *The Legalization of the profession of Sex works in Namibia*. Windhoek; UNAM, p25

⁹⁷ ICCPR, acceded to by Namibia on 28 February 1995

⁹⁸ The African Charter acceded to by Namibia on 30 July 1992.

Convention on the Elimination of all Forms of Discrimination Against Women⁹⁹; The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰⁰ and the International Convention on the Elimination of all forms of Racial Discrimination.¹⁰¹

The Namibian government has further signed the International Covenant on Economic, Social and Cultural Rights¹⁰². The above mentioned treaties advocate for the protection of rights that have specific reference to situations confronted by the sex workers in Namibia. The right to equal protection of the law, freedom from arbitrary arrest and detention, freedom from torture, cruel, inhumane and degrading treatment, the right to information, freedom of movement, the right to enjoy just and favourable conditions of work, the right to organize, the right to adequate standard of living, equal access to public services, including health care and the right to be free from discrimination. Many of these rights are also included in the Constitution of the Republic of Namibia.¹⁰³

Namibia has ratified the Optional Protocol to the African Charter on Human and People's Rights of Women in Africa. The protocol broadly protects the rights of the women and it reaffirms the commitment of African States to ensure their full participation as equal partners in Africa's development and declares that "any practice that ...affects the physical and psychological development of women and girls should be condemned and eliminated". The countries that are signatories to the Protocol agree to eliminate all forms of discrimination against women.¹⁰⁴ It can be argued that this form of discrimination can be interpreted to include sex work. The Protocol states that "every woman shall be entitled to respect for life and integrity and security of her person" and the Protocol further "requires State Parties to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex" and "take measures to prevent and eliminate such violence".¹⁰⁵

⁹⁹ CEDAW acceded to by Namibia on 23 December 1992.

¹⁰⁰ CAT, acceded to by Namibia on 28 December 1994

¹⁰¹ CERD acceded to by Namibia on 11 December 1982.

¹⁰² ICESCR was acceded to by Namibia on 28 February 1995.

¹⁰³ Shanghala, S.E 2000. The Legalization of the profession of Sex work in Namibia. Windhoek; UNAM, p26.

¹⁰⁴ Article 2 of the Optional Protocol.

¹⁰⁵ Article 4.

The Optional Protocol further recognizes that men and women are equal before the law and require State Parties to take appropriate measures to ensure effective access of women to legal services including legal aid and it further requires law enforcement structures to effectively interpret and enforce gender equality rights in the State Parties.¹⁰⁶

3.4 Prostitution and the Constitution

Namibia's Constitution is a liberal democratic constitution embodying principles of constitutionalism, human rights, the rule of law and constitutional supremacy. Despite the above standard setting, the position of women in the country still remains a challenge. The struggle for the liberation of women was fought alongside the country's independence and is still being fought to date.¹⁰⁷

The Namibian Constitution contains a Bill of Rights whereby all the rights and freedoms are enshrined and protected by virtue of the Constitution. It provides for mechanisms to protect democracy and promote accountability through the offices of the Ombudsman and the Auditor General. The Constitution is by virtue of Article 1(6) the Supreme Law of the land. While on the other hand for the sake of consistency and ensuring there are no holes in the law, article 140 of the constitution makes 'all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court'. The law that has not been repealed that is relevant is the Combating of Immoral Practices Act¹⁰⁸ which shall be discussed in depth.¹⁰⁹

While the Constitution of the Republic of Namibia acknowledges the fundamental freedom of practicing and manifesting any religion of practice under Article 21(1)(c) and elsewhere, it is also stated under Article 1 that Namibia is a sovereign, secular, democratic and unitary state founded upon the principles of democracy, *the rule of law and justice for all.*"

¹⁰⁶ Article 8.

¹⁰⁷ Shanghala, S.E 2000.The Legalization of the profession of Sex work in Namibia. Windhoek; UNAM, p26

¹⁰⁸ Act 21 of 1980.

¹⁰⁹ Ruppel, O (Ed).2008.Women and Custom in Namibia. Windhoek; Macmillan, p107.

