

THE DECRIMINALISATION OF VICTIMLESS SEXUAL OFFENCES

BY

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ABSTRACT

This dissertation serves as an analysis of the current legislation criminalising both prostitution and homosexuality. The object of the dissertation is to explore the possibility of decriminalisation in the aforementioned areas of the criminal law, on the premise that the criminalisation of the aforementioned areas is not justified.

The dissertation provides an overview of the historical progression of the law in relation to the sexual offences of homosexuality and prostitution, and examines the legislative trends that emerge within the historical context.

The law and its relation to morality is explored, with the objective of examining whether morality can serve as a sufficient justification for criminalisation of conduct. Additionally the legislative justification for criminalising both homosexuality and prostitution is explored in order to determine the legitimacy thereof.

The current legislation is defined and examined. The Constitution of South Africa, and specifically the Bill of Rights is investigated to determine whether there can be any foundation therein for an appeal for decriminalisation.

Finally, an examination of legislative alternatives is documented. The conclusion is then derived therefrom.

The purpose of the dissertation is to examine the decriminalisation of victimless sexual offences, and the results of the research demonstrate favourably towards such an initiative.

DECLARATION

I declare that the contents of this thesis are as a result of my own original work except where otherwise acknowledged.



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“THE FUNCTION OF LAW IN SOCIETY IS NOT TO PROHIBIT BUT
TO PROTECT, NOT TO ENFORCE MORALS BUT TO SAFEGUARD
PERSONS, THEIR PRIVACIES AND FREEDOMS.”

BISHOP JOHN A. T. ROBINSON

CHAPTER 1

INTRODUCTION

1. GENERAL INTRODUCTION

This dissertation seeks to examine the application of South African Criminal Law in relation to persons who practice prostitution or engage in homosexual sexual activities.

The reasons for focussing on prostitution and homosexuality emanated from several factors:

- Both crimes are classified as sex crimes, which could further be distinguished by the fact that they were apparently victimless.¹
- There appeared to be a desperate demand for intercession² into current practices emanating from application of the laws, which indicated discrimination and abuse of human rights. Additionally the justification of legal intervention in both of these spheres needs to be revisited. The chief motivation behind this being that an element of private morality was being tampered with in an unsatisfactory manner through legal intervention.

1. The discussion of the exact extent and meaning of victimless crimes follows at a later stage. Suffice it to say that in most instances the participants were both willing and consenting parties to the 'crime' and there was no injury incurred as a consequence of the encounter by means of which the law could justify its intrusion.

2. Involving a reevaluation of the law, and where necessary, a reform thereof.

- With regard to homosexuality it appeared that the law was trailing frighteningly behind social developments³. The enforcement of laws against homosexual activity resulted in a situation akin to the enforcement of the Immorality Act in the 1950's and 1960's wherein the police spied on persons, peered through gaps in curtains, and peeped through keyholes.⁴ The law surely has a more dignified and important role to perform in society than this function, and accordingly the need for law reform was absolutely imperative. Additionally, the human rights violations were numerous, people were deprived of their privacy, they were treated as inferior citizens, and were labelled criminal, all of which begged for law reform.

- With regard to the issue of sex work, this has traditionally been portrayed as the last desperate graspings of a socially destitute person to sustain themselves economically. However the role of a sex worker as a hapless individual lacking the capacity to integrate socially on a more acceptable plain, is perhaps a societal means of expressing revulsion towards any individual who voluntarily enters the profession. There is no consideration towards the individual's capacity to control their earnings as any other

3. The embracing of a new democracy in South Africa, and the consequent social changes have lead to a society which is demonstrating an embracing of multicultural beliefs and values, and a toleration of individual autonomy.

4. Debates - House of Delegates. 6 October 1987 at 3847.

worker might. If the law's intervention were therefore of no greater benefit other than to the puritans⁵ who support their own form of rigid morality, then the need for reform becomes overwhelmingly obvious.

2. DISTINCTION BETWEEN DECRIMINALISATION AND LEGALISATION

The removal of the stigma of immorality may not be sufficient protection against societal prejudices, and accordingly a distinction between the semantic meanings of **decriminalisation** and **legalisation** should be explained more clearly.

To decriminalise would effectively involve the removal of criminal prohibitions against the performance of a certain act.

“The European Committee on Crime Problems defines decriminalisation as ‘those processes by which the competence of the penal system to apply sanctions as a reaction to a certain form of conduct is withdrawn in respect of that conduct. Aaronson et al see decriminalisation as a form of legal policy change.’”⁶

Decriminalisation thus does not involve the state in proclaiming that an act is legal, but distances the state from the act by allowing the state to remove prohibitions against the performance of the act.

5. By this it is intended that the bulk of opposition arises out of moral abhorrence for the act of selling the service of sex, and accordingly the main protagonists in this opposition emanate from the ranks of the church. The description of ‘puritan’ is therefore intended to convey a limited morality and a lack of acceptance of all that is not the general norm.

6. Sunette Lotter. “Decriminalisation: A Principled approach.” (1994) *Consultus* 7:2 130. Wherein the following citations should be noted: Council of Europe. Report on Decriminalisation. (1980); D. E. Aaronson et al. *Public Policy and Police Discretion, Processes of Decriminalisation*. (1984).

Legalisation of acts involves state endorsement of the act in such a fashion as to legitimate the act. In most instances this legitimisation extends to mean state control over a particular activity in the form of regulations etcetera.

With regard to the issue of prostitution the arguments submitted are directed towards the decriminalisation thereof, involving no state approval, but a removal of discriminatory state practices that create greater difficulty for all practising the profession to protect themselves sufficiently.

With regard to homosexuality which has added protection arising out of the Bill of Rights prohibiting any discrimination on the basis of sexual orientation, decriminalisation is advocated, with the possibility of legalisation within aspects of homosexuality⁷ in order that additional protection be afforded to all who may be homosexually inclined in order to protect them from entrenched prejudices that are demonstrated by society.

3. CHOICE OF PARTICULAR WORDS WITHIN THIS DISSERTATION

In this work certain words are used primarily on the basis of their common usage and understanding within the legal profession. The word **prostitute** will be used interchangeably with the words **sex worker**, both words seeming to be accepted and rejected in all their controversiality by the members of this profession. There is as yet no conformity within any literature as to which would be the favoured term of reference and accordingly it seemed more

7. For example in the entrenchment of labour policies prohibiting unfair discrimination against homosexual persons etcetera.

diplomatic to support neither totally (although in all honesty the word prostitute is more favourable in that it does not derogate the members of the profession to mere labourers of sex, but affords them slightly more dignity).

Likewise within the focus on homosexuality the term homosexual does not receive unanimous support from within the gay community. However I have opted for the use of this word as it allows a degree of androgyny and does not favour either a male or a female definition.

The conclusions will hopefully expose the intolerance of the law to certain aspects of society, which is unjustified, and detrimental to the legal system as a whole. In the words of R. J.

Cruikshank:

“In abandoning toleration one loses other values as well - self-respect and natural dignity, a regard for truth and a dislike of cruelty. The worst thing about intolerance would seem to be the harm it does to the intolerant.”⁸

8. R. J. Cruikshank. *Roaring Century*.

CHAPTER 2

THE HISTORY OF THE SUBJECT

1. INTRODUCTION

The recorded history of prostitution and homosexuality provides an overview of both the origins, and the motivations behind current legislation governing such activities. This is evidenced by the fact that:

“Western states have at different stages in their history both criminalised and decriminalised prostitution, with no clear progression from one policy to another. Even where prohibited, prostitution has not always been vigorously prosecuted because of its ‘victimless’ nature, or lack of complainant, in most cases...prostitution occupies an ambiguous place in criminal law...”¹

The fluctuation in attitudes towards prostitution and homosexuality is evidenced within this chapter, which is intended as a broad overview of these themes in history.

It is difficult to escape the moral indignation and judgements of those providing both the data and interpretations, upon which much of this work is based.² However, the reflections of historical trends governing human sexuality involving “various combinations of law, religion, and morality to achieve control”³ will be examined. Sexual behaviour has been regulated in some fashion by every society on the basis that

-
1. Mary Gibson “Prostitution Laws after Italian Unification: The Role of ‘Regulationist’ and ‘Abolitionist’ Elites.” (1988). *Criminal Justice History*. 105.
 2. D. E. J. Macnamara and E. Sagarin. *Sex, Crime, and the Law*. (1978) x.
 3. James A. Brundage. *Law, Sex, and Christian Society in Medieval Europe*. (1987) 1.

“...sex represents a rich source of conflicts that can disrupt orderly social processes. Human sexuality is too powerful and explosive a force for any society to allow its members complete sexual freedom.”⁴

The economic, social and sexual values of society govern the attitudes expressed by that society to both prostitution and homosexuality.⁵ The trends that will be demonstrated below range from tolerance of ‘deviant’ expressions of sexuality, to rehabilitation and reform of the ‘offenders’ by criminal sanction where necessary, to attempts at total eradication of the ‘problem’ by the implementation of severe legislative penalties, and other variations on these themes.

1.1. INTRODUCTION TO PROSTITUTION

Prostitution, existed from the earliest times:

“Prostitution is coeval with society. It stains the earliest mythological records. It is constantly assumed as an existing fact in biblical history. We can trace it from the earliest twilight in which history dawns to the clear daylight of today, without a pause or a moment of obscurity.”⁶

There is evidence that the first form of prostitution related to religious practices.⁷

“The first ‘cities’ known to archaeologists, built by matriarchal peoples at places like Catal Huyuk (6500 BC) in what is now Turkey, were organised with the temples at their heart. Here the priestesses lived and worked, owning

4. ibid.

5. Richard Symanski. *The Immoral Landscape*. (1981) xii.

6. W. W. Sanger. *The History of Prostitution : Its Extent, Causes and Effects throughout the World*. (1910) 35; H. Evans. *The Oldest Profession - An Illustrated History of Prostitution*. (1979) 11-12; Richard Green. *Sexual Science and the Law*. (1992) 189.

7. “Evidence from contemporary Stone-Age cultures suggests that women were autonomous and uninhibited in their sexual expression...Within these prehistoric societies....culture, religion and sexuality were intertwined, springing as they did from the same source in the goddess. Sex was sacred by definition, and the Shamanic priestesses led group sex rituals in which the whole community participated, sharing in ecstatic union with the life force.” Nickie Roberts. *Whores in History*. (1993) 3; Richard Green op cit (note 6) 189; Vern Bullough. *The History of Prostitution*. (1964) 17; D. A. J. Richards. “Commercial Sex and the Rights of the Person”. (1979) 127. *University of Pennsylvania Law Review* 1207.

and administering the land on behalf of the community; here too, they continued to practice their age-old religion, with the sexual rites through which all people had access to goddess-power.”⁸

The sexual rites that were performed would later in history become redefined as prostitution, rather than being understood as a celebration of ecstatic union with the life-force of the goddess.

“Sacred prostitution was in fact the tradition of sexual ritual which had persisted from the Stone-Age to become an integral part of religious worship in the world’s earliest civilisations...the people continued to pay allegiance to [the goddess] through the ancient sexual rites, and this continued even while the priestesses were being undermined and prised from their positions of power. It is here that the true story of prostitution begins; with the temple priestesses who were both sacred women and prostitutes, the first whores in history.”⁹

The categorising of these sexual rituals under the broad title of prostitution is difficult to understand, other than when examined within the context of the transition from a matriarchal to a patriarchal society. However historical references are not clear on any substantive reason for such a loaded term as ‘prostitution’ being utilised to explain these sacred rituals.

“We cannot be sure which came first, religious or secular prostitution, but both existed as far back as any social records survive. The legal codes of Assyria, for example, dated about 1100 BC, contain explicit regulations about prostitution which clearly distinguish between religious and secular prostitutes.”¹⁰

It is difficult to understand how temple prostitution, came to be defined as prostitution at all.¹¹

Historical records seem to offer no other reason than that the patriarchal society was

8. Nickie Roberts op cit (note 7) 3.

9. Nickie Roberts op cit (note 7) 4.

10. H. Evans op cit (note 6) 28.

11. Laurie Shrager. *Moral Dilemmas of Feminism*. (1994) 102; J. Boswell. *Christianity, Social Tolerance, and Homosexuality*. (1980) 99.

determined to undermine the power of the goddesses and priestesses, and therefore perhaps it was instigated that the activities of these powerful women be called prostitution.¹²

1.2. INTRODUCTION TO HOMOSEXUALITY

Homosexuality is recorded in the works of ancient scholars¹³ and the philosopher Plato also passes comment on the phenomenon. In the *Symposium* Plato had indicated that homosexual love between two men was the purest form of love.¹⁴ An idea which he apparently reconsidered and within the *Laws* he condemned homosexual acts as “unnatural”.¹⁵

Historically, the evidence of homosexual persecution emanated from the ecclesiastical courts:

“... punishment of sexual ‘sinners’ was, at the instance of Henry VIII...transferred from ecclesiastical to secular courts at the Reformation. For the next 300 years, homosexuals were commonly perceived as ‘wicked heterosexuals’ - degenerate people who were jaded with ‘normal’ pleasures, and who sought fresh stimulation in ‘unnatural’ lusts.”¹⁶

12. Nickie Roberts op cit (note 7) 12 - 13.

13. Plotinus. *Enneads*. ii. 9 and 17; Plato. *The Symposium*.

14. J. Boswell op cit (note 11) 27.

15. This concept of unnatural is important because it denotes the idea that ‘nature’ plays an important factor in the determination of sexual morality and all that can be permitted within a society. J. A. Brundage op cit (note 3) 7, states the following in this regard:
“...what is ‘natural’ often means whatever is thought (correctly or not) to be the usual practice of the majority...the test of what is natural becomes inconsistently enough, the sexual behaviour of other animals. Thus homosexual relations and masturbation are labelled ‘unnatural’ because it is widely (but incorrectly) believed that animals do not engage in these practices...In point of fact...every ‘unnatural’ deviation that can be imagined occurs somewhere in ‘nature’”.

16. Antony Grey. *Quest for Justice - Towards Homosexual Emancipation*. (1992) 11.

Historically, the issue of sex had nothing to do with the legislation enacted against homosexuality, the alleged purpose of legislation had been to protect free-born citizens from “being ravished like slaves”.¹⁷

“The Lex Scantinia of 149 BC was confirmed by proper Augustan legislation on the same subject. This protected free-born youths and girls alike...What mattered was being free and not being a passive agent. The lawgiver was not trying to ban homosexuality; he simply wanted to protect the young citizen against infringement of his or her person.”¹⁸

2. ANCIENT GREECE

In the Classical period of Greek history, the great goddess Aphrodite occupied a position akin to that of the Phoenician deities Ishtar and Astarte,¹⁹ and was the patron of love and sex for the Greeks.²⁰ Aphrodite, being a fertility deity was also worshipped with particular fervour during the seasonal periods of crop cultivation in order to guarantee a successful harvest.²¹ These seasonal periods of worship have been recorded as having taken on orgiastic

17. Philippe Aries et al. *Western Sexuality - Practice and precept in past and present times*. (1985) 29.

18. *ibid.*

19. Ishtar and Astarte were androgynous goddesses who were the personification of the sexual desires of their devotees. Astarte was occasionally referred to as the queen of heaven, and the temples dedicated to this goddess were served by sacred prostitutes who provided through the means of sexual pleasure for all worshippers to experience the power of the goddess. Sensual pleasure was glorified and physical love celebrated unashamedly. J. A. Brundage *op cit* (note 3) 11; Hilary Evans *op cit* (note 6) 34.

20. Aphrodite had two aspects, Aphrodite Ourania representing the higher spiritual aspects of love and affection, and Aphrodite Pandemos who represented sensual pleasure and accordingly acted as the patroness of prostitutes. Sarah B. Pomeroy. *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity*. (1975); J. A. Brundage *op cit* (note 3) 13.

21. Laurie Shrage *op cit* (note 11) 10; D. A. J. Richards *op cit* (note 7) 1207.

proportions.²² The temple prostitutes²³ were also able during these periods to considerably increase the temple coffers in sacred reverence to their patron Aphrodite.²⁴

There was a permissive attitude towards sex in Ancient Greece,²⁵ which (aside from the socially inferior status of women²⁶) allowed expression of most forms of male sexuality unhindered by the bigotry and hypocrisy of modern society.²⁷ The only limitation on sexual freedom that is identifiable rests on ensuring minimal offence to other members of society.²⁸ There were undoubtedly contradictions in the popular opinion of Greek society, such as the expectation of a married man demonstrating discretion in relationships with other women, although sexual relationships with young men were not incompatible with the institution of marriage.²⁹ The double standard can be attributed to the inferior status of women within the Greek social structure.³⁰

22. H. Evans op cit (note 6) 35; Laurie Shrage op cit (note 11) 101.

23. See footnote 27; Laurie Shrage op cit (note 11) 102; H. Evans op cit (note 6) 28.

24. *ibid.*

25. Paul Cartledge. "The Politics of Spartan Pederasty". *Homosexuality in the Ancient World*. (1992) 75.
"...the Greeks did not see themselves as presented with an either/or choice between being 'a heterosexual' and being 'a homosexual'.

26. "The much lauded concept of democracy did not apply to [women] since only property owners had the right to vote - and only men were allowed to own property." Nickie Roberts op cit (note 7) 14.

27. The permissiveness applied only to men, and married women "spent most of their entire lives under conditions that can only be described as house-arrest." *ibid*; Paul Cartledge op cit (note 25) 75.

28. H. Evans op cit (note 6) 34.

29. J. A. Brundage op cit (note 3) 13.

30. D. A. J. Richards op cit (note 7) 1195 at 1209.
"...outright denial of women's power in society had come about through a line of male dictators...housekeeping and silence befit married women." Nickie Roberts op cit (note 7) 14.

2.1. PROSTITUTION IN ANCIENT GREECE

In Ancient Greece ritual temple prostitution³¹ was practised in various forms, and sex and religion were inextricably woven within the Greek society. The prostitute served as the personification of the powers of the goddess whom she served and these powers were transferred to worshippers through sensuous indulgences.³²

Prostitutes were by no means outcast, they were viewed as being socially inferior as a matter of fact, but no moral judgements were passed upon them.³³ There were no indications that the profession was 'evil' as prostitutes received religious sanction for their activities by virtue of the social acceptance of temple prostitution.³⁴

Greek men were allowed to indulge in sexual pleasures with little or no restraints.³⁵ Both the frequenting of prostitutes and acceptance of homosexuality were common-place amongst the Greek male community.³⁶

Women however fell within two identifiable and defined groups:

-
31. "...The first inhabitants of Greece were the goddess-worshipping peoples..." Nickie Roberts op cit (note 7) 13. Like the sexually liberated priestesses described above, this form of goddess worship involved 'religious rites' wherein participants were accorded 'access to goddess-power' through the performance of sexual rites. The patriarchal system that emerged transformed goddess worship into a controlled form of prostitution. Additionally there was the added appeal of the freedom accorded to prostitutes in society, and the fact that "women who were not model wives had little choice other than to prostitute themselves in order to survive." *ibid.* at 15.
32. Nickie Roberts op cit (note 7) 3; H. Evans op cit (note 6) 30; Laurie Shrage op cit (note 11) 101; D. A. J. Richards op cit (note 7) 1207.
33. J. A. Brundage op cit (note 3) 14 - 15.
34. *ibid.*
35. H. Evans op cit (note 6) 36. "The sexual latitude allowed to men by Greek public opinion was virtually unrestricted..."
36. Philippe Aries et al op cit (note 17) 28; H. Evans op cit (note 6) 36.

1. The wives and mothers. These group fell into what constituted the respectable, socially acceptable element of society.³⁷ They were prohibited from mixing with prostitutes, or becoming prostitutes themselves.
2. The 'other women'.³⁸ Into this category fell all forms of prostitutes.³⁹

Temple prostitution was not the only form of prostitution found in Ancient Greece.

Commercial prostitution also flourished and there is ample evidence⁴⁰ demonstrating well-organised, and flourishing brothels.

Prostitutes had a social hierarchy amongst themselves with discernable groupings.⁴¹ The lowest prostitute was the brothel prostitute⁴², alongside which fell the category known today as the streetwalker.⁴³ These prostitutes would exchange their services in exchange for an officially regulated fee, and there was a tax which was then deducted by the state.⁴⁴

37. H. Evans op cit (note 6) 36.
'Wives and mothers were respected and honoured, assured of their rights and protected by law; they lived dull, dutiful lives of unremembered domesticity, mistresses of their homes but in all public or cultural spheres nonentities.'

38. Nickie Roberts op cit (note 7) 15.
"Any woman attempting to live independently of men, all poor women, foreigners and slaves who worked outside the home fell into the latter category."

39. J. A. Brundage op cit (note 3) 14.

40. Nickie Roberts op cit (note 7) 17.
H. Evans op cit (note 6) 36 - 37.

41. Richard Green op cit (note 6) 190.

42. Called *deikteriades*. Nickie Roberts op cit (note 7) 16.

43. *ibid*.

44. H. Evans op cit (note 6) 37; Nickie Roberts op cit (note 7) 16.

The highest class of prostitute in Ancient Greece was a category known as *hetaerae* and these women

“appear to have enjoyed extraordinary intellectual and artistic advantages that women of their period were, in general, not permitted.”⁴⁵

While temple prostitution had performed its functions in Athens and the whole of Greece, Athens had another commercial advantage, being a sea-port with prolific amounts of trading potential, and as a typical business development commercial sex became one of the numerous commodities offered in the city.⁴⁶

In the sixth century BC Solon, who ruled Athens, introduced what is on record as being the first brothel in Athens.⁴⁷ In a carefully constructed piece of state policy Solon effected a monopoly in favour of the state in all brothels.⁴⁸ Most of the prostitutes who were on offer in these brothels were foreigners who had been brought into the country.⁴⁹ The prostitute had to be registered with the state, and she was then bound by certain regulations.⁵⁰ These

45. D. A. J. Richards op cit (note 7) 1208; J. A. Brundage op cit (note 3) 14; Sarah B. Pomeroy op cit (note 20); H. Evans op cit (note 6) 38; Richard Green op cit (note 6) 190; V. Bullough and B. Bullough. *Women and Prostitution*. (1987) 35.

46. J. A. Brundage op cit (note 3) 14 - 15.
“While most prostitutes were probably slave women, significant numbers of them were resident aliens who found commercial sex a rewarding enterprise. Intelligent and ambitious women of higher social origin often made careers as *hetaerae* and sometimes established long term relationships with men of power and wealth.”

47. D. A. J. Richards op cit (note 7) 1208; H. Evans op cit (note 6) 37.

48. “Solon quick to assess the enormous profits made by both commercial and religious whores, began to organise the business himself, with the result that official, state-run brothels sprang up all over Athens.” Nickie Roberts op cit (note 7) 15.

49. Nickie Roberts op cit (note 7) 17; D. A. J. Richards op cit (note 7) 1208.

50. J. A. Brundage op cit (note 3) 15; Nickie Roberts op cit (note 7) 16.

regulations ranged from a definition of a distinct form of dress which she had to wear⁵¹, segregation from 'respectable' women of the community, and a forfeiture of any rights of citizenship.⁵²

"For the first time in history, women were being pimped officially. Men were making vast fortunes out of the forced selling of [the women's] sexual services: first the brothel managers, then the tax-farmers, finally - at the top of the heap - the state, with 'wise' Solon as its head. State and private pimp were thus born, hand-in-hand."⁵³

Homosexuality whilst being conventional, and totally acceptable in ancient Greek society, with relatively little social stigma attached thereto, was faced with a surprising lack of tolerance when practised for commercial gain.⁵⁴ A male prostitute accordingly found himself categorised with female prostitutes of the slave variety, and he accordingly lost his rights of citizenship.⁵⁵ Alien men who prostituted themselves were subject to a special prostitution taxation.⁵⁶

So, in so far as prostitution was not criminalised in this society, they were subject to rather severe regulations which placed them in a position inferior in the social sense to other

51. H. Evans op cit (note 6) 37.

52. This information is gleaned from a variety of sources, most notable of which are: D. A. J. Richards, supra note 7; and H. Evans, supra note 6.

53. Nickie Roberts op cit (note 7) 17.

54. H. Evans op cit (note 6) 40.
David Cohen. *Law, Sexuality, and Society - The Enforcement of Morals in Classical Athens*. (1991) 176.
"One statute partially disenfranchised any Athenian citizen who engaged in homosexual intercourse for gain, whether as a boy or an adult; he lost his right to address the Assembly and to participate in other important areas of civic life."

55. K. Dover. *Greek Popular Morality in the time of Plato and Aristotle*. (1974) 214 - 216; J. A. Brundage op cit (note 3) 15.

56. J. A. Brundage op cit (note 3) 15.

citizens.⁵⁷ Women in Ancient Greece were generally perceived of as being inferior citizens, but whilst prostitutes were of even greater inferiority they were considered 'useful' by the male community⁵⁸ and despite the regulatory laws⁵⁹, were on occasion even accorded greater benefits than 'respectable' women.⁶⁰

The state eventually acceded to the fact that it could not regulate all the prostitution in Greece:

"...at some point it must have become obvious that the major stumbling-block faced by Solon's legislators was not so much the existence of the *heterae* as the overwhelming demand for their services; a demand that came exclusively from the very class of males who vilified them."⁶¹

When Solon died,

"... the Athenian laws that surrounded prostitution in all its guises were relaxed considerably; later rulers recognised the literal value to the state that all whores represented... Legislation went through periodic waves of tightening and relaxation, but never regained the severity that Solon had envisaged..."⁶²

57. Solon had attempted to regulate and control all prostitution, but the *heterae* were independent and continued "to enjoy full sexual and economic autonomy". Nickie Roberts op cit (note 7) 20.

58. The worth of prostitutes was derived from their satisfying certain male needs, providing "an alternative to non-commercial companions". D. A. J. Richards op cit (note 7) 1209; H. Evans op cit (note 6) 36.

59. Nickie Roberts op cit (note 7) 12 - 32.

60. As becomes apparent in the instance of the *hetaerae* who were better advantaged than their 'respectable' sisters. This is evidenced by the fact that they were "...the only women in Athenian society allowed to manage their own affairs...free to attend plays, ceremonies and speeches...to share the intellectual activities of Greece." Nickie Roberts op cit (note 7) 20.

61. Nickie Roberts op cit (note 7) 28.
The independent prostitutes of Greece were dealt with far less severely by the state, and they "...continued to follow illustrious careers, amassing fabulous wealth and enjoying a degree of power over their own 'sweet lives' that their 'virtuous' married sisters of Athens could never have dreamed of." 29.

62. Nickie Roberts op cit (note 7) 31.

Prostitution had entrenched itself in Greek history, it had not been eradicated, nor had the fairly severe legislation managed to adequately control it.

2.2. HOMOSEXUALITY IN ANCIENT GREECE

In general within Greek society there was relatively no social stigma attached to gay sex⁶³, apart from commercial homosexual intercourse.

“...the Greeks, men and women alike, found it practicable and rewarding to enjoy both. [sexual relations with men and women]”⁶⁴

Homosexuality was perceived as being fundamental to the Greek social structure.⁶⁵

Sexual submission however was perceived as being dishonourable, and perverse within the Greek society.⁶⁶

“The man who submits...becomes woman-like, and hence dishonoured, or even disenfranchised.”⁶⁷

2.3. CONCLUSIONS

The attitudes towards sexual conduct in Ancient Greece, were shaped by philosophers.⁶⁸

Different schools of philosophical thought arose during different periods of Greek history, and

63. J. A. Brundage op cit (note 3) 15.

64. H. Evans op cit (note 6) 36; Paul Cartledge op cit (note 25) 112; K. J. Dover. "Greek Homosexuality and Initiation". *Homosexuality in the Ancient World*. (1992) 127.

65. H. Evans op cit (note 6) 36; K. J. Dover op cit (note 62) 127; J. Boswell op cit (note 11) 27.

66. David Cohen op cit (note 54) 183; K. J. Dover op cit (note 55) 130.

67. David Cohen op cit (note 54) 183.

68. J. A. Brundage op cit (note 3) 16; J. Boswell op cit (note 11) 27.

contributed towards the moulding of attitudes regarding sexuality.⁶⁹ Several of these schools of thought are listed below in order to elucidate the reasons for the attitudes possessed by the Greeks towards both prostitution, and homosexuality.

The Cynics were radical philosophers who advocated full enjoyment of sexual pleasure so long as sex was:

“...simple, natural, voluntary and uncomplicated.”⁷⁰

The Cynics also provided no limitation on the sex of one’s chosen partner, or the number of partners that one could have.⁷¹

The Stoics represented one of the most influential Hellenistic schools of thought.⁷² Sexual gratification was not prioritised by the Stoics, and therefore received a lowly status.⁷³

However early Stoics did not assert limitations on sexual gratification as being only attainable within the marriage relationship. Later Stoics repudiated this by only acknowledging marital intercourse, and asserting that

“...free love would promote licentiousness.”⁷⁴

The Stoics defended regulation of sex by asserting that because of the link between sex and the birthrate, sex became a

“...legitimate interest of the polis...”⁷⁵

69. ibid.

70. J. A. Brundage op cit (note 3) 18.

71. ibid.

72. J. A. Brundage. op cit (note 3) 20.

73. ibid.

74. J.A.Brundage op cit (note 3) 20.

75 ibid.

Prostitution was regulated in Ancient Greece, and the establishment of state brothels is a phenomenon which runs throughout history, alongside the regulation of the profession.⁷⁶

Homosexuality was not morally condemned, however the passive partner in male homosexual sex was equated with a slave. The attitude in ancient Greece therefore, was permissive towards expressions of sexuality, however, elements of control are noted within the law.

3. ANCIENT ROME

History records that the origins of Roman culture lay in an agricultural people, where a

“clan mother Acca Larentia...left her land to the Roman people; interestingly, Larentia is described as ‘the noble whore’, which gives a clue to the existence of the old goddess-religion in Roman prehistory.”⁷⁷

The ancient Roman line of succession to property and power was through the female line, and males were only accorded rights through marriage.⁷⁸ However, a transition to a patriarchal society occurred and

“In the case of Rome...the revolution was particularly violent and sudden, with the result that the male rulers were able to introduce some of the most draconian patriarchal rules of the ancient world.”⁷⁹

These rules were enacted by the aristocracy who ruled Rome⁸⁰, and they set the standards of morally acceptable behaviour.⁸¹ The concept of a patriarchal marital institution emerged from

76. William Sanger. *The History of Prostitution*. (1897) 44; H. Evans op cit (note 6) 36.

77. Nickie Roberts op cit (note 7) 34; H. Evans op cit (note 6) 41.

78. Nickie Roberts op cit (note 7) 34.

79. *ibid.*

80. Unlike Greece wherein the merchant class had assumed power.

81. Nickie Roberts op cit (note 7) 34; H. Evans op cit (note 6) 46.

within the ranks of the aristocracy and developed the authority of the *paterfamilias*⁸². The common people of Rome did not follow patriarchal forms of marriage, and the children born of these unions between commoners belonged to the mother's family.⁸³ These marriageless relationships

“...still existed in Rome in later times, and were the basis of a widely developed system of free love, which soon changed into different kinds of prostitution.”⁸⁴

Much of Roman history that is accessible deals with the aristocratic classes and there is little to be found about the lower classes. Therefore, the discussion on the laws which follows is intended to relate specifically to the higher classes.

Romans' held 'respectable' women in higher esteem than their Greek counterparts.⁸⁵ The moral history of Rome is

“of a steady swing from austerity to indulgence.”⁸⁶

As in most of the places in the Mediterranean in ancient times the sexual double standard was already entrenched, whereby married men faced no sanction for consorting with women other than their wives, but married women could suffer death as a consequence of any of their

82. According to the Digest of Justinian, 15.16.195.1. The term family has a variety of meanings, but it could mean "all that was subject to the *paterfamilias* - the humans civilly related to and under him, his slaves and all his other assets." J. A. C. Thomas. *Textbook of Roman Law*. (1976) 411. In other words the *paterfamilias* had absolute power over all that fell within his family.

83. Nickie Roberts op cit (note 7) 35.

84. Nickie Roberts op cit (note 7) 35; O. Kiefer. *Sexual Life in Ancient Rome*. 8.

85. D. A. J. Richards op cit (note 7).

86. H. Evans op cit (note 6) 43. It has also been recorded that "...a fantastic and chaotic profusion of sexual practices flourished, for the Romans were self-indulgent to the extreme." Nickie Roberts op cit (note 7) 33.

sexual encounters.⁸⁷ Concubinage perpetuated this double standard,⁸⁸ and men were allowed to have sexual liaisons with concubines without penalty.⁸⁹ In the early Republic no distinction was made between a concubine and a female prostitute, and the same term *paelex* was used for all women who indulged in non-marital sexual relationships.⁹⁰ Gradually however the concubine's position made positive progress both socially and economically.⁹¹ Late in the Republic the law began to differentiate between concubines and prostitutes.⁹² Concubines emerged as a 'durable sexual relationship distinguished from marriage by the absence of *affectio maritalis*' meaning that the relationship could be between a patrician and "an

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87. J. A. Brundage op cit (note 3) 23.
This was obviously only in rare circumstances, but it provided a stark contrast with the idea that a married man's indiscretions carried no legal or social consequences.
88. J. A. Brundage op cit (note 3) 24.
Concubinage became the bachelor's alternative to marriage and ensured that regular sexual partners could be retained without the incumbent social obligations of marriage. There was no "moral or social stigma" for the male partner, but the woman fell into a category on the social scale that was considerably lower than the position of a married woman. Nonetheless certain concubines of "high-ranking men frequented the highest circles of Imperial society." The concubine was not able to attain her partners social status, unlike a wife. D.32.49.4.
D. A. J. Richards op cit (note 7) 1209.
89. J. A. Brundage op cit (note 3) 30.
'Upper class women, however, were forbidden to have sexual intercourse with anyone at all, save for their husbands...Some women of the upper classes so strongly resented the legal limitations on their sex lives that they registered with the magistrates as prostitutes in order to free themselves from harassment because of their nonmarital sexual activities. But such protests carried serious handicaps : registered prostitutes were barred from receiving legacies or inheritances and thus cut off from a share in familial property.' Tiberius closed this loop-hole by forbidding upper-class women to enrol as prostitutes.
H. Evans op cit (note 6) 45.
90. J. A. Brundage op cit (note 3) 25.
91. *ibid.*
92. J. A. Brundage op cit (note 3) 40.

honourable woman of low estate”.⁹³ But the Emperor Constantine did decree that no person of senatorial rank could indulge in concubinage with freed women.⁹⁴

Romans did express indignation at the regulation of sexual activity by law, based on the following reasons:⁹⁵:

“Sex was too personal and intimate, sexual habits too varied, and ideas about sexual morality too diverse for the formal processes of the legal system to deal adequately and fairly with them at all.”⁹⁶

However jurists and lawmakers did not heed this objection, and incorporated many regulations governing the appropriate sexual behaviour of Roman citizens.⁹⁷

“The basic category of sexual offence under Roman law was *stuprum*, that is habitual sexual intercourse with an unmarried, free woman...Fornication with slaves or servant girls did not count as *stuprum*, nor did intercourse with prostitutes or other women of degraded status.”⁹⁸

Stuprum could not be committed with a prostitute because

“...they have openly offered the free opportunity for *stuprum* before the *aediles*”⁹⁹

93. J. A. C. Thomas op cit (note 82) 434.

94. D.22.2.59; D.25.7.1.3.

95. J. A. Brundage op cit (note 3) 28.

96. J. A. Brundage op cit (note 3) 28.

97. J.A.Brundage op cit (note 3) 28.
In addition the following observation by J. A. Brundage is of interest.
“Roman law concerning sexual matters is permeated by symbols of patriarchal dominance. Legislators and jurists assumed that women were at the service of men, ministered to male pleasure, and accepted male gratification as their primary goal.”
H. Evans op cit (note 6) 45.

98. J. A. Brundage op cit (note 3) 29.

99. M. L. Hewett & B. C. Stoop. *On Crimes - A Commentary on Books XLVII and XLVIII of the Digest by Antonius Matthaeus* J. C. 315; C.9.9.22; D.5.3.27; D.47.2.39.

Loss of social status through the diminution of public esteem was termed *Infamia* and was attached to prostitution.¹⁰⁰ However this was not a sufficient deterrent for aristocratic women who found themselves faced with the prospect of forced marriages accompanied by the Emperor Augustus marriage legislation¹⁰¹, and therefore registered themselves as prostitutes to avoid forced marriages.¹⁰² This was rectified by the Emperor Tiberius who enacted legislation banning the aristocracy from working as prostitutes.¹⁰³

3.1. PROSTITUTION IN ANCIENT ROME

The historian Livy records an incident involving prostitutes when he

“tells of how in 501 BC a group of Sabine youths kidnapped a bevy of Roman prostitutes...”¹⁰⁴

There is accordingly no doubt of the presence of prostitution in early Roman society.

Furthermore the history of Rome shows a swing from the extreme moral highground right across to cultivated indulgence.¹⁰⁵ This shift leads to the same pattern found in every society regarding the issue of prostitution, wherein the prostitute is placed on a pendulum which swings from condemnation to toleration. The Romans did regulate prostitution, in an

100. D.3.2.

101. Augustus' matrimonial legislation became known as the caducary laws. The *lex Julia de maritandis ordinibus* and *lex Papia Poppae*. Augustus' legislation was designed to encourage "marriage and fidelity among the ruling class..." and consisted of "...a system of penalties....applied to single people of marriageable age..."and "rewards for married women who produced more than three children". Nickie Roberts op cit (note 7) 39.

102. *ibid*.

103. See footnote 89.

104. H. Evans, *supra* note 6 at 42.

105. H. Evans op cit (note 6) 43.
The throwing of parties which took on orgiastic proportions was not uncommon amongst the upper classes of Roman society.

apparent attempt to maintain moral standards. This regulation involved very similar rules to those found within the registration of Greek prostitutes. Regulations on mode of dress were enforced.¹⁰⁶ Respectable women were prohibited from wearing the kinds of clothes that prostitutes wore in order to sharpen the distinctions between prostitutes and respectable women.¹⁰⁷ In addition there was also a prohibition on access to certain temples, and a prohibition on prostitutes being allowed to marry.¹⁰⁸

A by-law was also created to prohibit prostitutes from riding in litters but

“...many women disobeyed the injunction; indeed some of them rode the streets in litters whose curtains were drawn, for obvious reasons.”¹⁰⁹

Romans were in a constant process of legislating the morals of the citizens, and attempting to limit decadence in order to ensure the future of the mighty empire that they were laying the foundations for.¹¹⁰

“As early as the fifth century BC the city fathers appointed censors to watch over Rome’s morals, but not until 180 BC did they feel it necessary to appoint officials to inspect and control prostitutes in this city which had grown from a small township to a world power. These aediles had authority to enter prostitute’s houses and brothels...”¹¹¹

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106. O. Kiefer. *Sexual Life in Ancient Rome*. (1934) 55-63.
“...Roman law proscribed in great detail that the prostitute could not wear the chaste stola that hides the body, or the vitta with which Roman ladies bound their hair...” Richard Symanski. *The Immoral Landscape*. (1981) 162.
“Legally, they were bound to wear the male toga instead of the female stola ...[they] were instructed...to wear sandals and their dress was to be of a floral pattern...the state was trying to control and inhibit the women by its use of petty legislation - no matter how futile that legislation turned out to be in the long run.” Nickie Roberts op cit (note 7) 42.
107. J. A. Brundage op cit (note 3) 47.
108. ibid.
109. Nickie Roberts op cit (note 7) 42.
110. H. Evans op cit (note 6) 42.
111. H. Evans, supra note 6 at 44.

Prostitution was associated with slavery, and the profession was perceived as degrading.¹¹²

The life-styles of the women of Rome were slightly superior to that experienced by the women of Greece, as Roman women were accorded a slightly higher status.¹¹³ This however did not benefit the lives of the prostitute population who were deprived of certain legal rights and freedoms:

“Prostitution itself was no crime, and no penalties attached to sex acts with a harlot.”¹¹⁴

Solicitation however, was prohibited:

“...prostitutes may only exercise their profession if they are approached, and not where they approach others. If they make the first move and attempt to corrupt virtuous men, you would say they can be persecuted for iniuria.¹¹⁵ And to indulge in unnatural sex is not even permitted to prostitutes...if they accepted money from more than one person at the same time, there was a penalty laid down against them.”¹¹⁶

In Roman society the prostitute was accorded no respect by virtue of the profession which they practised.

