

Submission on SALRC Report – Sexual Offences – Adult Prostitution

Michelle du Toit
LLB (Rhodes) LLM (Stellenbosch)
Legal Researcher
Tekano Atlantic Fellow

INTRODUCTION

This submission focuses on two issues concerning the SALRC report on adult prostitution. Firstly, this submission would like to emphasise a fundamental failure to distinguish between forced prostitution and prostitution as work. The consequences of failing to distinguish between these has severe implications for the arguments made, especially in relation to human trafficking, crime and violence. The second issue is that of constitutionality. It is submitted that the SALRC report fails to substantiate its position that the criminalisation of sex work is constitutional. This submission seeks to point out flaws in the arguments made in the report in this regard.

DISTINCTION BETWEEN FORCED PROSTITUTION AND PROSTITUTION AS WORK

The SALRC report fails to distinguish between forced prostitution and prostitution as work. They are not the same. Forced prostitution is a crime and is internationally recognised as a violation of human rights. It is forced prostitution that bears a relationship with human trafficking and exploitation, not prostitution as work.

It is unfortunate that these two practices are recognised by the same name. Nonetheless, there is a difference between a person being forced to perform services as a prostitute and a person who willingly chooses prostitution as income-generating work. As there is a distinction between forced prostitution and prostitution as real work, it is also necessary to distinguish the arguments made against these practices. The SALRC report fails to do this but uses its arguments against forced prostitution, based on the relationship to human trafficking and exploitation, to denounce prostitution as real work. This is a fallacy and a fundamental

definitional error on their part. It denies the agency of a person who chooses prostitution as a line of work and reduces them to a pawn of criminal conduct.

For future arguments, it is suggested that this distinction is clarified and supported by the necessary evidence.

SEXUAL RIGHTS AND AUTONOMY

Sexual and reproductive health rights include women's right to choose what to do with her body. It makes her an agent of her sexuality, not a victim. Here I wish to quote Cook on the relationship between women's sexuality and morals:

“Women's reproductive health raises sensitive issues in many legal traditions because it relates to human sexuality and affects moral order. The moral belief was this if women could enjoy sexual relations, with recourse to methods to prevent pregnancy and sexually transmitted diseases, sexual morality and family security would be in jeopardy. This traditional morality is reflected in laws that attempt to control women's behaviour by limiting, conditions or denying women's access to reproductive health services.”¹

This systemic issue extends into the realm of depriving women of sexual and reproductive liberties, which are enjoyed by men. Such reproductive liberties include, *inter alia*, both the choice to and not to procreate; both the choice to or not to engage in sexual relations.

Under international law, the United Nations Committee on Economic Social and Cultural Rights explicitly recognises women's sexual and reproductive health rights:

“The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom.”²

¹ R J Cook 'International protection of Women's Reproductive Rights' (1992) 24 *N.Y.U J Int'L & Pol* 645 645-646.

² 2002 (6) SA 642 (CC) para 8.

In recognising the freedoms linked to sexual and reproductive health rights, the Committee's General Comment 14 on the Right to Health ('General Comment 14') also recognises that certain practices and societal norms deny women their full enjoyment of sexual and reproductive health rights.³ General Comment 22 on the Right to Sexual and Reproductive health⁴ ('General Comment 22') similarly provides:

“The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health.”⁵

It recognises that, because of women's reproductive capabilities, the realisation of the sexual and reproductive health rights is fundamental to their enjoyment of all their human rights.⁶ International law clearly recognises a women's autonomy in whether to or not to engage in sexual relations. Recognition of women's autonomy is a step to empowerment and addressing systemic discrimination. This autonomy is integral to the enjoyment of sexual and reproductive health rights and in giving women due recognition beyond the reproductive roles.

CONSTITUTIONALITY AND THE ISSUE OF A LEGITIMATE GOVERNMENT PURPOSE

Section 12 of the Constitution of the Republic of South Africa, 1996 provides rights regarding the freedom and security of the person. Section 12(2) provides:

“Everyone has the right to bodily and psychological integrity, which includes the right-

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and

³ United Nations Committee on Economic, Social and Cultural Rights General Comment No. 14: *The Right to the Highest Attainable Standard of Health (art 12 of the Covenant)* UN Doc E/C.12/2000/4 para 21.

⁴ United Nations Committee on Economic, Social and Cultural Rights General Comment No. 22: *Right to Sexual and Reproductive Health (art 12)* UN Doc E/C.12/GC/22.

⁵ Para 11.5.

⁶ Para 25.

(c) not to be subjected to medical or scientific experiments without their informed consent.”

This is evidence that bodily autonomy is constitutionally entrenched, and this certainly includes sexual autonomy.