Chapter 3 of the Namibian Constitution which is the Bill of Rights provides, under article 5-25 for the rights and freedom guarantees by the Constitution. Article 25(1) states that:

Save in so far as it may be authorized to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid:

This only implies that chapter three of the Constitution is entrenched in guaranteeing its provisions to all. It is also provided under the Constitution that an aggrieved person can approach the courts of law for redress of the violated rights.

The Namibian Constitution recognises women's rights, it is gender neutral through the language used in the Constitution, and it further forbids discrimination on the basis of sex and provides for equality in all respects of marriage.

Shanghala argues that the illegality of prostitution in Namibia is contrary to the Namibian constitution and its enshrined Bill of Rights, which guarantees equal treatment and protection to all Namibian citizens.¹¹⁰ La Font adds that the illegality of sex work in Namibia has marginalised sex workers, putting them at risk of beating, harassment and prone to HIV infections by clients who refuse to use condoms. He further adds that decriminalisation could empower sex workers to seek legal redress when forced to engage in activities she does not wish to interact in.¹¹¹

These abuses and a lack of safe working conditions render sex workers particularly vulnerable to HIV. The chapter will further analyse amongst other cases, *Hendricks & others v Attorney General of Namibia & others*.¹¹²

To illustrate the relevance of the above case, I shall briefly mention the facts; the relevance of this case is to illustrate how women have been degraded and treated as a result of the profession being illegal. In this case Ms Hendricks and two other females and a man. The four ran a brothel and lived from the proceeds of the business. As a result the four of them

¹¹⁰ Shanghala, S.E.2000. The Legalization of the profession of commercial sex workers in Namibia, p 20.

¹¹¹ La Font, S. 2008. Help wanted: Sex workers in Katutura, Namibia. Windhoek; John Meinert, p15.

¹¹² Hendricks and Others v Attorney General of Namibia and Others 2002 NR 353 (HC).

were charged and detained on charges of having contravened the Combating of Immoral Practices Act¹¹³ on account of having kept a brothel and lived of the proceeds of prostitution. According to the facts of the case, police officers appeared on large numbers at the rural residence and searched the premises without a search warrant. Items were confiscated and the accused were subsequently charged on account of having contravened section 2 (1) and 10 (a) of the act.

The accused lodged motion proceeding in the High Court of Namibia for the declaration of section 1(1), 2 (1) and 12 of the Combating of Immoral Practices Act to be unconstitutional in terms of article 25 (1) (b) of the constitution. It was to be held unconstitutional on the basis that it was impinging on the accused's right to carry on any profession¹¹⁴, to equality and freedom from discrimination.¹¹⁵

In the case of *S v Jordan*¹¹⁶ the court displayed a relative ease in drawing the context of disadvantage. The majority of the court ignored the evidence that was placed before it and failed to apply its own jurisprudence which required it to consider context and impact. The court defined the issues narrowly and separated the law from social life. Therefore in this case sex work was not seen to be an issue of sex discrimination and the connection between poverty and sex work, were not considered by the court. The court only later recognised the potentially vulnerable position of poor women in sex work.¹¹⁷ The South African case of *S v Jordan*¹¹⁸ is the most recent case that challenges the criminalisation of sex work. Ellen Jordan was a brothel owner who with other was faced with charges under the Sexual Offences Act relating to the keeping of a brothel and sex work. In their defence they raised the Constitutionality of the Act. The High Court of South Africa found that section 20(1)(a) of the Act which related to sex work¹¹⁹ unfairly discriminated the individuals right on the basis of sex and gender. The matter was referred to the Constitutional Court for confirmation. When the case went to the Constitutional court women's organisations such as SWEAT decided to join as *amici curiae* to try and introduce arguments for sex work. The

¹¹³ Act no 21 of 1980.

¹¹⁴ Article 27 (1) (g).

¹¹⁵ Article 10, for having violated the privacy of the accused's and for unreasonably and unjustifiably violated the applicant's rights to be presumed innocent and rights to a fair trial.

¹¹⁶ *S v Jordan* 2001 10 BCLR 1055 (T).

¹¹⁷ Bonthuys, E and Albertyn, C. 2007. *Gender, Law and Justice*, Johannesburg; JUTA, p 104.