“Prostitution in Rome necessarily implied moral and social degradation not only because of the harlot’s sexual promiscuity, but also because of her way of life.”¹¹⁷

It must be noted, however, that within the social hierarchy the prostitute was regarded as a necessary, and definite fragment of the whole.¹¹⁸

112. J. Boswell op cit (note 11) 57.

113. D.A.J. Richards op cit (note 7) 1209; H. Evans op cit (note 6) 49.

114. J.A. Brundage op cit (note 3) 44.

115. D.47.10.9.4.

116. M. L. Hewett op cit (note 99) 316.

117. J. A. Brundage op cit (note 3) 45; H. Evans op cit (note 6) 49.

118. Even the pagan religious calendar had dedicated days upon which festivals in honour of prostitutes of both sexes were celebrated. Eva Cantarella. *Bisexuality in the Ancient World*. (1992) 102.

Two classes of prostitute were distinguishable within Roman history from the late Republican period to the early Imperial period.¹¹⁹ The 'lower class' prostitute worked in a brothels or simply functioned as a streetwalker.¹²⁰ Those who worked in brothels were

“...required to register with the magistrates, paid a special tax known as the *vectigalia meretricum*, and received in return a prostitute's licence (*licentia stupri*).”¹²¹

Aediles had to control the registration of the prostitutes of Rome, and were constantly on the lookout for unregistered women.¹²² Many Roman prostitutes did not register with the *aediles* because one's name could never be removed from the list once it had been recorded, and “the Roman police system was small and inefficient - not to mention corrupt.”¹²³

Many women therefore used their ingenuity to avoid prosecution, and registration,

“...the streets of the city were thronged with them at all times of the day or night. The *fornices* (from which our word fornicate is derived) were the arches underneath the theatre circuses and private houses...[where] many prostitutes entertained clients.”¹²⁴

Streetwalkers were not registered and were reputedly cheaper, but were said to be a far more risky option than their registered counterparts.¹²⁵ Many of this class of prostitute originated as slaves, or captives of war.¹²⁶

119. J. A. Brundage op cit (note 3) 25.

120. *ibid.*

121. *ibid.*

122. Nickie Roberts op cit (note 7) 41-43; H. Evans op cit (note 6) 45.

123. *ibid.*
Gambling at either avoiding the authorities, or bribing them was usually successful.

124. Nickie Roberts op cit (note 7) 42; H. Evans op cit (note 6) 47.

125. Nickie Roberts *supra* note 124.

126. Nickie Roberts op cit (note 7) 42; D. A. J. Richards op cit (note 7) 1208; J. Boswell op cit (note 11) 77.

The 'higher class' prostitutes were

“described as *delictae* or *pretiosa*”¹²⁷

and were courtesans to the wealthy and esteemed members of society.¹²⁸

“The professional skills of the Roman prostitute frequently included the ability to play musical instruments (usually the flute or the harp), to sing, and to dance. Acting ability was also counted among the skills that an accomplished *meretrix* should have. In addition the *artes meretricae*¹²⁹ presumably included more specifically technical skills, including artifices to avoid pregnancy, as well as a varied repertoire of sexual diversions.”¹³⁰

Roman law was distinctly prejudicial to the prostitute in certain respects. It limited inheritance rights by precluding a prostitute from inheriting from the estate of her parents¹³¹, or from inheriting under the will of a soldier on active duty.¹³²

Yet, in other areas the law

“protected the prostitutes right to money or other goods that she received for her sexual services.”¹³³

Fundamentally though the attitudes of the jurists¹³⁴ filtered through as is evidenced by the fact that the law did not provide protection for the physical well-being of the prostitute,

“...if a client abused her or ravished her by force, she had no legal redress against him, according to Ulpian because the client's motive was lust, not

127. Nickie Roberts op cit (note 7) 42.

128. *ibid.*

129. A term which has a variety of meanings within the Roman vocabulary.

130. J. A. Brundage op cit (note 3) 26; H. Evans op cit (note 6) 46.

131. Code of Justinian.6.51.1.

132. J. A. Brundage. op cit (note 3) 46.

133. *ibid.*

134. The jurists drafted documents, prepared cases for court, gave advice on points of law, advised on evidentiary matters. J. A. C. Thomas op cit (note 74) 42.

greed. So too, if a client broke down the door of a brothel in his eagerness to bed a harlot, he incurred no liability for goods stolen by thieves who thereby gained access to the premises.”¹³⁵

Justinian took active interest in the welfare of the prostitute in his legislation.

“Justinian sometimes speaks in his legislation in tones that express a surprising depth of feeling about the prostitutes’ situation.”¹³⁶

Justinian attempted to repress prostitution, and to reform the prostitute¹³⁷, particularly who had involuntarily been coerced into the profession.¹³⁸ Justinian clearly indicated his disapproval of prostitution, however he directed his anger not against the prostitute, but against those who profited from the prostitute's activities.¹³⁹

3.2. HOMOSEXUALITY IN ANCIENT ROME

Homosexuality was viewed with distaste by members Roman society who were not particularly tolerant thereof, unlike the Greek society wherein it was perceived as being a valuable and meaningful aspect of society.¹⁴⁰ Roman law did not specifically penalise homosexual acts,¹⁴¹ but rather enforced the same laws that were imposed on heterosexual acts

135. J. A. Brundage op cit (note 3) 46.

136. J. A. Brundage op cit (note 3) 120.

137. Justinian built a hospice for women who wished to reform and leave the wickedness of their lives as prostitutes. However the repentant women were apparently required to prove the measure of their repentance by becoming nuns!

138. J. A. Brundage op cit (note 3) 121; Code.6.6.1.4.

139. J. A. Brundage op cit (note 3) 123.

140. H. Evans op cit (note 10) 48; J. A. Brundage op cit (note 3) 48 and 49; Jan Bremmer "An Enigmatic Indo-European Rite: Paederasty". *Homosexuality in the Ancient World*. (1992) 57.

141. J. Boswell op cit (note 11) 64.

on homosexual acts.¹⁴² There were however, two important exceptions to the lack of manifested regulation of homosexual conduct :

“...Romans considered it disgraceful for a free man to adopt the passive role in anal intercourse. No disapproval attached to the man who played the active part in the relationship... The passive role in fellatio was even more strongly disapproved¹⁴³...No such disapproval appears to have attached to the man who performed cunnilingus on a woman. Lesbian relationships excited greater opprobrium than did male homosexual liaisons, perhaps because upper-class Roman men found lesbianism threatening to their own sexual self esteem.”¹⁴⁴

Roman law actually penalised those who played the passive role¹⁴⁵ in homosexual relationships by making them

“...ineligible to practice law or even to appear in court on their own behalf.”¹⁴⁶

It is submitted that the *Lex Scantinia* was the only law which may have contained some regulations with regard to homosexuality,¹⁴⁷ however

“...No text of this law survives and it is impossible to conclude with any certainty what it regulated”¹⁴⁸

142. J. A. Brundage op cit (note 3) 49.

143. Slaves were generally used as the passive partners in homosexual encounters.

144. J. A. Brundage op cit (note 3) 27.
Paul Veyne. "Homosexuality in ancient Rome" in Philippe Aries et al *Western Sexuality - Practice and Precept in Past and Present Times*. (1985) 26.

145. A free-born male adult who undertook the passive position in homosexual activities was termed *impudicus* or *diatithemenos*. They were not rejected for being homosexual, rather for lacking in virility, which was considered a grave moral and political offence. Paul Veyne op cit (note 134) 32.
Male citizens who became prostitutes were also subjected to severe opprobrium. J. Boswell op cit (note 132) 77.
Ramsay MacMullen "Roman Attitudes to Greek Love" *Homosexuality in the Ancient World* (1992) 351.

146. J. A. Brundage op cit (note 3) 49.

147. J. Boswell op cit (note 11) 65.
This is with regard specifically to the period of the Republic.

148. *ibid*.

In Rome male prostitutes existed far more abundantly than in Greece due to the apparent suppression of outward condonation by society to those exhibiting this preference. This resulted in high support of the male prostitutes services, as a means of satisfying the needs of sectors of the society. In Rome male prostitutes were therefore in high demand, so slaves who were considered to be very appealing in this sense were considered to be very valuable.¹⁴⁹ It has even been suggested by some historians that there were more male prostitutes than their female equivalents in Rome. The state is even recorded, under Augustus, as having imposed a taxation on male prostitutes.¹⁵⁰

H. Evans¹⁵¹ suggests that a reason for the high precedence of homosexuality may be as a consequence of the nature of the Roman society which was constantly participating in wars and therefore men were thrown together by circumstance, but this remains mere conjecture.

Justinian attempted to suppress homosexuality far more earnestly than other emperors of this period.

"In the *Institutes*, he invoked the ban of the old *Lex Iulia* against 'those who dare to practice abominable lust with men,' and imposed the death penalty upon offenders."¹⁵²

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149. "...The sort of homosexuality which was completely tolerated consisted in active relations between a master and a young slave..." Paul Veyne op cit (note 144) 31-32.
"...the value of male prostitutes exceeded that of farm lands..." J. Boswell op cit (note 11) 68. H. Evans op cit (note 6) 48 - 49.
150. J. Boswell op cit (note 11) 70.
151. H. Evans, *supra* note 6.
152. J. A. Brundage op cit (note 3) 121; *Institute* 4.18.4; J. Boswell op cit (note 11) 71.

Justinian attributed natural disasters to the activities of homosexuals, and repeatedly spoke of the destruction of Sodom contained within the Bible as being proof of divine retribution for such offenses.¹⁵³

“Justinian’s antihomosexual legislation is perhaps the area of his legislative activity where the influence of Christian authorities is most clearly evident.”¹⁵⁴

3.3. CONCLUSIONS

Laws in Rome fluctuated under the dictates of different Emperors, and accordingly reflected their personal preferences. For example, the Emperor Domitian who indulged in the pleasures offered by the prostitutes, revived old laws against homosexuals.¹⁵⁵

Messsalina, the wife of Emperor Claudius, was recorded as having challenged

“the Guild of Prostitutes that she could exhaust more men in one night than even the most skilled professional. She won.”¹⁵⁶

However the central theme upon which the law’s focus rested was on

“...marital and quasi-marital relationships, while non-marital sex received only incidental treatment and was a matter of marginal legal concern.”¹⁵⁷

Additionally there was a general concern within ancient legal systems on

“...the impact of sexual relations on the social order...”¹⁵⁸

rather than

153. J. A. Brundage op cit (note 3) 121; J. Boswell op cit (note 11) 71.

154. J. A. Brundage op cit (note 3) 121.

155. H. Evans, supra note 6 at 45.

156. *ibid.*

157. J. A. Brundage op cit (note 3) 49.

158. *ibid.*

“...limiting or controlling sex acts in themselves.”¹⁵⁹

Homosexuality, in the active form was tolerated and no legal prohibitions were enacted, however the passive partner in both homosexual sex or fellatio was scorned, and thrown out of the Roman army, or even put to death.¹⁶⁰

4. THE IMPACT OF CHRISTIANITY

“Christianity taught, as a religious dogma, invariable, inflexible, and independent of all utilitarian calculations, that all forms of intercourse of the sexes, other than life-long unions, were criminal. By teaching men to regard this doctrine as axiomatic, and therefore inflicting severe social penalties and deep degradation on transient connections, it has profoundly modified even their utilitarian aspect and has rendered them in most countries furtive and disguised. There is probably no branch of ethics which has been so largely determined by special dogmatic theology.”¹⁶¹

Christianity was not the first religion to advocate a restraint of sexual desires, but it appealed to the most earnest of intellectuals, and yet had roots in the ignorant common-folk whom it seemed to treat with apparent equality. Morality was a chief area of focus of the Christian faith exponents, who deigned it necessary to condemn even sex for procreation within a legally recognised marriage as being shameful.

However the attitudes expressed by Christian legislators was not drawn from the teachings of Christ, as Christ said very little about sexuality.

159. Paul Veyne op cit (note 144) 34.

160. Paul Veyne op cit (note 144) 30.

161. W. E. H. Lecky. *The History of European Morals*. (1869).

“Jesus’ attitude towards prostitution was also atypical of conventional Jewish thought. Although he did not condone prostitution and showed no particular tolerance for it as an institution, Jesus did not condemn individual harlots.”¹⁶²

Throughout the history of the Christian empire, imperial law relating to matters of morality is characterised by the attitudes of the Emperor Constantine, which were of:

“Moral reprobation, social contempt, and practical toleration.”¹⁶³

4.1. PROSTITUTION AND THE IMPACT OF CHRISTIANITY

Within the context of Christianity in its earliest phases, prostitution was not accorded a voice, let alone allowed an impartial hearing before unbiased and impartial judges - it was immoral, and that was final.¹⁶⁴

The Christian emperor Constantine enacted several changes to the law regarding prostitution.

The public honours and privileges afforded to members of the upper-class and those who were senators, were removed if these people were found to have had a child by a prostitute.¹⁶⁵

“In general Constantine’s attitude toward prostitutes was one of benign contempt. Loose women, he observed in a rescript of 326, should be spared judicial severity, because the vileness of their lives placed them beneath the law’s concern.”¹⁶⁶

162. J. A. Brundage op cit (note 3) 59.

163. J. A. Brundage op cit (note 3) 105.

164. J. A. Brundage op cit (note 3) 73.
‘The early Church also banned prostitutes from the Christian community...prostitutes might be admitted to the church only if they had renounced their trade and married...’

165. J. A. Brundage op cit (note 3) 105.

166. *ibid.*
‘It is characteristic of his pragmatic approach to prostitution that Constantine designated a section of his new capital city, Constantinople, as an official red-light district and required all of the cities harlots to remain within its confines.’

Certain of the prominent and influential church figures should be noted for their toleration of prostitution, as it was perceived as being an evil which reduced the risks of greater social evils, including the rape or seduction of innocents, or vulnerable women.

“What can be called more sordid, more void of modesty, more full of shame than prostitutes, brothels, and every evil of this kind? Yet remove prostitutes from human affairs, and you will pollute all things with lust; set them among honest matrons, and you will dishonour all things with disgrace and turpitude.”¹⁶⁷

Due to the disobedience of the woman Eve in the garden of Eden¹⁶⁸ women were condemned¹⁶⁹, by those who distorted the teachings of the Bible with their own interpretation, to the position of the inferior sex.¹⁷⁰ Women were the despised sex upon whom all guilt could rest for all the ills suffered by ‘mankind’.¹⁷¹ A woman who was sexually autonomous and sold a sexual service was therefore to be perceived as the epitome of this evil, which was the downfall of mankind. Despite these attitudes, there were thinkers of this time who identified the usefulness of prostitution.

St Thomas Aquinas held the view that prostitution is

167. St. Augustine. *De Ordine*. 11.4 (12); D. A. J. Richards op cit (note 7) 1210.

168. *Holy Bible*. Genesis, chapter 3, verse 6.

169. "In his 'apparel of women' Tertullian of Carthage (150-230) recommended that women should wear perpetual mourning clothes in order to atone for the 'ignominy and odium of having been the cause of the fall of the human race.'" Nickie Roberts op cit (note 7) 59.

170. "Paul saw women as 'naturally' inferior beings; they were a kind of afterthought on the part of God..." Nickie Roberts op cit (note 7) 59.

171. J. A. Brundage op cit (note 3) 64; H. Evans op cit (note 6) 53 held the following: "So the prostitute became the vicarious victim of a man's theology-induced self reproach, the receptacle of his loathing as well as his lust, condemned to be alternately cursed and caressed so long as the Church's teaching had effect."

“...like the filth in the sea, or a sewer in a palace. Take away the sewer, and you will fill the palace with pollution; and likewise with the filth (in the sea). Take away prostitutes from the world, and you will fill it with sodomy.”¹⁷²

There was a realisation that apart from the lowly status accorded women, a prostitute, however despised is a necessary component of society. This toleration of prostitution continued to be demonstrated in such comments as

“The supreme type of vice, she is ultimately the most efficient guardian of virtue. But for her, the unchallenged purity of countless happy homes would be polluted...On that one degraded and ignoble form are concentrated the passions which might have filled the world with shame. She remains...the eternal priestess of humanity, blasted for the sins of the people.”¹⁷³

The tolerance towards prostitutes was hypocritical, in that it stemmed from their provision of a service to society which was considered to be both necessary and important, but they were morally condemned in the process by many advocates of the Christian doctrine. Paradox it may indeed represent, however it is in conflict with the teachings of the Christian faith, under which it is espoused that it is not for any member of society to judge another, as this is a task left to the Almighty.¹⁷⁴ A further paradox stems from the condemnation of the women offering the service, who were penalised by legal sanctions for their kindness, and yet those utilising the service are perceived as being unidentifiable, and insignificant participants!

172. T. Aquinas. *Opuscula*. XVI (1225 - 1274).

173. W. E. H. Lecky, *supra* note 161.

174. Matthew 7:1. *The New International Version Study Bible*.
“Do not judge, or you too will be judged.”

4.2. HOMOSEXUALITY AND THE IMPACT OF CHRISTIANITY

Paul, one of the apostles of Christ whose epistles are contained within the Bible had very definite attitudes towards sex, and sexuality. His condemnation of all forms of extramarital sex was “...sweeping and unqualified”¹⁷⁵ He especially condemned homosexuality and declared that

“...neither the ‘the soft ones’ (masturbators and other sensualists) nor men who have sexual relations with other men would enter the kingdom of God.”¹⁷⁶

Paul’s rationale for his vociferous attitude towards sex, and homosexuality specifically, can possibly be given new understanding when viewed within the context of an age old Jewish aversion to sexuality.¹⁷⁷ The Jewish attitude towards the sexual act was that it was

“only lawful if it ended with the semen being deposited in the female uterus. Any emission of semen outside this context was a contamination.”¹⁷⁸

Thus homosexual relations between men, or masturbation were unquestionably sinful.

St. Paul’s condemnation of homosexuality continued to represent the Christian norm despite the fact that few other writers were as vociferous in their condemnations thereof.¹⁷⁹

St. Paul mentions homosexuality in his list of sins ¹⁸⁰, and according to his interpretation it was

175. J. A. Brundage op cit (note 3) 61.

176. *ibid.*
For a biblical account of Paul’s attitude see: 1 Corinthians 6 : 9-10; Romans 1 : 27; Timothy 1 : 10

177. Eva Cantarella op cit (note 118) 202.

178. *ibid.*

179. J. A. Brundage op cit (note 3) 73 and 74; Eva Cantarella op cit (note 118) 191.

180. 1 Corinthians 6. 9-10; 1 Timothy 1. 9-10.

“...an abominable and forbidden act.”¹⁸¹

It is difficult to find many other Christian writers who spoke on homosexuality within the period of the first three centuries, but

“...St. Paul’s condemnation of both active and passive gay sex apparently continued to represent the Christian norm.”¹⁸²

During the fourth and fifth centuries Christian sexual morality was beginning to take shape.¹⁸³

“...it gradually began to be transformed into law beginning in the mid-sixth century...[meaning] that it began to be expressed as rules of conduct to which Christians were obliged to conform under penalty of disagreeable sanctions.”¹⁸⁴

Christian sexual morality must be seen in the context that it was ‘neither uniform nor static’, but constantly changing as the

“...Church adapted itself to changes in society.”¹⁸⁵

Throughout these changes there seems to be the thread that St. Paul had initiated in his attitude to homosexuality permeating the attitudes of the law towards it.

4.3. CONCLUSIONS

Christianity undoubtedly affected the attitudes expressed by legislation to matters governing sexual intercourse. It appeared to have had a dramatic impact on the regulation of behaviour

181. Philippe Aries. "St. Paul and the Flesh." in Philippe Aries et al. *Western Sexuality - Practice and Precept in Past and Present Times*. (1985) 39.

182. J. A. Brundage op cit (note 3) 73-74; Eva Cantarella op cit (note) 192 & 221.

183. J. A. Brundage op cit (note 3) 3.

184. *ibid*.

185. J. A. Brundage op cit (note 3) 5; Eva Cantarella op cit (note 118) 208.

and due to the appeals made on the basis of divine retribution if behaviour were not corrected it exerted great social influence on the lives of the citizens governed by its rules.

5. FROM THE ELEVENTH CENTURY TO THE SIXTEENTH CENTURY

A broad overview of the laws, and attitudes towards prostitution and homosexuality follows. The trends of the law are of particular significance during this period.

5.1. PROSTITUTION FROM THE ELEVENTH CENTURY TO THE SIXTEENTH CENTURY

5.1.1. The Eleventh Century

The development of urban centres of commerce followed the agrarian economic revival, and urban life in the towns and cities of Europe expanded rapidly from the eleventh century.¹⁸⁶

Lower classes flocked to the urban centres in an effort to free themselves from “bondage to the lands of the rich lords.”¹⁸⁷ Work became scarce in these urban areas, but women

“...always had a commodity they could trade on; they could support themselves and their families by selling sex.”¹⁸⁸

Authorities initially attempted to repress prostitution by enacting ordinances to ensure that prostitutes could not work within the towns, however

186. Nickie Roberts op cit (note 7) 69; J. Boswell op cit (note 11) 169.

187. Nickie Roberts op cit (note 7) 69.

188. *ibid.*

“...the women simply set up their homes and brothels directly outside the town gates...Eventually the authorities capitulated and permitted the prostitutes to operate inside the townships, although there were often restrictions.”¹⁸⁹

The Visigothic code¹⁹⁰ was the only Germanic code which dealt with prostitution in any detail.¹⁹¹

5.1.2. The Twelfth Century

“By the twelfth century, European civilisation and culture was beginning to flourish once again, and men of the educated classes began to pit their wits against the ‘abhorrence’ of prostitution.”¹⁹²

During the first Crusade which occurred in the early middle ages (12th and 13th century), the Crusaders were

“...overrun by harlots, a situation that shocked and alarmed the clerical chroniclers...”¹⁹³

Church reform canonists were advocating the total condemnation of prostitution, but they met with opposition from other writers of this period who wanted to ensure the reform and rehabilitation of all prostitutes.

189. Nickie Roberts op cit (note 7) 70.

190. A code developed by the West Goths who were a Teutonic people that comprised a nomadic German tribe who wandered over Europe.; J. Boswell op cit (note 11) 176 - 177.

191. J. A. Brundage op cit (note 3) 133.
A free woman convicted of prostitution was given 300 lashes, and released on the provision that she would not resume the occupation. If caught again she was again lashed 300 times, and then she was given to a man who was to prevent her from resuming her occupation.

192. Nickie Roberts op cit (note 7) 71

193. J. A. Brundage op cit (note 3) 211.

“In 1198 conversion fervour reached Pope Innocent III, who extorted good Christians to reclaim whores. As a result, a full scale movement spread across France, Germany, and Italy...”¹⁹⁴

The ‘conversion’ of prostitutes was largely ineffectual, due chiefly to the fact that the ‘converted’ were obligated in most instances to take the vows, and were treated abysmally by many institutions.¹⁹⁵

The twelfth century was the period in which French jurists attempted to control prostitutes by enacting specific legislation against prostitutes, but

“...since there were no forces of law and order to carry them out on the scale they demanded, these laws were largely ineffective.”¹⁹⁶

Many of these laws, for example the 12-century Code of Alfonso IX of Castile¹⁹⁷ made it difficult for prostitutes to work without transgressing the law, despite the fact that prostitution itself was not made illegal.¹⁹⁸

“The net result of this kind of official harassment was the isolation of the women who worked as prostitutes in Alfonso’s realm...[they] in order to work [were] obliged to reach ‘agreements’ with the authorities...[and] in return for immunity from the full weight of the law the women handed over a portion of their earnings - not to mention sex on demand.”¹⁹⁹

Despite the failure of legal intervention, there was a constant exploration of the legal implications of prostitution. Gratian, who wrote a textbook of canon law in the twelfth

194. Nickie Roberts op cit (note 7) 73.

195. *ibid.*

196. Nickie Roberts op cit (note 7) 76.

197. *ibid.*
This was a royal decree.

198. *ibid.*

199. Nickie Roberts op cit (note 7) 77.

century, declared that it was both an offence to be a prostitute, or to patronise one.²⁰⁰ Gratian also condemned promiscuity, and diminished the focus on the commercial gain of prostitution by advocating that the

“...essence of prostitution lay in promiscuity... thus a woman who took many lovers was a prostitute, whether she took money for her favours or not.”²⁰¹

5.1.3. The Thirteenth Century

Regardless of the apparent ineffectiveness of prohibitory legislation, there was a continued interest in limiting promiscuity which continued into the twelfth and thirteenth centuries.²⁰² There ensued many debates over the number of lovers needed to have been ‘enjoyed’ by a woman before she could be deemed sufficiently promiscuous to be a prostitute.²⁰³

There is evidence that prostitution thrived within the Europe despite many efforts to suppress it.²⁰⁴ Louis IX of France attempted to totally eradicate prostitution by issuing an ordinance in 1254 declaring that public prostitutes be removed from the towns and the surrounding areas, and that their possessions be seized and given to the church.²⁰⁵ This ordinance was ineffectual in that the local authorities attempted to enforce it but lacked human resources to sustain their actions.²⁰⁶ However prostitution did assume a lower profile for the duration of the ordinance

200. J. A. Brundage op cit (note 3) 248.

201. *ibid.*

202. *Glos. Ord. to D 33c.6v.*

203. J. A. Brundage op cit (note 3) 390.
Numbers of lovers ranged from approximately 5 to between 40 to 60!

204. J. A. Brundage op cit (note 3) 147.

205. Nickie Roberts op cit (note 7) 77.

206. *ibid.*

which was repealed by King Louis in 1256.²⁰⁷ In 1259 King Louis IX issued a decree that all the brothels in France be destroyed, but the King embarked on a crusade, and the decree was ignored.²⁰⁸

“All attempts to eradicate prostitution by legislation and force have met with the same result...”²⁰⁹

“Louis the Pious²¹⁰ attempted to repress harlotry in his empire by making both prostitutes and their clients liable to a public whipping, but his efforts were short-lived and ineffective.”²¹¹

5.1.4. The Fourteenth and Fifteenth Centuries

During the thirteenth and fourteenth centuries certain cities attempted to expel all the prostitutes from their area, but this was not at all successful.²¹²

However the attitude of toleration was again advocated

“Most legal writers and theologians continued to advocate a policy of practical toleration. The prostitute had a certain public usefulness they believed, and what was required was to set limits to her practice, rather than to eliminate her from society.”²¹³

207. *ibid.*

208. *ibid.*
“...issuing decrees was one thing; having them carried out was another. Given the lack of effective law enforcement at the time, not to mention the general corruption of officialdom, it seems unlikely that decrees had any lasting effect. City authorities throughout the Europe of the early Middle Ages made continuous attempts...to control the movements of the lower-class whores...and confine them to certain quarters of the cities, but contemporary accounts reveal that the women swarmed through the streets wherever and whenever they chose.” at 78.

209. Nickie Roberts *op cit* (note 7) 78.
In reflection, on the laws of King Louis, that they were ineffective, is the only conclusion that one can reach.

210. King Louis IX who ruled from 1214-1270.

211. *ibid.*

212. J. A. Brundage *op cit* (note 3) 463.
The cities were: Bologna in 1259; Venice in 1266 and again in 1314; Modena in 1327.

213. J. A. Brundage *op cit* (note 3) 463 and 464.

During the fourteenth and fifteenth centuries efforts to reform²¹⁴ prostitutes decreased, and local governments saw the benefits of controlling the prostitute, and accordingly assumed the control of many brothels within their boundaries.²¹⁵

“The earnings of prostitutes were generally subject to taxes levied by municipal authorities...”²¹⁶

During this period, the bulk of the sanctions against prostitutes were directed at them by their families, rather than the authorities.²¹⁷

5.2. HOMOSEXUALITY UP TO THE SIXTEENTH CENTURY

“In the last few years books have appeared suggesting that homosexuality is an invention of the nineteenth century...Obviously it does not mean that before then there were no homosexuals...All we know is that there was homosexual behaviour connected with certain periods of human life...”²¹⁸

The finding of specific enactments of legislation during the eleventh to the sixteenth century is therefore extremely difficult. However, the Church during this period was exceptionally vociferous towards

“‘unnatural’ sexual relations between men and women or persons of the same gender.”²¹⁹

214. By attempting to encourage them away from the profession into more morally acceptable services.

215. J. A. Brundage op cit (note 3) 521.

216. J. A. Brundage op cit (note 3) 523.

217. J. A. Brundage op cit (note 3) 528.

218. Philippe Aries. "Thoughts on the History of Homosexuality" in Philippe Aries et al. *Western Sexuality - Practice and Precept in Past and Present Times*. (1985) 64.

219. J. A. Brundage op cit (note 3) 149.

The Visigothic laws²²⁰ advocated castration for homosexual offenders, but despite this homosexuality appears to

“...have flourished in Spanish cities during the eighth and ninth centuries.”²²¹

The penitentials²²² were most concerned with anal sex, which was generally termed sodomy, but they were even more vehemently opposed to oral sex.²²³ The penitentials treated female homosexuality in the same way as male homosexuality, however they were

“...more censorious of female sexual play that involved dildos and other mechanical aids than they were of male use of mechanical devices in masturbation.”²²⁴

During the twelfth and thirteenth centuries when the Crusades were embarked upon, it was advocated that all men guilty of sodomy be burned to death if they would not voluntarily confess and submit to penance.²²⁵

During the latter part of the twelfth century both secular and religious authorities were forthright in their condemnation of homosexuality, yet evidence shows that male brothels

220. Which were the laws of the nomadic tribe of West Goths who wandered over Europe, and took the country of Spain.

221. *ibid.*

222. The penitentials were a genre of Christian moral literature that emerged between the sixth and the eleventh centuries, and were said to provide foundations for the shaping of the Roman Catholic Church.

223. J. A. Brundage *op cit* (note 3) 166 and 167. They did not distinguish between heterosexual or homosexual oral sex, but treated both with equal distaste.

224. *ibid.*

225. J. A. Brundage *op cit* (note 3) 213.

blossomed during this period.²²⁶ However despite the existence of these brothels any “overt homosexual practices attracted increasingly repressive attention from authorities, both secular and religious.”²²⁷

The Roman Emperor Justinian’s condemnation of homosexuality as being the basis for all natural disasters became standard in

“...the rhetoric of medieval vituperation.”²²⁸

The latter part of the thirteenth century saw an increase in the homosexual legislation, and the punishment for such behaviour.²²⁹

During the fourteenth and fifteenth centuries the law retained its severity towards homosexual behaviour, and the standard form of punishment metered out to homosexuals entailed burning and beheading.²³⁰

5.3. CONCLUSIONS

The differing societal perspectives on sexuality are greatly affected by the attitudes of the emperor or ruler of the time, as is apparent in the fluctuations of attitude evidenced above.

The laws regarding prostitution during this period show a range of legal interventions from

226. J. A. Brundage op cit (note 3) 313.
“...male brothels existed in Chatres, Orleans, Sens, and Paris in the late twelfth century...”

227. J. A. Brundage op cit (note 3) 399; Andrew McCall. *The Medieval Underworld*. (1979) 206.

228. J. A. Brundage op cit (note 3) 399.

229. J. A. Brundage op cit (note 3) 472.

230. Andrew McCall op cit (note 227) 209; J. A. Brundage op cit (note 3) 534.

attempts at eradication, to attempts at reform, to regulation, and combinations of these different forms of intervention. Yet, no attempt at eradication proved successful, and control was never able to be enforced adequately.

With regard to homosexuality the Christian attitude permeates the legal positions in this regard, but little can be ascertained about the success of any punitive attempts at regulation or eradication of homosexuality.

6. AN OVERVIEW OF ENGLISH LAW

This chapter will provide a brief overview of the developments in English law regarding prostitution and homosexuality, from around the seventeenth century to the early part of the twentieth century.

6.1. PROSTITUTION IN THE UNITED KINGDOM

The English Parliament in 1641, during the reign of King Charles I passed an Act which proclaimed that

“...prostitution was no longer a criminal offence; henceforth it was to be seen in law as a ‘public nuisance’ or a ‘gross indecency’ if committed in public. Apparently the general trend of the Stuart administration was moving towards liberalising the laws surrounding prostitution - but this thaw was to be short-lived, and was swiftly overtaken by the events of the Civil War and the ensuing Puritan Commonwealth.”²³¹

The Puritan victory lead to an assumption that prostitution would be eradicated, however, “there were those who, even in the Puritan ranks, still saw a place for it in the new moral

231. Nickie Roberts op cit (note 7) 135

society.”²³² In 1649, a Doctor Chamberlen made a proposal to parliament that state-regulated brothels be opened across the country, however this was turned down.²³³

After the death of Oliver Cromwell, the Puritanical campaigns of moral repression abated.²³⁴

The Restoration period began in 1660 with the crowning of Charles II, and was characterised by

“...the example of public licentiousness given by the aristocracy, and prostitution was allowed to flourish.”²³⁵

Upon comparison with the attitudes towards prostitution in Ancient Rome the similarity in progression from repression to licentiousness is glaring, indicating the repetitiveness of the historical themes.

The eighteenth century saw the tightening of legislative control over brothels. The Disorderly Houses Act of 1752 was introduced.²³⁶

“This decreed that any house, room or garden in London or Westminster which allowed music, dancing or other entertainment without a licence, would be regarded as a disorderly house (that is, a brothel), and punished accordingly.”²³⁷

232. ibid.

233. ibid.
“This was undoubtedly the bleakest period for prostitutes of England.”

234. Nickie Roberts op cit (note 7) 137.

235. ibid.

236. Nickie Roberts op cit (note 7) 186.

237. ibid.

This Act set a precedent for the control and regulation of prostitution in English law, and serves as the foundation for English legislation on brothels to the present day.²³⁸

The end of the eighteenth century resulted in the British Industrial Revolution, and the rush to urban areas, and the lack of sufficient employment saw an increase in the numbers of prostitutes in the towns.²³⁹

From as far back as the year 1824, the main motivation that becomes apparent for the development of English law was to prevent the public, and obvious manifestations of prostitution.²⁴⁰

The Vagrancy Act of 1824 did not provide for the creation of a specific offence out of prostitution, but it did penalise

“a common prostitute who wanders in the public streets or public highways or in any place of public resort and behaves in a ‘riotous or indecent manner’”²⁴¹

The Vagrancy Act was amended in 1898 in order to include males within its definition, and thus prohibit them from soliciting.

The Metropolitan Police Act of the 1950's appeared to have been a reworking of the Vagrancy Act, and “made loitering an offence.”²⁴²

238. ibid.

239. Nickie Roberts op cit (note 7) 188.

240. Tony Honore. *Sex Law*. (1978) 118.

241. ibid.

242. Nickie Roberts op cit (note 7) 246.

In 1864 the first of three Contagious Diseases Acts was enacted.²⁴³ These acts were instituted in areas where there were naval and military stations.²⁴⁴ Under this act provision was made that a police superintendent, or inspector merely had to furnish a Justice of the Peace with information that a specific woman was a prostitute, and the Justice could then order the woman to be examined, and if she was found to be suffering from a venereal disease, she could be detained in a lock hospital for a period up to three months.²⁴⁵ If the woman concerned wished to avoid appearing in court she could sign a voluntary admission.²⁴⁶

In 1866 the second Contagious Diseases Act was passed.²⁴⁷ This act increased the detention period in a hospital from three to six months.²⁴⁸

In 1869 the third Contagious Diseases Act was passed. The period of detention was increased from six to nine months.²⁴⁹

The criticism of the British Contagious Diseases Acts, and the obvious double standard enforced by the Acts are aptly captured in the quotation below, drawn from the records of the Royal Commission investigating the Contagious Diseases Acts of between 1864 - 1869:

-
243. William Acton. *Prostitution*. (1968) 232.
Josephine Butler. 'Letter to my Countrywomen'. *The Sexuality Debates*. (1987) 153.
244. Peter Fryer. Introduction to William Acton's book *Prostitution*. (1968) 8.
The first act applied to the following towns : Portsmouth ; Plymouth; Woolwich; Chatham; Sheerness; Aldershot; Colchester; Shorncliffe; The Curagh; Cork and Queenstown.
Josephine Butler op cit (note 243) 154
The Act was intended "to root out sexually transmitted diseases among enlisted men in the army and navy." Nickie Roberts op cit (note 7) 246.
245. William Acton op cit (note 243) 232.
Josephine Butler op cit (note 243) 154.
246. *ibid*.
247. William Acton op cit (note 230) 232.
248. William Acton op cit (note 243) 232.
Windsor was added to the list of towns under which the act operated.
249. *ibid*.
The following towns were added to the list: Canterbury; Dover; Gravesend; Maidstone; Winchester; Southampton.

“There is no comparison to be made between prostitutes and the men who consort with them. With the one sex the offence is committed as a matter of gain; with the other it is an irregular indulgence of a natural impulse.”²⁵⁰

The context of the investigation by the commission was that prostitutes and women suspected of prostitution were mandatorily examined in the most humiliating fashion for venereal disease, and if infected were sent to a lock hospital. Their patrons, however, were exempted from both the examination and confinement. This double standard was therefore the primary focus of feminists of this time, including Josephine Butler.

In 1869 the Ladies National Association for Repeal issued a manifest,²⁵¹ and agitated until a Select Committee was finally formed in 1879 to investigate the Acts.²⁵² In 1882, the report of the Select Committee was released wherein the majority had opted for the continuation of the Acts, but the minority indicated that they objected to the Acts on religious, constitutional and moral grounds, and furthermore evidence showed that venereal disease had not been reduced in the army, but had in fact increased amongst women.²⁵³

In 1883, the Acts were suspended.²⁵⁴ Finally in 1886 the Acts were repealed.²⁵⁵

250. Carol Pateman "What's Wrong with Prostitution?" *The Sexual Contract*. (1988) 196.

251. The arguments by The Ladies Association were numerous, but the thread of their submission was that "These laws are immoral and unjust, whether they succeed in their object or fail...and if they really do enable men to sin without having to suffer for it, we shall only oppose them all the more, because we foresee that they will in the end destroy virtue, first among men and afterwards among women." Josephine Butler op cit (note 243) 165.

252. *ibid.*

253. *ibid.*

254. *ibid.*

255. *ibid.*

The most persuasive argument wielded by Josephine Butler in her condemnation of the Acts was that they legalised the organised activities surrounding prostitution which had hitherto been illegal.²⁵⁶ This intervention by the state is important to recall when examining modern alternatives for prostitution.

In 1859 The Criminal Law Amendment Act was passed, and the age of consent for sexual intercourse was raised to 16, as well as granting the police extensive powers to act against brothels and procurers.²⁵⁷ Organised prostitution was illegal, however the act of prostitution per se was not made criminal.

The Sexual Offences Act of 1956 prohibits brothel-keeping and living off immoral earnings. However being a prostitute is not criminalised, all the conditions that surround prostitution are however criminalised.

Section 32 of the Sexual Offences Act of 1956 provides that a male prostitute may also be charged with the crime of soliciting or importuning in a public place for immoral purposes.

In 1957 a *Report of the Committee on Homosexuality and Prostitution* (The Wolfenden Commission) was produced. This Commission examined the law relating to homosexuality and prostitution in order to determine the appropriate changes that should be effected, if any to the position in England. When examining the issue of prostitution they acknowledged the

256. "Now I wish you to try to realise that these Acts introduced into England not only an immoral principle and demoralising procedures, but the most violent infringement of all the first principles of law and of jurisprudence, legalising that which in all lands, until recent times, has been held to be illegal. The danger for the whole community is imminent when the safeguards of law and constitutional right are swept away for any portion of that community." Josephine Butler op cit (note 243) 181.

257. Nickie Roberts op cit (note 7) 257.

fact that it in itself was not a criminal offence.²⁵⁸ However, certain activities both of prostitutes, and those in some fashion connected to them were criminal offences.²⁵⁹ The Wolfenden Commission submitted that there could be no sustainable case for

“attempting to make prostitution in itself illegal.”²⁶⁰

The Commission indicated that they were not recommending any attempts towards the abolition of prostitution, nor the criminalisation of prostitution.²⁶¹ The Commission made the following statement assists in the examination of the efficacy of criminalising prostitution.

