



2 March 2016

## SELECT COMMITTEE ON PETITIONS AND EXECUTIVE UNDERTAKINGS: CONTENT OF EMBRACE DIGNITY PETITION AND EXISTING LEGAL FRAMEWORK ON SEX WORK

### 1. BACKGROUND

Over the period of the existence of the Constitutional Court, established in terms of the Constitution, numerous cases concerning the human rights of individuals have been heard by the court. Since the Constitutional Court is the court of final instance<sup>1</sup> in matters concerning constitutional rights, the court has produced numerous judgements which set the course for future matters of the same nature.

Currently though, the long-debated 'moral' issue of sex work has been at the forefront of legal legitimacy versus moral construct of society. The criminalisation of sex work was dealt with by the Constitutional Court in *S v Jordan*.<sup>2</sup> The appellants in this case, a brothel-owner, a brothel employee and a prostitute or sex worker, were convicted in the Magistrates' Court of contravening the Sexual Offences Act (No. 23 of 1957). In the case court held that prostitution does not infringe the rights to human dignity and economic activity and that if it does limit the right to privacy, such limitation is justifiable.<sup>3</sup> The Constitutional Court further articulated that it is up to Parliament to decide which avenue should be followed when regulating prostitution.<sup>4</sup>

Sex work is currently criminalised under South African legislation in terms of the Sexual Offences Act (No. 23 of 1957). This legislation criminalises engaging in intercourse for reward, living on the proceeds of sex work, and operating a brothel.

According to research conducted in 2012, some of the main reasons advanced for the criminalisation of sex work include the following:

- A range of moral preferences;
- Sex work as a public nuisance;
- The view that sex work is inherently exploitative and is characterised by domination and coercion;
- For health concerns, in particular the prevention of sexually transmitted infections;
- To prevent criminal activity, such as drug use and distribution, and human trafficking;

<sup>1</sup> In terms of the hierarchical nature of the judicial system; the Constitutional Court is the final court which may hear, and adjudicate upon a matter.

<sup>2</sup> 2002 (6) SA 642 (CC)

<sup>3</sup> Ibid para 56

<sup>4</sup> Ibid para 72



- To curb the abuse of sex workers.<sup>5</sup>

However, despite this, sex work is a burgeoning industry with street based workers being visible on many major roads, and newspapers openly advertising the services of 'indoor' sex workers. Thus, given the inability of the State to effectively outlaw sex work and the need to protect sex workers from the many abuses they endure within the industry, there has been debate for the past decade on whether there is a need for legislative reform to decriminalise sex work.

## 2. What are the legislative options open to South Africa with regards to the regulation of the sex industry?<sup>6</sup>

The following options can be considered in dealing with the sex industry:

- **Complete criminalisation** – which renders it a crime to engage in sex work or any related activity. Criminalisation can, however, be divided into two categories, prohibition and abolition. *Prohibition* is criminalising all activities related to sex work, while *abolition* does not prohibit the sale of sex, but makes illegal the solicitation and procurement of sex. Abolition is employed to deal with the negative impacts of sex work by focusing on the demand and management of sex work, instead of the supply. Both approaches serve to end sex work, not regulate it. Prohibition is the current approach in South Africa, while Sweden has legislated for abolition.<sup>7</sup>
- **Legalisation** – this practice makes it legal to engage in sex work, but under specific conditions. This may include licencing of sex workers, registration of brothels, and regulated health checks. Countries such as the Netherlands, Germany, Senegal and the USA State of Nevada have taken this approach.<sup>8</sup>
- **Decriminalisation** – While decriminalising may be somewhat similar to legalising, in the sense that when decriminalising, legislation criminalising sex work is repealed. The two forms of regulation differ in so far as the measures and controls by the state. With legalisation the state institutes sex work specific regulations, whereas with decriminalisation sex work is regulated under 'ordinary' labour regulations, as with any other economic activity. The aim of decriminalisation, much like legalisation, is to improve the working conditions of sex work, but to also eliminate any underground operations that may exist outside of the controls required for the legalisation approach. New Zealand has adopted decriminalisation as an approach, although there are some requirements that brothel owners must adhere to but by and large street based sex work is still illegal.<sup>9</sup>

<sup>5</sup> Mogorosi, T (2012) Parliament of RSA

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid





- **Unregulated** – This entails no State regulation where sex work is neither legal nor illegal. Countries that adopt this approach include those in Central and East Europe and Central Asia.<sup>10</sup>

Sex work may well be challenged on the basis that its non-regulation interferes with a person's right to freedom of association, and freedom of trade, occupation and profession.<sup>11</sup>

### 3. CONCLUSION

The moral construct of society seems to find reverence in either religious or cultural paradigms which notably have changed over the past few decades, with the consciousness of a human rights-based approach to the law. Yet, certain issues of a 'moral' nature, such as sex work, still seek to find its legal footing within the new constitutional dispensation. One of the arguments for not decriminalising sex work is based on issues of morality. Furthermore, the Constitution does provide leeway for the limitation of certain rights when tested against 'a law of general application' in terms of the limitations clause. Accordingly, the suspension of human rights in these circumstances are justifiable. However, the strict application of the limitations clause should be noted.

The question as to whether moral issues can or cannot be legislated depends upon the moral issue in question and whether the corresponding human right weighs more, which requires a balancing exercise. This test can only be applied on a case-by-case basis.

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<sup>10</sup> Ibid

<sup>11</sup> Section 22 of the Final Constitution