¹¹⁸ *S v Jordan* 2001 10 BCLR 1055 (T).

¹¹⁹ Unlawful carnal intercourse with another person for reward.

two main arguments were that the criminalisation of sex work violated women's rights to freedom and security of the person and that the criminalisation of sex work violated this right and rendered women vulnerable to multiple consequent rights violations.¹²⁰ The Constitutional court of South Africa unanimously found that the provision on brothels to be constitutional. The court did not accept that there was any sex or gender based distinction in the provision, the court did not take into account that the majority of sex workers are women neither the fact that sex worker and client distinction is thus a sex gender distinction. Therefore the court did not address the issue of sex or gender distinction.

The analysis of the case clearly illustrate that if the Judges had applied the arguments presented by the women's organisations it would have to declare the provision of the Act unconstitutional however the court chose to take a different route at arriving to its decision. Albertyn suggested that the majority of the court used mechanisms of legal formalism, distinguished the law from social attitudes and refused to engage with context.¹²¹

3.5 The Combating of Immoral Practices Act

Section one of the act provides for the definitions that are relevant to the Act, such as "Brothel" which, "Includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or immoral purpose;

When one looks at the definition of brothel under section 1 of the definitions in the Act, which includes any house or a place kept or used for the purpose of prostitution...' and further under the prohibition of the keeping of a brothel under section 2(1), it can drawn from this that by indirect means the legislature is taking with the left hand what is permitted with the right hand. For there is no definition of what sex work is or prostitution and there appears no statute or the Combating of Immoral Practices Act, that has gone to prohibit the keeping of a brothel, the commercial sex practitioner is left in a situation where she can for practical purposes not carry out her profession.

And further defines unlawful carnal intercourse as;

¹²⁰That woman exercised choices to engage in sex work under constrained and mostly powerless circumstances.

¹²¹ Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice. Johannesburg; Juta, p360.

" means carnal intercourse between persons who are not married or who are not partners in a customary union in terms of the traditional laws and customs applied by a particular population group referred to in section 3 of the Representative Authorities Proclamation, 1980 (Proclamation AG. 8 of 1980)

Describing what it is to keep a brothel;

(1) Any person who keeps a brothel shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three years or to such imprisonment and to a fine not exceeding three thousand rand.

(2) The following persons shall for purposes of subsection (1) be deemed to keep a brothel, namely-

(a) Any person who lives in a brothel unless he proves that he was ignorant of the character of the house or place;

(b) Any person who manages or assists in the management of any brothel;

(c) Any person who knowingly receives all the money or any share of the money taken in a brothel;

(d) Any person who is a tenant or occupier of any house or place and who knowingly permits it to be kept or used as a brothel;

(e) any person who is the owner of any house or place and who lets it or allows it to be let or to continue to be let, with a knowledge that such house or place is to be kept or used or is been kept or used as a brothel;

(f) Any woman found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;

(g) any person whose spouse keeps or lives in or manages or assist in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive all the money or any share of the money taken therein.

The Act further provides that it would be presumed that;

(1) When in any prosecution in terms of this Act the question arises whether any carnal intercourse between a male and a female was unlawful, such intercourse shall be presumed, until the contrary is proved, to have been unlawful carnal intercourse.

(2) When in any prosecution in terms of this Act a person is proved to live in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, it shall be presumed, until the contrary is proved, that such person lives wholly or in part on the earnings of prostitution.

(3) When in any prosecution in terms of section 6 it is proved that the accused has performed any act or has done anything or has furnished any information, which was calculated or likely to enable any male to communicate with or to establish the whereabouts of or to trace any female in respect of whom the accused had reason to suspect to be a prostitute, it shall be presumed, until the contrary is proved, that the accused have performed such act or have done such thing or have furnished such information as the case may be, with intent to enable such male to have unlawful carnal intercourse with such female.¹²²

In its long title the Combating of Immoral Practised Act states that “it purports to combat the keeping of brothels, prostitution and other immoral practices”. This gives rise to the issue of immorality and its entire influence to the rest of the community. It further influenced the entire movement of banning the practice of sex work from society. It is said that the Namibian society is 90% Christian and wanting to preserve such culture was of great importance at the time and combating immoral acts was the key.¹²³

It will therefore not be surprising for a Christian legislature to bring forth Christian beliefs as they make laws and preside over cases. This is the code of belief that runs with the Namibian Constitution that the Namibian society is Christian; however legislators need to consider the need for morale that changes over time and so does the need to change laws in

¹²² Shanghala, S.E.2000. The Legalization of the profession of commercial sex workers in Namibia, p 19.