“Prostitution is a social fact deplorable in the eyes of moralists, sociologists and, we believe, the great majority of ordinary people. But it has persisted in many civilisations throughout many centuries, and the failure of attempts to stamp it out by repressive legislation shows that it cannot be eradicated through the agency of the criminal law.”²⁶²

1959 saw the revision of nineteenth century legislation within the Street Offences Act. This Act implemented the first part of the recommendations of the Wolfenden report.²⁶³ The Act prohibited loitering or soliciting in a street or public place for the purpose of prostitution.²⁶⁴ The apparent motivation for the Act lay in an attempt to prevent the public from being

258. Wolfenden Commission. Chapter VIII paragraph 224.

259. *ibid.*

260. Wolfenden Commission. Chapter VIII paragraph 224, and Chapter II.

261. Wolfenden Commission. Chapter VIII paragraph 285.
“We do not think that the law ought to try to do so; nor do we think that if it tried it could by itself succeed. What the law can and should do is to ensure that the streets of London and our big provincial cities should be freed from what is offensive or injurious and made tolerable for the ordinary citizen who lives in them or passes through them.”

262. Wolfenden Commission. Chapter VIII paragraph 225.

263. Anthony Grey. *Quest for Justice - Towards Homosexual Emancipation*. (1992) 247.

264. Section 1 (1) of the Street Offences Act.

accosted or affected by the visible presence of prostitutes.²⁶⁵ The Act removed the requirement of annoyance, that was previously required for bringing charges against prostitutes for solicitation or loitering.²⁶⁶

This Act is particularly notorious for the fact that a woman could be labelled 'A common prostitute' if she received two cautions for soliciting, and this label could be adduced as evidence if she were to appear in court regardless of whether she is still working as a prostitute.²⁶⁷

"The Street Offences Act was not only drafted with the aim of deterring prostitutes through the use of legal penalties, but with the intention of drawing women away from prostitution by means of contact with the probation service at the point of being cautioned...the problem with this approach as subsequent criminal statistics in any sphere indicate, is that there is no guarantee that it will secure the intended result."²⁶⁸

6.2. HOMOSEXUALITY IN THE UNITED KINGDOM

In 1533 anti-homosexual laws were enacted in Great Britain.

"'Buggery' laws forbade homosexual acts, anal sex, and later, solicitation for sex."²⁶⁹

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265. Richard Symanski. op cit (note 5) 118.
Wolfenden Commission. paragraph 257.
"[The law] should confine itself...to what is offensive or injurious; and the simple fact is that prostitutes do parade themselves more habitually and openly than their prospective customers, and do by their continual presence affront the sense of decency of the ordinary citizen. In doing so they create a nuisance which, in our view, the law is entitled to recognise and deal with."
266. Eileen McLeod. *Women Working: Prostitution Now*. (1982) 92.
267. Nickie Roberts op cit (note 7) 288.
268. Eileen McLeod op cit (note 266) 95.
M. Davies. *Probationers in their Social Environment*. (1969).
N. Walker. *Crime and Punishment in Britain*. (1970).
269. Anthony Russo. "Homosexuality and Crime" in *Encyclopaedia of Crime and Justice*. 866.

The Criminal Law Amendment Act of 1859 outlawed male homosexuality.²⁷⁰

Labouchere's amendment to the Criminal Law Amendment Act of 1885 provided that all forms of male homosexual behaviour, termed 'gross indecency' would be criminal.²⁷¹ This was extremely severe legislation as it did not discriminate between acts committed in public, or private, and neither did it make allowance for acts committed with consent.²⁷² It was Labouchere's Amendment which resulted in highly publicised homosexual trials, such as that of Oscar Wilde.²⁷³

In 1957 The Wolfenden Commission recommended that homosexuality between consenting adults in private no longer be a criminal offence.²⁷⁴

In 1967 The Sexual Offences Act provided that homosexual acts between males over the age of 21 years, would not be criminal if committed in private.²⁷⁵ The 1967 Act did have several limitations in that the act cannot be treated as being done in private if there are more than two people taking part.²⁷⁶ Section 1 (2) (b) prohibits the act from taking place in public lavatories, even if the act is performed within a locked cubicle.

270. Nickie Roberts op cit (note 7) 257.

271. Anthony Grey op cit (note 263) 16.

272. *ibid.*

273. *ibid.*

274. Wolfenden Commission. paragraph 54.
"...But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individuals privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind."
paragraph 61.
"...Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business."

275. Tony Honore op cit (note 240) 89.

276. s 1 (2) (a) of the Sexual Offences Act 1967.

Lesbianism is not a crime, and apparently never has been at common law.²⁷⁷ If there is a lack of consent by one woman, or an inability to consent through being younger than 16 years of age then in very rare circumstances such homosexual activity between women could be prosecuted.²⁷⁸

6.3. CONCLUSIONS

Prostitution per se has never been a criminal offence in English law, however the surrounding activities such as procuring, brothel-keeping, soliciting etcetera. have been criminal offences from the eighteenth century

Homosexuality had been criminally prosecuted since the nineteenth century under English law, however since 1967 acts committed in private between two males over the age of 21 years, are now no longer perceived as criminal.²⁷⁹

7. THE SOUTH AFRICAN POSITION

As with most countries the incidence of prostitution becomes visible in urban areas where the economic attraction for prostitutes is apparently as powerful as for those who consort with them. The sea-ports of Durban and Cape Town seemed to attract, alongside the traders numerous prostitutes.²⁸⁰ In South Africa, at the turn of the twentieth century the discovery of

277. Tony Honore op cit (note 240) 100.

278. *ibid.*

279. Sexual Offences Act of 1967.

280. This information is derived from an examination of the areas within South Africa where legislation was enacted to specifically deal with prostitution.

gold in the Transvaal marked one of the largest migrations of fortune-hunters to the region of the Transvaal in what has been described as the “most explosive capitalist development”²⁸¹ between 1886 - 1914. Along with the others seeking their fortunes were the prostitutes who flocked into the country from all over the world, and who also migrated from the Cape Colony to avoid restrictive laws that prevented their applying their trade in an uninhibited fashion.

7.1. PROSTITUTION IN SOUTH AFRICA

By the mid-1890's there

“were between 200 - 300 pimps, ‘white slavers’ and professional gangsters who controlled Johannesburg’s prostitution business. It was largely as a result of the efforts of this latter group that commercialised sex and police corruption came to assume a highly organised form in the city.”²⁸²

In addition to the elements of vice²⁸³ described above,

“...prostitutes and brothels attracted a fringe element of petty criminals, thieves and gamblers to the city centre...”²⁸⁴

281. C. van Onselen. "Prostitutes and proletarians" in *Studies in the Social and Economic History of the Witwatersrand 1886 - 1914*. (1982) 103.

282. C. van Onselen op cit (note 281) 104.

283. The pimps, the gangsters, and the corrupt police officials.

284. C. van Onselen op cit (note 281) 104.

The government felt an obligation to intervene²⁸⁵ and this occurred with great impact in the Transvaal region²⁸⁶, accompanied however by blackmail, bribery and corruption on the part of the law enforcement agencies.²⁸⁷

In 1885 a Contagious Diseases Act²⁸⁸ was enacted by the Cape Parliament. This was an imitation of the British Act of the same name which was so heavily criticized in Britain and ultimately repealed in 1886. The Act provided for the registration of all prostitutes, the scheduling of areas, and insisted on compulsory medical examinations for all prostitutes. In 1899 the Cape Colony was confronted by the same problems and criticisms that the English Contagious Diseases Act had presented.²⁸⁹ A select parliamentary committee was mandated to investigate the issue. The findings of this committee were that

285. This obligation towards intervention appears as a trend throughout history, regarding the "problem of prostitution".

286. C. van Onselen op cit (note 281) 105.

287. These factors which follow legal interventions will be given some attention in an examination of the reasons governing why decriminalisation should be the natural course to follow with regard to prostitution.

288. Act 39 of 1885.

289. The double standard entrenched by the Act. The wide powers conferred on the law enforcement officials by the Act, which could result in the reputations of women being subject to the discretion of a police-officer. The cruelty of the punishment and treatment accorded to a woman who was ordered to submit for a medical examination under the Act. The fact that venereal diseases, and the spread thereof have never been adequately controlled by law.

Josephine Butler op cit (note 243) 161-162

The Contagious Diseases Act 39 of 1885.

The Act provides at s 45 (Part III) that

"This Act does not legalise prostitution or exempt any person engaged therein from the penalties of the existing law."

This section obviously inserted in an attempt to ensure that the same criticisms raised by Josephine Butler towards the British Contagious Diseases Acts, could not be invoked against this Act. It is a strange position to oppose an activity, yet to legislate on that activity, with a disclaimer such as s 45 being sufficient to legitimate the purpose behind the enactment of this legislation.

“the Act did not play any material role in diminishing the spread of venereal disease, but that it continued to provide - via the notorious ‘compulsory examination’ clause - the means by which women could be humiliated.”²⁹⁰

It is of consequence to note however that even in the light of such findings the Act was not immediately repealed.

Several laws were enacted²⁹¹ in an attempt to combat vice²⁹², however many of these laws contributed to the problems of enforceability by creating new potential for official corruption.

For example:

“Law No. 2 of 1897 simply increased unavoidable occupational hazards, and raised necessary overhead expenditure on police bribes.”²⁹³

The Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902 was introduced, (Known by its short-title, The Morality Act of 1902). This was a South African innovation which made sex between black males and white prostitutes an offence. In addition the Act also attempted to deal with the burgeoning problem of pimps and ‘slavers’ and to this end provided for up to two years imprisonment or the provision for up to 25 lashes for a person convicted of this offence.

Law Relating to Brothels and Immorality Act 31 of 1903 of the Parliament of the Colony of Natal prohibited living wholly or in part on prostitution, and proscribed solicitation or

290. C. van Onselen op cit (note 281) 135.

291. In the Cape, in Natal, and in the Transvaal.

292. C. van Onselen op cit (note 281) 105.

293. C. van Onselen op cit (note 281) 118.
Law no. 2 originated in the Transvaal.

importuning for immoral purposes.²⁹⁴ The Act was substantively similar to the Cape Act 36 of 1902, which also proscribed against solicitation. Both Acts contained emulations of the provisions of the Police Offences Act 27 of 1882 which prohibited soliciting and the committing of acts which constituted a public nuisance.²⁹⁵

Section 16 of the Act prohibits "illicit sexual intercourse between any white woman and any coloured person as defined by Law 15, 1869."²⁹⁶

The Transvaal had an Ordinance which effected the same prohibitions as the Act, Section 19 (1) of Immorality Ordinance 46 of 1903 of the Transvaal 'prohibits any white woman' from 'voluntarily' permitting 'any native to have unlawful carnal connection with her'. This demonstrates an interesting reflection of the chief concerns of the legislators during this period. Section 20 (a) and (b) deals with a prohibition on solicitation or exhibition 'in an indecent dress or manner at any door or within view of any public street or any place to which the public have access.'

The Immorality Ordinance of 1903 was passed by the British Administration under Lord Milner as an attempt to control the influx of prostitutes within the area of the Transvaal.²⁹⁷

294. Section 15.

295. Part 1, Section 5, paragraph 29 of the Police Offences Act 27 of 1882.
"Any common prostitute or night-walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers. The penalty for the commission of the offence created by this section shall be a fine...or in default of payment imprisonment with or without hard labour for any period not exceeding thirty days..."

296. This is a uniquely South African provision.

297. C. van Onselen op cit (note 281) 105.

The Immigrants Restriction Act 15 of 1907 of the Transvaal was utilised to deport prostitutes and all who were connected with prostitution. The Act defined a prohibited immigrant as including

“any prostitute or person living on the earnings of prostitution or procuring women for immoral purposes”²⁹⁸

and allowed for prohibited immigrants to be restricted from entering the colony or removed from the colony.

However these deportations had little effect on the rapidly growing numbers of locally born persons who were entering the profession to meet the growing demand.

When a particularly stringent piece of legislation was enacted and the law enforcement officials attempted to enforce it within a certain area, the prostitutes and their pimps migrated to other areas where they could operate with little interference from the law, or could bribe or blackmail any law enforcement official to turn a blind eye to the application of their trade.

In 1987 the *Report of the Ad Hoc Committee of the State Presidents Council*²⁹⁹ was published.

At this point in South African Law it was not a crime to be a prostitute.³⁰⁰ The recommendations of this report were that the position be retained as it was, and that prostitution not be brought under the control of the criminal law.³⁰¹ However, despite these

298. Section 2(3) of the Act.

299. PC 1/87.

300. s 2.56 of the *Report by the Ad Hoc Committee of the State Presidents Council*.

301. Chapter IV, paragraph 4.13 - 4.16.

"The Committee accepts that prostitution unfortunately cannot be eradicated by measures under the criminal law. In fact the Committee has evidence that penal sanctions do little...to make a hardened prostitute abandon her way of life. The aim of criminal law measures is consequently not to attempt to impose absolute prohibitions, but to curb the

(continued...)

recommendations in 1987, the Immorality Amendment Bill was moved³⁰², and subsequently became law,³⁰³ and irrevocably affected the lives of prostitutes in South Africa. It is now an offence for any person to have sexual relations with another person for reward.³⁰⁴ The Sexual Offences Act 23 of 1957 governs all activities surrounding prostitution, and criminalises prostitution itself.

7.2. HOMOSEXUALITY IN SOUTH AFRICA

The history of homosexuality in South Africa is difficult to trace, and the legislative interventions are also difficult to locate prior to the twentieth century records.³⁰⁵

Sodomy is a common law crime in South Africa, and has frequently been used against homosexual males.

301(...continued)

incidence of prostitution...the most effective way of combatting prostitution would be to deal with the public manifestations under the criminal law and leave other manifestations to public opinion...There are strong arguments...against the use of the criminal law to combat prostitution per se."

The arguments mentioned within the report include:

- prostitution cannot be eradicated.
- if prostitution were driven underground this would impact on health control.
- the distinction between the act of prostitution and other consensual adult sexual activities (eg. adultery) which are beyond the reach of the criminal law.

302. *Debates*. 7 October 1987 col 3426.

303. Immorality Amendment Act 2 of 1988, which inserted section 20 (1) (aA) into the Sexual Offences Act 23 of 1957.

304. This therefore means that it is an offence to be a prostitute, and live off the proceeds of one's occupation. s 20 (1)(aA) of the Sexual Offences Act 1957.

305. This can possibly be attributed to the covert nature of homosexuality, and the fact that it was underground because of social reprobation thereof, and that it was considered a 'disease' by many medical journals, and people could be committed to institutions for manifesting the 'symptoms' until such time as they were 'cured'. The *Diagnostic and Statistical Manual* (DSM) of the American Psychiatric Association listed homosexuality as a mental disorder, until as recently as 1987 when the DSM III-R was published and that classification removed.

The commission of and/or the procurement of the performance of acts of gross indecency were punishable by law under Act 22 of 1898 of the Parliament of the Colony of Natal, which was enacted in order to

“...amend the law relative to the trial and punishment of the Crimes of Rape and Indecent Assault and Conduct.”³⁰⁶

The Act prohibits “Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure, the commission by any male person of any act of gross indecency with another male person...”³⁰⁷

The South African homosexual history, appears to emerge most clearly with the autonomy of individuals becoming a greater reality in the aftermath of the urbanisation processes that followed the “...mining rushes that created Johannesburg,”³⁰⁸ followed by the influx of rural people into urban areas in the period between the First and Second World Wars.³⁰⁹

In the evolutionary process of the development of South African law from its Roman-Dutch common law origins, only sex for procreation was condoned.³¹⁰ The lack of proper justification for such a restrictive ban against all other forms of sexual activity slowly became apparent, and many of the Roman-Dutch restrictions were limited.³¹¹ However, one restriction

306. Act 22 preamble.

307. Section 10 of the Act.

308. Mark Gevisser. "A Different Fight for Freedom : A History of South African Lesbian and Gay Organisation from the 1950's to 1990's." *Defiant Desire - Gay and Lesbian Lives in South Africa*. (1994) 18.

309. *ibid.*

310. Edwin Cameron. "'Unapprehended felons' : Gays and Lesbians and the Law in South Africa." *Defiant Desire - Gay and Lesbian Lives in South Africa*. (1994) 91.

311. *ibid.*

definitely remained, and that was the prohibition against sodomy.³¹² In addition physical contact of an intimate nature such as

“...mutual masturbation between two men is criminal as an ‘unnatural offence’.”³¹³

In 1966, the police raided a homosexual party in Forest Town, Johannesburg. This was a highly organised and publicised raid, which led to a serious reconsideration³¹⁴ of the homosexual legislation in South Africa.³¹⁵ The dilemma which faced the authorities, was that there was insufficient legislation under which to penalise homosexuals, except for the prohibition on sodomy and the fact that

“...gay men could only commit statutory offenses when in public: this meant masquerading as women or soliciting at cruising spots.”³¹⁶

In March 1967, P. C. Pelser, the then Minister of Justice placed a Bill before the House of Assembly.³¹⁷ In 1968, because of the severity of the proposed legislation, a Parliamentary Select Committee was charged with the investigation thereof, and the determination of what amendments to the legislation would be beneficial.³¹⁸ The Select Committee proposed three amendments to the law:

312. ibid.

313. ibid.

314. By the legislators, who were prompted to act by the law enforcement officials.

315. Mark Gevisser op cit (note 308) 30 - 31.

316. ibid.

317. Mark Gevisser op cit (note 308) 32.

318. Mark Gevisser op cit (note 308) 32 - 35.
Glen Retief. "Keeping Sodom out of the Laager : State Repression of Homosexuality in Apartheid South Africa." *Defiant Desire - Gay and Lesbian Lives in South Africa*. (1994) 102 makes the following comment:
"The report of this investigation, [by the Parliamentary Select Committee][was] the only serious policy-making initiative to ever come from the government on the question of homosexuality, was published in 1968 and makes for entertaining, if horrifying reading."

- a. the age of consent for male homosexual acts be raised from 16 - 19.
- b. dildoes should be outlawed.³¹⁹
- c. the now infamous 'men at a party' clause should be inserted into the Immorality Act.³²⁰

Amendments (a) and (c) are still present within the Sexual Offenses Act³²¹, however in 1988 the age of consent for female homosexual acts was raised³²² to 19 in line with the prohibition on male homosexual acts.

7.3. CONCLUSIONS

South African law, demonstrates conservatism in its approaches to issues of sexuality. Recent history demonstrates a far less tolerant attitude towards matters involving sexuality which are not always consistent with the development of the South African society, and therefore the potential for reform is far more apparent.

319. Glen Retief op cit (note 318) 103.

"The MPs were rather worried about the sizes, shapes and attributes of the different kinds of 'dilders' used by lesbians - 'Is this instrument of normal or abnormal size?' a United Party member wanted to know. Perhaps the eventual decision to ban unnatural articles was representative of a general anxiety about the penis being made redundant."

320. This is now section 20A of the Sexual Offenses Act 23 of 1957.

321. Act 23 of 1957.

322. By the Immorality Amendment Act 2 of 1988.

CHAPTER 3

THE RELATIONSHIP BETWEEN LAW AND MORALITY

1. INTRODUCTION

Since the beginning of recorded history, the relationship between law and morality has been regarded as being in some fashion intrinsically related.¹ The result is that the layperson tends to believe that there is a law enforcing all acts into compliance with the dictates of common morality.² This cannot be the case however, as one notes that when one moves from society to society laws differ vastly, and morality is greatly different in certain societies from the morality prevalent within South Africa.³ An example of this is apparent in an examination of the practice of bigamy which in South Africa is viewed as being immoral, and the criminal law provides sanctions against any individual who commits the act. However there are certain countries⁴ wherein bigamy is neither immoral, nor subject to legal sanction and the practice of having more than one husband/wife is perceived as being a symbol of wealth and social

1. Dennis Lloyd. *The Idea of Law*. (1987) 57.

"The relation of law to morals is sometimes described as two intersecting circles, the part inside the intersections representing the common ground between the two spheres and the parts outside representing the distinctive realms in which each holds exclusive sway. This picture however is misleading in so far as it suggests that there is common ground between the two, there is a kind of identity. This is not generally the case."

2. *ibid.*

3. J. W. Harris. *Legal Philosophies*. (1989) 132.

An example given in this work relates a comparison of the apartheid laws in South Africa to the affirmative action laws for Black American citizens. Both laws were morally justified in the respective countries, but both could on the basis of that same moral justification be found to be inherently flawed.

4. Certain Islamic countries, and central African countries.

esteem. And, in even other countries bigamy is criticised as being immoral, but no criminal sanctions are applied to any person who commits the act.

Another example of an act regarded within the minds of many as being immoral is adultery.

This is an act which has no defined victims other than the persons who are caught between the circumstances in the event of the act becoming public knowledge.⁵ In South Africa the act of adultery was subject to a common law penal sanction⁶ until the case of *Green v Fitzgerald*⁷ which was as recent as 1914, when the court decided that it did not have the required justification for its interference in such issues.⁸ However in certain Middle Eastern countries to this day the act of adultery is punishable by death. There is therefore clear indication that the law, and social morality differ from country to country, and why not therefore from society to society, as the progression of time changes so many other things?

The origins of certain laws can certainly be connected to the laws of a Divine Law-giver, and the Bible, the Koran, and other religious documents often contain laws which are directly linked to the laws of most countries.⁹

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5. Dennis Lloyd op cit (note 1) 60.
"In fact in some places (as in certain states of the United States) where adultery is treated as a criminal offence the law is virtually a dead letter and so tends to do harm by bringing the law generally into disrepute."
 6. J. Burchell & J. Milton. *Principles of Criminal Law*. (1991) 563.
 7. 1914 AD 88.
 8. Dennis Lloyd op cit (note 1) at 60.
"...there may be fields of human activity where the law deliberately prefers to abstain from supporting the moral rule because it is felt that the machinery is too cumbersome to engage upon the particular task and that more social evil may be created than prevented by its intervention."
The case of *Green v Fitzgerald* resulted in judicial decriminalisation of adultery because of the rarity of the application of the common-law penal code governing adultery.
 9. The Ten Commandments represent an ideal example of this assertion. Laws seem to have common ground with the prohibitions contained within the ten commandments, for example: murder is prohibited and the commandments hold that one should not kill ; likewise theft is prohibited by law, and the commandments state that one should not steal.

“This elementary feeling that law is in some way rooted in religion, and can appeal to a divine or semi-divine sanction for its validity, clearly accounts to a considerable degree for that aura of authority which law is able to command and more particularly for the belief, to which we have referred, in the moral duty to obey the law.”¹⁰

While the object of this study is not to examine the moral duty which is seen to be the director of the obedience with regard to a following of the directives of law, the origins of the connection between law and morality are however crucial for the purposes of ascertaining the rationale behind the implementation of certain laws, and the determining of the validity of such laws in the context of their implementation and their concomitantly sustained sanctions.

It is expedient to expand on the relationship between religion and the legal enforcement of morality due to the fact that the most outspoken advocates in opposition to any alteration of the law in the areas of homosexuality and prostitution are indisputably the religious organisations.¹¹

Firstly within the Hebrew development of law there was a certain blur without the possibility of determining boundaries between law and morality based on the fact that all law was that which emanated from God through the means of the prophets.¹² However the prophets and other ancient law-makers cannot be removed from the human realm of subjective

10. Dennis Lloyd op cit (note 1) 47.

11. D. A. J. Richards. "Homosexual Acts and the Constitutional Right to Privacy" in *Homosexuality and the Law* ed. D. Knutson. at 53.
“...some religious groups in our society will continue to condemn homosexuality as unnatural, just as they continue to abhor contraception. They acknowledge a religious duty to reproduce, believing that any use of sexuality without the intention and likelihood of procreation is unnatural...Religious groups cannot legitimately require that others, who do not share their views, be forbidden to love or to express themselves sexually in the only ways available to them.”

12. Dennis Lloyd op cit (note 1) 46.
“...law was regarded as having a sanctity which bespoke a celestial or divine origin. Law, morality, and religion were treated as inevitably inter-related.”

interpretations, and ideological biases with which man is unfortunately equipped.¹³ The interpretation of the scriptures has resulted in the complex situation, wherein we find ourselves today, where many different groups are interpreting identical documents differently. Each endeavours to assert their perspective on the issues, which then results in an irrational trend towards dogmatism over rationality, and encouragement of blind obedience as opposed to open questioning of issues in an attempt to derive the truth. This Truth does however appear to be as elusive as the history of our origins.¹⁴

In contrast to the Hebraic approach, the Ancient Greek culture devised a system of laws which rested on the basis of rationality, and could be discovered by means of rational enquiry and investigation.¹⁵ The distinction between the Greek and the Hebraic concepts of law rested on the mere facts, that within the former, man could rationally discover the foundations for a law and accordingly the justifications therefore, whereas in the latter the law was mystical and beyond the comprehension of man, and therefore had to be followed by means of blind obedience.¹⁶ It is obvious that one will respond more positively towards obeying laws that one can rationally understand and defend. For example the most obvious law that has as its justification the state's aims towards the protection and preservation of the life of its citizens is

13. *ibid.*
"Some laws, indeed, might be traced directly to a divine lawgiver, as in the case of the Ten Commandments; others, while clearly owing their direct origin to human sources, would be given an aura of divine sanctity by attributing a measure of divine inspiration to the human lawgiver...lawgivers in ancient times tended to be treated as mythical, semi-divine, or heroic figures."

14. The evolution debate, versus the garden of Eden story of creation makes a definitive history of the origin of humankind elusive. Likewise the imposition of morality affected by interpretative bias is equally problematic for possibly similar reasons.

15. Dennis Lloyd *op cit* (note 1) 51.
"...the Greek form of faith in a rational order of the universe, governed by intelligible laws ascertainable by rational investigation, provided so important a countervailing force to that of moral mysticism."

16. *ibid.*

the crime of murder. The crime can be rationally justified by most right thinking persons as one can rationalise the advantage of having sanctions against any individual who attempted to take one's life, and accordingly one can act daily in the knowledge that one has a fair chance of surviving until the following day, and accordingly one can labour productively without expending all of one's energy attempting to ensure self preservation. In addition to being rationally justifiable on its own merits, murder also has a moral implication in that one is conditioned that it is 'wrong' to take the life of another human being. This approach based on rationality is the more logical direction which seems to have been adopted by modern legislators who no longer enforce laws by means of threats of divine retribution.¹⁷

So acts such as adultery which may still be morally condemned in some circles are no longer legally condemned.¹⁸ It is important that law and morality should not only be perceived as appearing to be concurrent in most instances, but that they can be divergent as well. Laws are sometimes created which are devoid of moral validity, such as the Apartheid laws that South Africans are all too familiar with, and of course the Nazi laws which were totally devoid of the remotest connection to morality.¹⁹ So law and morality are therefore words which cannot in good faith be used interchangeably. They are separate but related aspects of the whole system.

17. Dennis Lloyd op cit (note 1) 56.

18. As discussed above, examples of this are: adultery, the changing attitude towards divorce law etcetera.

19. J. W. Harris. *Legal Philosophies*. (1989) 132.

In order to determine to what extent the law **should** enforce morality, a closer examination of the purposes of the law is required within a framework of an examination of the renowned philosophers who have deliberated upon this very issue.

The law is deemed to serve as a means by which a person's freedom is secured from his/her neighbour's invasion thereof.²⁰ However it is common knowledge that any prescription by law leads to a limitation on the extent of freedoms.²¹ As has already been discussed above, any restraint on liberty requires sound justification for such limitation. So in examining the restraint placed on activities such as prostitution and homosexuality which are activities which cannot in all certainty be said to result in any harm to the broader community, the limitation on the freedom of the participants in such activities should be above reproach.

2. JOHN STUART MILL'S HARM PRINCIPLE

In 1859 John Stuart Mill's first *Essay on Liberty* was published.²² This essay contained what was to become known as 'Mill's Harm Principle'. The extract below will speak for the Mill, but to contextualise the issue at stake, what the 'harm principle' was based upon was the fact that there are certain laws which punish people for crimes which are not of a violent nature, nor are the crimes harmful to any person save the perpetrator him/herself. The sole justification apparent for the existence of such crimes, was the fact that the conduct in

20. J. W. Harris op cit (note 18) 115.

21. *ibid.*
Law may be seen as "...a set of prescriptions which necessarily detract from natural liberty."

22. in *Utilitarianism, Liberty and Representative Government*. 72-73.

question was deemed to be immoral.²³ John Stuart Mill was preoccupied with the notion of individual liberty, and did not applaud state interference with that liberty, espousing the notion that the only justification by the state for interfering with individual liberty was in order to protect the community. His 'harm principle' follows:

"The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."

So according to Mill only the prevention of harm to others was justification for a limitation of the freedom of the individual.²⁴ In the light of this theory,²⁵ there is apparently no justification for governmental interference with regard to the issue of homosexuality. No harm is caused to any member of society, even though it is acknowledged that many members of society may disapprove of the activity, that disapproval cannot be interpreted to constitute harm. The only extent to which Mill would possibly concede some limitation on homosexual behaviour would be if people were in a position to observe the behaviour and thus suffer great discomfort, however this would only operate under the same principle that governs the protection of one's sensibilities with reference to both homo- and hetero-sexual behaviour. By homosexual behaviour we are hereby referring to consensual intercourse between adults of the same sex. (Accordingly all activities involving children, or imbeciles would be treated in the same fashion

23. The immorality of the conduct being determined by the legislators, who thereby impose their concept of morality on the whole of society, thus limiting the freedoms of those who do not perceive the conduct to be immoral.

24. As is evidenced in the extract above.

25. Particularly within a Utilitarian context.

as occurs where the perpetrators are indulging in heterosexual activity with the above mentioned categories of person).

Prostitution, in the light of Mill's theory, appears slightly more complex in terms of state interference thereto. If the arguments indicating that harm was caused to others as a consequence of the activities of prostitutes were persuasive enough, perhaps Mill would contemplate a restriction on these activities. However the customers of a prostitute are acquiring a service for which they obviously provide the demand, and the prostitute is providing the service for pecuniary gain. The only persons affected are those judging the issue according to their concepts of morality. Therefore if it boils down to a mere infringement of sensibilities, this ought not constitute sufficient harm, and the activity should not be interfered with by the state. So under Mill's harm principle, it would appear that arguments for decriminalisation would effectively succeed, and both prostitution and homosexuality would be allowed to operate in the absence of either state interference or criminal sanction that is linked thereto.

3. MORALISTIC AND PHYSICAL PATERNALISM

Patrick Devlin draws an interesting distinction between the concepts of moralistic paternalism and physical paternalism.²⁶ He asserts that moralistic paternalism is liberty-limiting and entrenches the belief that the law acts to protect individuals from moral harm. Physical

26. Patrick Devlin. *The Enforcement of Morals*. (1965) 136.

paternalism is seen to be that which protects one from physical harm to oneself, and from this harm generally by implementing legal sanctions to this effect.

“If it is difficult to draw a line between moral and physical paternalism, it is impossible to draw one of any significance between moral paternalism and the enforcement of moral law. A moral law, that is a public morality, is a necessity for [moralistic] paternalism, otherwise it would be impossible to arrive at a common judgement about what would be for a man's moral good. If then society compels a man to act for his own moral good, society is enforcing the moral law, and it is a distinction without a difference to say that society is acting for a man's own good and not for the enforcement of the [moral] law.”²⁷

What is therefore of crucial importance is the demand that a statute which creates a victimless crime finds justification for its existence that is above reproach, because a crime is created from a wrongdoing which both harms no-one, and violates no-one's rights. Devlin indicates above that there is no distinction between the justification that ‘society is acting for a man's own good’ and the fact that the moral law is being enforced on the merits of its own ‘morality’.²⁸

However if a law is being enforced simply on the basis of its morality, this then returns one to the question of whose morality is being enforced, and leads to a destruction of the credibility of the justification for the law in the first instance.

“Criminal law, Devlin argued, is completely unintelligible without reference to morality, which it enforces.... Devlin maintains that morality is a necessary condition for the existence of society. To change the law in such a way as to violate that morality is to threaten the stability of the social order.”²⁹

27. ibid.

28. See extract.

29. D. A. J. Richards. "Homosexual Acts and the Constitutional Right to Privacy" in *Homosexuality and the Law* ed. D. Knutson. 58.
Richards continued by providing Devlin's definition of morality:
"Morality, in this connection, is to be understood in terms of the ordinary person's intuitive sense of right and wrong, as determined, Devlin suggests, by taking a man at random from the Clapham omnibus.... Ordinary men and women morally loathe homosexuality: accordingly, homosexuality is immoral and must be forbidden by law."
Richards however criticises this position by holding that:
"There is no good reason to identify morality with social convention, since the latter is based on an indefensible and naive moral philosophy as well as on unexamined and

(continued...)

However Devlin's theory has been found to be unsatisfactory by the learned author D. A. J.

Richards³⁰:

"[Devlin's] argument is based on nonmoral instincts, social tastes, and accepted conventions. It is a mark of the unhappy separation of legal theory from serious moral theory that Devlin's superficial analysis can have been taken so seriously by lawyers, when its moral basis is so transparently inadequate."³¹

4. THE SOCIAL RIGHT THEORY.

The individuals within a society are a product of the forces that determine their relations with each other.³² The individuals within a society have rights, but these rights must be balanced with the rights of other individuals in order to allow for social solidarity.³³

The question of whether the rights of others are affected by a victimless crime was examined in a rather indirect fashion by Mill's Social Rights theory.³⁴ Mill does not always represent arguments that can be sustained within the context of social reality and rights. He deals with the issue of a violation of the 'social rights of others' as follows:

"...it is the absolute social right of every individual that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in

(...continued)
unsound sociology."

30. *ibid.* 59.

31. *ibid.*

32. J. W. Harris *op cit* (note 18) 245.

33. J. W. Harris *op cit* (note 18) 246.

34. John Stuart Mill. *On Liberty*. Chapter iv Paragraph 18.

the smallest particular violates my social right and entitles me to demand from the legislature the removal of the grievance.”³⁵

An interpretation of the above indicates that any person who would find their moral rights violated would be entitled to seek legal redress for this violation, however there is no account made for the causal connection between perpetration of the moral wrong, and the interests of the individual who has been wronged through the transgression of his/her moral rights.

Furthermore there is an assumption of an **absolute** social right³⁶ of all individuals which would be violated in consequence to the actions of an individual not acting ‘exactly as he ought.’

This then provides legal justification for intervention into areas wherein one may be acting contrary to ‘the ought’ but without the knowledge of any other individual, purely on the basis that this action violates the ‘social right’ of all other individuals. Freedom to act could arguably be seen to be limited despite the fact that there is no observation or knowledge of the act. So Mill’s Social Rights theory is problematic with regard to both his own, and the general emphasis placed on the value of individual liberty.

5. THE OFFENSE PRINCIPLE.

The ‘offense principle’ examined by Joel Feinberg offers arguments in favour of moral conservatism which demonstrates a trend towards legal coercion in consequence to the thesis that there is moral legitimacy in preserving a particular way of life with no radical or essential changes.

Feinberg’s analysis of the ‘offense principle’ is as follows:

35. John Stuart Mill op cit (note 33) at Chapter iv paragraph 18.

36. See extract.

“...indirect way of arguing for the legal enforcement of a society’s customary moral expectations is to invoke explicitly or tacitly the offence principle, and argue against legal impunity for discreetly private immoralities on the ground that they would come to be directly offensive anyway, their original privacy notwithstanding...”

As the ‘immoralities’ spread, it is claimed, their presence will inevitably be felt in subtle but pervasive ways that shock or disgust the ordinary person. If 10% of the population is homosexual, allowing homosexual behaviour even in private (and only in private) would be like sweeping so much dirt under the rug that large crinkles and bulges would show, which would be as offensive to the unwilling observer as the dirt itself (or almost so). There are empirical presuppositions behind this version of the argument, too, which if true would require the liberal to admit at least the relevance of the reasoning.”³⁷

Feinberg acknowledges that the conservative thesis espoused above is

“...itself derived from, or at least reinforced by, one of the other liberty -limiting principles, and to that extent its defence is ‘impure’.”³⁸

The obvious fear contained within Feinberg’s interpretation of the conservative thesis, is that when deviant conduct becomes respectable, it is perceived as a real threat to the existence of the norm itself, and therefore is no longer a mere deviation from the norm.³⁹ Decriminalisation is therefore feared, as it removes the stigma of criminality from conduct and can be interpreted (rightly or wrongly) as legitimating that activity. This produces a dilemma to those whose moral position cannot condone the performance (albeit consenting performance) of such conduct. Such conduct is perceived by the proponents of this morally conservative approach as being blatantly evil even if they are private and harmless, and this evil is expounded as sufficient justification for the prohibition of the activity.

37. Joel Feinberg. *Harmless Wrongdoing - The Moral Limits of the Law*. (1988) 43.

38. *ibid*.

39. Joel Feinberg *op cit* (note 31).

Feinberg's analysis of the offense principle provides a basis upon which other writers have expanded in their own fashion. The inherent characteristic is that there be an offense (or an evil) upon which the focus is placed, which then allows for legitimate prohibition of whatever the activity may be.

“There are acts of wickedness so gross and outrageous that... (protection of others apart), they must be prevented at any cost to the offender and punished if they occur with exemplary severity.”⁴⁰

This perspective entrenches the religious code of punishing the sin and in consequence eliminating immorality. This was a position reiterated by the philosopher Bertrand Russell who says:

“We may define a puritan as a man who holds that certain kinds of acts, even if they have no visible bad effects upon others than the agent, are inherently sinful, and being sinful, ought to be prevented by whatever means is most effectual - the criminal law if possible... This view is of respectable antiquity ; indeed it was probably responsible for the origin of criminal law. But originally it was reconciled with a utilitarian basis of legislation by the belief that certain crimes roused the anger of the gods against communities which tolerated them, and were therefore socially harmful... But nowadays even Puritans seldom adopt this point of view... The laws in question can, therefore, only be justified by the theory of vindictive punishment, which holds that certain sins, though they may not injure anyone except the sinner, are so heinous as to make it our duty to inflict pain upon the delinquent.”⁴¹

Again it tends towards a liberty-limiting position justified solely on the basis of a moral notion of offense.

In contrast to the absolute statement that crime is sin the Wolfenden Report stated the following

“Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude

40. James FitzJames Stephen. *Liberty, Equality, and Fraternity*. (1967) 162.

41. Bertrand Russell. *Sceptical Essays*. (1935) 158.

terms, not the law's business. To say this is not to condone or encourage private immorality.”⁴²

In order for an ‘immoral’ action to be made criminal, the meaning of immorality should be ascertainable from an objective and critical perspective, failing this the criminalising of certain forms of behaviour will always be open to criticism on the basis of an inadequate foundation.

“External morality refers to the social, the aggregate, the anonymous opinions and prejudices of what a landscape is or ought to be. Mostly, the labelled and unlabelled judgemental depictions have no single spokesperson, usually no one who even cares that much about what happens in a place tomorrow or even two weeks hence. For this reason the distal morality almost always contains distortions, lies and specious misrepresentations.”⁴³

6. MORAL PLURALISM

The inherent defect exposed thus far, within an examination of the relation between morality and sanctions therefore, has been the doctrine of absolutes with regard to the issue of moral supremacy. A response to the morally conservative approach was moral pluralism. It was identified that there was a defect in the belief that

“...two or more moralities cannot exist in mutual toleration in the same society.”⁴⁴

Every ‘free’ society can be seen to have multiple religions, many political ideologies, and numerous cultural variances within the same society. Thomas Jefferson once observed the following in relation to diversity of position:

42. Wolfenden Commission. Report on Homosexual Offenses and Prostitution. (1957).

43. Richard Symanski. *The Immoral Landscape -Female Prostitution in Western Societies*. (1981) 6.

44. Walter Barnett. *Arizona State University Law Journal*. (1971) 215.

"It does me no injury for my neighbour to say there are twenty gods or no god. It neither picks my pocket nor breaks my leg."⁴⁵

However the morally conservative dogmatically suggested that morality was singular and there could be no variances on the prevailing interpretation thereof.⁴⁶ Proponents of moral pluralism acknowledge that alternative forms of morality could only co-exist if there were no direct confrontation initiated by either ideological group. The casual observer should not therefore be exposed to the 'torment' of witnessing that which he/she finds morally objective. The realities of social life indicate that the feasibility of avoiding ideological clashes is remarkably slim, and accordingly the concept of moral pluralism does not solve the problems that are illuminated by the following statement by Mill

"There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their own feelings..."⁴⁷

It is submitted that the majority of sex offenders within the classes of homosexuality, and prostitution can be generally seen as not seeking to convert the majority of society to their chosen way of life, they merely want the space to exist without discrimination or fear of reprisal.⁴⁸

Raymond Gastil identifies a human right infringement that does occur within the very foundation of moral tolerance when he observes that

45. Thomas Jefferson. *Notes on the State of Virginia*. (1955) 159.

46. Richard Symanski op cit (note 37).

47. John Stuart Mill. op cit (note 28) paragraph 12.

48. Harriet Pilpel. "Sex vs. the Law: A Study in Hypocrisy." in *Studies in Human Sexual Behaviour: The American Scene*. (1970) 61 as contained within Richard Symanski. *The Immoral Landscape - Female Prostitution in Western Societies*. (1981) 7.
"The sex laws of the United States today reflect a formidable mass schizophrenia. The split between our society's permissive - even obsessive - sexual behaviour and attitudes, and our punitive, puritanical statutes is indeed scarcely credible."