Much of the SALRC report, as far as constitutional law goes, relied on the case of *S v Jordan*. Arguably this is a flawed reliance, for a number of reasons. Firstly, this case was decided upon under the Interim Constitution. The judgment recognises that the issue of autonomy, which was raised by SWEAT, cannot be addressed because the Interim Constitution did not make provision for it. Section 11 of the Interim Constitution provided the right to safety and security of the person, but in a more limited form:

1. Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
2. No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment

This difference is fundamental in looking to *S v Jordan*⁷ for authority. Arguably, if the same logic used in the *S v Jordan* case were to be applied today, under the present provision of the right of safety and security, the result would be different because of this recognition of autonomy. The Court reasoned its reliance on the interim Constitution, but perhaps failing to see how this recognition of bodily integrity implicates autonomy was a fatal flaw in grappling with the case which ultimately concerned sexual autonomy.

Similarly, the right to economic activity is different under the 1996 Constitution. The right to economic activity under the Interim Constitution was replaced by section 22 of the 1996 Constitution which provides:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁷ 2002 (6) SA 642 (CC).

However, these textual differences are not the only difference to consider in the current question regarding the de-criminalisation of sex work. The stigma and social perceptions of sex work has changed. O'Regan J and Sachs J, in a minority judgment, held:

“Their [prostitutes] status as social outcasts cannot be blamed on the law or society. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the market place, they undermine their status and become vulnerable.”⁸

It is 2018.

Both the arguments around discrimination and the general limitation of rights grappled with the issue of a limitation having to be *'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'*.⁹ The Interim Constitution made provision for this, but the 1996 Constitution also requires the following factors to be considered when there is a limitation of rights:

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

Similarly in an inquiry of discrimination, if there is differential treatment, it must be determined if the differentiation is connected with a legitimate government purpose. This is where I argue the circumstances of *S v Jordon* differ greatly from present day. In *S v Jordon* in both the arguments regarding the limitation of rights and discrimination, the criminalisation of sex work was just accepted as a legitimate government purpose. The majority cites the following:

“The state has advanced several explanations for the suppression of commercialised sex. First, the business is said to breed crime which is not confined to the sale of sex but which extends

⁸ Para 66.

⁹ Section 36 of the Constitution, emphasis added.

into violent crimes. Second, the business result in the exploitation of women and children. Third, it leads to trafficking in children. Fourth, it leads to the spread of sexually transmitted diseases.”¹⁰

One does not need a law degree to determine that reliance on such claims absent of evidence in law is irrational. Why is the criminalisation just accepted as a legitimate government purpose? The SALRC report makes the same mistake of failing to establish this *in law*.

Moreover, if it were ever a legitimate government purpose I would question whether this would be the same case today in 2018? Women’s sexual autonomy is more recognised, sex work is recognised and carries less stigma than it did 16 years ago. The SALRC report refers to women’s exercise of abstinence and the effect that de-criminalisation of sex work may have on that. However, if women’s’ right to refrain from sexual activity is recognised, then it follows that women’s’ right to engage in sexual activity should also be. You cannot only have the right not to do something; you must then also have the right to do it. This is the fundamental issue of choice and autonomy.

The SALRC report refers to the power dynamics and the structural issues which may make women vulnerable in such work. To argue against de-criminalisation on this basis is also fatally flawed. Saying that sex work must be criminalised because society is systemically oppressive of women and their sexual autonomy is like saying that because society is homophobic it is just better to criminalise it. NO. Again, *in law*, and in logic – the SALRC report lacks a substantial legal argument for its case. This is primarily due to its reliance (albeit indirect) on the assumed ‘legitimate government purpose of criminalising commercial sex.

It is suggested that the SALRC clarify why and how this is a legitimate government purpose in 2018. In this regard I suggest a close legal analysis of section 36 of the 1996 Constitution, which differs from the Interim Constitution which was relied upon in *S v Jordan*. On this basis, the issue of discrimination should be re-examined, as should potential violations of the right to dignity, freedom and security of the person and the right to freedom of trade, occupation and profession.

A part of *S v Jordan* which should influence the steps forward is a statement by Ngcobo J:

¹⁰ 2002 (6) SA (CC) 642 page 9.

“Much of the argument in this case, and the evidence placed before this Court, was directed to the question whether the interests of society would be better served by legalising prostitution than by prohibiting it. In a democracy these are decision that must be taken by the legislature and the government of the day, and not by the courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability.”¹¹

This is an important point to note. The decision of what is and what is not a legitimate government purpose lies with the government and is to be translated into law by the legislature. This must reflect the ‘will of the people’. For this reason, it is suggested that more weight be placed on the submissions of those affected rather than an old judgment and deductions from comparative analyses.

¹¹ Para 30.