¹²³ Shanghala, S.E.2000. The Legalization of the profession of commercial sex workers in Namibia, p 22.

order to fit in with the modern changing lives of the society. The query is whether or not, law should even at the cost of constitutional rights, should enforce morality considerations on the society? Perhaps the courts will take heed and decide no more than what is absolutely necessary for a decision of a case. This would mean that the courts that are faced with matters relating to the applicability of the Combating of Immoral Practise Act should consider the Constitutional validity of the provisions and refrain from expressing opinions on the remnant of the Act, except insofar as the impugned Constitutional guarantees are impacting on the rest of the provisions of the Combating of Immoral Practice Act.

3.5 The legalization of Sex Work

Sex work exists even in the parts of the word that we least expect it to, and has existed with all the laws, regulations and prohibitions and still exist. It can be said that the industry has survived in the worst times, in more than decades and attempt to wash it away have simply failed and have merely proved to be futile to the lawmakers.¹²⁴ This has led to the reconsideration of many countries to consider legalising prostitution and so should Namibia.

Decriminalization simply means the removal of all legal prohibitions and regulations that would control sex work. Sex work in is not per se illegal in Namibia but merely the acts around sex work that are illegal such as loitering and so forth. The truth is that sex work can never be totally eradicated and criminalising it will only further violate the rights of the sex workers concerned.

According to Shanghala¹²⁵ *“the advancement of the process of decriminalization by affording sex workers their human rights; the eradication of the stigmatization and marginalization effects of the criminalization of sex; equal status of sex workers before the law; equal protection and benefit from the law; commercial and personal autonomy and control sex works over their live; improvement of working conditions for sex; protection of sex workers from crimes perpetrated by law enforcement agencies and their abusive clients and the*

¹²⁴ Cook, J.R.1995. Human Rights of Women. Philadelphia; University of Pennsylvania press, 555.

¹²⁵ Shanghala, S.E 2000 The Legalization of the profession of Sex work in Namibia. Windhoek; UNAM, p20.

*reallocation of meagre police resources to the policing of serious and violent crimes” would decriminalization of sex work”.*¹²⁶

However on the other hand legalization would permit the practise of sex work but under regulated means. “Legalization means permitting prostitution with regulated conditions. This usually includes licensing, zoning restriction, requiring medical examinations, mandating of the use of condoms, protecting minors and other measures to protect the safety, freedom and health of the sex workers” says Shanghala.¹²⁷

The objective of legalization are to accept the reality and inevitability of sex work, which is by no means a form of approval but turning into a reflection of social need and moral repugnance. Legalization provides for the regulation and control by government agencies, the imposed health checks, the taxes for sex workers and not per se decriminalization without any controls. Therefore the sex worker is not viewed as a criminal and can approach the authorities for relief and protection and the authorities will look at the sex worker as any other citizen who must be protected under the constitution. By invoking a description that moves away from the sex worker as a deviant and towards the acceptance of sex work will signify a move towards accepting the sex workers and treating them equally.¹²⁸

The legalization would incorporate the mandatory periodic testing of sex workers. Proposals to such effect have been met with a lot of criticism that not only does the mandatory testing amount to an infringement of a sex workers common law and constitutional rights, but also contradicts the doctrine of informed consent.¹²⁹ It is further contended that the right to equality and freedom from discrimination of sex workers is infringed as they are singled out of the rest of society and condemned as a risk group.¹³⁰ Respect for human dignity is said to be violated where a contradiction is created by legalizing the practice and then stigmatizing the sex workers and it is further contended that

¹²⁶ Shanghala, S.E 2000 The Legalization of the profession of Sex work in Namibia. Windhoek; UNAM, p20

¹²⁷ Shanghala, S.E.2000. The Legalization of the Profession of Sex work in Namibia. Windhoek, UNAM, p21.