“The right to try to form new majorities is the basic right given to individuals in both the majority and the minority that makes meaningful the rights of either.”⁴⁹

This is crucially important in the light of the law's contribution to moral tolerance wherein one observes that a particular ideology is limited from growing by means of the imposition of sanctions and criminalisation which renders the ideology to a second rate status without the fair application of notions of *audi alterem partem*.⁵⁰ So criminalisation can in certain instances obstruct the democratic process, violate rights, and attempt to silence some ideologies without sufficient justification.

It should be noted that a sub-culture cannot consume a culture, other than by a process of evolutionary development over a vast period of time, and this form of evolutionary development cannot be assumed to be entirely negative, as it has accounted for the continued survival of the human race in association with the development of external factors.

Accordingly, it is wrong to create legislation in an effort to preserve the hypocritically determined social morality, on the basis that such legislation protects the dominant ideology.⁵¹

49. Raymond Gastil. *Ethics*. (1976) 232.

50. Donald. C. Knutson. "Introduction" in *Homosexuality and the Law*. ed. D. E. Knutson. (1979/80) 14.
"The argument that discrimination against a minority is justified by intolerance and prejudice of the majority is not novel. It has been used in support of the miscegenation statutes; to justify removal of the children of interracial marriages; and by the military in its unsuccessful attempt to resist racial integration..."

51. Richard Symanski op cit (note 42) 6.
"The external morality involves dubious, often erroneous assumptions. One is that immoral conduct has harmful social effects. In fact, such effects are either difficult to identify or when pinpointed, ...they prove to be nonexistent, unproven or less than assumed."

‘The enforcement of the majority's prejudices, without any plausible empirical basis, could be independently unconstitutional as a violation of due process rationality in legislation.’⁵²

7. THE ENFORCEMENT OF MORALITY THROUGH THE STATUTORY CREATION OF ‘VICTIMLESS CRIMES’

The relationship between law and morality assumes new dimensions when the law is utilised to enforce moral standards through statutory means, of actions which could only harm the actor(s).

“...it has frequently been suggested that certain crimes are in reality ‘victimless’ and that all statutes defining such offences should be repealed or at least substantially restricted.”⁵³

Acknowledgement of the futility of criminalising conduct that involved the voluntary consensual participation of adults emerged during the second reading of the Immorality Bill⁵⁴ by Mr R. S. Nowbath who held:

“I wonder whether we should not address ourselves to a control of the subject, rather than trying to create moral standards by law. In no way can we really create moral standards or establish sexual morality by means of legislation...In the past, when this country tried to control sex across the colour line, it failed very miserably. We had a host of policemen, engaged in sitting on top of trees, looking through windows...Where did that get us? Nowhere.”⁵⁵

52. D. A. J. Richards. "Homosexual Acts and the Constitutional Right to Privacy" in *Homosexuality and the Law* ed. D. Knutson. 52.

53. Richard S Frase. "Victimless Crime" in *Encyclopedia of Crime and Justice*. (1983) 1608.

54. Which became law in the form of the Sexual Offences Act 23 of 1957.

55. *Debates*. 6 October 1987. col 3847.

In most crimes it is apparent that the crime is committed to the detriment of either one or many individuals, who can be identified as being the victim(s) of the perpetrator of the crime's actions. Yet, in the crimes of homosexuality and prostitution⁵⁶ there is no identifiable victim of any identifiable perpetrator. The only 'victim' is that created by the criminalisation of conduct, which causes the actors in the prohibited conduct to be labelled as criminal⁵⁷, and made to endure the criminal processes for having acted contrarily to the moral requirements of the legislature.

"The acts are crimes in that they are against the law; they are victimless in the sense that they are committed with the willing consent of the parties, and there are no complaining witnesses."⁵⁸

The following consideration is also of crucial importance:

"It is submitted that just as conduct should be of such a nature that it deserves the stigma of being labelled a 'crime' in that it should be regarded as morally reprehensible, so the offender should be a person who deserves the stigma of 'criminal' and consequently of punishment."⁵⁹

The question that emerges was aptly answered by the Wolfenden Committee when they held

"...there must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law."⁶⁰

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- 56. This excludes the situation which may involve an abuse of a power relationship between the parties. (Meaning that children too would be excluded from within this observation.)
 - 57. Although it must be noted that only the person offering the service of sex for reward, in the crime of prostitution is penalised, and not the person procuring such services.
 - 58. D. E. J. MacNamara and E. Sagarin. *Sex, Crime, and the Law*. (1977) 7.
 - 59. M. A. Rabie & S. A. Strauss. *Punishment - An Introduction to Principles*. 4th Ed. (1985) 108.
 - 60. Wolfenden Commission. p 24. paragraph 61.

However, despite adequate evidence that there is no definable victim within voluntary prostitution, there is a crime committed if a person 'sells' his/her sexual services⁶¹. As Millett indicates:

"There is no conviction at any level that prostitution is a crime on anyone's part, only a total and satisfied acceptance of the double standard, excusing the male, accusing the female."⁶²

Anthony Gordon indicates a similar attitude to the double standard implicit in the criminal sanctions:

"[There are]...two consenting parties, one of the consenting parties being the witness. Why should he enjoy more immunity and protection than the accused, when he is the person who voluntarily frequented the brothel. There should be no distinction between the publication of the names of a witness who visited the brothel and of the accused who allegedly kept the brothel. It is in the interests of justice that justice must not only be done, it must be seen to be done. The people must be made fully aware of precisely what happened at the trial and who the parties are."⁶³

Advocate Gordon⁶⁴ speaks of 'two consenting parties' one of whom voluntarily sought out the services offered, and this perpetuates the idea that there is no victim who would be in need of seeking criminal redress.⁶⁵ The criminalisation of prostitution involves criminalising the autonomous choice made by two adult persons⁶⁶, and this indicates a problematic area in the light of the infringement of individual civil liberties.

61. Section 20 (aA) of the Sexual Offenses Act 23 of 1957.

62. G. Schur. *Victimless crimes: two sides of a controversy*. (1974) 16.

63. An extract from an in camera hearing quoted in Mildwisky, C. C. *A Criminological study of Adult European Prostitution in Johannesburg*. (1984) 139.

64. Referred to in the extract above from an in camera hearing.

65. Autonomy of adult consensual sexual relations must be respected, and acknowledged where there is an absence of any abuse of power.

66. This is accepting that the laws to protect children from any form of abuse are adequate, and therefore no special provision is required for maintaining prostitution as a crime merely on the basis of protecting children.

D. A. J. Richards states the following:

“The criminalisation of prostitution appears to be an illegitimate indication of unjust social hatred and fear of autonomously sexual women and their rights to define and pursue their own vision of the good.”⁶⁷

The case against the ‘creation’ of a ‘victim’ is apparently stronger in the context of a homosexual relationship wherein love bonds may exist. Again, in the absence of a power relationship between the parties, there is no apparent victim to be found within this form of immorality other than the victim created by the law.⁶⁸ The very act of physically manifesting the attraction one may feel towards a person of the same sex may cause one to be acting contrarily to the law, whether one is apprehended or not.⁶⁹

In a recent decision of the Cape Supreme Court⁷⁰ it was held by two judges⁷¹

“What, in my view, also renders the criminalisation of consenting, adult, private, homosexual acts particularly repugnant is that the free mutual expression of erotic attraction between adult members of the same sex is proscribed even though such orientation may indeed be immutable. There are cases in our Courts where it has been accepted that, in particular cases, homosexual orientation is congenital and that it might well-nigh be impossible to change such orientation.”

It is clear that the motivation for the criminalisation of ‘victimless’ crimes is problematic, and lends itself towards the concept of illegitimacy. If it were not for the moral condemnation of

67. D. A. J. Richards “Commercial Sex and the rights of the person”. *University of Pennsylvania Law Report*. (1979) 1279.

68. Within the prohibitions defined within the Sexual Offenses Act 23 of 1957.

69. Homosexuals become ‘unapprehended felons’ by their mere existence. This term ‘unapprehended felons’ was apparently conceived by Richard D. Mohr. *Gays/Justice - A Study of Ethics, Society, and Law*. (1988).

70. *S v H* 1993 (2) SACR 545 (C).

71. at 551 G.

such crimes, it would appear that there was little basis upon which the criminalisation of the conduct would be compelled to rest.

8. CONCLUSIONS

“...law, as the expression of man's will, may adopt three differing standpoints to ethical and moral rules. First, it may regard [some] rules...as pertaining to the higher ethical attitude and treat them as lying outside its province. Secondly, it may refuse to assist those who have breached moral rules. It punishes them indirectly as it were... Thirdly, it may regard breaches of certain moral rules as posing such a threat to the security of society that criminal sanctions are enforced.”⁷²

The third standpoint appears to be that adopted by the South African legislature in criminalising homosexuality and prostitution, yet the arguments for the first appear far stronger when examined within the framework of the relationship between law and morality. Surely sexual activities that are victimless, and occur between consenting adults in private could be determined to fall outside the province of the law.

Mill's Harm principle would be a powerful motivation in favour of removing the legal sanction from autonomous, adult, consensual sexual relations performed in private.⁷³

72. W. J. Hosten. *Introduction to South African Law and Legal Theory*. (1995) 22.

73. John Stuart Mill op cit (note 20).

The law would need to exercise caution with regard to Devlin's assumption that social cogency is achieved through the enforcement of morality.⁷⁴ This theory is criticised as lacking social reality, and assuming an identification of morality with social convention.⁷⁵

Both the Social Rights theory and the Offense Principle tend towards a liberty limiting position when examined in order to determine the nature of the relationship between law and morality.

Moral pluralism is an important consideration which would assist in ensuring that no singular morality is presumed to be more appropriate than another. Co-existence between moralities can be achieved⁷⁶ so long as there is no direct conflict between the ideologies.

To return then to the notion of 'victimless' crimes, one looks at the general evidence that within the activities of prostitution and homosexuality there are no complainants, simply adults engaging in consensual sexual intercourse.⁷⁷ Therefore in the context of the relationship between law and morality, it is submitted that the Wolfenden Commission⁷⁸ was correct in asserting that there is indeed a realm of '...private morality and immorality...' which is '...not the law's business.' Based on the general assumption that there is no apparent harm caused by the activities of homosexuality and prostitution between consenting adults, it is submitted that the law should remove itself from this area of 'immorality', and allow for the growth of pluralistic and divergent ideologies within South African society.

74. Patrick Devlin *op cit* (note 27).

75. D. A. J. Richards *op cit* (note 29).

76. Walter Barnett *op cit* (note 44).

77. D. E. J. Macnamara and E. Sagarin *op cit* (note 58).

78. Wolfenden Commission *op cit* (note 60).

CHAPTER 4

ANALYSIS OF THE MOTIVATION BEHIND THE CRIMINALISATION OF PROSTITUTION

There are several reasons espoused for the justification of the legal intervention into the area of prostitution. The debate surrounding the various approaches to prostitution by the law, involves a consideration of social issues, public health issues, policy considerations, as well as the economic implications of enforceability, and the creation of a climate conducive to abuses.¹

This chapter will endeavour to deal with all of the major reasons for which prostitution is criminalised, and examine the strength of such reasons.

1. VENEREAL DISEASE

It is often asserted that the chief policy consideration in regard to the criminalisation of prostitution involves an attitude directed towards the curbing of the spread of all forms of venereal disease.² The evidence demonstrated within a historical context is that conduct of certain natures may be banned where it is justifiably believed that such a banning will halt the

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1. MacNamara and Sagarin. *Sex, Crime and the Law*. (1978) 119.
 2. D. A. J. Richards. "Commercial Sex and the Rights of the Person" 1217. *University of Pennsylvania Law Review* (1979); *The Saturday News* April 3, 1993. "Health factors play significant role in Cape Town call - Legalise Prostitution."; *Citizen* April 3, 1993; Wilcox, R. R. "Prostitution and Venereal Disease". *British Journal of Venereal Disease* 37 - 42.

spread of a particular disease,³ but when that conduct is rendered harmless by universal vaccination then the banning is lifted. Yet, within the context of prostitution the most ageless justification for criminalising prostitution is that this is to curb the spread of venereal disease, despite the fact that there can be no **justifiable** belief that this indeed succeeds, or is even warranted.

“One of the arguments of social hygienists and moral crusaders against prostitution is that it spreads venereal disease. One might expect this assertion to be true, but investigations have failed to verify it. With the high incidence of venereal disease in the United States and in many other parts of the world since World War II, experts estimate that not more than 5 percent⁴, and possibly less, can be traced to heterosexual prostitution. This is because the prostitute is probably highly adept at taking measures that by reasons of hygiene, cleanliness, and prophylaxis make her a far less likely target than an amateur promiscuous female or a promiscuous male involved in homosexual relations.”⁵

Additionally, the foundation for the assertion that prostitution is a major cause of the spread of venereal disease is brought into question by progressive studies.⁶ The 1962 *British Journal of Venereal Disease*⁷ contained an article prepared for a World Health Organisation Venereal Disease Seminar, and within that article the following was asserted:

“There is no sufficiently objective study to determine the place of prostitution in the spread of venereal disease, as compared with the spread of such diseases by girls of a lower social level who are not prostitutes.”

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3. J. Milton. "Prostitution - Current Debates" in *Woman and the Law*. (1984) "The discovery of penicillin and other antibiotics resulted in this particular argument losing some of its force."
 4. D. A. J. Richards op cit (note 2) 1217.
 5. D. MacNamara and E. Sagarin. *Sex, Crime and the Law*. (1977) 121; D. A. J. Richards. "Commercial Sex and the Rights of the Person" 1217 holds the following: "...the great majority of prostitutes do not suffer from the disease, and most tend to take more precautionary measures than does the promiscuous amateur...Those age groups in which the venereal disease rate is the highest are those in which patronage of prostitutes is the lowest."
 6. D. A. J. Richards op cit (note 2) 1218; R. R. Wilcox op cit (note 2) 37 - 42.
 7. 1962 (38) at 37.

It must be noted that prior to the discovery of penicillin, venereal disease was widespread.⁸ In the nineteenth century the Contagious Diseases Acts were enacted in both the United Kingdom and South Africa, as a result of the concern expressed over the transmission of venereal diseases allegedly being perpetrated by prostitutes.⁹ These Acts resulted in women suspected of prostitution being examined, and if found to be infected, being confined to a lock hospital.¹⁰ The double standard implicit in the legislation,¹¹ which was directed solely against prostitutes, and not their clients, was the focus of much criticism.¹² Due predominantly to the pressure brought upon these Acts they were eventually repealed.¹³

In 1921, Howard B. Woolston published a study of prostitutes in more than forty cities in the United States, which had been conducted during the first decade of this century.¹⁴ Within this study Woolston contended that

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8. Richard Symanski. *The Immoral Landscape*. (1981) 49; J. Milton. "Prostitution : Current Debates" in *Women and the Law*; D. A. J. Richards. *Commercial Sex and the Rights of the Person*" 1217.
 9. W. Acton. *Prostitution*. (1968) 232.
 10. W. Acton op cit (note 9) 232; J. Milton. "Prostitution - Current Debates" in *Women and the Law* 143.
 11. The double standard emerging clearly in the following quotation from the Royal Commission investigating the Contagious Diseases Acts between 1864 - 1869.
"There is no comparison to be made between prostitutes and the men who consort with them. With the one sex the offence is committed as a matter of gain ; with the other it is an irregular indulgence of a natural impulse."
 12. W. Acton op cit (note 9) 232.
Josephine Butler and Florence Nightingale opposed these Acts in the United Kingdom.
J. Milton op cit (note 10) 143.
In South Africa, Saul Solomon lead debates around the implicit double standard demonstrated by the Acts.
 13. W. Acton op cit (note 9) 232.
In the United Kingdom the Acts were repealed in 1886.
 14. Howard.B. Woolston. *Prostitution in the United States*. (1921).

“...60 to 70 percent of prostitutes had the ‘social disease’, and that 84 percent of the infections in the navy at that time came from this source.”¹⁵

This study was examined by Richard Symanski,¹⁶ who held that

“...even if Woolston's percentages are not exaggerated the figures are less an indictment of the prostitutes and their hygiene concerns than the fact that venereal disease was widespread before the discovery of penicillin.”¹⁷

The discovery of treatment had an obvious impact on the incidence of venereal diseases, and yet this impact did little to reduce the general opinion that prostitutes were still the main route of transmission of venereal disease.¹⁸

Of the available figures from a study conducted in the seventies the incidence of venereal diseases amongst prostitutes is exceptionally low.

“The Chief of the Centre for Disease Control of H. E. W.¹⁹ estimated that for 1970 - 1971 less than 3 percent of 13 600 females who had infectious syphilis were prostitutes.”²⁰

This low percentage is further reiterated by 1973 estimates given by United States public health officials which accredit heterosexual prostitution with only five percent of all venereal diseases.²¹

15. ibid.

16. Richard Symanski op cit (note 8) 49.

17. ibid.

18. D. A. J. Richards op cit (note 2) 1218.

1919. H.E.W stands for Health, Education, and Welfare.

20. Richard Symanski op cit (note 8) 49.

21. ibid.

Jennifer James. *The Law and Commercial Sex*. (1973) unpublished ms; D. A. J. Richards op cit (note 2) 1217. Richards adds that most prostitutes are better informed and take far more precautions than do promiscuous amateurs and other promiscuous members of society; Richard Green. *Sexual Science and the Law*. (1992) 203.

Generalities on venereal disease transmission must be approached with knowledge of

“...type of prostitute, cultural setting and kind of venereal disease...In urban areas with a significant number of street walkers, many of whom are lower-class within the prostitution hierarchy, the rates are expectedly higher.”²²

Statistics must be examined with caution due to the underground nature of the profession in question, which allows for a high degree of unreliability due to persons not divulging the true nature of their profession unless the records are guaranteed to remain anonymous.

Many have contended that the law should facilitate a process of deprecation of all that discourages a commercial sex worker from seeking medical advice or assistance.²³

“Since the evidence seems mixed and inconclusive it only seems feasible to suppose that when prostitutes find themselves working outside the law they are more likely to avoid the institutional structures that they associate with oppression and control.”²⁴

In consequence, education on matters of health becomes exceedingly difficult to successfully achieve, and conversely prostitutes themselves are highly fearful of approaching health institutions because of the possible implications of being labelled a ‘disease carrier’, which would then threaten their livelihood.

“No doubt prostitution is a medium for the spread of venereal disease, but there is no empirical evidence that the suppression of prostitution will bring an end to venereal epidemics. As experience with AIDS has shown, the answer to this most grievous social problem does not lie in prohibition but education.”²⁵

Therefore, the issues surrounding the criminalisation of prostitution on the basis of the alleged spread of venereal diseases is highly complex, with statistics from western countries indicating

22. Richard Symanski op cit (note 8) 50.

23. This would ultimately result in far greater social benefit to the community at large, upon whom the impact of all diseases, and disadvantages falls.

24. Richard Symanski op cit (note 8) 49.

25. J. Milton op cit (note 3) 143 and 144.

that the basis for this justification seeming to rest on misconception. However, with regard to the threats posed by venereal disease transmission, and AIDS, the following extract offers a rather less condemnatory approach to the issue of prostitution as a means of transmission:

“With very few exceptions all society is at risk at some time and the difference between those who contract no infections in their life and many who do so but once, may be dictated more by luck than behaviour.”²⁶

2. CRIMINOGENESIS

An argument utilised to legitimate the criminalisation of prostitution rests on the premise that such criminalisation is justified in order to curb ancillary crime, which is allegedly generated by prostitution. This argument has been criticised for its circular nature wherein it rests on the foundation generated by the results of criminalisation, and not on the results of prostitution.²⁷

The argument that prostitution generates other forms of crime remains as one of the most popular justifications for the intervention of the criminal law into the area of prostitution.

“The argument has been made that the criminal prohibition of prostitution is justified because of the number of crimes, such as theft and assault of patrons, trafficking in heroin, and the enlarged scope of organised crime operations, which are said to occur incident to prostitution and of which prostitution is alleged to be the genesis.”²⁸

26. R. Willcox in *Sexually Transmitted Diseases*. (1976).

27. J. Milton op cit (note 3) 143. Wherein it is noted that the converse of the criminogenesis argument can also be found to be true:
“...by criminalising prostitution and its various attendant activities, the incidence of crime is increased.”
Richard Green op cit (note 21) 203.

28. D. A. J. Richards op cit (note 2) 1215.

The impact of the criminal sanction reduces the prostitute's profession to the status of a sub-culture, which acts subversively beyond the facade of normal social interactions.²⁹

"One factor must be borne in mind when considering prostitution and related crime, namely that prostitution activities constitute criminal behaviour because they are against the law; everyone involved in prostitution is desocialised to the extent that they develop a profoundly antisocial disposition."³⁰

Concomitant to this sub-culture that develops, is the parasitically natured 'criminal sub-culture', within which the development and nurturance of many clandestine activities is facilitated.

"In and of itself, prostitution is often considered a matter of personal morality, something that should not be regulated by legislation or punished by law. However, the nature of prostitution as a marginal occupation, the secrecy and anonymity surrounding not only the prostitute but her customer, and the hostile social climate in which the act takes place all create a situation in which crime and other antisocial transactions may thrive."³¹

Perhaps the 'profoundly antisocial disposition' referred to by Cronje and Van der Walt above, emerges in response to the fact that despite the justification espoused for criminalisation because of the development of ancillary crimes, it appears to be empirically substantiated that

"...the prostitute is the most frequent victim of so-called ancillary crimes."³²

The fact that the prostitute may fear exposure of his/her profession, also allows for many crimes which are committed against prostitutes to go unpunished.

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29. G. M. Hall. *Prostitution: A Survey and Challenge*. (1933).
"Tolerated, and yet outcast and declassed, she lives on the borderline of the criminal world when not actually within it. At intervals, unless sufficiently clever to avoid it, she becomes an offender amongst other offenders, often a prisoner amongst other prisoners. The very nature of her appeal to men may make her a woeful coadjutor to some criminal, and her position on the outskirts of the criminal world, makes her more easily accessible."
30. G. Cronje and P. J. Van der Walt. *Deviancy in Society: A crimino-pathological approach*. (1978).
31. D. MacNamara and E. Sagarin. *Sex, Crime and the Law*. (1978) 111.
32. L. Crites. *The Female Offender*. (1976)

“Prostitutes have been assaulted in the course of their work, some have been badly beaten, and many have been murdered...a reputation as a prostitute, even when undeserved, has served to diminish the restraints on some men and has given them the excuse; justification, or rationalisation for demanding sexual favours, even to the point of committing forcible rape.”³³

In the United Kingdom the position is much the same as that of the prostitutes in South Africa, despite the differences in the law between the two countries:

“Prostitutes are regularly beaten up or raped by clients, but are inhibited from taking legal action because they know the problems they face once they go to court. Any excuse turns into a credible defence when the complainant is a ‘tom’, as prostitutes are called by police. The general yarn spun by defendants is that the prostitute tried to rob him and when accused became physically violent. The likelihood of a woman taking on a man in this way is forgotten when she is a whore.”³⁴

This is of course not to deny that prostitution can be perceived as the ideal vehicle for the perpetration of criminal behaviour, and has indeed shown itself to be so.³⁵ The very nature of the profession of prostitution, by virtue of the illegality thereof, has to operate underground, and accordingly lends itself to crime.

An additional form of crime, that emerges in consequence to the criminalisation of the activities of prostitutes, is that of alleged bribery and corruption emanating from within the ranks of law enforcement officials.

“...bribery, extortion, and shakedowns play a big part in the life, and take out a considerable portion of the earnings of prostitutes, at least in some cities. This type of payoff is seldom demanded by policemen in uniform, and hence it is

33. D. E. J. MacNamara and E. Sagarin op cit (note 1) 113.

34. Helena Kennedy. *Eve Was Framed*. (1993) 148 - 149.

35. *ibid*.
“...of crimes by the prostitutes, robbery, assault, and rolling are the most frequent. ...Prostitutes, their colleagues, and their co-workers have blackmailed customers who did not wish it to become known to family and others that they were patrons. However, ordinary streetwalkers, themselves anonymous, difficult to locate, and if found, hard to prosecute for blackmail, have been more likely to rob customers.” 112.

difficult to know how much of it goes to men pretending to be police officers and how much to corrupt members of the force.”³⁶

Despite the evidence of ancillary crime, the question that remains an enigma is whether the genesis of such crime rests in prostitution itself, or whether it is by virtue of the criminalisation of prostitution that the crime is generated.

3. MORAL ARGUMENTS

Several moral arguments are advanced in support of the criminalisation of prostitution :

- 3.1. Sex for money is wrong.
- 3.2. Prostitution is degrading.
- 3.3. Prostitution is sex devoid of romantic love.
- 3.4. Non-procreative sex is condemned by many religions.

3.1. SEX FOR MONEY IS WRONG

“The reason for the hostility to prostitution, he [T. C. Esselstyn] points out, is that society ‘senses the seeds of social collapse in promiscuous, commercialised, and uncontrolled sexual congress’ and as a result develops ‘a folk wisdom [that] commands that no one should make love for money...all other arguments [against prostitution] vice, crime, disease, white slavery - are important, but actually they are disguises.’ Exempt from the ignominy heaped upon the prostitute is the female who marries solely or principally for money or social status. Evidently, marriage legalises, institutionalises, and even sanctifies her action; although, of course, marriage removes the promiscuity and indiscriminate nature of sexuality that is a hallmark of prostitution. However, to return to the statement of Esselstyn, a woman is allowed to ‘make love for

36. D. E. J. MacNamara and E. Sagarin op cit (note 1) 113.

money' so long as it is not in the form of 'promiscuous, commercialised, and uncontrolled sexual congress.'³⁷

The reduction of the status of the person to that of the commercial object is expounded as being one of the primary reasons that prostitution is perceived as being wrong.³⁸

The arguments submitted in this regard will be examined, however, a single, notable position ought to be carefully considered: Does prostitution involve the sale of 'the human body' or is it merely the sale of a 'service'? In the terms of the philosopher Immanuel Kant the terms of prostitution involve an alienation of one's moral personality which he describes as being wrong, therefore it is implied that prostitution is wrong, however the argument fails in its equation of the physical person to the moral personality.³⁹

Marx also objected to the concept of prostitution as being the

"reductio ad nauseam of capitalist commercialization of all personal relationships."⁴⁰

Marx also drew analogies between wage labour under capitalism, and the reality of prostitution.

"Prostitution is only a specific expression of the general prostitution of the labourer, and since prostitution is a relationship which includes both the one

37. D. E. J. MacNamara and E. Sagarin op cit (note 1) 118.

38. J. Milton op cit (note 3).

39. J. Milton op cit (note 3) quotes the philosopher Kant thus:
"To allow one's person for profit to be used by another for the satisfaction of sexual desire...is...to make oneself a thing on which another satisfies his appetite, just as he satisfies his hunger upon a steak. But since the inclination is directed towards one's sex and not one's humanity, it is clear that one partially sacrifices one's humanity...Human beings are, therefore, not entitled to offer themselves, for profit, as things for the use of others in the satisfaction of their sexual propensities...To let one's person out on hire and to surrender it to another for the satisfaction of his sexual desire in return for money is the depth of infamy. The underlying moral principle is that man is not his own property and cannot do with his body what he will...This manner of satisfying sexual desire is, therefore, not permitted by the rules of morality."

40. D. A. J. Richards op cit (note 2) 1220. from K. Marx . *Economic and Philosophic Manuscripts of 1844*. 133.

who is prostituted and the one who prostitutes (and the latter is such more the base), so the capitalist, etc. comes within this category.”⁴¹

Marxist feminist analysis of prostitution is interesting in the light of the ‘selling of sex’ argument for the criminalisation of prostitution. They perceive the differences between a prostitute and a wife as being

“...merely a difference of degree, not of kind. Both sell themselves - that is, their sexual services and, in the case of wives, also their domestic and nurturing services - for economic livelihood.”⁴²

Therefore the Marxist feminists could be interpreted as indicating that the motivation of sex for money, or the selling of any other commodity, is not found solely within the realm of prostitution, but also in other aspects of society,⁴³ and this questions the motivation behind justifying criminalisation on this basis.

3.2. PROSTITUTION IS DEGRADING

The argument that prostitution is degrading emanates from an apparently paternalistic perspective, wherein certain social values are prized. Amongst these treasured social values is the reverence accorded to the notion of female chastity, and accordingly any attempt at reducing women into mere sex objects is rejected.⁴⁴

“In contemporary circumstances, however, the force of this moral vision has been somewhat reinterpreted in line with the growing acceptability of non-commercial sex outside marriage. For many, the objection to prostitution would today be based not on female promiscuity, but on the transformation of

41. K. Marx. *Early writings*. translated and edited by T. Bottomore; Dori Posel and Ros Posel. *A feminist contextualisation of prostitution in contemporary society: the impact of AIDS*. Paper No. 41 13.

42. R. Tong. *Feminist Thought. A Comprehensive Introduction*. 65. as quoted in D. Posel and R. Posel op cit (note 41).

43. ibid 14.

44. D. A. J. Richards op cit (note 2) 1221.

sex into an impersonal encounter with no emotional significance by means of commercialisation.”⁴⁵

Prostitution is perceived as exposing the prostitute to certain harms:

- a shortened lifespan
- venereal diseases and AIDS
- mental deficiency or neurotic impairment
- incapacity for orgasm
- vulnerability to pimps and other forms of exploitation⁴⁶

Accordingly

“The criminal prohibition of prostitution has thus been justified on the basis of protecting people from these kinds of self inflicted harms.”⁴⁷

The factual verification of these harms would, it is submitted be close to the impossible. The prostitute therefore exists on the parameters of society in

“a profession that enjoys no public esteem at all”⁴⁸

The paternalism evident within this argument, as a justification for the criminalisation of prostitution, is the weakest link in the argument. The justification for severe punishment at the

45. ibid.

46. ibid 1221. wherein the following references were utilised: M. Ploscowe. *Sex and the Law*. (1962) 245 - 246; George. *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*. (1962) 746 - 752; A. Flexner. *Prostitution in Europe*. (1914) 12; H. Greenwald. *The Elegant Prostitute*. (1970) 221 - 237.

47. ibid.

48. J. Milton op cit (note 3) 145.

hands of the criminal law in an endeavour to prevent other forms of harm is ludicrous if viewed from a rational perspective.⁴⁹

3.3. PROSTITUTION IS SEX DEVOID OF ROMANTIC LOVE

“...prostitution is sex outside the marriage relationship it is both non-procreative and devoid of romantic love, and thus in violation of basic social and moral norms.”⁵⁰

Because of the apparent reprehensibility of sex for pleasure, and the apparent mercenary nature of the coupling that defines it, prostitution becomes morally condemned and accordingly the criminal sanction is vindicated.

“This argument represents a legitimate expression of personal ideals that one may urge upon others as desirable, but it is fallaciously misconceived as a valid moral argument to justify the application of criminal sanctions, as is made manifest by consideration of moral theory and the underlying values of equal concern and respect for autonomy.”⁵¹

The most glaring anomaly of the argument that the justification for criminalisation rests in the fact that the conduct is sex devoid of romantic love is the very nature of romantic love itself.⁵²

49. J. Milton op cit (note 3) 145.

50. J. Milton op cit (note 3) 144.

51. D. A. J. Richards op cit (note 2) 1245.

52. *ibid.* at 1249.
“...it is particularly inappropriate to use an ideal like romantic love to justify any form of compulsory moral norm. This ideal, based on the cultivation of spontaneous romantic feeling is the very antithesis to compulsory forms of sexual expression. Furthermore, loveless encounters are sometimes prerequisites for genuine love relationships; to forbid the former is, therefore, to inhibit the latter. Accordingly, the invocation of such ideals to justify such compulsory norms is a travesty of the spiritual meaning of these ideals.”

3.4. NON-PROCREATIVE SEX IS CONDEMNED BY MANY RELIGIONS

This argument involves invocation of old mores into a modern day situation, wherein the idea was that one had one sexual partner, who only acquired the privilege of being the sexual partner after marriage, and the concept of sex was purely designed in order to beget children. However, empirical evidence shows that this is not the reality. Additionally, the free availability of contraception, and other prophylactic mechanisms, contradicts the foundation upon which this argument rests.

Non-procreative sex is a reality, and therefore prostitution cannot be condemned on this basis.

4. PUBLIC NUISANCE

This is one of the most persuasive arguments advocated in favour of the criminalisation of prostitution. The concept rests on the premise that solicitation, and the resultant sexual activity is a public nuisance.

England is an example wherein laws exist which prohibit the manifestations of prostitution⁵³, but not the activity itself. At present the visibility of streetwalkers make them likely targets for police raids, however the low-profile of the activities emanating from many brothels save such from frequent harassment. There is thus discrimination intrinsic within the ranks (or hierarchy) of prostitutes.

53. The Vagrancy Act of 1824 proscribed against prostitutes 'wandering' in public places.

In South Africa since 1882, there has been a prohibition against solicitation⁵⁴ in the Cape Province, and in 1899 the Transvaal⁵⁵ enacted a prohibition on similar grounds.

The current position in South African law is that under section 19 of The Sexual Offences Act 23 of 1957 solicitation and enticement is prohibited.⁵⁶

A 1984 Canadian decision⁵⁷ brings the arguments surrounding public nuisance into focus. The court in this case found that it constituted a public nuisance for a group of prostitutes to engage in “disorderly, indiscreet and indecent conduct...”⁵⁸ The court discussed the limitation of rights enshrined within the Canadian Charter of Rights and Freedoms if these limitations “can be demonstrably justified in a free and democratic society.”⁵⁹ Public nuisance was defined in the case as “one which affects citizens generally...”⁶⁰ The Judge commented on public nuisance through the agency of prostitution as follows:

“Public nuisance for the purpose of prostitution has had too long a grasp upon this city and it is time for its dreadful regime to come to an end.”⁶¹

There was no enjoiner against prostitution in the case, however the public nuisance caused by the prostitutes attempting to attract clients was sanctioned.

54. The Police Offences Amendment Act 44 of 1898.

55. The ‘Ontug’ Wet 11 of 1899.

56. For a complete discussion see the following chapter.

57. *Attorney-General of British Columbia v Couillard et al* (1984). 11 Dominion Law Reports 4th 567.

58. *ibid.*

59. *ibid.* McEachern C.J.S.C. 568

60. *ibid.* 571.

61. *ibid.* 573.

The primary objection to solicitation is the offensiveness of the conduct. However, it is submitted that standard business codes could be exercised in order to limit solicitation to appropriate areas, and thus avoid the necessity of utilising this argument to legitimate the criminalisation of prostitution.

However, it is acknowledged, that within an attempt to decriminalise prostitution, any attempt to decriminalise solicitation may well serve to be self-defeating.

The rhetoric surrounding the justification for the criminalisation of prostitution, in addition to being unconvincing, is deeply entrenched within the social fabric of society, and it is submitted that the law has done a great deal to further this entrenched foundation of discrimination.

CHAPTER 5

ANALYSIS OF LEGISLATION PERTAINING TO PROSTITUTION

The existence of prostitution within South Africa is indisputable. Several sociological studies have been conducted to examine aspects of the phenomenon¹, but the findings from such studies demonstrate that the law does not achieve the eradication of prostitution, but serves to oppress prostitutes and deny them equal access to justice. The existence of prostitution despite legislation prohibiting most matters relating thereto² indicates either a failure of the law in its objectives, or a distinct need within society which has historically been met through the agency of prostitution, despite all endeavours to eradicate this commercial activity.³

There is no definition of the word 'prostitute' to be found anywhere within statutory law, however, the courts have endeavoured to find a suitable definition⁴ that was believed to have been appropriate at the time. These definitions which follow must be noted for the narrowness of their application, their gender specificity, and the undertones of disapproval contained therein.

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1. As is evidenced in the study conducted within the Natal Midlands: Tessa Marcus, Karen Oellerman, Nonceba Levin. *AIDS Education and Prevention - A feasibility study for a pilot intervention with commercial sex workers and long distance truck drivers in the Natal Midlands*. (1995).
Charlene Carol Milwidsky. *A Criminological Study of Adult European Prostitution in Johannesburg*. M.A. Criminology. (1984).
 2. In the Sexual Offenses Act 23 of 1957.
 3. Opposition appears through the mechanism of the anti-prostitution laws, the religious objections to prostitution, and the marginal societal position occupied by prostitutes.
 4. See below for examples.

In *R v Roel Wainer*⁵ it was defined as follows:

“...girl or woman who indiscriminately consorts with men for hire.”

In *R v De Munck*⁶

“Prostitution is proved if it be shown that a woman offers her body commonly, for lewdness, for payment in return.”

In *R v Kam Cham*⁷

“A prostitute is a woman or girl who indiscriminately consorts with men for hire or admits a common and indiscriminate sexual intercourse for gain.”

*R v Webb*⁸

“...so far as this court is concerned we see no reason to depart in any way from the decision of this court in *De Munck's* case.”

Within the cases cited above, which span the period 1917 to 1964, the interpretation of the word ‘prostitute’ was female specific, despite historical evidence that prostitutes can be of either sex. The term prostitute traditionally is taken to mean a female in most instances wherein it is used, and the term male prostitute⁹ has traditionally been used to describe homosexual prostitutes who cater for homosexual males. The traditional terminology¹⁰ for a male who ‘sells’ sex to women is the word ‘gigolo’ which has almost pleasant ramifications, suggesting a Latin lover who is highly successful with women.

5. 1917 OPD 65 at 66.

6. 1918 (1) K.B. 635 at 637

7. 1921 EDC 327 at 329

8. 1964 (1) Q.B. 357 at 365.

9. Carol Pateman. "What's Wrong with Prostitution?" *The Sexual Contract*. (1988) 192. "Male homosexual prostitutes...are not uncommon."

10. Carol Pateman op cit (note 9) 192 states that the term gigolo belongs in a very different context from the term prostitute.

In recent times a great many older women are also seen with much younger men who are termed 'toy-boys'. Perhaps one could equate the service thus performed with that provided by prostitutes, however society doesn't appear to make this comparison. The distinction between this type of 'socially accepted' behaviour differs infinitesimally from the types of activity that the Sexual Offences Act seeks to proscribe and therefore it is of great relevance to question the rationale behind the fact that in most countries which prohibit prostitution, the toy-boy phenomenon is tolerated, when both can be defined as an exchange of sexual favour for reward.

Perhaps the only differentiating factor between a 'toy-boy' and his 'keeper', or an economically dependant wife and her husband,¹¹ as distinct from the connotations of prostitution would be a level of emotional participation which is apparently lacking in the course of the performance by the former. Surely it is not the law's intention to define a crime based solely on a degree of emotional indifference during the commission of the sexual act? However if one were to systematically analyse the distinctions raised above, then that is the resultant conclusion which hinges solely on emotion! Society also appears to have a greater degree of tolerance towards male sexual autonomy, than it does for female sexual autonomy.¹²

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11. Carol Pateman op cit (note 9) 90. Wherein Emma Goldman is quoted as saying:
"it is merely a question of degree whether [a woman] sells herself to one man, in or out of marriage, or to many men."
Simone de Beauvoir (also quoted in the above article) states that a wife is:
"hired for life by one man; the prostitute has several clients who pay her by the piece. The one is protected by one male against all others; the other is defended by all against the exclusive tyranny of each."
12. Helena Kennedy. *Eve Was Framed*. (1993) 146.
"Prostitution is tolerated because of an acceptance of male promiscuity which is not afforded women".