¹²⁸ Cook, R.J.1995. Human Rights of Women. University of Pennsylvania press; Philadelphia, p 555.

¹²⁹ La Font, S. 2008. Help wanted: Sex workers in Katutura, Namibia. Windhoek; John Meinert, p15

¹³⁰ Article 10 of the Namibian Constitution.

the search of a person to mandatorily withdraw blood further violates the privacy clause in the Constitution.¹³¹

Criminalization of sex work is the current position of the Combating of Immoral Practises Act, which maintains the status quo of prostitution currently. The Act fails to criminalise sex work but criminalises the use of the proceeds of sex work for the subsistence of any activity. Criminalization involves the rendering of sex work which is punishable by law with fines and lock ups. Criminalization has traditionally been based on the argument that sex work generates crimes and contributes to the spread of venereal disease. While it can never be disputed that prostitution appalling the answer however lies in education rather than prohibition of sex work. It is also submitted that sex work constitutes a nuisance. A lot of authors like Milton see merit in this argument, but argues whether the answer to that does not lie in the regulation and zoning of sex work. According to Albertyn criminalisation involves the criminalisation of some or all aspects of sex work and the rationale behind criminalisation is to act as a deterrent.¹³²

Criticism of sex work argue that sex work is not procreative, it is degrading and legalizing it would not change its debasing character for both partners, they further argue that since sex work is morality wrong and taints the society it should be criminalized. However, Namibia should reconsider the laws surrounding the profession and seek to make a clear decision regarding sex work in Namibia.

¹³¹ Article 8 and 13 of the Namibian Constitution.

¹³² Bonthuys, E and Albertyn, C. 2007. Gender, Law and Justice, Johannesburg; JUTA, p361.

CHAPTER 4

THE FIELD WORK

The findings

The research into the nature and conditions of sex work in Namibia points out the fact that adult prostitution is done because of several reasons, amongst the reasons is poverty. This is particularly important to be listed because of the absent element of choice. The fact that the sex worker goes to work in the street, not because she wants to but because she is starving, her family is starving and there is no other choice but to go out in the streets and make a living. While on the other hand, there is a list of professional prostitutes, who just want to sex work and do not do it out of poverty. These sex workers are however are in the minority in Namibia.¹³³ As a result of the above it can be said that the majority of sex workers in Namibia go out to the streets out of poverty. The majority of sex workers stand on the Okahandja highway in short miniskirts to try and attract their customers, and in streets and areas around the industrial development areas, especially the northern industrial areas. The group of street sex workers was found to be more marginalised in social and economic terms. Namibia is a country with a high unemployment rate and this resulting in the poor seeking alternative means to make a living.

In the field work report, it was discovered that the researcher found extensive evidence of police abuse toward sex workers by the police including sexual violence and beatings. Sex workers are abused and beaten by the police officers and sometimes even left permanently injured. "The police take all the money from us that we have worked for and sometimes even hit us with the police cars and have left my friend bruised to such an extend she cannot walk anymore", said Roxy a sex worker in the district of Windhoek near the Kalahari Hotel. Another sex worker from the northern industrial area, said that some men would just drive and hit sex workers for no reason and nothing would be done if the incident was reported to the police officers.

Organizations working with sex workers such as the LAC in Windhoek have documented police violence against sex workers. Many of the sex workers interviewed for this research

¹³³ These sex workers proved hard to find and refused to talk to the author of the paper.

said that they had been raped and sexually assaulted by the police. “We are scared to report the rape because sex work is illegal, we are just too scared to do anything but the government should seek out ways to help us please” Meggie said when she was interviewed voicing her cry to the government for help with tears in her eyes. According to Selma “the police arrest us, beat us up and take advantage by raping us”, she further adds that “on the street on the street the police put pepper spray guns on our private parts, hands and eyes, on those who wear mini-skirts”. In addition to forcing the sex workers to have unsafe sex with them, police officers may also confiscate or destroy the sex workers condoms, making it impossible for workers to protect themselves. The police officers further confiscate the sex workers hard earned money and there is not much that the sex worker can do because it is the law enforcement agent that has taken the money. When the sex worker seeks to report the incident to higher authority no particular attention is given to her and the news falls on deaf ears, sometimes the police pretend to open a case to make the aggrieved sex worker believe that she has a case but nothing happens thereafter.

The police also unlawfully arrest the sex workers on the street and use the arrest as a way to extort money from them. The police invoke regulation on loitering or public conduct to detain the sex workers. In order to release the sex workers the police charge ranging from N\$300-350 in order to be released.¹³⁴ Roxy confirms that “they refuse to give any official receipt for the money they pay or any formal indication that they were arrested for loitering therefore once we pay we can’t go to the court as there is no record of the charges”. The amounts that are confiscated by the police from the sex workers constitute a significant amount of the workers income. The constant raid by the police on the sex workers compromises not only their health and safety but by robbing them of the means to taking care of themselves and their basic well-being. Failure to pay the extortion money to the police may lead to incarceration and sometimes even time in jail. Selma, a sex worker based in Windhoek, Namibia spent three months in jail for failure to pay a fine. She says the police arrested me again in January and kept me in jail until April, I had no one to call who could come and pay N\$300-00 so they kept me that whole time, with just a little porridge and two slices of bread a day”. When faced with systems of extortion sex workers attempt to

¹³⁴ Sometimes the police just take all the money from the sex worker, who must then walk home after the release.

protect themselves by fleeing but this leads to equally detrimental situations. Extortion seems to be the most important factor causing unlawful arrest, but from time to time the police use their power for other reasons. Sometimes the police may unlawfully detain the sex workers in order to perpetrate sexual violence. According to Roxy, the police take them and drop them off in secluded areas. “Sometimes the police take sex workers in their cars and drop them very far off outside the city with no money and they must struggle to come home” Roxy adds. These acts cause not only psychological terror and place sex workers at an even higher risk of violence. “Imagine being drop of in the bush” Selma adds. Selma tells her story of a client who picked her up in a lavish car and they drove out into the mountains, he got out of the car and asked her to take off all her clothes, which she did hence the character of sex work, he took all her clothes and put them in the car, and still she was not surprised, but to her dismay he drove off with all her clothes and her hand bag. She was left to walk from the outskirts of Windhoek, naked and barefoot.¹³⁵

Usually in order to protect each other the sex workers have formed groups that work together and write down car number plates if one of the mates are gone with, therefore this group received minimal violence.

Arrest unlawful or otherwise is a frequent experience for many workers in all areas covered by the research. Periods spent in detention knock off-balance the life’s of sex workers in Windhoek. The threat of constant arrest leaves sex workers feeling as if they are constantly under blockade because violence usually comes with the arrest. Once in arrested, sex workers living with the HIV/AIDS suffer treatment interruptions, Emma says that “you can’t take you antiretroviral drugs or any sort of medication that you might need”. Some of the sex workers are forced to do unpaid labour while in detention. At the police stations they are forced to clean the toilets and wash the passages.

Sex workers who participated in this research were all very reluctant to seek any form of protection from the relevant authorities. The reason why the sex workers in Windhoek do not seek protection is due to the fear of abuse, rape and other forms of violence. Sex workers have no recourse when the people who abuse them are police officers. Additionally the general public is well aware of the fact that the police offer no protection to

¹³⁵ This illustrates the risk and violence that sex workers on the streets experience and the need to assist the sex workers in order to protect their human rights.

the sex workers and this creates an attitude among the community that sex workers do not have rights causing them to be at even more risk amongst the community.

With the exception of one known case against police officers in Windhoek, sex workers efforts to denounce police violence against the sex workers have been futile. Sex workers have further reported that in the past few years eight sex workers have been murdered along the highway where they worked. This research has also found that violence occurred outside of the context of the sex work. Gangs known as Tsotsis target and rob sex workers of their money. Furthermore, people in local communities who know them to be sex workers sometimes attack and beat saying they taint the nation with HIV/AIDS. Roxy, a sex worker from Katutura survived an attack and reported that "A man left me naked on the street and no one would help me, adding that it serves me right." This violence is caused by the stigma that is attached to sex work.