The Sexual Offences Act 23 of 1957, penalises the following broad areas relating to prostitution:

- Solicitation [s 19]
- Being a prostitute [s 20 (1) (aA)]
- Living on the earnings of prostitution [s 20 (1) (a)]
- The keeping of places for the purposes of prostitution [s 2]
- The procuring of persons to be prostitutes [s 9 - 12]

The provisions of the Sexual Offences Act which relate directly to the criminalisation of prostitution will be explored below:

1. SOLICITATION

SECTION 19

Section 19 is the first section of the Sexual Offences Act which can specifically be invoked against the person who can be said to be the prostitute who is soliciting for business.

Solicitation, or enticement, or beseeching for custom are actually the only activities which are of nuisance value to the public¹³, as it can be said that they impact in some instances on those who find the suggestions highly offensive. Accordingly, the section is one which is difficult to fault in the context of allowing the public to feel secure about venturing beyond their doors in the sound knowledge that they will not become victims of solicitation. Even the Wolfenden Commission in 1957 had the following to say in regard to this particular aspect of the crime:

13. See previous chapter.

“From the evidence we have received there is no doubt that the aspect of prostitution which causes the greatest public concern at the present time is the presence, and the visible and obvious presence, of prostitutes in considerable numbers in the public streets of some parts of London and of a few provincial towns.”¹⁴

The section reads as follows:

“19. Enticing the commission of immoral acts. - Any person who -
 (a) entices, solicits, or importunes in any public place for immoral purposes; or
 (b) wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access,
shall be guilty of an offence.”

1.1. SECTION 19 (a)

Section 19 (a) prohibits enticement, solicitation, or importuning in any public place for immoral purposes. It is therefore a crime for a prostitute to make known her availability to potential customers, for the purposes of prostitution.¹⁵

1.1.1. Enticement, solicitation, importuning

The terms ‘solicit’, ‘entice’, or ‘importune’ are not defined within the Act, but have been defined thus:

Solicit:

“...in relation to prostitution, is defined as ‘accosting and importuning’. The term thus denotes an approach to a person which is accompanied by an asking or inviting in an earnest manner. It too denotes beguiling, alluring or petitioning.”¹⁶

14. Wolfenden Commission. (1957) p 81 para 229.

15. J. R. L. Milton and M. G. Cowling. *South African Criminal Law and Procedure*. Vol III Statutory Offenses. (1989) Chapter E3 at 38.

16. J. R. L. Milton and M. G. Cowling op cit (note 15) 40.

In the case of *R v Van Niekerk*¹⁷ it was held that the inference of soliciting could be drawn simply from the fact that a woman who was a known prostitute was indiscriminately approaching men, and that there was no need to have the person allegedly solicited lead evidence to that fact.¹⁸

Entice is defined as

“...alluring or attracting by hope of pleasure, and involves a petitioning. Any offer or proposal made will involve an enticing.”¹⁹

Importune is defined as having

“...a connotation of persistence and requires a repetition or insistence that is not necessarily present in the case of enticing or soliciting...persistent soliciting will constitute an importuning.”²⁰

1.1.2. Public place

Section 19 (a) prohibits solicitation ‘in any public place’. The meaning of a public place is not defined within the Act, however it has been defined as being a place to which

“Members of the public have access *de facto* or habitually...irrespective of whether admission has to be paid for, or *de jure* by agreement or customary use.”²¹

A public place has more broadly been defined as

17. 1919 TPD 185.

18. J. R. L. Milton and M. G. Cowling op cit (note 15) 40.

19. *ibid.*
With reference to: *R v F* 1958 (4) SA 300 (T) and *R v P* 1958 (2) PH H294 (GW).

20. *ibid.*

21. *Report of the Ad Hoc Committee of the State Presidents Council on The Immorality Act No.23 of 1957.* at 4.32.2 on page 32.

“...a place to which the public has access whether of right or not.”²²

1.1.3. Immoral purposes

Given the nature of the Sexual Offences Act the ‘immoral purposes’ would presumably extend to mean sexually immoral purposes²³. It has been submitted that immoral could be interpreted to indicate

“...an act of a sexual nature which according to contemporary standards of morality is considered to be immoral.”²⁴

Mens rea in the form of an intention to entice, solicit or importune a person into the commission of an immoral act is also a requirement of the offense.²⁵

1.1.4. General discussion of s 19 (a)

The essence of the offence is that the solicitation, enticement or importuning must occur in a public place, by the person performing such, with the intention of resulting in an immoral purpose. The immoral purpose interpreted in this context to mean a sexual immorality, given the purpose of the Act.²⁶

22. J. R. L. Milton & M. G. Cowling. *South African Criminal Law and Procedure*. Vol III. Statutory Offences. at 41.

23. J. R. L. Milton and M. G. Cowling op cit (note 15) 41.

24. *ibid*.

25. *ibid*.

26. J. R. L. Milton and M. G. Cowling op cit (note 15) 41.

Section 19 (a) is sufficiently broad to not only prohibit solicitation by the prostitute, but also any potential customers who may be soliciting for the services of a prostitute.²⁷ There is additionally no specification of a particular sexual orientation being a requisite for the fulfilment of the elements of the offence, so it would apply equally to homosexual and heterosexual solicitation.²⁸

It is however submitted that in all probability if prostitution were decriminalised in South Africa, the incidence of high profile solicitation could very well decrease in consequence of the availability of other avenues of obtaining customers.²⁹

It must additionally be noted that within the Bill of Rights in the interim Constitution in South Africa one could determine that s 19 violates the Right to Freedom of Speech³⁰, given that much of solicitation is dependant on advertising one's availability. Commercial speech is constitutionally protected in the United States,³¹ and there is uncertainty about the limitation of commercial speech because of probable violations of the First Amendment.³² Therefore indicating the availability of prostitutes services could be perceived as an inherent right within a democratic country, which espouses equality for all, based on principles of free speech.³³

27. J. R. L. Milton and M. G. Cowling op cit (note 15) 39.

28. *ibid.*

29. Some possible avenues could be through the means of advertising, or establishing brothels in areas where there is a high demand for sexual services, or even providing designated areas for customers to be able to make contact with street-walkers without impeding the flow of traffic.

30. s 15 of Chapter 3 of the Constitution of South Africa Act 200 of 1993.

31. *Virginia Pharmacy Bd v Virginia Consumer Council* 425 US 748. (1976).
Johann van der Westhuizen. "Freedom of Expression" in Van Wyk et al. *Rights and Constitutionalism - The New South African Legal Order*. (1994) 290.

32. Johann van der Westhuizen op cit (note 31) 290.

33. Constitution of South Africa Act 200 of 1993.

However, the Canadian courts have not interpreted the protection of commercial speech under the Canadian Charter, easily.³⁴

“It is preferable to recognise commercial speech as speech or expression, subject to the right of the government to impose reasonable and justifiable limitations.”³⁵

In terms of American jurisprudence it appears that the advertising of unlawful products could be legitimately prohibited.³⁶ Therefore it is possible that the prohibition against solicitation may be a justifiable limitation of the right to freedom of speech.

There is empirical evidence demonstrating that the incidence of graphic verbal suggestions is common place in most bars, clubs or discos, where it may result that the seductor suggests that he/she will buy the other party a drink and they will then retire to a venue conducive to the performance of his/her suggestions. This could fall within the ambit of the criminal prohibition, despite the fact that neither party intended to engage in an ‘immoral act’, but merely considered their actions to be part of an elaborate social ritual. In such instances, it is submitted that the right to freedom of speech would be upheld, because the suggestions were accompanied by the intention, that they institute a commercial exchange.

The author Richard Symanski stated the following with reference to the United States case of *Cohen v California*:

“...a man cannot be prevented from wearing a jacket in public emblazoned with the slogan, ‘Fuck the Draft’. According to the court those annoyed can avert their eyes or walk away. Paradoxically, this is more difficult than avoiding a street solicitation, for streetwalkers, as a rule, are street-wise. They focus their

34. Johann van der Westhuizen op cit (note 31) 290.

35. *ibid.*

36. Johann van der Westhuizen op cit (note 31) 290.

advances on solicitous males, those who in one way or another indicate an interest in commercial sex.”³⁷

So it could be argued that the fears of random, indiscreet solicitation of all persons, is merely a calculated myth entrenching the motivation for criminalising prostitution in avoidance of a public nuisance.

1.2. SECTION 19 (b)

Section 19 (b) prohibits any person from ‘wilfully and openly exposing’ him/herself in ‘an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access’.

1.2.1. Wilfully and Openly

This prohibition can be perceived as being exceptionally vague in consequence to the fact that it

“...has ...on occasion been wrongly invoked for prosecutions of mere nudity where there was no intention to entice others to sexual immorality.”³⁸

‘Wilful’ denotes that the accused should have acted with intention. ‘Openly’ can be construed as meaning ‘publicly’.

37. Richard Symanski. *The Immoral Landscape - Female Prostitution in Western Societies*. (1981) 97.

38. Ad Hoc Committee of the State Presidents Council. op cit (note 6) 33.
R v K 1983 (1) SA 65 (CPD).
S v H 1991 (2) SACR 329 (C).

1.2.2. Exhibiting him/herself in an Indecent Dress or Manner

The Act does not define ‘indecent’, and this has resulted in the courts being faced with the problem of defining it within the specific circumstances presented before them.

In *S v L*³⁹ Marais J stated the following⁴⁰

“The task might have been made less difficult if the makers of the two laws under consideration had spelt out what they envisaged as being indecent but they have not...No truly exhaustive definition could have been given and definition would have probably been undesirable when changing social mores are likely in time to render some aspects of any definition ridiculous.”

Further the definition of what constitutes an indecent act is explained in *S v W*⁴¹ wherein

O’Donevan AJ says⁴²

“a person may be said to exhibit himself in an indecent manner within the meaning of section 19 (b) if the exhibition offends against recognised standards of decency.”

1.2.3. ‘At any door or window or within view of any public street or place or in any place to which the public have access’

Public place is not defined within the Act, however the same definitions that have been accorded to the meaning of ‘public place’ for the purposes of s 19 (a)⁴³ would be applicable. It follows that a person scantily clad who steps into his her garden in the morning to retrieve the daily newspaper may be construed as falling foul of the provisions of the Act at s 19 (b) by ‘exhibiting himself or herself in an indecent dress or manner...within view of any public street...’ Obviously taken to its extreme the contents of this section indicate a conservatism

39. 1991 (2) SACR 329 (C).

40. Supra at 334 D-E.

41. 1975 (3) SA 841 (T).

42. Supra at 843 D.

43. See 1.1.2. above.

reminiscent of the Victorian period wherein piano legs were covered in the interests of complying with social decorum. However Foxcroft J in *S v L*⁴⁴ stated that

“Having regard to the title of the section and the reference to doors and windows...it seems to me that the section was aimed primarily at the prevention of prostitution, or indecent or immoral acts. The heading does not, of course, limit the operation of s 19 (b).”⁴⁵

In order to ensure that the intention of the legislature is recognised one should therefore return to the rationale behind the development of s 19, and that could be assumed to be; a curtailment of the nuisance factor of street solicitation, offensive behaviour, and exhibitionism, calculated to “entice the commission of immoral acts.”⁴⁶ However one must balance these factors out with the rights constitutionally guaranteed to a person committing any of these acts, and ensure that violation of such rights is legitimate, and not unconstitutional. If there is an element of unconstitutionality then the section cannot be upheld and must be struck down.

2. SECTION 20

Section 20 of the Sexual Offences Act 23 of 1957 provides as follows:

“20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. - (1) Any person who -
 (a) knowingly lives wholly or in part on the earnings of prostitution; or
 (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or
 (b) in public commits any act of indecency with another person; or

44. 1991 (2) SACR 329 (C)

45. Supra at 337 H

46. *Report of the Ad Hoc Committee of the State President's Council*. 33. With reference to *R v K* 1983 (1) SA 65 (CPD).

(c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence.

(2) If it is made to appear to a magistrate by information on oath that there is reason to suspect that any house is used for purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorising any police officer not below the rank of sergeant to enter and search the house and to arrest that person.”

2.1. LIVING OFF THE EARNINGS OF PROSTITUTION

SECTION 20 (1) (a)

This section prohibits any person from knowingly living on the earnings of prostitution. This section has been interpreted as meaning that an offense is committed by a person exploiting the prostitute.⁴⁷ The courts found that there were several attempts at charging the prostitute with contravention of s 20 (1) (a), and in examining the meaning of the section the courts turned to rules of interpretation of statutes and determined from the Literal Rule of interpretation that:

“In construing the statute the object is, of course, to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide the courts in arriving at that intention is to take the language of the instrument...as a whole, and, when the words are clear and unambiguous, to place upon them their grammatical construction, and to give them their ordinary effect.”⁴⁸

47. *Report of the Ad Hoc Committee of the State President's Council.* paragraph 4.36.

48. Per Innes CJ in *Venter v R* 1907 TS 910 at 913.

Furthermore, with reference to interpreting the words of a statute in accordance with their ordinary grammatical meaning in the 1946 case of *Volschenk v Volschenk*⁴⁹ the following was held:

“The cardinal rule of construction is that words must be given their ordinary, literal, grammatical meaning.”

Therefore when approaching a statute this would be the most obvious point to note with regard to analysing legislative intention, in that not only the meaning of words, but the context in which the words are presented is important. Obviously clarity of language would dominate over the contextual use of words, however the scope and purpose of a statute would assist in a final determination of the intention of the legislature.⁵⁰

Legislative tautology⁵¹ is also considered important, as is demonstrated in the case of *Horn v The State*⁵² wherein a prostitute was charged under s 20(1) (a) of the Sexual Offenses Act.⁵³

Roux J in the aforementioned case held that:

“...prima facie I hold the view that a prostitute knows that she lives on the earnings of prostitution. The use of the word ‘knowingly’ is tautology. ‘and accordingly the section only applies to’ a person, not being the earning prostitute, who lives on the earnings of such prostitute.”⁵⁴

Therefore, s 20 (1) (a) can only apply to persons other than the prostitute.

49. 1946 TPD 486 at 487.

50. *Jaga v Donges* NO 1950 (4) SA 653 (AD) at 664.

51. Legislative tautology is where a statute makes a statement which is necessarily true. For example it is necessarily true that a prostitute lives off the earnings of prostitution, therefore the legislature could not have intended a prostitute to be penalised by a prohibition prohibiting living off the earnings of prostitution.

52. Case number A452/86. TPD.

53. of Act 23 of 1957. Note the extract above.

54. G. M. Cockram. *Interpretation of Statutes*. (1987) 45.

Roux J⁵⁵ held the following in relation to s 20 (1) (a)⁵⁶

“I must conclude that the relevant legislation preceding s 20 (1) (a) was not directed at prostitutes living on their own earnings...”

The learned Judge additionally held

“My conclusion is therefore that s 20 (1) (a) of Act 23 of 1957 only refers to a person, not being the earning prostitute, who lives on the earnings of such a prostitute”.⁵⁷

In the judgement in *S v H*⁵⁸ the court noted that in 1986 when the case was heard, that there was no criminalization of prostitution per se, and that there was no historical precedent

indicating that such a provision was desirable. Roux J holds:⁵⁹

“A further circumstance that must not be overlooked is that I was not referred to any earlier or existing statute which makes prostitution a crime. I was not able to find any such provision. Milton and Fuller vol III at 343 sum up the position in the following words:

‘The law (and society) adopts an ambivalent attitude to this oldest of professions. On the one hand prostitution is condemned as a social evil while on the other hand it is tolerated in so far as it is not a criminal offence for a woman to be a prostitute nor is it an offence for a man to have sexual relations with a prostitute.’”

The extract above provides a foundation for the decision reached in the case in question, wherein it determined that s 20 (1) (a) could not have been intended against the prostitute him/herself. Additionally, it emphasises that prostitution per se was not criminal at this time, in South Africa.

55. *S v H* 1986 (4) SA 1095 (T).

56. *Supra* at 1097 I - J.

57. *Supra* at 1098 I.

58. *ibid.*

59. at 1098 F -G.

*S v H*⁶⁰ was taken to the Appeal Court by the Attorney-General in an attempt to have it found that the section did intend to apply to the prostitute as well. Kumbleben JA held the following:

“By the same token the prostitute on receipt of the money must be taken to be living on such earnings, no matter how the money is spent or used. There is, however, merit in the submission that, if it were intended to make prostitution per se an offense, this would have been done explicitly.”⁶¹

The appeal was dismissed, and prostitution was not an offence under South African law.

The elements of the offense created by s 20 (1) (a) will be examined below.

2.1.1. Any Person Knowingly Living on these Earnings

It is clear from the above examination of the offense, that it is directed against a person who is exploiting the prostitute. It is said that:

“It is ...sufficient that the accused lives in a relationship with the prostitute which is of a ‘parasitic’ nature insofar as it enables him to obtain cash or kind by which he was able to clothe, house, feed, entertain and maintain himself. Proof of this element thus requires evidence as to the nature of the accused’s relationship with the prostitute...”⁶²

To reiterate the explanation given above, a prostitute cannot be held liable for living on the earnings of prostitution under this section.⁶³

60. 1988 (3) SA 545 A.

61. *ibid.* at 554 E.

62. J. R. L. Milton and M. G. Cowling *op cit* (note 15) 43.

63. *ibid.*

The word 'knowingly' describes intention, and it must therefore be shown that the accused was aware that the earnings upon which he/she was living, were the earnings of prostitution.⁶⁴

2.1.2. The Earnings

These earnings are those received in consideration for services rendered through the act of prostitution.⁶⁵ The law has also extended the concept of earnings to include

“...profits or income produced by prostitution.”⁶⁶

2.1.3. Prostitution

There has to be a connection between the activity of prostitution, and the earnings.⁶⁷

2.2. THE OFFENCE OF 'BEING' A PROSTITUTE

SECTION 20 (1) (aA)

This section prohibits a person from committing an act of indecency, or having unlawful carnal intercourse with any other person for a reward.

Section 20 (1) (aA) specifically penalises the prostitute him/herself. Section 20 (1) (aA) was introduced in 1988⁶⁸ despite the recommendations contained within the Report of the Ad Hoc

64. J. R. L. Milton and M. G. Cowling op cit (note 15) 47.

65. *ibid.*

66. J. R. L. Milton and M. G. Cowling op cit (note 15) 46.

67. J. R. L. Milton and M. G. Cowling op cit (note 15) 47.

68. By the Immorality Amendment Act 2 of 1988.

Committee of the State President's Council which was produced in 1987 and held the following:

"The most effective way of combatting prostitution would be to deal with the public manifestations of the offence under the criminal law and leave other manifestations to public opinion."⁶⁹

The gender neutrality of the provision indicates that the legislature acknowledges that the phenomenon of prostitution is not gender specific.⁷⁰ However, the provision criminalises only the acts of the prostitute, and not the client, which exposes an element of discrimination within the provision.⁷¹

2.2.1. Unlawful Carnal Intercourse or Acts of Indecency

Unlawful carnal intercourse is defined as intercourse other than between a husband and wife.

This definition of 'unlawful carnal intercourse' could in all probability result in most of the younger generation finding themselves prosecuted as a consequence of the widely accepted trend of young people who are not married (therefore are not 'husband and wife') merely living together and indulging in carnal intercourse, thus contravening the Act.⁷² Likewise, any person who receives a reward for sexual intercourse from another to whom he/she is not married would be liable for prosecution under this section.

69. *Report of the Ad Hoc Committee of the State President's Council* op cit (note 6) 36.

70. J. R. L. Milton. "The Sexual Offences Act" in *South African Journal of Criminal Justice*. (1988) 272.

71. *Ibid*.

72. J. R. L. Milton and M. G. Cowling op cit (note 15) 38.
"It is submitted that the legislature did not intend to criminalise promiscuous persons whose unchaste behaviour brings them a return or recompense..."

“It is submitted that the section should be strictly construed so as to be confined to those who habitually and indiscriminately engage in sexual relations for reward.”⁷³

The offence is not limited to sexual intercourse alone, but also prohibits ‘an act of indecency’ when such is committed for reward.

“The term ‘indecency’ here denotes acts that are lewd or lascivious...acts designed to promote or gratify sexual passion qualify as lewd or lascivious...[including] masturbation, flagellation and the indulging of various fetishes. These forms of indecency would constitute a contravention whether practised heterosexually or homosexually.”⁷⁴

2.2.2. For Reward

Within the context of the Act the term ‘for reward’ can be seen to mean:

“...a return or recompense made to or received by a person for some service.’ In order to qualify as a reward the recompense must be a quid pro quo for the service rendered...Construed in this wide sense the term would bring within the ambit of the prohibition not only the professional prostitute receiving money from a client but also a mistress or lover receiving some gift or other recompense in consideration for sexual intercourse. It is submitted that the legislature did not intend to criminalise unchaste persons whose behaviour brings them a return or recompense...the term reward must be construed for these purposes as a pecuniary recompense given solely for the hire of the body of the accused for the purpose of sexual gratification.”⁷⁵

2.2.3. Intention, and Ambit of the Prohibition

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73. J. R. L. Milton and M. G. Cowling op cit (note 15) 36.
However this has not been judicially confirmed. *S v C* 1992 (1) SACR 174 (W) at 176 E.
74. J. R. L. Milton & M. G. Cowling op cit (note 7) 37.
75. J. R. L. Milton and M. G. Cowling op cit (note 15) 37.

The person committing the prohibited act must intend to do so, in return for a reward.⁷⁶ It is submitted that the section is intended to deal with prostitution, and the engagement of sex for reward, not general promiscuity.⁷⁷

2.2.4. General Comments on Section 20 (1) (aA)

Section 20 (1) (aA) brings the act of prostitution under the sanction of the criminal law. There does not seem to be a rational basis behind the criminalization of prostitution. The section was inserted despite recommendations by the State President's Council.⁷⁸ The parliamentary debates on the subject reflect no rationality.⁷⁹

There are other criticisms of the section such as that of Milton⁸⁰ regarding the implications of criminalisation:

"The first relates to the enforcement of the prohibition. The criminalisation of prostitution per se now imposes upon the police a duty to gather evidence that individual prostitutes had engaged (a) in sexual intercourse or acts of indecency (b) for reward. In the nature of things such evidence is usually obtained either by spying upon the prostitute and her client or by a process of entrapment. Given the nature of the offense, entrapment to establish the choate offence would require the trap to participate in the completed act of 'unlawful carnal intercourse' or engage in an indecent act 'with' the prostitute. At the least, a successful entrapment would require that the trap engage in such acts of preparation as would enable a charge of attempting to contravene the section. These sordid and demeaning activities are not only of dubious morality, but, more importantly, are costly in terms of manpower, and require the diversion of personnel from the combatting of more serious crimes."

76. J. R. L. Milton and M. G. Cowling op cit (note 15) 38.

77. J. R. L. Milton and M. G. Cowling op cit (note 15) 36.

78. Report of the Ad Hoc Committee PC 1/85.
See above for relevant paragraph.

79. The member for Roodeplaat held "it was wrong for the prostitute to get away with it in the past" *Debates of Parliament*. 15 February 1988 col 893.

80. J. R. L. Milton op cit (note 64) 272.

The case of *S v C*⁸¹ deals with a contravention of s 20 (1) (aA). In this case the accused had agreed to have sex with a man for a price, and had undressed and handed him a condom. The court held that in undressing she had committed an act of indecency, however she had not done so for reward, and could only be found guilty of attempting to contravene the section.

Van Dijkhorst J held:⁸²

“The two acts of which the legislature disapproves in the section are unlawful carnal intercourse (as defined) and an act of indecency (undefined), both, however, committed with another person for reward. In fact publicity is not required and neither is a crowd. The offence may be committed behind closed doors involving only one other person...The act must be done for reward and it must be indecent.”

It therefore appears that without a trap having sexual intercourse with a prostitute for reward commission of the offence cannot be proved, and this is highly problematic given the morality of such attempts at law enforcement.⁸³ Thus, despite the fact that the legislature views prostitution as criminal, the enforcement of s 20 (1) (aA) is almost impossible.

“The high enforcement costs seem a quite inappropriate expenditure to achieve the eradication of that which history has taught cannot be eradicated.”⁸⁴

The Ad Hoc Committee of the State President’s Council⁸⁵ held the following:

“Immoral deeds should be visited by criminal sanctions only if such sanctions would enjoy the support of the overwhelming majority of the population.”

81. 1992 (1) SACR 174 (W).

82. at 175 E-F.

83. See J. R. L. Milton op cit (note 64) 272 for a detailed examination of this.

84. J.R.L. Milton op cit (note 64) 273.

85. op cit (note 6) 23.

This is however controversial in the context of sexual offences, as the majority of the population may fail in their objectivity, and impose unfair burdens of morality on others. The Bill of Rights should constantly be at the forefront of any consideration regarding the impingement on another's freedoms, and the law should seek to serve as a shield for the citizens of a country, and not as a weapon to be used indiscriminately against them.

CHAPTER 6

ANALYSIS OF THE MOTIVATION BEHIND THE CRIMINALISATION OF HOMOSEXUALITY

The motivation behind the legal prohibition on homosexual sexual acts stems from the origin of South African law, which is rooted in Roman law¹, wherein

“...homosexuals were barred from legal practice - sharing this fate with gladiators (an unseemly occupation), and those suffering from physical handicaps such as deafness or blindness...In the Roman-Dutch common law...only male/female sex acts which were directed to procreation were permitted. All other sex acts - whether between men or between a man and a woman - were cruelly punished.”²

Most of the prohibitions on sex acts other than for procreative purposes have disappeared from South African law.³ However, the laws against homosexuality remain. This chapter will seek to deal with the justifications indicating that the law is acting legitimately in criminalising homosexuality.

There are several broad titles, under which the justifications for the criminalisation of homosexuality have fallen, and these will form the basis for the discussion in this chapter :

1. Legal history.
2. The Moral arguments.

1. H. R. Hahlo and Ellison Kahn. *The South African Legal System and its Background*. (1968) 139.

2. Edwin Cameron. "'Unapprehended felons': Gays and lesbians and the law in South Africa." in *Defiant Desire - gay and lesbian lives in South Africa*. (1994) 91.
See also the Chapter on the History of the Subject in this work.

3. *ibid*.

- 2.1. Homosexuals are child molesters, out to pervert the morals of the young and innocent.
 - 2.2. Homosexuality leads to the disintegration of social values, and destroys society as a consequence.
 - 2.3. Homosexuality is 'unnatural' and sinful, and only sex for procreation is advocated.
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1. LEGAL HISTORY

The prohibition on sodomy is a common law crime.⁴ The basis for South African common law rests in Roman-Dutch law from whence these forms of prohibition emanated. As has been indicated already, most of the common law prohibitions against certain forms of sexual conduct, are no longer operational in South Africa.⁵ Recent judicial decisions would indicate fairly persuasively in favour of the statutory abolition of the crime of sodomy.⁶ Ackerman J., with Tebbutt J concurring held the following in a 1993⁷ case involving the offence of sodomy:

“What, in my view, also renders the criminalisation of consenting, adult, private, homosexual acts particularly repugnant is that the free mutual expression of erotic attraction between adult members of the same sex is proscribed even though such orientation may indeed be immutable... Whilst immutability of homosexual orientation would make the criminalisation of adult, private, consensual homosexual acts even more undesirable, this does not detract from the broader and more fundamental consideration, already

4. Having been introduced into South Africa by Roman-Dutch and English law. See also the Chapter on Legislation pertaining to Homosexuality.

5. Edwin Cameron *op cit* (note 2) 91.

6. *S v H* 1993 (2) SACR 545 (c).

7. *ibid*.

alluded to, that principles of equality, privacy, autonomy and the absence of public harm militate strongly against criminal prohibition of such acts.”⁸

An additional common law crime which has also been used as a basis for the legal discrimination against homosexuals is the common law crime of ‘unnatural sex acts’.

“This is an archaic offence where notions of what amounts to natural and unnatural acts have been used to criminalise homosexual acts. This category of offenses has been criticized by both the judiciary and academic sources.”⁹

The historical justification for these common law crimes has been criticised by the judiciary.¹⁰

The social milieu has altered to an extent where these crimes are no longer perceived as being appropriate:

“The foregoing suggests broad consensus on eliminating discrimination against homosexuality and the likelihood that this will be entrenched in a new constitutional dispensation. If this were to happen it is difficult to see how common law or statutory offenses which proscribe private ‘unnatural acts’ between consenting adult men can escape being struck down.”¹¹

8. *ibid.* at 551 g - i.

9. Submissions to the Minister of Safety and Security, Provincial MEC's for Public Safety and Security and the Commissioners of Police on behalf of gay and lesbian community organisations. at 57 Annexure A.
See also: *S v H* 1993 (2) SACR 545 (C); *S v Matsemela en 'n Ander* 1988 (2) SA 254 (T); *S v M* 1979 (2) SA 167 (T).

See also 8.2.3. below for a further discussion on the definition of ‘unnatural sex acts’

10. See *S v H* *op cit* (note 6).

11. *S v H* 1993 SACR 553 (C) at f.

2. THE MORAL ARGUMENTS¹²

The bulk of most objections to the issue of homosexuality can be traced back to some moral or religious perspective being advocated at the expense of another.¹³ There appears to have been a desire towards the categorisation of homosexuality as an illness¹⁴ as a means of avoiding the reality of the situation.¹⁵

“Instances abound where judges denounced homosexual conduct as a defilement and abomination of human nature - and thus as immoral and depraved.”¹⁶

There are specific areas of morality¹⁷ which are ascribed to the homosexual community as being the most problematic, and therefore the most justifiable basis for the criminalisation of homosexuality. These areas will be examined individually as subsections under the broad title of morality.

12. For a more detailed examination of the relationship between law and morality, refer to the Chapter in this work on this issue.

13. J. Boswell. *Christianity, Social Tolerance, and Homosexuality*. (1980) 6.
“...hostility to gay people provides singularly revealing examples of the confusion of religious beliefs with popular prejudice.”

14. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is one such example wherein homosexuality was declared by the American Psychiatric Association to be a mental disorder until 1987. This was the classification in the DSM I published in 1952 ; the DSM II published in 1968; the *DSM III* published in 1974, and was removed from the *DSM III-R* published in 1987.

15. *R v C* 1955 (2) SA 51 (T); *Baptie v S* 1963 1 PH H96.
Both of the aforementioned cases alluded to homosexuality being some form of disease. In the former case it is described as a “biological condition which is very difficult to cure...”. In the latter case it is described as a mental disorder.
The reality of the situation is that there are many homosexual people within society, and they cannot be explained away by an appeal to either mental or physical illness, but should be accorded the same rights as other citizens to live their lives devoid of moral judgements.

16. Edwin Cameron op cit (note 2) 93.

17. Such as assertions that homosexuality is contagious, and will corrupt the young and innocent; that homosexuality will result in the disintegration of society; that homosexuality is evil and unnatural.

2.1. HOMOSEXUALS ARE CHILD MOLESTERS, OUT TO PERVERT THE MORALS OF THE YOUNG AND INNOCENT

This has been a theme which has been perpetuated by law enforcement officials¹⁸ who rely on the creation of “moral panic”¹⁹

“in the three months between June and August 1988, detectives from the police Child Protection Unit (CPU) arrested more than 60 adult men and teenage boys in what quickly became seen as a countrywide net against child abuse... Child abuse experts, Members of Parliament, and police spokespeople demanded drastic action: one suggestion was a jobs blacklist aimed at keeping known molesters away from children ...police spokespeople drew explicit links between homosexuality and child abuse, encouraging the idea that gay men were child-corrupters.”²⁰

The idea that a child, if not protected from the ‘horrors of depravity’ that are intrinsically related to homosexuality, will be converted to homosexuality²¹ provides the basis for the justification of the disparity in the ages of consent between heterosexual and homosexual persons.

“These beliefs are irrational - but that does not diminish their power to reinforce prejudice and discrimination. In 1987 the Committee for Social Affairs of the tricameral President’s Council issued a Report on the Youth of South Africa in which homosexuality was categorised as part of the problem of promiscuity (along with ‘extra-marital sexual intercourse’, ‘prostitution’, and ‘living together’). Homosexuality was classed as an ‘acquired behavioral pattern’ and ‘a serious social deviation’ which was damned as ‘irreconcilable

18. Such as the police, as will be evidenced below.

19. Glen Retief. "Keeping Sodom out of the Laager: State Repression of homosexuality in apartheid South Africa" in *Defiant Desire - gay and lesbian lives in South Africa*. (1994) 105.

20. *ibid.*

21. *ibid.*
"Captain Leonard Solms...At a 1990 Dutch Reformed Church conference, entitled 'Chaos Around Eros', ...told delegates that sexual abuse of boys by men was a much bigger problem in Cape Town than other South African cities and that 'if we don't do something, we will have many homosexuals in the next generation'."

with normal marriage'; it was one of a range of 'evils' to which 'promising young people' fell prey."²²

The notion of homosexuality being 'contagious', was probably reinforced by the Select Committee of Parliamentarians established at Justice Minister P. C. Pelser's request in 1967.

"The central point of debate in the Select Committee deliberations was whether or not homosexuality was infectious and could endanger the country's youth. The tug-of-war was between the law-and-order lobby, which was convinced that homosexuality was spreading because older men and women were seducing teenagers..."²³

The point that has evaded much of the debate on the issue of homosexuality being legitimately repressed in the interests of 'preserving the young' is the misnomer that this generates.

"To say that such laws are justified because indirectly they stop homosexual intercourse by or with the underaged, would be as absurd as to recomend absolute prohibitions on heterosexual intercourse for the same reason. There is no data proving that homosexual persons as a class are more often involved in offenses with the young than are heterosexual persons. Nor is there any reliable evidence that anti-homosexual laws inhibit children from becoming homosexual."²⁴

In 1981 The European Court of Human Rights, in the case of *Dudgeon*²⁵, in determining that the Northern Ireland law prohibiting homosexual activity interfered with "the right to respect for private life"²⁶, reached the following conclusion about the age of consent for homosexual males being higher than that for heterosexuals:

22. Edwin Cameron op cit (note 2) 93.

23. Glen Retief op cit (note 18) 102.

24. D. A. J. Richards. "Homosexual Acts and the Constitutional Right to Privacy' in *Homosexuality and the Law*". ed. D. Knutson. at 56.

25. (1981) 4 EHRR 149.

26. Simon Bronitt. "Legislation Comment: Protecting Sexual Privacy under the Criminal Law - Human Rights (Sexual Conduct) Act 1994 (Cth)" in *Criminal Law Journal Vol 19*. at 226.

“...[the higher age of consent is a] legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth.”²⁷

However subsequent commentary on this decision of the European Court of Human Rights, indicates that the restrictions on the age of consent for homosexual activity is not justified as it extends the laws protection of young persons disproportionately in relation to the laws intervention on heterosexual intercourse.²⁸ In the United Kingdom in the Criminal Justice and Public Order Act 1994²⁹ lowered the age of homosexual consent from 21 years to 18 years. Therefore, with the vulnerability of youth being promulgated as justification for the disparity in the ages of consent for homosexual and heterosexual activities, the argument that such disparity exists to prevent co-option of youth into homosexuality fails because it is not used to protect heterosexuals, nor can it cannot be legitimately proven.

2.2. HOMOSEXUALITY LEADS TO THE DISINTEGRATION OF SOCIAL VALUES, AND DESTROYS SOCIETY AS A CONSEQUENCE

“There is no apparent distinction between the heterosexual and homosexual populations in terms of symptoms of mental illness or measures of self-esteem and self-acceptance. In general, apart from their sexual preference, exclusively homosexual people are indistinguishable from the general population. Finally, homosexual preference appears to be a largely irreversible adaptation of natural human propensities to social circumstances at a very early age.”³⁰

27. *Dudgeon* (1981) 4 EHRR 149 at 168.

28. Simon Bronitt op cit (note 25) 226.

29. Section 145.

30. D. A. J. Richards op cit (note 23) 52.

Richards, in the extract above, succinctly provides an argument which would make the 'social disintegration' theory difficult to sustain. The indistinguishability of homosexual people from heterosexual people makes it difficult to understand how society can disintegrate as a consequence of allowing homosexuality. Perhaps the origin of the idea that homosexuality leads to the disintegration of society can be traced back to the sixth century BC, where a Jewish tradition is identifiable.³¹ This Jewish tradition held that there was a duty upon the Jews to procreate and multiply, and therefore if semen were emitted outside of the woman's uterus, this was considered to be unlawful.³² Homosexuality opposed the processes of procreation, and was therefore could be criticised for not contributing to the development of society, and as a consequence could have been thought to lead to the destruction of society.

To see homosexuality as antisocial, is to overlook the most basic flaw in this argument, which is that the majority of homosexual people emerge out of conventional nuclear families.³³

Accordingly it would seem logical to prohibit such nuclear families in an effort to prevent homosexuality!

The entire fabric of the argument that homosexuality is justifiably criminalised on the basis of the social disintegration theory rests on a very tenuous base:

“Empirical support for the view that homosexuality is a kind of degenerative poison and leads directly to disease, social disorder, or even to natural disaster as Emperor Justinian supposed when condemning homosexuality as a capital offence, would indeed justify anti-homosexual laws. Principles of justice must be compatible with the stability of institutions of social cooperation. In particular, the principle of equal liberty would not extend to forms of liberty incompatible with stable social cooperation...If the above allegations regarding

31. Eva Cantarella. *Bisexuality in the Ancient World*. (1992) 202.

32. *ibid*.

33. Anthony Grey. *Quest for Justice - Towards Homosexual Emancipation*. (1992) 18.

homosexuality were true, homosexual behaviour might fairly be prohibited on the grounds that it undermines the entire constitutional order of equal liberties. However, these fears are unjustified. Numerous nations, including many in Western Europe, have long allowed homosexual acts between consenting adults and have suffered no consequent social disorder, disease, disruption, or the like.”³⁴

On the basis of the above information, given that there have been no recorded incidents of divine retribution on countries wherein homosexuality is not a criminal offence, it appears that the Social Disintegration theory is unconvincing, and insufficient to justify continued criminalisation of homosexuality.

2.3. HOMOSEXUALITY IS ‘UNNATURAL’ AND SINFUL, AND ONLY SEX FOR PROCREATION IS ADVOCATED

Many references to homosexuality are characterised by the use of the term ‘unnatural’. Yet it has been contended that the distinction between ‘natural’ and ‘unnatural’ has never been cogently described in any philosophical system.³⁵

Plato represents one of the earliest recorded categorisations of sexual deviance into a category defined as being ‘unnatural’.³⁶

“Plato contended that homosexual acts between males are unnatural on two grounds: First, such acts undermine the development of desirable masculine traits - eg. courage and self-control. This idea probably rested on an assumption that homosexual acts reduce men to the status of women. Second,

34. Glen Retief op cit (note 18) 57.

35. J. Boswell. *Christianity, Social Tolerance, and Homosexuality*. (1980) 11.

36. Plato. *Laws*. Book VIII at 835d - 842a.
J. Boswell op cit (note 35) 13.
D. A. J Richards op cit (note 23) 45.

Plato argued that male sexuality has but one proper use, namely, procreation within marriage, and that homosexuality is unnatural because it is sterile.”³⁷

St. Thomas Aquinas reformulated the perspective that was advocated by St. Augustine who had indicated that only the purpose of procreation justified any type of ‘genital commotion’.³⁸

“...St. Thomas argued that, even granting that homosexual acts between adults harm no one, the acts are still unnatural and immoral for they are an offense to God, who has ordained procreation as the only legitimate use of sexuality.”³⁹

However it appears that St. Augustine may not have been accurate in his supposition that human sexuality was always

“...wild, incoherent, animal passion whose drives undermine human capacities for self-control...Augustine at once underestimated the peculiarly human capacity for self-command over sexual desire...Humans can and do postpone sex indefinitely...They engage in sexual intercourse for diverse purposes - to express love, or for recreation. or for procreation...From this perspective, we can see that the Augustinian idea that procreation is the only proper sexual function is, at best, a plausible description of the animal, not the human, world.”⁴⁰

It is quite apparent that the use of the term ‘unnatural’ is fairly common-place when referring to homosexuality. In the *Report of The Ad Hoc Committee of the State President's Council on the Immorality Act in August 1985 on the issue of homosexuality* the following was held:

“Churches and others continue to condemn this manifestation as contrary to nature and therefore unacceptable.”⁴¹

37. D. A. J. Richards op cit (note 23) 45.

38. ibid.