It can be also concluded from the research that sex workers are as unlikely to receive police protection when a crime is committed against them by members of the public as they are when the crime is committed by law enforcement agents themselves. Reporting a crime may require that the sex worker communicate with the same officers that have harassed them in the past. In Namibia, a crime must be reported to the police station closest to where the attack took place. This only means that sex workers seeking to report rape are obliged by law to report it to the same station at which they were detained or from local police stations in the areas in which they work.

Sex workers in Windhoek have organised to defend themselves by protecting each other from raids by the police and working together in groups. The police have however undermined this solidarity by arresting them. Sophie a sex worker who was a friend to one of the girls who died on the high way says that "the girls who were killed were all working alone; we must stick together and protect each other". Failure by the relevant authorities to protect sex workers has led to them turning to drug dealers to protect them from violence and arbitrary arrest for a fee.

According to Jayne Arnott and Anna-Louise Crago¹³⁶, Walvis Bay provides a different picture that may point to ways in which sex workers can be protected from violence. Sex work in certain clubs is tolerated and relations between the police and sex workers are not as negative as in other parts of the country especially Windhoek. The authors also pointed out that sex workers in Walvis Bay reported very few instances of violence perpetrated by police officers. The police in the city address the problems of sex workers by helping them with clients who didn't want to pay or who became abusive towards them. The fact that sex workers can turn to the police for assistance reduces the perception among the communities that sex workers are easy targets. As a result violence against sex workers in Walvis Bay in general was significantly less in comparison to Windhoek.

The HIV epidemics in Namibia is very severe, as a result low-income and marginalised communities are often areas where many sex workers live and work, the areas are affected by the HIV epidemic compared to areas with access to greater resources. This research has further proved that sex workers were unable to access adequate prevention, testing counselling and treatment services. Many people in Windhoek believe that sex workers are a threat to society and the reasons why HIV is rising with the amount of infections per day.

Access to safer materials is another key element of efforts to prevent HIV and empower the sex workers. The research found that many sex workers were unable to access sufficient quality condoms. Although there are condoms being distributed in the government offices, none of the Windhoek based sex workers have access to free condoms unless at the hospitals. None of the sex workers interviewed was able to access free lubricant and as a result many sex workers reported discomfort and injury after the long hours of sex,

¹³⁶ Arnott, J and Crago, A.2009. Rights Not Rescue. South Africa; Open Institute, p43.

CHAPTER 5

CONCLUSION

Research suggests that sex work is linked to wider social and economic reasons. In the Namibian context, which has high levels of poverty and economic inequality, it can be concluded that many women resort to sex work for purely economic reasons. Once involved in sex work, many sex workers become vulnerable to abuse, exploitation, feelings of low self-worth and prone to drug and alcohol abuse.

Violence against women is a crime and must be treated as such. Arrested or detained women shall not suffer discrimination and shall be protected from all forms of violence or exploitation.¹³⁷ The principles set out above are in the Namibian Police Human Rights Manual and can be said to include all women in Namibia and even sex workers.

The government should take the stance on human rights that is proposed by human rights activist, which is *“To protect the inviolability of human dignity in Namibia is the ultimate objective of the concept of human rights. Human rights are considered and officially accepted as universal, regardless of their genesis or cultural manifestation. History and experience show, however, that respect for the dignity and rights of human beings cannot be taken for granted: they must be constantly nurtured and vigorously guarded”*, these were the words of Anton Bosl and Joseph Diescho in their book titled Human Rights.¹³⁸

The moral and economic case for the legalization of prostitution is overwhelming. Government prohibition and regulation blatantly violate the rights of the individual and are economically expensive. Therefore, Namibia’s views and strategies on the topic of prostitution must undergo an immediate and radical change. The time has come to abandon the nation’s archaic attempts to legislate personal morality. The time has come to face up to the facts aimed to implement the only policy that can truly make a positive difference; the time has come for the legalization of prostitution.

There are various feminist approaches to understanding sex work and there are different legal and constitutional responses, focusing on different aspects of sex work and the sex

¹³⁷ Legal Assistance Centre.2001. Namibian Police Human Rights Manual. Windhoek, Capital press, p 186.