39. ibid.

40. D. A. J. Richards op cit (note 23) 49.

41. Chapter III at para 3.22.5 on page 23.

However in the light of the ‘sex solely for procreative purposes’ theory outlined above it would appear that

“A more exact use of the ‘natural-unnatural’ distinction would be to call the exclusive use of sex for procreation unnatural for humans, though natural for animals. Thus, sexual relations between same-sexed partners should not be included within the notion of ‘unnatural acts’; homosexuality is not necessarily an impairment of proper function.”⁴²

The justification for legislative intervention into homosexual relations is problematic for the reasons enunciated above, and additionally that the criminal law cannot be the tool for the enforcement of religious morality. Consequently, that arguments in favour of criminalising homosexuality should be revisited.

Many legal systems⁴³ have used the phrase ‘against the order of nature’ to define homosexual relations. The phrase ‘against the order of nature’ means ‘unnatural’ and is therefore problematic.

In the Australian state of Tasmania legislation made it illegal for men to have

“sexual intercourse ... against the order of nature.”

Australia ratified the *International Convention on Civil and Political Rights* which entrenched an individual’s right to privacy.

42. D. A. J. Richards op cit (note 23) 49.

43. Among these legal systems are Nigeria; Kenya; Botswana; and previously the Australian state of Tasmania.

In 1994⁴⁴ the United Nations Human Rights Committee held that the penal provision against homosexuality⁴⁵ was unable to be justified, based on Australia's ratification of the International Convention.

The United Nations Human Rights Committee

“...found that the existence of these offences in Tasmania constituted an arbitrary interference with Mr Toonen's privacy, even though no prosecution had been brought for nearly a decade.”⁴⁶

This decision has the potential to impact favourably where the arguments of homosexuality being ‘unnatural’ arise. Additionally in the context of the South African Bill of Rights⁴⁷ the *Toonen* decision sets a policy precedent that will certainly be persuasive.

The Wolfenden Commission have the most powerfully formulated argument defining that the criminal law ought not to be used as a tool to ensure the protection of morality:

“Unless a deliberate attempt is to be made by society acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.”⁴⁸

Finally, the term ‘unnatural’ being used against homosexuality exposes a major flaw in the criminalisation of homosexuality:

“The objection that homosexuality is ‘unnatural’ appears, in short, to be neither scientifically nor morally cogent and probably represents nothing more than a

44. The case was that of *Toonen v Australia*. No 488/1992. The United Nations document can be referenced at UN Doc CCPR/C/50/D/488/1992, 4 April 1994.

45. Section 122 of the Tasmanian Penal Code.

46. Simon Bronitt op cit (note 25) 223.

47. Chapter 3 of The Constitution Act 200 of 1993.

48. *Report of the Committee on Homosexual Offences and Prostitution*. (1957).

derogatory epithet of unusual emotional impact due to a confluence of historically sanctioned prejudices and ill-informed ideas about 'nature'.”⁴⁹

Accordingly, the argument that homosexuality is 'unnatural' fails to be sufficiently persuasive to justify the criminalisation of homosexuality.

49. J. Boswell op cit (note 35) 15.

CHAPTER 7

ANALYSIS OF THE LAWS PERTAINING TO HOMOSEXUALITY

1. INTRODUCTION

Prior to 1988, the statute governing matters relating to sexual relations was known as The Immorality Act 1957, but after the enactment of the Immorality Amendment Act 2 of 1988, it became known as the Sexual Offences Act 23 of 1957.¹ In 1985 a Report by the Ad Hoc Committee of the State President's Council was published. This report dealt with recommendations regarding the Immorality Act² 23 of 1957. Emanating out of this report was a recommendation that the South African society had not reached

“...a sufficient measure of tolerance towards homosexuality...”

for the law to be amended. Accordingly the legislation criminalising homosexuality remained. The statutory provisions contained within the Sexual Offences Act which specifically penalise homosexuality are:

- the penalisation of acts committed with a member of the same sex where one party is under the age of 19. [s 14]
- the penalisation of acts between males occurring at a party, which are designed to stimulate sexual passion or to give sexual gratification. [s 20A]

Additionally there are common law crimes of sodomy, and unnatural sexual offences.

1. J. R. L. Milton & M. G. Cowling. *South African Criminal Law and Procedure: Volume III Statutory Offences*. (1988) 2.
2. Renamed the Sexual Offences Act.

The legislation in existence in South Africa which pertains specifically to homosexuality is yet to be challenged on the basis of the conflict that it represents with regard to the Bill of Rights as contained in Chapter 3 of the Constitution of South Africa 200 of 1993.³

2. SECTION 14 OF THE SEXUAL OFFENCES ACT⁴

Section 14 of the Act was described by the Report of the Ad Hoc Committee of the State President's Council⁵ as providing protection for persons who are

“...vulnerable to sexual exploitation because of their youth...”⁶

The section in the Immorality Act 23 of 1957 related to boys having sexual offences with girls under the age of 16 years, and boys under the age of 19 years. The State President's Council⁷ recommended that this be extended to remove the sexism, and that girls could now be guilty of seducing boys under the age of 16 years, and girls under the age of 19 years.⁸

It appears that the section was designed to protect the young from exploitation by adults,⁹ it has also been described as having been intended to serve as a deterrent for child prostitution.¹⁰

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3. s 8 of Chapter 3 expressly prohibits discrimination on the basis of sexual orientation, see Chapter on The Constitution for a more detailed exposition of this provision.
 4. Act 23 of 1957.
 5. PC 1/85.
 6. Report of the Ad Hoc Committee of the State President's Council PC 1/85 paragraph 4.48. C. R. Snyman. *Criminal Law*. (1984) 339.
 7. *supra* note 6.
 8. *supra* note 6.
J. R. L. Milton. “The Sexual Offences Act”. *South African Journal of Criminal Justice*. (1988) 269.
 9. J. Burchell and J. Milton. *Principles of Criminal Law*. (1991) 565.
 10. *ibid*.

The provision to protect females under the age of 16 years has been defined as serving the following interest:

“[inhibiting] sexual relations with a female whose age renders her unlikely to be sufficiently prepared psychologically, emotionally and physically for the effect and consequences of sexual intercourse...”¹¹

The same factors are assumed to provide the motivation for preventing boys from being exposed to homosexual sex at an early age.¹²

In 1988, certain recommendations of the State President’s Council¹³ were enacted by the Immorality Amendment Act 2 of 1988, and the section now appears as follows:

“14. (1) Any male who -
 (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
 (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or
 (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,
shall be guilty of an offence.

14. (3) Any female who -
 (a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or
 (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or
 (c) solicits or entices such a boy or girl to the commission of an immoral or indecent act,
shall be guilty of an offence.”

The provisions of s 14 which relate to heterosexual sexual intercourse, or the commission of an immoral or indecent act will be examined alongside the provisions specifically penalising

11. J. Burchell and J. Milton op cit (note 9) 565 - 566.

12. See Chapter on the Motivation for the Criminalisation of Homosexuality, and the argument which follows below on the double standard created by having different ages of consent for heterosexual, and homosexual intercourse.

13. supra note 6.

homosexual acts. The motivation for examining both the heterosexual and homosexual provisions of s 14, is that it clearly shows a disparity in the treatment by the law, between the two categories.

2.1 SECTION 14 (1) (a) - (c)

2.1.1. Unlawful Carnal Intercourse

S 14 (1) (a) prohibits a male from having unlawful carnal intercourse¹⁴ with a female under the age of 16 years. The female must be older than 12 years of age or the boy will be found guilty of rape.¹⁵ Section 14(1) is sufficiently broad to include a commission or an attempt at committing the unlawful sexual intercourse.

2.1.2. Immoral or Indecent Act

S 14 (1) (b) prohibits the commission of an immoral or indecent act with a girl under the age of 16 years, or a boy under the age of 19 years. The law is specific in that the performance of the immoral or indecent act must be **with** the young person defined within the section.¹⁶

‘Immoral’ is not defined in the Act, however one could submit that the immorality of the action when performed with a female under the age of 16 years, rests simply in its

14. Defined in the Act as being intercourse other than between a husband and a wife.

15. Contravention of section 14 (1) (a) is a competent verdict on a charge of rape. C. R. Snyman op cit (note 6) 339.

16. C. R. Snyman op cit (note 6) 339.
Therefore masturbating in front of a girl under the age of 16 years, or a boy under the age of 19 years could not be seen to be in contravention of the section.
"Thus if X merely exposes his body improperly to Y, a young person, he does not contravene the section, although he may be charged with *crimen injuria*."
S v H 1959 (1) SA 343 (C).
S v M 1970 (4) SA 647 (N).

performance, contrary to accepted standards of morality governing the sexual activity of young girls. The immorality of the act when performed with a boy under the age of 19 years could arguably stem from the moral reprobation against homosexual activities.¹⁷ The terms ‘immoral’ or ‘indecent’ have been described as being

“...synonymous, and connote that which contains an element of sexual lewdness or lasciviousness.”¹⁸

‘Indecency’ within the context of acts committed by a male with a boy under the age of 19 years,¹⁹ has been defined as meaning:

“...sexual acts between men that do not involve sodomy.”²⁰

2.1.3. Solicitation or Enticement to the Commission of Immoral or Indecent Acts

S 14 (1) (c) prohibits the solicitation or enticement of either a girl under the age of 16, or a boy under the age of 19 years to commit an immoral or indecent act with a male over the respective ages.

2.1.4. Specific Examination of Cases Arising out of Section 14 (1)(b)

There have been several cases arising out of contraventions of s 14 (1) (b) regarding sexual relations with boys under the age of 19, and several of these will be examined below:

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17. See Chapter on An Analysis of the Motivation Behind the Criminalisation of Homosexuality for a fuller discussion.
 18. J. Burchell and J. Milton op cit (note 9) 579.
 19. Within the context of section 14 (1) (b).
 20. J. Burchell and J. Milton op cit (note 9) 573.
The offence is not committed if both males are under the age of 19 years.

*S v V*²¹ wherein the accused was convicted on nine counts of having committed indecent acts with young boys, in contravention of s 14 (1) (b). The conduct upon which the accused stood trial for, involved the mutual handling of the private parts between himself, and the young boys. There was no sodomy, no violence, nor any physical harm used against any of the boys.

*S v E*²² involved a contravention of s 14 (1) (b) wherein the appellant had indulged in masturbation with eight teenage boys over a period of 5 years. Howie AJA²³ stated that the magistrate had been correct in inferring

“...that the statutory provision contravened by appellant is there specifically to protect minors from their inherent impressionability and gullibility and their lack of judgement and control.”

*S v R*²⁴ wherein the accused was accused of contravening s 14 (1) (b) because of having committed indecent acts with a 15 year old boy, involving fondling of private parts, and masturbation. The sentence imposed in this case was one of correctional supervision. The court was of the opinion, that despite the seriousness of the offence, masturbation was presumably not a shocking revelation for a boy of 15 years of age, and there was no assault or sodomy, therefore correctional supervision was an appropriate sentence in this instance.

*S v K*²⁵ was a case which exposed a contravention of s 14 (1) (b) by the accused who had committed indecent acts with street children in exchange for payment. The accused had been

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21. *S v V* 1991 (1) SACR 68 (E).
 22. *S v E* 1992 (2) SACR 625 (A).
 23. *ibid.* 631 H.
 24. *S v R* 1993 (1) SACR 209 (A).
 25. *S v K* 1995 (2) SACR 555 (O).

convicted previously on the same offense, and the court sentenced him to seven years imprisonment.

The sentences imposed demonstrate that the court takes cognisance of the age of the boys with whom the indecent act is committed, and the sentence is based upon the vulnerability of the boy, the severity of the indecent act, and the age of the boy.²⁶

2.2. SECTION 14 (3) (a)-(c)

2.2.1. Unlawful Sexual Intercourse

Section 14 (3) (a) prohibits any female from having sexual relations with any male who is not her husband, if such male is under the age of 16 years of age.

2.2.2. Immoral or Indecent Act

Section 14 (3) (b) prohibits a female from committing or attempting to commit an immoral or indecent act²⁷ with a boy under the age of 16 years of age, or a girl under the age of 19 years of age. The insertion of the prohibition against a female committing an immoral or indecent act with a girl under the age of 19 was as a consequence of the Immorality Amendment Act 2 of 1988. This was on the recommendations of the Report of the Ad Hoc Committee of the State President's Council²⁸ wherein it was stated that

26. See above cases for evidence of such an assertion.

27. See discussion on the meaning of immoral or indecent act in the examination of s 14 (1) (b) above.

28. PC 1/85.
J. Milton op cit (note 8) 269.

‘ “...both sexes should be protected against acts committed with or in respect of them by women over the age of 16 years”²⁹

‘Immoral and indecent’ have been described as including

“...any touching or fondling that is designed to arouse sexual desire or give sexual gratification.”³⁰

Therefore, since 1988, lesbianism involving a woman committing an immoral or indecent act with a girl under the age of 19 years is criminally punishable under s 14 (3) (b).³¹

The effects of s 14 (3) (b), with regard to female same-sex relations is that it provided the law with the authority to regulate such encounters in a fairly effective fashion. Parliament extended the prohibitions against men and boys to also include women and girls under 19.

The first case in this regard was celebrated, and sensationalised by the press which was able to utilise the facts to the advantage of ensuring validity of entrenched stereotypes. Some of the headlines in the newspapers were:

“City woman on child-sex charge”³²

“Women who prey on little girls”³³

29. supra note 6 paragraph 4.54.2.

30. J. Burchell and J. Milton op cit (note 9) 575.

31. Sexual Offences Act 23 of 1957.
J. Burchell and J. Milton op cit (note 9) 575.
It is suggested by Burchell and Milton, that because the statute fails to define the age of the offender, that two girls under the age of 19 years could also contravene the Act.
J. Milton op cit (note 8) 270.
“The effect of this [s 14(3)(b)] is that, for the first time in our law, a form of consensual lesbian activity attracts a penal sanction... What does seem beyond doubt is that no offense is committed if both women are over 19 years of age...”

32. *Cape Times*. 14 November 1989.

33. *Sunday Times*. 19 November 1989.

2.2.3. Solicitation or enticement to the Commission of an Immoral or Indecent Act

S 14 (3) (c) prohibits the solicitation or enticement of either a boy under the age of 16, or a girl under the age of 19 into committing an immoral or indecent act with a female.

2.3. GENERAL ANALYSIS OF SECTION 14

Section 14 has been criticised as being a very discriminatory provision in that it presents two standards for the age of consent.

Firstly, in heterosexual encounters the age of consent is accepted as being 16 years.³⁴

However section 14 (1) (b) and 14 (3) (b) deliberately discriminate against same-sex unions until both parties are over the age of 19 years. There is an inherent double standard between the ages of consent for heterosexual and homosexual activities. Surely standards should be made uniform in order that all young people are accorded the same respect with regard to their indulgence in sexual activity at a young age, regardless of whether this activity is homosexual or heterosexual. There is nothing in the Sexual Offences Act to show the motivation for such distinction and neither is there empirical evidence³⁵ to support any of the arguments raised by those who support the distinction that it is warranted.³⁶ The provision also is a mockery of the right to equality before the law.³⁷

34. At this age, it is assumed that the legislators believe that a person is sufficiently prepared to make an informed decision regarding his/her exercise of the right to autonomy with regard to matters involving sexual intercourse.

35. See chapter on the Analysis of the Motivation behind the Criminalisation of Homosexuality for an expansion of this discussion.

36. Amongst some of the more frequently encountered arguments invoked against the standardisation of the age of consent is the argument that if a young adult is exposed to the 'sinful and debauched' ways of homosexuality this will obscure to them the passage of 'normal sexual relations' and permanently bind them to a life of 'sinful debauchery'.

37. Larence. R. Helfer. "Finding a Consensus on Equality - The Homosexual Age of Consent and the European Convention on Human Rights". (1990). *New York University Law Review*.

Furthermore there is an added discrimination against homosexuals found in the wording of s 14 as enunciated by Edwin Cameron:

“...the heterosexual prohibition somewhat curiously is limited only to having or attempting to have ‘unlawful carnal intercourse’ with a boy or girl under 16 or soliciting or enticing such a boy or girl ‘to the commission of an immoral act’. The homosexual prohibition by contrast extends to committing or attempting to commit with an under-age girl or boy any ‘immoral or indecent act’. The effect is that merely committing or attempting to commit an immoral or indecent heterosexual act with an under-age boy or girl without solicitation or enticement is not punishable.”³⁸

Section 14 provides an indication of the prejudice that the law has demonstrated with regard to homosexuality. The fact that on the basis of a challenge under s 8 of Chapter 3 of the Constitution³⁹, s 14 of the Sexual Offences Act would in all probability be struck down⁴⁰ is an encouraging step in the right direction, however whether it is sufficient safeguard with regard to the attitudes expressed within society remains to be seen.⁴¹ A high level of ignorance and prejudice persists that the act of indulging in same-sex relations is unnatural⁴², and the proponents of this perspective will undoubtedly not surrender gently into an attitude of tolerance.

38. Edwin Cameron. “Sexual Orientation and the Constitution : A Test Case for Human Rights”. *LHR - Rights Magazine*. April (1993) 34.

39. The Constitution of South Africa Act 200 of 1993.

40. For greater discussion on the unconstitutionality of this provision refer to the chapter on the Constitution of South Africa, to clarify the position.

41. Depending on the efficacy of existing legislation in dealing with ‘hate-crimes’ in response to the knowledge of a person’s sexuality there could arise a need for the legalisation of certain activities in order to facilitate the social transition towards equality.

42. In addition to being perceived as unnatural there is a tendency to believe that exposure to homosexual contact will permanently corrupt a younger person. Glen Retief. “Keeping Sodom out of the Laager: State Repression of homosexuality in Apartheid South Africa in *Defiant Desire - Gay and Lesbian lives in South Africa*. (1994) 105. “Captain Leonard Solms, the man behind the 1989 Cape Town swoops, was even more explicit. At a 1990 Dutch Reformed Church conference, entitled ‘Chaos Around Eros’, he told delegates that sexual abuse of boys by men was a much bigger problem in Cape Town than other South African cities and that ‘if we don’t do something, we will have many homosexuals in the next generation’.”

It can therefore be seen, that the danger of embracing autonomy with regard to one's sexual preference, is that it is a choice only allowed by the law at a specified age, which is different depending on one's sexual preference. This disparity in the unequal application of the law is one of the foundations upon which this provision may be challenged.

3. SECTION 20A OF THE SEXUAL OFFENCES ACT⁴³

This has possibly been the most widely utilised of all the provisions against male homosexuals since its enactment in 1969.⁴⁴ In 1966, a home in Forest Town, Johannesburg, was raided by the police who had received information that a homosexual party was being held at that address.⁴⁵ The raid was highly publicised,⁴⁶ and well organised. The motivation for the raid occurring when it did is unclear.⁴⁷ After the raid the police were faced with a dilemma in that

“while sodomy and a range of other ‘unnatural’ offences was illegal according to the common law, gay men could only commit statutory offenses when in public⁴⁸...If, then, the authorities were to enter private homes and crack down on this organised ring of ‘queer parties’, they would not have the necessary

43. Act 23 of 1957.

44. Glen Retief. "Keeping sodom out of the laager: State repression of homosexuality in apartheid South Africa." in *Defiant Desire - Gay and Lesbian Lives in South Africa*. (1994) 103. "The recommended amendments to the Immorality Act were passed into law in 1969."

45. Mark Gevisser. 'A Different Fight for Freedom : A History of South African Lesbian and Gay Organisation from the 1950's to 1990's.' *Defiant Desire - Gay and Lesbian Lives in South Africa*. (1994) 30.

46. *The Rand Daily Mail*. 22nd January 1966 carried the headline: "350 in Mass Sex Orgy".

47. Mark Gevisser op cit (note 45) 30 suggests that Vervoerd's entrenchment of apartheid policies, and his attempts at eliminating all liberation movements may have been a motivation for the raid occurring when it did.

48. Either through masquerading as women, or soliciting at known cruising spots.

legislation behind them: apart from picking up a few drag queens, as they did at Forest Town, they would have to leave empty-handed.”⁴⁹

In order to provide the necessary legislation to eliminate the lack of justification for arresting homosexual people.⁵⁰ In 1969 the amendments to the Immorality Act became law.⁵¹ Section 20A provided:

“20A. Acts committed between men at a party and which are calculated to stimulate sexual passion or to give sexual gratification, prohibited. - (1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.

(2) For the purposes of subsection (1) ‘a party’ means any occasion where more than two persons are present.

(3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law.”

3.1. SECTION 20 A (1)

The elements of the offense are spelt out in s 20A (1) in that the crime is committed if the accused, being male, commit any act designed to ‘stimulate sexual passion or give sexual gratification’, at a party.

Both participants have to be males in order for the offense to be committed.⁵²

The act performed must be such that it is ‘calculated to stimulate sexual passion or to give sexual gratification’. Acts ‘calculated to stimulate sexual passion’ are defined as

49. Mark Gevisser op cit (note 45) 33.

50. Glen Retief op cit (note 44) 103.

51. *ibid.*

52. J. R. L. Milton op cit (note 1) 28.

“...acts that would have the effect of arousing sexual desire in one or both parties...[and] would seem to include fondling, kissing, displaying the genital organs”⁵³

Acts designed to ‘give sexual gratification’ involve

“...anything that induces an orgasm in one or both parties, as, for instance, masturbation or fellatio of one partner by the other.”⁵⁴

The Act specifically defines that the act must be performed **with** the other person, not merely within their presence.⁵⁵

The act must be committed at a party, which in s 20A (2) is defined as ‘any occasion where more than two persons are present.’

“The object of the legislation is apparently to prevent gatherings of male homosexuals for purposes of engaging in homosexual acts and to prevent ‘the obtrusion of conduct which, from time immemorial, has to many people been profoundly repulsive as depraved and repugnant to nature’.”⁵⁶

The effect of s 20A (1) is that the offense is not committed if performed in private between two males, with no other person present.⁵⁷

In the case of *S v C*⁵⁸ the contravention of s 20 A of the Immorality Act⁵⁹ was the charge laid against the accused. However, there was a material omission within the charge sheet in that

53. J. R. L. Milton op cit (note 1) 27.

54. *ibid.*

55. *ibid.*

56. J. R. L. Milton op cit (note 1) 28.
S v C 1987 (2) SA 76 (W) at 79 G-H.

57. *ibid.*
S v C 1983 (4) SA 361 (T).

58. 1983 (4) SA 361 T.

59. Act 23 of 1957.

there was no statement indicating that the act had occurred at a party. Accordingly the appeal by the accused succeeded and the conviction and sentence were set aside. The charge sheet had disclosed no offence because of its omission with regard to the fact that the act in question by law had to occur at a party (as defined in the extract from the Act above). The act in question had however occurred in a cubicle at a health club, and accordingly could not be seen to fulfil the demands of the definition of s 20A. However the case had an additional impact in that Gordon J in his judgement held⁶⁰:

“...The object of the section is clearly not to punish acts performed in private, as long as no more than two persons are present on any such occasion.”

Subsequent cases against homosexual males were brought, despite the fact that these cases were continuously overturned on the basis of a lack of justification for the charges, due to the enigma presented by the phrase ‘at a party’. The fact that the acts, if performed in private, could not be penalised, resulted in police trying to constitute a party, but failing.⁶¹

The case of *S v C*⁶² is a further case in point demonstrating that s 20A was not designed to prohibit homosexual acts in private. In this instance the accused were in a dark cubicle at steam baths, and when a policeman barged in upon them they sprang apart, thus demonstrating that there was no continuance of the acts for which they were charged in the presence of a third or any other person. The accused were again successful in their appeal, and the conviction and sentence were set aside. What ought to be noted from this case however are the observations of Schabert J:⁶³

60. at 364 E-F.

61. *S v C* 1983 (4) SA 361 (T).

62. 1987 (2) SA 76 W.

63. F-H.

“...It seems likely, so B van D van Niekerk contended, that the legislature’s intention in introducing 20A was to stamp out homosexual gatherings.”⁶⁴

“It also seems likely, I would add, that it was intended to prevent the obtrusion of conduct which, from time immemorial, has to many people been profoundly repulsive as depraved and repugnant to nature.”

It is, with respect, a sad reflection of the conservative attitude possessed by the judiciary that the comments of the learned Judge were highly emotive, in the light of the fact that this case was heard as recently as November 1986, and so much has changed within the attitudes of many sectors of society.

3.2. GENERAL COMMENTS ON SECTION 20 A

The essential enigma is that cases involving private, adult consensual intercourse even reach the law courts, constituting a severe waste of time, manpower, and involving a great deal of cost. The fact that the prohibition involves the stipulation that the action must occur at a party, supports the idea that such enactments were designed to suppress gatherings of homosexual people, and the condoning of homosexual activities.

The true purpose of this provision is not clear as the courts have interpreted s 20A to prevent homosexuals from indulging in any specific activities so long as those activities are performed in private.

The enforcement of such a provision gives rise to sad indications of unnecessary use of law enforcement officials as they are used to peer under toilet doors, through bedroom curtains and in many other obscure locations in the interests of attempting to assert that they constituted a party and accordingly that an offence had been committed. There is no doubt that most liberal thinkers would still agree to an element of prohibition with regard to sexual

64. as quoted in “The ‘Third Sex’ Act 1970”. *SALJ.* 87 at 89.

activities being performed in the presence of unwilling bystanders, or in public where it was likely to cause some degree of discomfort to any observers, however such legislation would only be justified if it applied to all persons irrespective of sexual orientation, and in this regard the common law crime of ‘public indecency’⁶⁵ may suffice.

The fact that homosexual activities performed in private are not subject to the prohibitions contained within s 20A is enlightening, given an examination of the fundamental right to privacy that should be accorded all citizens. With reference to the idea of protecting one's privacy and thereby according one with a degree of respect it is expedient to turn to the policy criticism of the United States case of *Bowers v Hardwick*.⁶⁶ In any instance involving adults engaging in voluntary conduct within the sanctity of their own homes affected by intervention of the law, one must consider as did Tribe⁶⁷ in the aforementioned case, that:

“...the relevant question is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the state of Georgia was doing there.”

The above statement would extend to protect against any instance wherein a police-person found him/herself in the presence of two consenting adult males who were performing intimate acts within supposed privacy.

65. *R v Marais* (1889) 6 SC 367.

66. 478 US 186 (1986).

67. *American Constitutional Law*. 2nd ed at 1428, as quoted in *S v H* 1993 (2) SACR 545 C at 510 H - l.

4. COMMON-LAW CRIMES OF SODOMY AND UNNATURAL SEXUAL OFFENCES

4.1. SODOMY

Sodomy is defined as consisting of

“...unlawful and intentional sexual intercourse per anum between males”⁶⁸

The essential elements of the crime of sodomy are that it is unlawful, intentional, sexual intercourse per anum, between two males.

4.1.1. Unlawful

The unlawfulness of sodomy existed simply by virtue of the commission of the act regardless as to whether the parties consented or not.⁶⁹ However the current penalisation of private, consensual, adult sodomy is likely to be challenged for its unconstitutionality.⁷⁰ Accordingly there is a suggestion that for a charge of sodomy to succeed, one of the parties would have to be below the age of consent, or one of the parties would have to have failed to consent.⁷¹

4.1.2. Intentional

The intention element of the crime must be determined from an examination of whether the accused intended to

68. J. Burchell and J. Milton op cit (note 9) 571.

69. J. Burchell and J. Milton op cit (note 9) 572.

70. Ackermann J - S v H 1993 (2) SACR 545 (C) 552 F. s 8 of Chapter 3 of the Constitution Act 200 of 1993.

71. J. R. L. Milton. Chapter 13 of an edition of *South African Criminal Law and Procedure* pending publication. (1996) 14 of 21.

“...have intercourse per anum.”⁷²

4.1.3. Sexual Intercourse per anum

Sexual intercourse per anum involves actual penetration of the anus.⁷³ Attempted sodomy is committed if there is no penetration.⁷⁴

The offense is only committed between two males. However, as a consequence of the unconstitutionality of the offense, the offense is only committed if the

“passive party has not consented and is the victim of an indecent assault.”⁷⁵

4.1.4. General Comments on Sodomy

There is a partial decriminalisation of sodomy that is occurring within South Africa.⁷⁶ The South African Constitution is described as giving effect to this partial decriminalisation of sodomy in so far as the parties are consenting, and have capacity to consent.⁷⁷ There is additionally evidence that in more recent cases involving the offence of sodomy, the judiciary have sought to avoid sentencing an offender to imprisonment.⁷⁸ The commission of the act of

72. J. R. L. Milton op cit (note 71) 16 of 21.

73. ibid.
S v M 1984 (4) SA 111 (T).

74. J. R. L. Milton op cit (note 71) 16 of 21.

75. ibid.

76. J. R. L. Milton op cit (note 71) 1 of 21.

77. ibid.

78. ibid.
S v M 1990 (2) SACR 509 (E).

sodomy in the case of *S v M*⁷⁹ occurred in private, between consenting adults. The court held that the position would have been vastly different where children are involved due to the public attitudes towards activities involving children.

In *S v H*⁸⁰ the court again determined that where there is a private homosexual act occurring between males, wherein there is no threat to any legitimate social interest, then even though sodomy is a crime a sentence of imprisonment would be inappropriate. In brief the case determined that a custodial sentence was inappropriate for

“...consensual, adult, private sodomy taking place under circumstances which pose no threat to any legitimate societal interest.”⁸¹

The conviction was however confirmed, although the sentence was of nominal discharge, and caution. Despite the fact that the case was a remarkable inroad into dispelling rigid enforcement of private morality, the fact that the Bench was compelled to confirm a conviction is nonetheless problematic. Homosexuals are reduced to the role of being “unapprehended felons”⁸² and furthermore anti-sodomy laws “produce severe psychological damage for many gays.”⁸³

The issue is clearly that where there is private, adult, consensual sodomy the provision of s 8 of the Constitution prohibiting discrimination on the basis of sexual orientation should be upheld.

Older cases, by contrast demonstrate a rigid application of the common law crime of sodomy.

79. ibid.

80. 1993 (2) SACR 545 (C).

81. as per Ackermann J at 552 G - H.

82. Richard Mohr. *Gays/Justice - A study of Ethics, Society, and Law*. (1988) 108.

83. op cit (note 18) 54.

Two males who indulge in anal sex were found guilty of the offence of sodomy, and this was upheld in the case of *S v V*⁸⁴ in 1967 in South Africa.

In 1988 in the case of *S v Matsamela en 'n Ander*⁸⁵ the accused were brought before the court on a charge of having indulged in sodomy with one another, however the evidence did not support such a finding so the magistrate resolved to convict the accused on the basis of indecent assault. In an appeal however, the convictions were set aside on the basis of an investigation into what constitutes an indecent assault, and a subsequent finding that the element of unlawfulness was only created through a situation wherein no consent was given. However in this instance the accused had consented, and accordingly the convictions could not be upheld.

4.2. 'UNNATURAL SEXUAL OFFENCES'

Offences which are termed to be "unnatural"⁸⁶ have been punishable under the common law.⁸⁷

The offences which fall within this category are

"...masturbation, fellatio, intercrural 'intercourse'. These forms of sexual gratification when performed by heterosexual participants are not 'unnatural' for these purposes, and thus not punishable as this crime."⁸⁸

84. 1967 (2) SA 17 (E) at 18 C.

85. 1988 (2) SA 254 (T).

86. It is noted that historically, within the category of unnatural sexual offences, a sexual relationship between a Christian and a Jew was deemed to be 'unnatural'. C. R. Snyman op cit (note 6) 334.

87. J. Burchell and J. Milton op cit (note 9) 573.

88. *ibid.*

The offense of ‘masturbation’ is only regarded as punishable if committed as masturbation of one male by another, or as mutual masturbation.⁸⁹

Ultimately in the light of the Constitution of South Africa⁹⁰ it is important to bear in mind that the common law crimes proscribing ‘unnatural offenses’ between consenting adults cannot be upheld and would have to be struck down.⁹¹

However, the issue of altering the attitudes of society will involve a longer period than will the alteration of the law in this regard.

Mr Justice Ackermann in the case of *S v H*⁹² prior to the implementation of the 1993 Constitution⁹³ read the draft proposals for the final draft of the interim Constitution and found that there was an inherent suggestion towards a

“...broad consensus on eliminating discrimination against homosexuality and the likelihood that this will be entrenched in a new constitutional dispensation.”

89. J. Burchell and J. Milton op cit (note 9) 573.
C. R. Snyman op cit (note 6) 334.
Solitary masturbation is not punishable.

90. Act 200 of 1993.

91. see Chapter on the Constitution and the Bill of Rights.

92. op cit (note 19) at 552 F.

93. op cit (note 22).

5. THE CRIMINAL PROCEDURE ACT 51 OF 1977

The act of sodomy is listed as a schedule 1 offense, and this would also be found to be in contravention of the Constitution.⁹⁴

Section 40 (1) (b)⁹⁵ provides that a police officer may effect an arrest of a person suspected of having committed a schedule 1 offence⁹⁶, without a warrant.

Section 42 (11) (a)⁹⁷ provides that a private citizen may effect the arrest of a person, without a warrant, if that person is suspected of having committed a schedule 1 offence.⁹⁸

Section 49 (2)⁹⁹ authorises the killing of a person suspected of having committed a Schedule 1 offence where that person either resists arrest or cannot be arrested due a tendency to flee arrest.

6. SECTION 12 (1) (b) OF THE SECURITY OFFICERS ACT

This section prohibits anyone who has ever been convicted of sodomy from being a security officer. This could be challenged under section 8 of Chapter 3 of the Constitution¹⁰⁰ as it is discriminatory, and in violation with the fundamental tenets of the equality clause.

94. s 8 of the Constitution provides that there can be no discrimination on the basis of sexual orientation, therefore to penalise consensual adult sodomy would be in contravention of this section.

95. of the Criminal Procedure Act 51 of 1977.

96. Sodomy is a schedule 1 offence.

97. *ibid.*

98. Which includes the act of sodomy.

99. *ibid.*

100. Act 200 of 1993.

CHAPTER 8

THE SUBJECT IN A CONSTITUTIONAL CONTEXT

The Constitution of the Republic of South Africa Act 200 of 1993, has serious implications¹ with regard to a consideration of the decriminalisation of homosexuality and prostitution.

This chapter will include an analysis of Chapter three of the Constitution with regard to the probable interpretive implications.

The interpretation of our Constitution is dependent on the attitude adopted by the Justices of the Constitutional court who will develop an interpretation of the issues set before them.

Therefore, it remains an area for mere conjecture with regard to the specific approach that the court will take towards cases brought before it, which fall within the scope of this study.

Several probable avenues of interpretation will be outlined with reference to attitudes adopted by courts in other countries faced with the issue of interpreting a Bill of Rights. It is intended that these submissions serve as a guideline for the proposals that will follow with regard to the present focus of study.

Section 35 (3) of Chapter 3 is crucially relevant in dictating the path that interpretation will follow.

1. A. Cachalia et al. *Fundamental Rights in the New Constitution*. (1994) preface. "Chapter 3 of the Constitution of South Africa, 1993 will undoubtedly have a major effect upon the development of South African law. Not only will the Chapter impact upon the legislature and the executive but it will also exert a significant influence on the development of our common law."

“35. (3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.”

For a court to have ‘due regard’ to the ‘spirit, purport and objects’ of Chapter 3 this impacts by natural extension on the manner in which one should approach the interpretation of Chapter 3 itself. This path of interpretation demonstrates an inclination towards an approach to interpretation referred to as the purposive approach,² which will be critically examined hereunder.

“...Each right should be so interpreted as not to reach behaviour that is outside the purpose of the right-behaviour that is not worthy of constitutional protection.”³

The quotation above constitutes what is termed to be a purposive approach to the interpretation of a constitution. This is indicated by the focus on ‘the purpose of the right’. This means that the right must be understood in the light of the interests it was meant to protect, and any analysis of a meaning of a right must be conducted within the parameters set by an examination of the purpose of such a guarantee.⁴ However within the courts of Canada to whom we turn for guidance in this regard,⁵ the purposive approach has not always emerged

2. The purposive approach is suggested as being the approach favoured because it is “predicated upon the purpose of the right, with the result being that the widest possible interpretation will not inevitably be the one which will be supported.” Dion Basson. *South Africa's Interim Constitution - Text and Notes*. (1994) 56.

3. Peter Hogg. “Interpreting the Charter of Rights”. *Osgoode Hall Law Journal*. (1990) 819.

4. A. Cachalia et al op cit (note 1) 9.
“The constitution cannot be read clause by clause nor can any clause be interpreted without an understanding of the framework of the instrument. In interpreting a constitutional instrument courts have to strike a balance between allowing the democratic process of an elected parliament to take its natural course while ensuring that the framework of values as contained in the instrument continue to form the broad context within which social, political and economic activity take place.”

5. S 35 (1) of Act 200 of 1993 deals with the interpretation of Chapter 3 of the Constitution and holds that a court of law

(continued...)

as a favourable alternative as indicated by the following extract from the case of *Hunter et al v Southam Inc.*⁶

“...Once enacted, its (the Bill of Rights) provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historic realities often unimagined by its framers. The Judiciary is the guardian of the Constitution and must, in interpreting its provisions bear these considerations in mind.”

The flexibility of an interpretative component, such as enunciated in the above extract, has the redeeming feature of ensuring accessibility of disadvantaged groups to the constitutional court, even if the original constitutional drafters had not even remotely envisaged the specific plight of the hypothetically proposed group.⁷ However it must be noted that a generous interpretation such as is suggested in the extract from *Hunter et al v Southam Inc.* could have serious implications on the legitimacy of certain existing distinctions that have been formulated within the law with a specific purpose. The widest possible interpretation is accordingly not always favoured and in fact it has even been held that:

“...A purposive interpretation limits the equality clause to discrimination against the groups named in the clause with the qualification that they have been disadvantaged. It is submitted that this approach to constitutional interpretation is one which South African courts would do well to follow if they wish to put Chapter 3 of the Constitution in the best and most coherent possible light.”⁸

(...continued)

“...may have regard to comparable foreign case law.”
accordingly throughout this chapter due regard will be granted to foreign case law which may offer possible indications as to the direction that may be adopted by the Constitutional court in interpreting the Constitution.

6. 1985 11 DLR (4th) 641 at 649.

7. Dion Basson op cit (note 2) 57.
“It is important to understand that... legal values are not static but dynamic.”

8. A. Cachalia et al op cit (note 1) 11.

One would hope that whilst a purposive approach may be favoured,⁹ the purpose of equality not be negated by highly restrictive interpretations of a purposive interpretation. Because South African society still lacks a truly democratic nature, the equality clause should be applied cautiously, in order not to result in a failure of expectations as a consequence of the gap between society and the protection of the law. Until the intolerance within society¹⁰ has been challenged the law should aspire towards the function of serving as a shield protecting individual rights against unjustified intolerance. It has also been suggested that s 35 (3) allows for a teleological approach to interpretation wherein the courts would

“...go beyond the words of the text itself in order to determine the spirit, purport and objects of the bill of rights. This section paves the way for the courts to abandon their stale, positivist style of interpretation and to substitute therefor a value-oriented interpretive theory.”¹¹

In an attempt to explore the specific means by which the effects of Chapter three become apparent in relation to the subject, each subsection that is seen to be relevant will be quoted and analyzed for its potential influence.

1. SECTION 8 OF CHAPTER 3

“8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

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9. A purposive approach can only be favoured if "the values contained in the Constitution are first determined." Gerhard Erasmus. "Limitation and Suspension" in Van Wyk et al. *Rights and Constitutionalism - The New South African Legal Order*. (1994) 633. *R v Oakes* (1986) 26 DLR (4th) 200.
 10. Gerhard Erasmus op cit (note 9) 635. "Ours is a highly divided society with marked socio-economic and cultural disparities and differences."
 11. Brian Currin & Johann Kruger. *Interpreting a Bill of Rights*. (1994) 133.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

... (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”¹²

1.1. INTRODUCTION

Section 8 advocates a concept which is little different from similar clauses contained within International Bills of Rights.¹³ The idea of all individuals being regarded as equal before the law is sacrosanct in any society which is governed by a Bill of Rights.¹⁴ Section 8 can only be limited to any extent by the invocation of Section 33 (1) which justifies any limitation only if that limitation is deemed to be reasonable and justifiable in an open and democratic society rooted in the principles of both freedom and equality, and only if such limitation, when invoked, does not negate the essential content of the right.

It is acknowledged that the concept of equality could give rise to complications by its very definition, which would extend way beyond the scope of the present study. Accordingly it should be noted that an acceptance of ‘equality’ as it stands, including the fact that it does give rise to situations of distinctly different treatment being allowed¹⁵, in order to cope with the

12. Constitution of the Republic of South Africa Act 200 of 1993.

13. Such as The Canadian Charter of Rights and Freedoms; The Constitution of the United States of America.

14. A. Cachalia et al op cit (note 1) 25; Dion Basson op cit (note 2) 22; Dennis Davis. "Equality and Equal Protection" in Van Wyk et al. *Rights and Constitutionalism - The New South African Legal Order*. (1994) 196.

15. Dennis Davis op cit (note 14) 197.

demands of society. These distinctions, and the apparent accommodation thereof within the law, form the true essence of the notion of equality. This statement ought to be qualified by the assertion that these legal distinctions must be both reasonable and able to stand up under the scrutiny of the legitimate objectives of the law.

1.2. PROSTITUTION

Section 8 (4) indicates that the respondent in any action bears the onus of justifying any forms of discrimination which fall within the ambit of Section 8 (2). The applicant is deemed merely to have to show *prima facie* proof of such discrimination before the onus shifts. However it is postulated that in the event of an applicant bringing an action under Section 8 wherein the grounds of discrimination are not specifically listed in Section 8 (2), but which may be interpreted to fall within the scope of Section 8, then this shift of the onus will not be such a simple matter. Catherine Albertyn and Janet Kentridge in their article *Introducing the Right to Equality in the Interim Constitution*¹⁶ offered the following interpretation:

“...Arguably, the Section 8 (4) presumption operates only to facilitate proof of unfair discrimination on the grounds which are actually named in s 8 (2). While s 8 (2) leaves space for claims of discrimination on other grounds, a claimant relying on an unlisted classification gets no help from s 8 (4). She is therefore required to prove that she is adversely affected by the particular distinction and that the distinction is unfair.”

Thus according to the authors quoted above, the onus is definitely resting on the person bringing the action, if the specific form of discrimination is not listed within s 8 (2).

Accordingly, in a situation involving a prostitute the onus would rest on the applicant (the prostitute) to demonstrate the unfairness of the treatment accorded to him/her under the law.

In order to ascertain that the prostitute would have grounds for utilising s 8, it is submitted

16. *South African Journal on Human Rights*. Volume 10 Part 2. (1994) 175.

that he/she need merely attempt to show that prostitution which is his/her profession, is an extension of himself/herself.¹⁷ The physical aspect of the profession is either an immutable characteristic, or an inherent feature of the human personality. If this is shown, then prostitution must of necessity fall within the ambit of the application of s 8. The basis for this assumption rests in the premise that the core of an equality clause involves the protection of either disadvantaged groups, or groups against whom discrimination is levelled as a matter of the natural course of societal prejudices, albeit that these may be irrational prejudices. The notion of this profession being an inherent feature of the human personality must surely be apparent from the historical evidence that despite severe penalties, and sometimes total societal ostracism, the profession has remained, and continued. Economic necessity cannot be seen as the sole reason for one pursuing such a profession, as it has been shown that throughout history the occupation of 'high class courtesan' is evident, thus proving that both the benefits, and the returns of this profession are sufficiently notable, to attract those who are not economically disadvantaged. So arguments espousing economic necessity cannot obscure the facts, (as distasteful as they may be to the more puritan aspects of society, who favour the ideas which further the notion of discrimination, and obliterate all notions of equality), as there are those who enter the profession for a variety of other reasons. Surely therefore it can legitimately be submitted that the profession could indeed be an inherent feature of the human personality.

17. In all professions which require a degree of skill, emanating from the professional (eg. the skill of surgery demonstrated by a surgeon) aspects of the self become enmeshed within the work. Perhaps the most appropriate analogy in this instance is that of an artist who transfers aspects of his/her inner essence, or his/her soul if one prefers, onto canvas, or into a sculpture. We all put something of ourselves into any task that we undertake.

Once it has been shown that s 8 does indeed offer some comfort to the prostitute, one should remember the reasons upon which any action could be brought in the light of challenging existing legislation for its discriminatory nature. Based on the fact that the very nature of the profession into which the prostitute steps, is prohibited by legislation, he/she will not be accorded the same equality before the law as will other citizens of the country who occupy professions which are deemed to be legal and respectable. Accordingly, if the prostitute is assaulted or not paid for services rendered, there is no legal remedy which he/she may reasonably seek,¹⁸ and this by its very nature is discriminatory, and grossly unfair. The foundation of these specific Acts of parliament provide one with a situation wherein there is a very extreme form of paternalism being undertaken by the law, which results in discrimination. Paternalism assumes an inadequacy on the part of one party to make decisions that are beneficial to themselves. S 8 specifically mention 'gender' as a ground for which protection is offered, and this will of consequence cause all Acts of legislation which are paternalistic towards one gender to be challenged. On this basis it is submitted that this particular brand of protection, which can be defined as paternalistic, when applied to citizens of South Africa who have reached the age of majority, should be struck down for the discriminatory implications contained therein.

Section 20 of the Sexual Offenses Act¹⁹ is the main creator of the inequality experienced by those who engage in sex work.

S 20 (1) (Aa)

18. Because of the illegal nature of the profession being practiced by the prostitute.

19. Act 23 of 1957.

“(Any person who -) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward...(shall be guilty of an offence.)”.

This section defines the criminal offense of prostitution, under South African law. However, it has far wider implications when one looks at the specific clause which brings all prostitutes within the ambit of the Act, and this is the phrase ‘for reward’ which illuminates a form of discrimination. If one were to look at the definitions in the Act it is apparent that ‘unlawful carnal intercourse’ is taken to mean ‘carnal intercourse otherwise than between husband and wife’²⁰. Accordingly, all non-marital sexual liaisons involving any reward can be read to fall within the ambit of the Act!

“The phrase ‘for reward’ would bring within the ambit of the prohibition not only the professional prostitute receiving money from a client but also a mistress or lover receiving some gift or recompense in consideration for sexual intercourse.”²¹

The inequality emerges in that there has not been any prosecution of those who engage in non-marital sexual relations and receive a ‘reward’ in gratitude for those services so performed, if these participants are not known to be sex workers, and perhaps these people do not frequent the areas frequented by known sex workers. There is therefore a glaring double standard in that a mistress can be kept by a man who is not her husband, has sex with her, pays her rental, and perhaps even settles all of her bills and accounts, and there is no prosecution. Perhaps the inequality stems from an archaic acceptance of the role of a mistress as she is not perceived as a woman inviting multiple sexual partners, but remaining loyal to the one. Whatever the reason for this distinction, the material fact is that there is discrimination emanating out of a

20. Section 1 of Act 23 of 1957.

21. J. Burchell and J. Milton. *Principles of Criminal Law*. (1991) 569.

system of an inequality in the application of legal standards, and it is submitted that this is unconstitutional.

1.3. HOMOSEXUALITY

The right to be treated equally has finally been recognised for the other minority group which form the focus of this study. Discrimination on the basis of ‘sexual orientation’ is expressly prohibited in s 8. This provides a major breakthrough in terms of the enlightenment of the legislative bodies, finally recognising the human right to equality that ought to have been accorded to persons who indicate a preference for members of the same sex as sexual partners. This inclusion into the scope of s 8 will result in the challenging of many laws which specifically prohibit acts of homosexuality. Some of the Acts which may be struck down, or at the very least challenged as a consequence of the application of the Bill of Rights in this regard are:

- s20 A of the Sexual Offenses Act²² which involves a prohibition of acts between men at a party, where these acts are deigned to stimulate sexual arousal or to provide sexual gratification. This section is discriminatory as a consequence of the specificity in the manner in which it targets homosexual men, and accordingly under s 8 it is submitted to be unconstitutional.
- The Sexual Offenses Amendment Act²³ which stipulates the age of consent for homosexual activities, is unconstitutional, as it provides that the age of consent for

22. ibid.

23. Act 2 of 1988.

homosexuality is 19, whereas the heterosexual age of consent is 16 years of age.²⁴ This disparity in the ages of consent is discrimination of the kind that s 8 was designed to prevent. The age of consent should accordingly be made uniform for both heterosexual and homosexual encounters, and it is hoped that this uniformity would result in the age of 16 being accepted.²⁵

- Schedule 1 of the Criminal Procedure Act²⁶ wherein sodomy²⁷ is listed, is unconstitutional when viewed within the context of s 8. (see ss 40, 42, and 49 of the aforementioned act which contain specific provisions that relate to schedule 1 offences.)
- Abolition of the common law crimes of sodomy, and ‘unnatural sexual offenses’.

There are in addition several other legislative enactments which are contrary to the spirit of s 8 and discriminate against people on the basis of their sexual orientation, and these laws would also have to be reviewed within the context of a reading of s 8. These include:

- a prohibition on artificial insemination for homosexuals²⁸

24. S 14 (1) (b) provides that it is a crime for any male to commit or attempt to commit immoral or indecent acts with a boy under 19.
S 14 (3) (b) provides that it is a crime for any female to commit or attempt to commit immoral or indecent acts with a girl under 19.

25. On the basis that sexual orientation is one of the grounds specified within s 8 under which no person can be directly or indirectly discriminated against.

26. Act 51 of 1977.

27. Sodomy is a common-law crime.

28. Regulation 3 and 8(2) of 3 GN R1182 GG 10283 of 20 June 1986.

- a bias away from awarding custody to a parent because of the signs of a homosexual preference from that parent²⁹
- a failure to recognise longstanding same-sex relationships,³⁰ and an according failure to accord such relationships with taxation benefits, medical aid, or pension benefits.

A provision for intestate inheritance within a same-sex relationship that has lasted for a period to be specified by law (if permanent domestic relationships are not granted legal recognition) would additionally be recommended.

All of the above stated instances are examples of inequality on the basis of the fact that the participants were disposed to a sexual orientation contrary to the societal norm, and accordingly were discriminated against. However it is submitted that s 8 outlaws such discriminations and accordingly would prohibit their continuance.

In 1979 a landmark decision was reached by a vote of 4-to-3 in the California Supreme Court in the case of *Gay Law Students Association v Pacific Telephone & Telegraph*³¹:

“...This important case held that the California equal protection clause does not permit privately owned utilities (or the state) to arbitrarily discriminate against homosexuals regarding employment. This is the first time that the equal protection clause has been used by a state supreme court in protecting gay men and women as a class.”³²

This case is demonstrative of the climate that is envisaged under s 8 of the Constitution of South Africa.

29. Van Rooyen v Van Rooyen 1994 (2) SA 325 (W).

30. Same-sex unions are recognised in Sweden, Norway, and Denmark.

31. California Supreme Court, No S.F. 23625 (1979).

32. Dominick Vetri. "The Legal Arena: Progress For Gay Civil Rights" in *Homosexuality and the Law*. ed. D. Knutson. 34.

1.4. CONCLUSIONS

Given the constraints imposed by the vast area of this study, a more extensive analysis of s 8 cannot be conducted, however it is hoped that a clear idea of the advantages of the application of this section with regard to both prostitutes and homosexuals, has become apparent, and that the submissions contained herein provide a solid term of reference under which s 8 and its implications are noted.

2. s 10 OF CHAPTER 3

“10. Every person shall have the right to respect for and protection of his or her dignity.”

2.1. INTRODUCTION

Section 10 is a provision in keeping with the spirit of the Universal Declaration of Human Rights which refers to all human beings as being ‘born free and equal in dignity and rights’. Dignity has been defined in Roman-Dutch law as “self esteem”³³. The right to dignity is protected, however, there is no clear definition of exactly what this right encompasses.³⁴

“What is clear, however, is that...international instruments suggest a meaning of the word ‘dignity’ which is broader than the more technical Roman-Dutch law definition.”³⁵

Human dignity has generally been adequately protected within South African law by means of the civil law remedy of a delictual action. However one would have to assume that within the

33. Cachalia et al op cit (note 1) 33.

34. *ibid.*

35. Cachalia et al op cit (note 1) 33 - 34.

context of a Bill of Rights the interpretation of dignity would have a broad base which indicated a reflection of the inherent worth of a human being.³⁶ So under this broad framework, all treatment of human beings which detracts or removes from them their inherent worth, would constitute an infringement of their dignity.

In this context one would view discriminatory legislation which targets any person as a consequence of their actions, which are contrary to accepted social mores, as also infringing on that persons dignity. Accordingly if a religion subscribes to a particular set of beliefs, it cannot impose these beliefs on others by judging others and derogating the worth of one who does not fall within its accepted behavioral modes. The law, by imposing penalties on the acts of prostitutes is derogating their individual worth as human beings by suggesting that they are not sufficiently competent to make their own choices with regard to their vocations. Sexual activity by mutual consent is surely a matter into which all human beings should be allowed to venture without the threat of legal sanction being imposed on them and thus denying them the full dignity that they are accorded as human beings.

2.2. PROSTITUTION

On the subject of human dignity many moralistic arguments have been advanced about the loss of dignity involved when one has sex for commercial gain, however within an analysis of s 10 all that can be said in this regard is two-fold:

36. ibid.

1. Judgement of the activity of commercial sex, presupposes that some are in a better position to decide what constitutes either dignified or undignified behaviour. It indicates a moral judgement.
2. In the context of s 10 if the dignity of those offering the sexual service is to be forsaken as a consequence of retaining the legislation prohibiting their activities, then it is submitted that the procurers of these services should face the same impairment of their dignity by the imposition of legislation against them too.

The solution is to eliminate all forms of legislation which specifically attack the dignity of a prostitute who is utilising his/her right to offer an economically viable service which apparently harms no other person. The right to human dignity accorded under s 10 would demonstrate a desire for the law to protect all of its citizens from discrimination, and could be submitted to also include the rights of minority groups such as those that are within the scope of the present study.

If however the dignity of the prostitute is not perceived as having been impaired by the legislation, then one should seriously contemplate the motivation behind the impunity afforded the procurer of the prostitutes services, and question to what extent he is deserving of a greater right to retain his dignity through lack of prosecution as opposed to the rights of the prostitute. This apparent societal acceptance of the one party at the expense of the other entrenches gender stereotyping wherein the urges of men were normalised through societal misconceptions of the different gender roles as demonstrated in the following extract:

“... there is no comparison to be made between prostitutes and the men who consort with them. With the one sex the offence is committed as a matter of gain; with the other it is an irregular indulgence of a natural impulse.”³⁷

37. Report of the Royal Commission into the Contagious Diseases Acts. (1864, 1866, 1869).

Again one can identify that the dignity of the person offering the service is sacrificed, thus giving rise to a situation of inequality and a violation of s 10 which accords respect to the dignity of all persons without exception.

2.3. HOMOSEXUALITY

Section 10 also assists in the final destruction of all discriminatory legislation aimed at people purely on the basis of sexual orientation, because sexual orientation is an express ground upon which one cannot be discriminated³⁸. Accordingly, any violation of a person's dignity, because of their sexual orientation would violate both s 8 (2) and s 10 of the Constitution. The state is bound by s 10 to provide mechanisms which would assist in preventing a person from having his/her dignity impaired.³⁹ Accordingly, it is submitted that enactment of laws penalising 'gay-bashing' may be a legitimate exercise of state power in this regard.

2.4. CONCLUSION

The right to have one's dignity respected is inter-related with many of the other rights contained within the Bill of Rights.⁴⁰ Accordingly, the protection afforded homosexuals by the sexual orientation clause in s 8, would impact on the interpretation of any violation that could be deemed to be an infringement of such a person's right to dignity. The harassment faced by prostitutes from clients and police officers alike could also be interpreted as constituting an impairment of the dignity of the prostitute. Therefore, the right to dignity is perceived as an

38. S 8(2) of Chapter 3.

39. A. Cachalia et al op cit (note 1) 33.

40. A.Cachalia op cit (note 1) 34.

important right in the context of achieving the decriminalisation of laws which contribute to the loss or impairment of the dignity of certain South Africans.

3. s 11 OF CHAPTER 3

“11. (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.”

3.1. INTRODUCTION

The right to freedom, if generously interpreted allows a large area of room for the claiming of rights specifically pertaining to each individual’s own choices. Freedom to choose should be seen as granting autonomy to all individuals.

In the United States Supreme Court case of *Board of Regents v Roth*⁴¹ freedom was seen as a ‘broad and majestic term’ which could be interpreted to include such areas as social and economic domains, and further should be seen to be a dynamic concept which could be empirically developed.

“While there is no definition of the word freedom in the Chapter of Fundamental Rights, the concept of freedom will include the freedoms guaranteed in the Chapter such as the freedoms of worship, speech, association, thought and the right to privacy for example. They constitute a subset of the broad and overarching concept of freedom...The fact that this right to freedom of person is subject to a higher threshold for limitation under s 33 suggests that a purposive interpretation limits the operation of the concept, outside of its interface with the other freedoms in Chapter 3, to freedoms that have some physical component to them.”⁴²

41. 408 U.S 564.

42. A. Cachalia op cit (note 1) 35.

Therefore, one could, it is submitted, expansively include within the ambit of definitions of freedom, the right of freedom to contract.⁴³ If this submission were accepted on the proviso that such contract were not deemed to be detrimental to the interests of either party concerned, or to the interests of any other person(s), then the rights of prostitutes to contract out their services becomes legitimate. A prostitute offers a service and this service carries with it economic benefits for the person who is making the offer, and surely in the light of the above proviso any limitation of such right should be read to indicate a limitation on s 11.

‘Security of the person’ is a term which also offers many opportunities for interpretation. If one views the words at face value one is struck by the notion of physical protection, yet in order to provide a more definite solution to the interpretive dilemma posed by this clause one would have to examine International trends.

“In Canada, the tendency of the courts has been to restrict the concept of security to what is encompassed by the physical and mental integrity of the person in the broad sense. (*R v videoflicks* (1984) 14 DLR)”⁴⁴

It is further held that

“...in certain cases the court was prepared to extend the concept to whatever concerns human dignity.”⁴⁵

In the case of *Re R L Crain Inc v Couture*⁴⁶ it was held that “‘security of the person’ contains considerations which also underlie the privilege against self-incrimination.”⁴⁷

43. ibid.

44. A. Cachalia et al op cit (note 1) 35.

45. ibid

46. (1984) 6 DLR (4th) 478.

47. ibid.

3.2. PROSTITUTION

All of the aforementioned considerations have implications which could be seen to ultimately affect the rights of prostitutes. The concerns relating to human dignity were examined in the examination of s 10, and therefore the focus of the present study should be on the considerations against self-incrimination. If a prostitute were to present her/himself at a police station and indicate an assault against themselves as a consequence of the nature of their profession, this should not lead to further persecution and the laying of charges under s 20 of the Sexual Offences Act⁴⁸ against them. The prostitute has as much right to the protection of the law as any citizen, furthermore the security of the person of the prostitute should be sufficient guarantee of their access to justice without the fear of negative repercussions, and horrifically enough, self-incrimination.

3.3. HOMOSEXUALITY

The ambit of this provision could extend to include an examination of whether through the existence of criminal sanctions on homosexual behaviour, could not be deemed to affect the “physical and mental integrity of [a] person in the broad sense”⁴⁹ This however is superfluous given the constitutional protection afforded by the sexual orientation clause.⁵⁰

48. Act 23 of 1957.

49. A. Cachalia et al op cit (note 1) 35; *R v Videoflicks* (1984) 14 DLR (4th) 10.

50. In s 8 of Chapter 3.

4. s 13 OF CHAPTER 3

“13. Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”

4.1. INTRODUCTION

Privacy is the most sought after right that a human being could desire in a world developing along the lines of George Orwell’s frighteningly realistic novel *1984* wherein state interference in one’s private life was closely examined. The issue of sexuality and the related practices of different aspects of such sexuality form the foundation of this study, and the idea of the apparent virtue of keeping such sexuality in the realm of one’s private life is therefore assumed to be highly desirable.

There is no definition of privacy within Chapter 3, however an examination of international jurisprudence will assist in determining the parameters of the right.

Resolution 428⁵¹ of the Consultative Assembly of the Council of Europe⁵² contains a definition of the right of privacy in Article 8 which is set out as follows:

“The right to privacy consists essentially in the right to live one’s own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”⁵³

51. 1970.

52. which contains the Declaration concerning the Mass Media and Human Rights.

53. Van Dijk and Van Hoof. *Theory and Practice of the European Convention of Human Rights*. (1991) 368.

The first line of the above extract is particularly noteworthy in that it suggests ‘minimum interference’ which in a democratic country would surely indicate a limitation on state interference in accord with one’s constitutional right to freedom. Furthermore a regulation of one’s sexuality as it is expressed in the private confines of one’s home is a very definite limitation on one’s freedom. If a democratic country is to be a country wherein individuals can operate with a certain degree of autonomy, then all limitations on the right to privacy should be closely monitored in the interests of society at large.

In *Einstadt v Baird*⁵⁴ the court enunciated the following:

“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person ...”

The constitutional right to privacy in the United States of America has been expanded quite considerably since its introduction in the case of *Griswold v Connecticut*⁵⁵.

“The constitutional right to privacy clearly turns on some form of substantive liberty to act in certain ways without the threat of governmental sanction, interference, or penalty.”⁵⁶

4.2. PROSTITUTION

The argument in favour of the right to privacy being invoked in order to protect prostitutes is based on the fundamental issue that the skill which they possess is inherently linked to their own private autonomy, as a consequence of the use of their bodies as an economic commodity by means of which a service is provided. State interference therefore constitutes an

54. 405 US 438. at 453.

55. 381 U.S. 479 (1965).

56. D. A. J. Richards. "Homosexual Acts and the Constitutional Right to Privacy" in *Homosexuality and the Law*. ed. D. Knutson 46.

interference on personal privacy in the sense that there is an unwarranted intrusion on the rights of an individual to do as he/she pleases with his/her body within the framework of ensuring that no harm is caused upon either themselves or any other person. The perfect example of a situation wherein state interference would cause an outcry is that of a glutton, who is causing serious harm to his person as a consequence of overeating, however the state respects that individual's right to privacy and does not enact legislation prohibiting gluttony. Accordingly within the context of one who is offering the service of sex for a price, surely state interference is insulting and unwarranted due to its infringement of the individuals right to privacy. In this vein section 3 (a) - (g) of the Sexual Offenses Act⁵⁷ is challenged as constituting a further invasion of privacy based on the fact that these provisions (provided below) occur within the privacy of 'any house or place' which the law could determine to be a brothel. This again involves interference with private space merely on the supposition that as a consequence of 'moral opinion' prostitution is wrong and should be eliminated. Such validation of a piece of legislation is hardly sufficient to justify limitations on the constitutional right to privacy.

57. Section 3 of the Sexual Offenses Act 23 of 1957.
"The following persons shall for the purposes of section 2 be deemed to keep a brothel:
(a) any person who resides in a brothel unless he or she proves that he or she 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 the whole or any share of any moneys taken in a brothel;
(d) any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
(e) any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;
(f) any person 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 resides in or manages or assists 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 the whole or any share of the moneys taken therein."

4.3. HOMOSEXUALITY

The right to privacy is possibly the most adequate of all justifications for an exclusion of the law from the sphere of private consensual intercourse. In the past the laws relating to acts of homosexuality were couched in ludicrous possibilities when the enforcement thereof was contemplated, with images of police hiding under beds, or in cupboards or leering through cracks in a bedroom curtain while perched on the top of a long ladder, were mentally conjured up. As long as the 'sexual orientation' clause exists within s 8 some degree of protection is afforded to people with a same-sex preference, and the comically tragic scenarios described above will not be likely to occur. Perhaps the privacy clause could be invoked if ever an issue of sexual orientation arose, in order to negate the importance of such revelation, within the present social climate of intolerance.

5. s 15 OF CHAPTER 3

"15. (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion."

5.1. INTRODUCTION

Within Chapter 3 of the Constitution there is no

"...hierarchy of values. Rights of free expression will therefore have to be weighed against many other claims including the right to equality (s 8), dignity (s 10), privacy (s 12), political campaigning (s 21), fair trial (s 25(3)), economic

activity (s 26) and property (s28)...In no country is freedom of expression absolute.”⁵⁸

Freedom of expression is one of the most crucial rights within a democracy.⁵⁹

“Freedom of thought and speech...is the matrix, the indispensable condition, of nearly every other form of freedom.”⁶⁰

5.2. PROSTITUTION

One would hope that under such a broad clause granting freedom of expression that the advertisement of services offered and available with regard to prostitution would be permissible. However in this regard Canadian legislation has not been overly optimistic in that the Canadian Supreme Court has held that the criminal prohibition against communication for the purposes of prostitution is a justifiable limitation on the concept of freedom of expression.⁶¹ The dissenting judgement in the case did however feel that the prohibition fell short of what is referred to as the ‘little as possible’ test wherein the aim is to ultimately interfere in as little as possible a manner with the right in question, and accordingly the dissenting argument held that the criminal prohibition against communication for the purposes of prostitution, was overinclusive. One can only hope that in this instance the Constitutional Court would give due regard to the dissenting judgement.

58. A. Cachalia et al op cit (note 1) 53.

59. A. Cachalia op cit (note 1) 54.

60. *Palko v Connecticut* 302 US 319 at 327.

61. A. Cachalia et al op cit (note 1) 114.
The Canadian case was that of:
Reference re ss 193 and 195 1 (1)(c) of the Criminal Code (1990) 2 SCR 1123.

S 15 (1) also involves the term ‘...freedom of artistic creativity...’ which gives rise to rather broad implications. Amongst these implications is the concept of artistic creativity that arises out of the very nature of a professional sex worker’s profession. The profession could be argued to fall within the parameters of being defined as an art form based on the fact that the degree of success within the profession must surely be attributed to some degree of skill and expertise. Surely then the expression of this art form could be argued to fall within the ambit of s 15!

5.3. HOMOSEXUALITY

In the past in South Africa any photographs depicting homosexual activity were banned under the Obscene Photographic Matter Act.⁶² Under challenge on the basis of freedom of expression in conjunction with several other rights which are violated by such prohibition it is unlikely that such a prohibition would survive a constitutional challenge.

An interesting situation may arise in consequence of a definition of the exact ambit of the meaning of ‘freedom of expression’ as this may result in a challenge from same-sex couples to be protected from harassment whilst expressing their affection for one another in public.

Although it is acknowledged that due to the apparent trend towards a more vertical application of the Bill of Rights that additional legislation may better be able to serve this function.

62. Act 37 of 1967.

6. s 17 OF CHAPTER 3

“17. Every person shall have the right to freedom of association.”

6.1. INTRODUCTION

This is undeniably a core democratic right.⁶³ If one were to examine the operation of this right in the light of prohibitions with regard to sexual associations, then the right would allow one the freedom to define such associations, including the acceptance of reward for such associations as one may choose. Granted this would require an extremely generous interpretation of the right with regard to the concurrent implications.

6.2. PROSTITUTION

Freedom of association includes the right to freely join and form trade unions.

“Freedom of association is the bedrock of trade union activity and has been a source of attack on labour rights”⁶⁴

This could therefore provide an interesting platform upon which prostitutes could base arguments in favour of their right to form trade unions.⁶⁵

63. A. Cachalia op cit (note 1) 59.

“The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.” (A de Tocqueville).

64. A. Cachalia et al op cit (note 1) 61.

65. As is guaranteed by s 27 of Chapter 3.
Dion Basson op cit (note 2) 29.

6.3. HOMOSEXUALITY

Apart from the fact that in certain countries ‘gay clubs’ are prohibited, this may serve as a guarantee of the constitutional right to choose the circles in which one finds oneself to be most comfortable. Again it serves as merely additional constitutional protection, extending the right created within s 8, providing freedom from discrimination.

7. s 19 OF CHAPTER 3

“19. Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.”

7.1. PROSTITUTION

This clause if generously interpreted could impact on the lives of prostitutes if legalisation were to occur concurrently with the implementation of many regulations. If certain areas were designated to be ‘red-light’ districts this would constitute an infringement of s 19 if the sex worker were to want to operate from home, and was so prohibited by the regulation. The infringement would arise through sex workers being compelled to live in designated areas or as near to such areas as to make their work viable.

7.2. HOMOSEXUALITY

The clause would protect against designated areas being created for people with a preference for members of the same sex.

8. s 22 OF CHAPTER 3

“22. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.”

8.1. PROSTITUTION

Access to court is sadly deficient⁶⁶ for sex workers other than in situations where they appear as defendants to criminal charges themselves. Accordingly, if they are assaulted, raped, victims of theft, fraud or any other form of abuse, there is no-one to whom they can easily turn for a legal remedy.⁶⁷ If the law were to decriminalise the profession in which they find themselves this would impact positively on all crimes which arise subsequent to the underground nature of the profession of prostitution, and perhaps the real criminal element would be exposed.

8.2. HOMOSEXUALITY

Due to the positive effects of sexual orientation being decriminalised, gay people will now have access to the courts on all levels without the fear that their sexual orientation could be exposed, in whatever action they may bring. This is especially pertinent in cases involving child custody etc. wherein a gay person may have hesitated before approaching the courts for assistance in any matter purely on the basis of fear of exposure with regard to the issue of sexual orientation.

66. Because of discrimination, and lack of respect accorded prostitutes when they approach justice officials, due to the fact that the profession in which they are situated, is illegal.

67. For fear of victimisation due to the illegality of their profession.

9. s 26 OF CHAPTER 3

“26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.”

If certain activities are at present categorised as being criminal, and it can be shown that such activities are in fact wrongly categorised, then such activities should be allowed and the economic benefits that are generated by such activities should be allowed. If one is selling a service connected to a skill inherent within one, and this service is prohibited through some degree of paternalism from the law, then this paternalistic motivation must be challenged and free economic activity should follow.

10. s 33 OF CHAPTER 3

“33. (1) The right entrenched in this Chapter may be limited by law of general application, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable ; and

(ii) justifiable in an open and democratic society based on freedom and equality ; and

(b) shall not negate the essential content of the right in question...”

10. 1. INTRODUCTION

The limitations clause demonstrates that the elements of the criteria for any limitation as enunciated within s 33, are not superior over one another. In other words reasonableness cannot take precedence over justifiability, or non-negation of the essential content of the right,

as all criteria carry equal weight. The meaning of the terms ‘freedom’, ‘equality’, ‘open and democratic society’ will have to be explained by the court before the court can determine the justifiability of any of the rights set out within the constitution.⁶⁸

In the case of *S v Makwanyane and Another*⁶⁹ Chaskalson P held:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.”⁷⁰

It was further held that “there is no absolute standard which can be laid down for determining reasonableness and necessity.”⁷¹

In order to determine ‘reasonableness’ the court would have to apply an objective test. In this regard the social motivation for legislation would have to be able to withstand an objective test demonstrating stronger reasons for the retention of such legislation, as opposed to the abolition thereof.

68. Of importance in this regard is reference to a sample distinction in the Canadian case of *R v Oakes (1986) 1 SCR 103 50CR (3d) 1*. where in consequence of determining the meaning of ‘free and democratic society’ the court identified certain values and principles essential to such a society as including amongst other items the following : respect for the inherent dignity of a person, commitment to social justice and equality, accommodation for a wide variety of beliefs etc. All of these values would assist in achieving the end goal which serves as a foundation for this thesis and therefore such an interpretation would be unequivocally supported.

69. 1995 (2) SACR 1 (CC).

70. Supra note 68 at 43 D.

"In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question" 43 F - G.

71. Supra note 68 at 43 E.

“In the leading case of *R v Oakes*⁷² two considerations were identified as of prime importance in defining reasonableness. These are (i) that the limitation operating on a protected right should serve a sufficiently important purpose which outweighs the right itself, and (ii) that the means used to serve that purpose must extend no further than is necessary to achieve that object.”⁷³

‘Justifiable’ denotes the notion that the right be balanced against social interests for the retention of any legislation impeding on the application of such right, and would therefore require convincing motivation for any limitation on a right. The notion of a weighing of interests is particularly relevant in that it indicates that there ought to be no preconceived ideas or biases influencing the conclusion to limit a right.

“This necessarily involves a delicate balance between the wishes of the individual and the utilitarian ‘greater good of the majority’. But democratic societies approach this problem from the standpoint of the importance of the individual, and the undesirability of restricting his/her freedom.”⁷⁴

‘Not negate the essential content of the right’ is understood to indicate that it defeats the object of the constitutional clause prohibiting such discrimination.

“The onus of proof, once discrimination on a disallowed ground has been established, rests with the defendant/respondent to establish a justification for continued discrimination.”⁷⁵

In order to ensure that the essential content of the right is not negated the

72. 26 DLR (4th) 200.

73. Craig Lind. “Sexual Orientation, Family Law and the Transitional Constitution”. *South African Law Journal*. vol 112 Part III (1995) 496.

74. Paul Sieghart. *The International Law of Human Rights*. (1983) quoted in Cachalia et al op cit (note 1) 115.

75. Craig Lind op cit (note 45) 500.
Cachalia et al op cit (note 1) 107.

“ambit of the right must be clearly demarcated”⁷⁶

10.2. PROSTITUTION

Section 19 of the Sexual Offences Act contains a prohibition against solicitation. It is submitted that despite arguments advanced to the effect that this is a limitation on freedom of speech⁷⁷, international interpretations of freedom of speech⁷⁸ limit this form of commercial speech, apparently because of the illegality thereof. Therefore it is submitted that under the limitations clause, such a limitation could be perceived as being justifiable, if on a balance social interests outweigh the right to freedom of speech being exercised by a prostitute.

The prohibition in s 20 (1) (a)⁷⁹ which deals with living off the earnings of prostitution could also be submitted as being justifiable in an open and democratic country. The purpose of this prohibition is to prevent the exploitation of commercial sex workers by pimps, partners, or any other person. It is unlikely that such a provision would be construed as being unconstitutional. Section 20 (1) (aA)⁸⁰, however, is the one area of the law that could be declared unconstitutional. The rationale for this being evident in the examination of the sections of Chapter 3 that were examined above. It is unlikely that a limitation could be justified against the protection of the fundamental rights of prostitutes, based on an appraisal of s 33, and the essential content of the rights examined within this chapter above.

76. George Devenish. "An Examination and Critique of the Limitation Provision of the Bill of Rights Contained in the Interim Constitution". *South African Public Law*. (1995) 142.

77. See discussion under subsection 5 of this Chapter, and Chapter 5 of this work wherein the law is examined.

78. In the Canadian Charter, and the United States Constitution.

79. Of the Sexual Offences Act 23 of 1957.

80. Of the Sexual Offences Act 23 of 1957.

10.3. HOMOSEXUALITY

Due to the inclusion of sexual orientation as a category under s 8 of Chapter 3, it is highly unlikely that any limitation will be invoked against homosexual people attempting to assert their rights. The use of the limitations clause in the area of sexual orientation would be unable to be justified in an 'open and democratic society based on freedom and equality'. Sexual orientation is an intrinsic characteristic of a person, and therefore ought to be afforded constitutional protection. The "undesirability of restricting [the individual's] freedom"⁸¹ is critically important when contemplating the effect of limiting a right. Therefore it is submitted that limitations are unlikely to be effected against persons who are homosexual, purely on the basis of their sexual orientation.

10.4. CONCLUSION

The Constitution of South Africa provides exceedingly powerful arguments in favour of decriminalisation of the victimless sexual offences that are within the scope of this study. The crime of 'being' a prostitute is submitted to be unconstitutional, and likely to be declared such if a challenge arises. The motivation for such an assertion rests in the derogation of the human rights of certain members of South African society as a consequence of the criminalisation of certain of their activities. Many of these criminal prohibitions are unable to be justified when examined within the context of the Bill of Rights of South Africa. Homosexuality will undoubtedly be decriminalised in the light of the provisions of s 8 of the Bill of Rights. The equality clause is the most fundamental provision that will assist in ensuring that constitutional

81. Paul Sieghart op cit (note 73) 115.

protection is afforded to all citizens equally, despite their divergent sexual activities with consenting adult partners.

“By scrutinising all law which seeks to enforce or consummate a relationship the court can use s 8 to safeguard and promote the spirit, object, and purport of the Constitution, as it is enjoined to do so by the express wording of s 35(3).”⁸²

82. Dennis Davis op cit (note 14) 211.

CHAPTER 9

PROSTITUTION: LEGAL ALTERNATIVES

There are several alternatives that are proposed to deal with the issue of prostitution in South Africa:

1. A return to 'traditional values'.
2. Retention of the status quo.
3. Decriminalisation.
4. Legalisation.

1. A RETURN TO 'TRADITIONAL VALUES'

This alternative indicates that

“...prostitution in South Africa could be eliminated by the implementation of stricter legislation and the conscientious application of such measures”¹

According to the Law Commission's Report² the HSRC undertook certain studies in 1991 in KwaMashu and Umlalazi and these studies

“...indicate continuing strong opposition against commercial sex work on the part of the broad community.”³

1. *South African Law Commission*. Working Paper 58. Project 85. "Aspects of the Law relating to AIDS". (1995) 80.

2. *ibid.*

3. *ibid.*

The return to 'traditional values' is problematic in the sense of the vastly subjective interpretation that can be ascribed to the term 'traditional'. Additionally, given the historical⁴ indications of social development, the presence of commercial sex workers can even be interpreted as being a traditional aspect of any society. It is difficult to imagine that any country could totally eradicate incidents of prostitution. However, what is even more complex is to imagine stricter legislative measures to combat prostitution. The current legislation on prostitution appears to be susceptible to a challenge when viewed in terms of the Bill of Rights. Accordingly, any more severe legislation would certainly be problematic, as it cannot but conflict with the Bill of Rights, by further limiting the rights and freedoms of prostitutes in South Africa.

"...the gravest enforcement problems appear under the prohibitionist approach. The core of these enforcement evils is that the crimes in question typically are consensual and private. Consequently, the absence of either a complaining victim or a witness requires costly forms of enforcement, including police work that is possibly unconstitutional, often clearly unethical, and eventually corruptive of police morals - for example, entrapment. Such high enforcement costs also include lost opportunities to combat more serious crimes on which police resources could be better expended...Moreover there are serious difficulties with the moral assumptions underlying criminalisation."⁵

Any attempt to enforce more severely the legislation against prostitution would therefore have severe ramifications involving the abuse of human rights.

"It is paternalism that prompts the legislature to protect women by proscribing prostitution, that motive is ill-served by the prostitution laws since women are not protected, but rather are penally punished...However offensive it may be,

4. See Chapter 2 above.

5. D. A. J. Richards. "Legal Aspects - Prostitution" in *Encyclopaedia in Crime and Justice* 1313-1314.

recreational commercial sex threatens no harm to public health, safety or welfare and therefore may not be proscribed.”⁶

The return to traditional values appears to be founded in illegitimate assumptions of the purposes of the law, and cannot be supported without resulting in serious conflict with the Bill of Rights.

2. RETENTION OF THE STATUS QUO

If this were the favoured approach the laws would remain as they are, and would continue to be applied by the police.

The negative aspects of supporting the status quo position would be:

- this conflicts with the Bill of Rights of South Africa.⁷
- it results in the exploitation of prostitutes by pimps, police officers, and other prostitutes
- it has not been demonstrated that there is any evidence of the current legislation being effective for any purpose save that of enforcing morality.

An undesirable consequence to retaining the status quo with regard to prostitution is found in the argument that prohibition leads to far greater and more harmful consequences in the long term.

6. Richard Symanski. *The Immoral Landscape*. (1981) 6. This quotation being drawn from a 1978 New York Family Court.

7. D. A. J. Richards op cit (note 5) 1311.
"The moral premises...[behind the prohibitionist approach] violate the basic rights of the individual with respect to personal autonomy."
See Chapter on the Constitution.

“...a problem is encountered in prohibition, whereby the making of the sale of sexual services criminal, often affects the quality of what is supplied and the safety under which this occurs vary enormously depending upon the buyers purchasing power.”⁸

Additionally, those offering the service are placed at a greater risk than if they were permitted to legitimately operate in areas that were not high-risk crime environments.