¹³⁸ Bosl, A and Diescho (Ed).2009.Human Rights in Africa. Macmillan Education Namibia; Windhoek 4.

workers lives. In Namibia there have been several attempts by women's organisation and human rights organisations, to try and secure the decriminalisation of sex work through the courts and through advocating for law reform.¹³⁹ These organisations further seek to protect the human rights of sex workers in the industry.

The illegality of sex work in the Namibian society has not prevented its presence. Instead what it has done is marginalise sex workers, putting them at cornerstone of human rights violations such as beating, harassment and HIV and Aids. In order to address this issue the government should decriminalise sex work in order to empower sex workers to seek redress when forced to engage in a potentially life threatening activity. Sex workers who are violated by their clients need to be able to report crimes committed against them to the police, otherwise the constitution does not clothe them with protection as envisaged in the Bill of Rights. Looking at poverty the prevalence of HIV and AIDS in Namibia, morality should not stand in the way of human rights, health and the dignity of its citizens at all as morality now is distant place in time.

This research suggests that sex work is linked to wider social and economic relations. In relation to the high levels of poverty and economic inequality in Namibia, many women resort to sex work for purely economic reasons. The author of this paper argues that many sex workers become vulnerable to abuse exploitation and stigmatisation by pimps, clients and police, as well as feelings of low self worth, drugs and stigmatisation by society.

As mentioned above in the paper, there are three legal options for the regulation of sex work that the Law Reform Commission in Namibia, namely, criminalisation, decriminalisation and legalisation. It should be noted that regulation of the sex industry does not automatically protect the sex worker.

¹³⁹ Amongst these organisations is the Legal Assistance Centre and Women's Action for Development.

QUESTIONNAIRE

PART A

1. What is Prostitution?
2. What are the different types of Prostitution?
3. How many prostitutes are there in Windhoek?
4. Should Prostitution be legal in Namibia?
5. Should it rather be legal only in brothels?
6. Is prostitution a victimless crime?
7. Would legalising prostitution decrease sexual violence against women?
8. Would legal prostitution better protect prostitutes from violence?
9. Should police resources be used to assist prostitutes?
10. Do the police abuse prostitutes who are arrested?
11. Should the government shame Johns by putting their faces on the Billboards, television and the internet after their arrest?

PART B

1. What is the difference between the decriminalization and legalization of prostitution?
2. Should prostitution be decriminalised but not regulated?
3. Should selling sexual acts be decriminalised but buying criminalised such as in Sweden.

PART C

1. Is legal prostitution a legitimate business?
2. Does individual economic opportunity justify legalising prostitution
3. Should the government collect taxes from prostitution?

PART D

1. Should people have a right and freedom to become a prostitute?
2. Is prostitution a freely chosen profession?
3. Is legal prostitution a part of sexual liberation?

4. Do prostitutes want to be prostitutes?
5. Should prostitution be legalised for the benefit of society?
6. Does law enforcement want prostitution legalised?
7. Are children involved in prostitution that are under age?
8. Does the scratching of laws change the morals of society

PART E

1. Can you tell us how you work and where you do business?
2. What are the benefits and disadvantages of this trade?
3. What could support sex workers to maintain their prices, work more safely and protect their health at work?
4. If you have another income do you use any of this income to make your sex work easier and safer?
5. Can a sex worker working where you work make enough money if she insists on condom use?
6. What is the charge/price ranges for sex in your area?
7. Can you tell me how the laws have been used against you as a sex worker or others that you know?
8. Can you give me an example of how you have experienced different people using the law against you? Such as the people you work for, clients, the police and the community?
9. Do you have examples of being discriminated against, being abused, or treated differently because people know you are a sex worker?
10. Have you been forced to pay off police or anyone else in the past two years?
11. Have you ever been arrested or fined for sex work?
12. Have the police ever threatened you with violence?
13. How often are the police violent with sex workers?
14. Have any of your clients ever forced you to have sex against your will in the past two years?
15. Do most sex workers that you know, know their HIV status? If not why?
16. Can you describe the legal and policy framework related to sex work in Namibia?

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