By affecting ‘the quality of what is supplied’ the customers ultimately suffer through the implications of the transmission of STD’s and AIDS. Furthermore, when specialised services are called for by customers wishing to engage in sado-masochistic rituals, or assisted auto eroticism, because of the underground nature of the profession the providers of the service may not be sufficiently equipped or trained to perform what is requested, and fatalities as well as injuries could ensue.

There is a further problem in retaining the status quo with prostitution still on the law books in that

“Cops behave criminally to obtain minor criminal convictions, they are tempted by graft and often accept it, they selectively discriminate against the poor and racial minorities according to their own prejudices, they lie to themselves about the probity of their own behaviour and through all this they make a mockery of the very system that they are supposed to exemplify.”⁹

This raises the very important point that criminalisation does tend to focus on the economically disadvantaged members of society, as they are the more likely to resort to solicitation and street-walking, thus incurring the wrath of the law. This disparity in the application of laws is also a valid ground for rejecting the maintaining of the status quo.

8. Charlene Carol Mildwisky. *A Criminological Study of Adult European Prostitution in Johannesburg*. M.A. Unisa. 143 - 144.

9. Richard Symanski op cit (note 6) 229.

Finally, the most pervasive argument against retaining the status quo rests in the economic reality that unfolds:

“...one inescapable reason for breaking with the status quo concerns the obvious mismanagement of scarce public resources. Even without considering the nature of the offense, the extremely high rates of recidivism and the more general futility of the effort, prostitutes are simply very expensive to arrest and jail...One can only conclude that social morality and hypocrisy are not just expensive but a good deal more costly than most people realise.”¹⁰

The burgeoning crime rate in South Africa is indicative of the pressures that the police force experience, and to burden them with the additional senseless attempt at curbing a trade that is firmly entrenched in the South African system is unjustifiable.

3. DECRIMINALISATION

This approach involves ensuring that

“...existing legislation be repealed and the public educated so that commercial sex work is no longer stigmatised.”¹¹

Prostitution, if decriminalised would neither be legitimated by the government, nor would it be illegal. It would no longer be a matter for the criminal law.

“Decriminalisation would put prostitution outside the law; it would be neither illegal nor legal...”¹²

10. *ibid.*

11. South African Law Commission *op cit* (note 1).

12. Richard Symanski *op cit* (note 6) 228.

Decriminalisation is an attractive alternative to legalisation¹³ in that

“...it says only that a particular type of behaviour is not subject to criminal sanctions, not that it is right or wrong.”¹⁴

Decriminalisation therefore removes the criminal sanction from prostitution, and would allow for the operation of prostitution without police harassment, or the current underground nature of the profession.

This distinction is important, in that it would allow for a counteraction against objections to decriminalisation by those who cannot reconcile what they perceive to be the ‘moral repugnancy’ of the trade with their own conception of morality, by removing the necessity for legitimisation of the profession.

The attempt at enforcing the criminal sanction against prostitution has been criticized for the concomittant effects that it has, in that there is evidence of police corruption,¹⁵ and exploitation of the prostitute by the police, the community, and the clients.¹⁶

In 1958 the United Nations passed a resolution calling for the decriminalisation of prostitution, and it was interesting that the American Press virtually ignored this resolution.¹⁷

13. As described below.

14. Charlene Carol Milwidsky op cit (note 8) 228.

15. Eileen McLeod. *Women Working: Prostitution Now*. (1982) 105.
Nickie Roberts. *Whores in History*. (1993) 182 and 263.
“It is pointed out that illegal prostitution brings with it police corruption because of the protection, the abortive arrests that are bought off, and the concomittant criminality that would be reported more frequently if prostitution itself were not criminal.” D. E. J. Macnamara and E. Sagarin. *Sex, Crime and the Law*. (1978) 126.

16. Charlene Carol Milwidsky op cit (note 8) 153.

17. Richard Symanski op cit (note 6) 8.

The relevance of the legislation criminalising prostitution, lies only in the fact that it serves as an attempt to control morality, and yet there is no legitimacy for such a perspective.

“Prostitution is regarded essentially as a private agreement and act between two consenting adults. The enforcement of anti-prostitution laws constitutes an increased workload on police and justice systems... Decriminalisation would extend the practice of official tolerance, whereby unpopular laws drift into the category of unenforced laws.”¹⁸

The whole fabric of the criminal justice system is questioned when the state starts to control morality.

“The aim of the criminal justice system is not to impose public standards of morality upon the private acts of consenting adults, immoral though they may be by widely held social standards, but rather to protect people and property from the harmful effects of others. Decriminalisation would not only rectify this misdirected use of the justice system but it also would have the virtue of not implying that the initiation or act of prostitution is a privilege of the state.”¹⁹

The motivation for the criminalisation of prostitution offers ample reason for decriminalisation.

“The criminalisation of prostitution appears to be an illegitimate indication of unjust social hatred and fear of autonomously sexual women and their rights to define and pursue their own vision of the good.”²⁰

Additionally

“Those who call for decriminalisation believe that the activities of prostitutes simply do not pose a threat to the health of a community and that sexual intercourse for recreation or monetary gain is an individuals own choice and not an appropriate area for government interference.”²¹

18. Charlene Carol Mildwisky op cit (note 8) 147.

19. Charlene Carol Milwidsky op cit (note 8) 228.

20. D. A. J. Richards. “Commercial Sex and the Rights of the Person” in *University of Pennsylvania Law Review*. (1979) 1279.

21. Charlene Carol Milwisky op cit (note 8) 148.

Decriminalisation would result in a lack of governmental control of prostitution outside of the laws governing normal business practices, and this has resulted in much fear from people who believe that it is the governments role to control morality. There is an underlying belief that

“...prostitution strikes a blow at societies morality.”²²

However it is important to see that decriminalisation is

“...not to make a statement on morality, but on criminal law, which is meant to protect people, not judge individual morality...”²³

With decriminalisation, the one area of prostitution that could possibly be problematic is that of solicitation. It may be necessary for the state to introduce provision for the control of solicitation²⁴ so as to avoid problems arising. As mentioned above the ordinary laws of business could be utilised, however, local ordinances and by-laws could be created to specifically regulate prohibited areas where prostitutes cannot operate.²⁵ However any such endeavour would have to be carefully scrutinised under the Bill of Rights in order to ensure that there are no unconstitutional consequences.

“Prostitution, as a form of commercial service, may be zoned on grounds applied in an even-handed way to other businesses.”²⁶

22. ibid.

23. D. A. J. Richards op cit (note 5).

24. In England solicitation is prohibited, and prostitutes and their customers have to seek one another out far more discreetly, so as to avoid high concentrations of prostitution in the theatre and shopping areas. D. A. J. Richards op cit (note 5) 1282.

25. For example, near churches and creches, and schools.

26. D. A. J. Richards op cit (note 20) 1283.

The existing laws against fraud, abuse, violence and coercion would serve to protect both the prostitute and the client against exploitation and abusive violations.

4. LEGALISATION

The legalisation alternative is generally not a highly supported option. This alternative would result in greater controls being implemented by the state. Thus prostitution would not be a criminal offence but would be strictly regulated by the state.

“State control of prostitution rouses hackles. Even such a professing liberal as John Stuart Mill argues that, if there is compulsory medical inspection of prostitutes to prevent VD ‘it cannot but seem (to soldiers and ignorant persons) that legal precautions taken expressly to make that kind of indulgence safe are a licence to it.

There is no parallel case of any indulgence or pursuit avowedly disgraceful and immoral for which the government provides safeguards.’ Yet in the case of activities, like drinking, smoking, and gambling, which are allowed but not encouraged by the state, it is agreed that the state can properly intervene to make sure that they are carried on with due regard to health, comfort and decency. If they are degrading the state’s intervention is designed to make them less so.”²⁷

This argument is convincing in that state control does tend towards representing state legitimisation of a particular activity.²⁸ Additionally state control makes the state a shareholder instead of an impartial observer, and thus reduces the legitimacy of state actions involving the particular activity.

Legalisation of prostitution could well be referred to as regulation of prostitution.

“Regulation means that practising prostitutes must register with the police and are subject to rules aiming to protect public health and decency...Regulation

27. Tony Honore. *Sex Law*. (1978) 141.

28. Richard Symanski op cit (note 6) 228.

would require a quasi-legal reclassification that would permit official acknowledgement in the form of licensing, to work in specified houses or areas... Those in favour of regulation, believe it would diminish the cost of the criminal justice system, the incidence of violent crime linked to prostitution, street soliciting and police pay-offs, as well as control venereal disease.”²⁹

However, state control is no guarantee against exploitation. A street pimp would now be exchanged for a bureaucratic pimp, and the pay-offs would undoubtedly continue.

Additionally, a false sense of security³⁰ would be created by compulsory medical examinations of the sellers of the service, whereas the buyers are never expected to undergo any form of examination, therefore it is unlikely that venereal disease could be controlled.³¹

“The problem with licencing is not that there are good arguments against it, but there are no powerful arguments for it.”³²

Regulation of a service such as prostitution would undoubtedly bring the state into disrepute, and accordingly the legalisation and concomitant licencing of prostitution is not perceived as an ideal solution.

“In general licencing is an appropriate prerequisite to valid exercise of a service profession when there is a long professional education and when incompetence in providing the service will disastrously affect the interests of customers. Prostitution does not appear to satisfy either of these conditions...”³³

Licencing produces additional burdens such as the fact that it is

29. Charlene Carol Mildwisky op cit (note 8).

30. "When prostitution is legal and regulated, as has been the case in many parts of the world at different times, it is said to give a false sense of security to customers and community, particularly insofar as the spread of venereal disease is concerned." D. E. J. Macnamara and E. Sagarin. *Sex, Crime and the Law*. (1978) 125.

31. D. A. J. Richards op cit (note 20) 1280-1281.

32. *ibid*.

33. D. A. J. Richards op cit (note 20) 1282.
D. E. J. Macnamara and E. Sagarin op cit (note 28) 126.

“...degrading to women on account of public records that made it difficult to leave the profession, various arbitrary regulations and demeaning inspections, and a general failure to regulate brothels on terms fair to the prostitutes.”³⁴

Additionally there is no guarantee that all prostitutes will voluntarily register.³⁵ The main problem that becomes apparent when considering the issue of regulation of prostitution is that it presumes that there is a degree of police control over prostitutes, sufficient to enable the enforcement of the regulations. This presumption is questionable given the current difficulties of enforcement that exist in merely trying to prohibit prostitution. Therefore regulation could result in an even greater burdening of human resources in an attempt to enforce it. However, as is evidenced throughout history prostitution is not easy to control, and the potential for exploitation is extremely obvious.

5. THE SOUTH AFRICAN CONTEXT REVISITED

Given the legal alternatives available to South Africa with regard to prostitution, it is important to reflect on the control over human beings that the criminalisation of prostitution reveals. South Africa has a Bill of Rights which offers individuals protection from state exploitation, and this emerged after careful consideration of the history of human rights violations within South Africa. Therefore, when determining the most favourable alternative

34. D. A. J. Richards op cit (note 5) 1312.

35. "In regulated cities, most prostitutes never register; studies made in Paris, Bremen, Hamburg, and elsewhere have found that only about 10% of all women regularly walking the streets or in other ways soliciting customers are registered with the police and have a licence to pursue their occupation. Where legal red light districts are established, the legal and other problems of dealing with prostitutes who solicit outside the designated areas are little different than the difficulties involved where prostitution is totally illegal." D. E. J. Macnamara and E. Sagarin op cit (note 28) 125.

for prostitution under South African law, the past must be used as a measure of how the law ought not to deprive individuals of their autonomy, and their dignity.

CHAPTER 10

THE LEGAL ALTERNATIVES TO HOMOSEXUALITY

The law would have two alternatives with homosexuality:

1. Decriminalisation of homosexuality based on the constitutional protection afforded to persons on the basis on 'sexual orientation'.¹
2. Ensure that the sexual orientation clause is removed from the final constitution, and retain the status quo in relation to the existing legislation against homosexuality.

1. DECRIMINALISATION OF HOMOSEXUALITY

In terms of the sexual orientation provision under the equality clause², the legislation criminalising homosexuality would of necessity be struck down as being unconstitutional. The law would be unable to justify any interference with the activities of homosexual persons³

The following considerations are prohibitions which would have to be reconsidered in terms of the position emanating from the appeals to the Constitution by means of which the criminalisation of sexual offenses involving homosexuals would be struck down.

1. S 8(2) of Chapter 3 of the Constitution Act of 1993.

2. *ibid.*

3. Unless there were contraventions of the laws governing exhibitionism, or public indecency etcetera.

1.1. CUSTODY OF CHILDREN

The law has not demonstrated any support with regard to awarding custody of children to a parent who is involved in a same-sex relationship. One would assume that this position largely stemmed from the fact that the courts were demonstrating uniformity with regard to the application of the criminal sanctions against such relationships. It is also in all probability an indication of the societal misconception relating to the fact that within same-sex partnerships the children are disadvantaged as a consequence of the lack of exposure to both male and female gender roles. However, while it is not within the scope of this study to assess the sociological effects on children, it is interesting to note that many children who develop in a same-sex relationship ultimately opt for the heterosexual option for themselves.

The recent case of *Van Rooyen v Van Rooyen*⁴ was a decision that would undoubtedly be resolved in a different fashion in the light of the present Constitution⁵. In the case at hand the applicant, who was the mother of the two minor children, had enjoyed fair access to the children for the duration of the six years leading up to the application, which arose as a consequence of the children's father, who had been awarded custody of the children, denying her access because of his objections to the mother's lesbian relationship. The court in this instance took a confusing attitude of little relevance to societal realities. The court acknowledged that the applicants lifestyle was such that she had a right to make her own choices which the court would be obligated to both respect and protect. However, the court then proceeded to prescribe the manner in which the applicant should conduct her personal life in the presence of her minor children. The decision would undoubtedly be concluded

4. 1994 (2) SA 325 (W).

5. Act 200 of 1993.

differently within the parameters of the application of the Constitution which dictates that there can be no discrimination on the basis of sexual orientation.⁶

What is aspired towards is a situation wherein the sexuality of a person is of **no** consequence in the determination of custody battles. It is seldom noted with approval after all that the court is satisfied that both parents are heterosexual and accordingly can find no justification for not awarding joint custody! Sexuality should not be perceived as an indication of sound parenting practices.

1.2. ARTIFICIAL INSEMINATION

The law precludes single people from receiving artificial insemination and this therefore constitutes a discriminatory practice against female homosexuals. The law expressly provides that only a married person with written consent from her husband may receive artificial insemination.⁷

It will be of great importance to monitor the impact of the Constitution on the prohibition against all but married parties, with their mutual consent, being eligible for artificial insemination, particularly if there are any changes in the law with regard to the position of homosexuals and marriage. Suffice to say that if homosexuals were granted the right to legally marry, then the prescription that a husband's written consent is needed may have to be altered to read: 'a partner's' written consent would be required.

6. s 8 of the Constitution.

7. Regulation 3 and 8(2) of the Human Tissue Act 64 of 1983.

1.3. MARRIAGE

The approval and legal recognition of legal homosexual partnerships is a hotly contested issue. In South Africa the Evangelical Churches have expressed strong condemnation of legal recognition with regard to same-sex unions, however certain other churches have displayed a more contemporary attitude in this regard.⁸ If the law were to grant some form of legal recognition to such partnerships it would serve as a great protection for homosexual persons. An example of one of the most important areas wherein such recognition would be invaluable is where one partner is hospitalised and the other partner excluded from utilising visitation rights which are only accorded to family members. If a legal recognition of the partnership existed then such exclusions would not be permissible.

With regard to foreign policy in this regard three countries already recognise same-sex unions, and these are: Sweden; Norway; and Denmark. It is also indicated that Finland is also looking to pass a similar law.

“According to the new law, the couples will have the same legal and social rights as married heterosexual couples.”⁹

This is obviously a positive step in the appropriate direction, and one which South Africa would do well to follow in keeping with the indications emanating from the Constitution that the concept of equality for all is a valued ideal.

8. Archbishop Tutu of the Anglican Church, has been an outspoken advocate of the need to embrace diversity, also including the rights of homosexual persons.
St Martin in the Field -London - Primates Meeting - 12 March 1995.
“...let ours be inclusive communities, welcoming and embracing, refusing to exclude people on the basis of culture, ethnicity, faith, gender or sexual orientation; go forth to celebrate that we are indeed the rainbow people of God.”

9. *The Daily News*. Tuesday, January 3, 1995. 5.

1.4. INTESTATE INHERITANCE

At present in South African law there is nothing to protect the surviving partner of a homosexual relationship, in the event of the death of the one partner without having left a valid will. If a heterosexual couple have been living together beyond a certain period specified by law they are regarded as being common-law husband and wife, however the same courtesy is not extended to homosexual partners, and accordingly a death in the absence of a testamentary document is most unfortunate, and results in the surviving partner possibly forfeiting what is rightfully his/her vested interest.

Accordingly South African law would have to embrace some form of intestate provision which would serve as a protective mechanism for a surviving homosexual partner where no will is in evidence. The most favoured approach would have to be a legal recognition of a homosexual partnership which has lasted in excess of a certain period, and accordingly would have to be noted, in the event of an intestate death.

1.5 FOSTERING AND ADOPTION OF CHILDREN

Again there would have to be a re-evaluation on the current position of the law which precludes homosexual couples from fostering children, as this would appear to be both discriminatory and unwarranted in the light of the new Constitution.

The Johannesburg Child Welfare Society recently allowed an anonymous lesbian couple to adopt a child, and this is a very positive indication that there is some cognisance being given to the Interim Constitution and the Equality clause.

2. REMOVAL OF THE 'SEXUAL ORIENTATION' CLAUSE FROM THE FINAL CONSTITUTION AND THE RETENTION OF THE STATUS QUO

There resulted many debates around the inclusion of the sexual orientation clause in the Final Constitution of South Africa, and certain political parties presented submissions to Theme Committee 4 of The Constitutional Assembly with regard to either the retention or the removal of the clause. The retention arguments appear to have succeeded, as the clause has appeared in the first draft of the final constitution. [Included in Appendix A is a copy of the submission by the Gay and Lesbian Coalition of South Africa advocating the retention of the clause]

If the clause were removed from the final constitution it would be a sad day for South African Law, as the inclusion of the clause was internationally hailed as being unique to the South African Interim Constitution, and promotes the concept of pluralism and diversity within South Africa. [See Appendix B for a list of the legal position with regard to homosexuality in several international contexts]

It remains mere conjecture as to whether the sexual orientation clause could be removed from the constitution, but given current legislative development one could submit that this is highly unlikely.

CHAPTER 11

CONCLUSIONS

1. PROSTITUTION - THE CONCLUSIONS

“...William Acton who argued that prostitution would exist whatever governments decided, and so it was better that it should operate openly and legally, and be subject to regulation and control which would prevent abuse and exploitation, than that it should operate illegally and clandestinely, where the authorities could not prevent abuse. It is an argument which permeates public attitudes towards prostitution throughout the rest of history, and has still to be resolved.”¹

There are several powerful reasons advocated in support of the decriminalisation of prostitution, over any other legal alternative.

Firstly, criminalisation of prostitution is submitted to be unconstitutional², and therefore should be challenged, and if found so, removed from the statute books.³ Within the context of the unconstitutionality of prostitution the following should be respected:

- The basic right to privacy that the prostitute should be accorded. The exchange between a prostitute, and his/her client(s) is an extremely private negotiation, based on

1. Hilary Evans. *The Oldest Profession - An illustrated History of Prostitution*. (1979) 134.

2. See Chapter on the Constitution.

3. The same argument could be used in the United States of America. “Were prostitutes treated as the constitution provides they should be, 44 states would be deprived of their principle means of making arrests. In a review of legal injustices against prostitutes Marliyn Haft concluded that ‘solicitation should be decriminalised for the very same reasons that the laws against prostitution should be decriminalised.’ Both are unconstitutional”. Richard Symanski. *The Immoral Landscape - Female Prostitution in Western Societies*. (1981) 94.

mutual consensus.⁴ Additionally, the utilisation of one's body for sexual services is a private matter, and one which should be respected by the state.⁵

- The right to be treated equally is particularly relevant in the South African context. Prostitutes are not accorded respect and are treated in a degrading fashion by law enforcement officials.⁶ Additionally, because of the nature of the criminal prohibitions in South Africa, the lower economic groupings who are compelled to resort to solicitation for customers are disadvantaged. The higher economic groupings are able to operate with discretion from private homes with advertisements in select publications, however, the streetwalkers incur the continued persecution of the law, in a most unjust fashion, purely on the basis of their lack of bargaining power, resulting in the obvious manifestation of their trade.

There are numerous other constitutional infringements to be found within the legislation criminalising prostitution, including the infringement against the dignity of the person; the right to engage in free economic activity; the right against discrimination on the basis of race, gender, sex etcetera.⁷

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4. This is based on the premise that there is no abuse of a power relationship between the parties contracting, nor any third party procuring for the prostitute.
 5. Where such service has been voluntarily embraced by the prostitute him/herself.
 6. Tessa Marcus et al. *AIDS Education and Prevention - A feasibility study for a pilot intervention with commercial sex workers and long distance truck drivers in the Natal Midlands*; Charlene Carol Mildwisky. *A Criminological Study of Adult European Prostitution in Johannesburg*.
 7. See chapter on the constitution for more details.

If prostitution were decriminalised the police would be far better empowered to deal with matters such as fraud, violence, and exploitation of both customers and prostitutes.⁸ The undesirable link between prostitution and other ancillary crimes could be combatted if prostitution were no longer forced to operate underground.⁹ The police would not be perceived as operating antagonistically to the profession of prostitution, and thus there would be greater access to justice for prostitutes.

The stigma that is associated with criminalisation of behaviour, and identifying oneself as criminal, is not only degrading but diminishes one's self esteem, and this situation could be rectified by decriminalisation.

The tenuous link between law and morality could be revisited by the separation of the two, with regard to private consensual sexual intercourse. The basis for this submission rests in the fact that prostitution is not injurious per se, and the primary justification for the criminalisation thereof rests in the enforcement of morality, which is not sufficient justification for the criminalisation of behaviour in a free and democratic country.

“When we extend to prostitutes concern and respect for their equality as persons, we can see the source of the previous misperception. The failure to see the moral and human dignity of the lives of prostitutes is a moral failure of imagination and critical self-assessment.”¹⁰

8. D. A. J. Richards. “Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalisation of Prostitution”. *University of Pennsylvania Law Review*. Vol 127. 5. (1979) 1216.

9. *ibid*.

10. D. A. J. Richards *op cit* (note 8) 1286.

The autonomous right to use one's body for whatever purpose one desires should be respected, and if this extends to the selling of a sexual service, such service should be respected as any other profession involving the sale of a physical service would be.

The decriminalisation of prostitution would allow for collective bargaining power to emerge among prostitutes, to assist in the achievement of certain standards of service, and acceptable conditions of work. [See Appendix C for an Example of how collective bargaining could be utilised within the *World Charter for Prostitutes' Rights*]

Decriminalisation may also assist in achieving greater health intervention projects amongst prostitutes. Likewise education campaigns could be aimed at customers, indicating their responsibilities, and possibly extending to provide that it is 'the buyer's responsibility to beware' thus eliminating liability only against the prostitute for transmission of venereal diseases etcetera.¹¹

“...the presence of prostitution is, on balance, one of the colourful amenities of life in large urban centres. It should not be hidden and isolated, but robustly accepted as what in fact it is: an inextricable part of urban life. In this view forms of regulation are hypocritical and moralistic subterfuges of irresponsible politicians who seek to accomplish by isolation what they cannot legitimately achieve by prohibition.”¹²

11. Whilst acknowledging that transmission of such diseases by prostitutes is low. See Chapter on motivation for criminalisation of prostitution.

12. D. A. J. Richards op cit (note 8) 1285.

Accordingly, it is submitted that the most desirable alternative is for the state to decriminalise prostitution, and to thus accord many South African citizens their full rights of access to justice in the absence of discrimination.

2. HOMOSEXUALITY - THE CONCLUSIONS

“Full liberty to enjoy and express physical love deserves to be recognised as an additional general good since it, too, develops self-respect. Love in some form is a necessary ingredient of a fulfilled life. Whether this love is for a specific individual, for a number of individuals, or even for an abstract entity, love is essential to what is commonly meant by the meaning of life. In the absence of love, one’s life plan is incoherent, the life of the spirit deformed and miserable. Love in its sexual forms affords a uniquely ecstatic experience, for sex makes available to modern men and women experiences increasingly inaccessible in public life: self-transcendence; expression of private fantasy; release of inner tensions; and a socially accessible expression of the regressive desire to be again an omnipotent child, who is playful, vulnerable, spontaneous, and sensual. While people may choose voluntarily to forgo sex, the coercive prohibition of certain forms of love could be a deprivation of a uniquely significant experience.”¹³

The extract above sums up current social trends towards the tolerance of different forms of love, and indicates the motivation that criminalisation is an inappropriate means of attempting to assert one ideology over another.

The chief motivation for the decriminalisation of homosexuality rests in the unconstitutionality thereof.

13. D. A. J. Richards. "Homosexual Acts and the Constitutional Right to Privacy" in *Homosexuality and the Law* ed. D. Knutson. 48.

APPENDIX A

SUBMISSION TO CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4 ON FUNDAMENTAL RIGHTS
on behalf of the

NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY

20 FEBRUARY 1995

THE RIGHT TO EQUALITY

SUMMARY OF MAIN SUBMISSIONS

In the accompanying submission, we place the following main points before the Assembly for the consideration of its members:

- 1 Equality and non-discrimination are the fundamental and overriding principles of the interim Constitution.
- 2 South Africans share a unique history of legislated prejudice, exclusion and discrimination. This includes irrational discrimination against gays and lesbians.
- 3 In our transition to democracy, we have made a commitment to reject past hatred and prejudices as a basis of public conduct and decision-making.
- 4 Sexual orientation (whether heterosexual, homosexual or bisexual) is an ineradicable part of human identity. Compelling historical, scientific and medical evidence shows that homosexual orientation is a natural phenomenon.
- 5 Discrimination on the ground of sexual orientation is therefore irrational and arbitrary and cannot be justified.
- 6 Unfair discrimination demeans individuals on the basis of characteristics intrinsic to their

identity. Irrational discrimination against gays and lesbians displays the same basic features as discrimination on the ground of race and gender.

- 7 The fourteen enumerated conditions in section 8(2) are connected. Omitting any of these grounds could make each of the remaining conditions vulnerable to prejudice or political whim.
- 8 A central justification for a bill of fundamental rights is that non-partisan principles of justice are required to transcend the differences between and within religious and other persuasions, and to create a just and stable social order in which human growth can flourish.
- 9 The principle of separation between religion and the State is fundamental to constitutional freedom, and ensures autonomy for all within a diverse society.
- 10 The Constitution enshrines the right to express differing views and to live varying lifestyles. It cannot enforce only the views of certain religions. This would endanger the fertile pluralism of our society, the rich diversity of our lives and experiences, and endanger our commitment to transcending our discriminatory past.
- 11 It is precisely the guarantee of freedom that underlies also the protection of religious expression and belief in the Constitution. Just as the Constitution should provide for the right of every citizen to embrace religious convictions, on the ground that these are intrinsic to self-identity, it should provide that unfair discrimination on other grounds intrinsic to self-identity should be outlawed.
- 12 To sanction discrimination against gays and lesbians in a future Constitution would thus be a regression to the forms of bigotry, hatred and exclusion which underlay apartheid.

...ooOoo...

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1 Discarding the Past

- 1 Equality and non-discrimination are among the most frequently affirmed norms of international human rights law.¹ Given our country's particular history of discrimination and prejudice, these norms are critical to a future bill of rights.
- 2 Equality is a fundamental and overriding principle of the interim Constitution. The Preamble declares one of the principal aims of the Constitution to be a new order where 'all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.' Section 8(2) prohibits discrimination on fourteen specific grounds, and enshrines the right to equality and equal treatment for all. Limitation of the rights contained in section 8(2) is justifiable only so far as consistent with a democratic society based on freedom and equality. Interpretation of the Constitution and other laws must promote values which underlie equality (section 35(1) and (3)). The overriding notion is thus a compelling commitment to equality for all.
- 3 These principles of equality must be translated into the final constitutional text with reference to the binding constitutional principles contained in Schedule 4. Principles II, III and V compel equality and equal treatment as fundamental to a new order.
- 4 In the democratic transition, South Africans entered a solemn promise² with each other - young and old, male and female, the healthy, the disabled and the ailing, black and white, heterosexual, gay or lesbian, rich or poor - to leave the past 'of a deeply divided society characterised by strife, conflict, untold suffering and injustice', and to build 'a future founded on the recognition of human rights, democracy and peaceful co-existence'.³
- 5 The express intention of the new Constitution is thus to provide a historic bridge from that past. The Constitutional Assembly needs to formulate clearly what it is a bridge from, and what a bridge to.⁴ South Africa's history makes it imperative that a future bill of rights provides a mechanism for addressing discrimination in

¹ Bayefsky A., *The Principle of Equality or Non-Discrimination in International Law*, 11 (1990) HRLJ 1.

² President Mandela in his inaugural address referred to it as a 'covenant'.

³ Postamble to the Constitution of the Republic of South Africa Act 200 of 1993. In the interim Constitution section 232(4) provides that the postscript 'shall not have a lesser status than any other provision of this Constitution which is not contained in a Schedule'. It accordingly has a special place in ensuring a purposive interpretation of the provisions of Chapter 3. See Marcus G., *Interpreting the Chapter on Fundamental Rights* 1994 (10) SAJHR 92 101.

⁴ Mureinik E., *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR (1994) 31.

every manifestation. The future envisaged is based on national unity and reconciliation, and a commitment to reconstruction, development, human rights and equality.⁵

- 6 The interim Constitution enumerates fourteen conditions which have been traditional bases of discrimination. These are 'race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language' (section 8(2)). The challenge for all South Africans held out by the interim Constitution has been succinctly summed up by Professor Edwin Cameron (now Mr Justice Cameron)⁶ as follows:

The unifying theme of the last [four] years in our country, despite the awful carnage that has occurred and what seem to be frequent lapses of good faith, has been our search for transformation. As a nation we are laden with the guilt and the shame and inhibitions of the past. In our commitment to creating a common future for ourselves we have at least a chance to embrace new principles of dealing with each other. In the past we South Africans signalled to each other through our differences - the distinctions of race, colour, creed and religion that separated us. The debate about non-discrimination on the basis of sexual orientation offers an invitation to us to deal not in this coinage but in something different.

- 7 The fourteen conditions enumerated in section 8(2) represent traditional forms of discrimination. Each has been manifest in our past. Each has its own legacy of exclusion, prejudice and injustice - with race and gender discrimination at the epicentre. Sexual orientation shares that oppressive past. But its inclusion as an expressly protected condition has now been criticised in two submissions to the Constitutional Assembly.⁷ Both these submissions assert a religious basis. However, both ignore the irrational nature of such discrimination. And they fail to recognise that all traditional forms of discrimination are fundamentally related.
- 8 As we try to show in this submission, sexual orientation is intrinsic to individual identity. Discrimination on the ground of sexual orientation perpetuates injustices similar to those practised under apartheid - exclusion, irrational prejudice, and arbitrary State-sanctioned discrimination. To sanction discrimination against gays and lesbians in a future Constitution would be a regression to the bigotry and exclusion which underlay apartheid.

⁵ Albertyn C. & Kentridge J., *Introducing the Right to Equality in the Interim Constitution*, 1994 (10) SAJHR, 149 at 150.

⁶ Cameron E., *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 (1993) SALJ 450, 472.

⁷ The African Christian Democratic Party and Judy Dalton (Submissions, Volume 2, 16 January 1995);

2 Sexual Orientation and Identity

A common thread of discrimination

- 1 The fourteen conditions specified in section 8(2) of the interim constitution contain a common thread: they are all human characteristics, some immutable, others inherent features of human identity.⁸ They do not form a closed number of protected conditions. But they constitute a recognisable complex of related and analogous conditions intrinsic to human individuality, personality or identity.⁹
- 2 An individual's sexual orientation - hetero- or homosexual - is intrinsic to his or her identity. Unfair discrimination demeans individuals on the basis of characteristics intrinsic to identity. The enumerated conditions in section 8(2) are therefore connected. Accordingly, omitting any of these grounds from the enumerated formulation would make each of the remaining conditions vulnerable to prejudice or political whim.
- 3 In this submission we submit that the two submissions calling for sexual orientation to be scrapped from the list are unjustifiable and violate the fundamental principles underlying all South Africans' constitutional endeavour.

Before considering the form of protection on the ground of sexual orientation, it is necessary to consider the scope of the term as it applies to sexual self-identity.

Sexual orientation and the identity of people

- 4 The sexual orientation of an individual does not refer merely to the preferred gender of a sexual partner; nor is it just an indication of preferred erotic activity. Sexual orientation is intrinsic to human identity. This embodies both personality and individuality.¹⁰ Intrinsic to sexual orientation are aspects of self-identity, social and emotional bonding, lifestyle, and sexual- attraction, conduct and fantasy

⁸ Cachalia A, Cheadle H, Davis D, Haysom N, Maduna P and Marcus G, *Fundamental Rights in the New Constitution*, 1994 30 confine the classification to immutable characteristics and inherent features of human personality. Albertyn & Kentridge (note 5) 168 suggest that in addition to immutable human features, it should be recognised that certain choices are so important to self-definition that they should be protected. On this reading any additional ground need not necessarily be an immutable characteristic, but must be a valuable aspect of human identity.

⁹ In *Andrews v Law Society of British Columbia* [1989] 56 DLR (4th) 52 it was held that the purpose of the equality guarantees in the Canadian Charter "was not to eliminate all unfairness from our laws, let alone all classifications that could not be rationally defended, but rather to eliminate discrimination based on immutable personal characteristics."

¹⁰ Isaacs G. and McKendrick B., *Male Homosexuality in South Africa, Identity Formation, Culture and Crisis*, Oxford University Press, 1992 5.

systems¹¹. Identity here is not the same as gender.¹² Gender differentiates male and female physiology. This is generally inherited. Identity relates to male or female physiology only in so far as this is incorporated into the individual's psycho-social make-up.¹³ 'Sexual orientation' encompasses both gender and identity.

- 5 As an aspect of inherent identity, sexual orientation extends much further than sexual conduct and emotional or psychological considerations. As a result, discrimination on the ground of sexual orientation has been pervasive and encompassing:
- 6 Increasingly compelling scientific and medical evidence¹⁴ supports the conclusion that same-sex intimacy is indivisible from individual identity. This contrasts with the discredited claim that intimacy, or desire, are separable from human identity. Today, most professionals accept that the gender of those to whom one is attracted is an irremovable part of personality and identity.¹⁵ That sexual orientation is immutable - in that the individual cannot change it - has already been recognised in South African judicial decisions¹⁶ and in international

¹¹ Theron A., *Ontwikkeling van die Homoseksuele Oriëntasie : Die Biologiese Perspektief*, 1994 Forthcoming, Department of Criminology, University of Pretoria, 1.

¹² Hart J. and Kegan, P., *Social Work and Sexual Conduct*, 1979 London: Routledge.

¹³ Isaacs, (note 10).

¹⁴ The most important studies are Bailey JM & Pillard RC, *A Genetic Study of Male Sexual Orientation*, 48 Archives Gen. Psychiatry 1089 (1991); Hamer DH, Hu S, Magnuson VL, Hu N & Pattatucci AML, *A Linkage between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 Science 321 (1993); le Vay S, *A Difference in Hypothalamic Structure between Heterosexual and Homosexual Men*, 253 Science 1034 (1991).

¹⁵ *Sexual Orientation and the Law*, Harvard Law Review, Vol 102 (1989) 1511.

¹⁶ See *S v H* 1993 SACR 1993 (2) SA 545 (C) (noting that 'what, in [our] view, also renders the criminalisation of consenting, adult, private, homosexual acts particularly repugnant is that the free mutual expression of erotic attraction between adult members of the same sex is proscribed even though such orientation may indeed be immutable. There are cases in our Courts where it has been accepted that, in particular cases, homosexual orientation is congenital and that it might well-nigh be impossible to change such orientation. ... there appears to be a growing body of psychological opinion that such [homosexual] orientation is immutable and a product of psychological or genetic factors. Whilst immutability of homosexual orientation would make the criminalisation of adult, private, consensual homosexual acts even more undesirable, this does not detract from the broader and more fundamental consideration, already alluded to, that principles of equality, privacy, autonomy, and the absence of public harm militate strongly against criminal

proscription of such acts'); *R v K*, referred to in *R v C* 1955 (2) SA 51 (T) 52-3 ('congenital homosexuals, congenitally disposed towards having relations with others of their own sex'); *R v C* at 53A-B ('a biological condition which it is very difficult to cure - very difficult indeed'); at 53E-F (possibility that 'treatment' might be effective 'remote'); *S v S* 1965 (4) SA 405 (N) at 409E-G (making a distinction between conduct evincing a 'temporary aberration' as opposed to 'a tendency to perversion'); contrast *Baptie v S* 1963 (1) PII 196 (N) ('they can usually be cured by psychiatric treatment');

precedents.¹⁷

The constitutional meaning of 'sexual orientation'

7 Constitutionally, 'sexual orientation' is neutral. It denotes both heterosexuality and homosexuality. But sexual orientation is usually an issue only for those not in the majority.¹⁸ Traditionally, therefore, protecting sexual orientation has in practice focused on same-sex orientation. Minority sexual orientation, with concomitant irrational discrimination, and the fact that sexual orientation is immutable and part of human identity, that provides the rationale for including it as a protected condition in the Chapter of Fundamental Rights. Including it is neutral as between homosexual, heterosexual and bisexual orientation. The notion that sexual orientation applies only to gay and lesbian orientation is therefore inaccurate.

8 Most approaches to homosexual orientation (whether positive, negative or neutral) recognise either directly or indirectly that it is intrinsically related to personality or identity:

- If homosexual acts are considered a '*sin*', and immoral and therefore wrong, then the individual's conduct is an attribute of personality in that he or she exercises a choice;
- If homosexuality is an '*illness*' then the medical paradigm entails that

S v K 1973 (1) SA 87 (RA) at 90C-D ('the reformation of the accused, in the sense that he may be cured of his disease').

¹⁷ For references to international authority holding sexual orientation to be immutable and intrinsic to individuality, see *Watkins v United States Army* 875 F.2d 699, 726 (9th Cir. 1989) (concluding that even if therapy made sexual reorientation possible, 'the possibility of such a difficult and traumatic change does not make sexual orientation mutable for equal protection purposes' and that 'allowing the government to penalise the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the Constitutional ideal of equal protection of the laws'); *Bowers v Hardwick* 478 US 186, 203 n2 (1986) ('homosexual orientation may well form part of the very fibre of an individual's personality'); Laurence Tribe, *American Constitutional Law*, 943 (1st Ed 1978) (stating that same sex sodomy is 'central to the personalities of those singled out by' anti-gay sodomy statutes); Tribe *supra* note 20 at 1075-77 (arguing that anti-gay legislation should be rejected on the basis of a substantive view that 'what it means to be a person' because it 'denies those subject to it a meaningful opportunity to realise their humanity'); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv L Rev, 1285, 1304-5 (1985) (asserting that 'a gay person's sexuality is fundamental to her personal identity' because 'homosexuality is a determinative feature of personhood'); *High Tech Gays v Defense Industry Security Clearance Office* 909 F.2d 375, 377 (9th Cir 1990) (relying on the 'overwhelming weight of respectable authority' to conclude that '[s]exual identity is established at a very early age; it is not a matter of conscious or controllable choice'); *Jantz v Muci* 759 F.Supp 1543, 1548 (D Kan 1991) (noting that 'available scientific evidence ... strongly supports the view that sexual orientation is not easily mutable').

¹⁸ *Sexual Orientation and the Law*, (note 15) 1511.

homosexuality is part of the affected individual's personality (albeit one that can be cured);

- If the '*neutral difference*' approach is adopted, then sexual orientation is part of identity, but is a mere difference that does not justify discrimination;
- If homosexuality is a '*social construct*', then categorising individuals by sexual orientation is rejected - same-sex acts and relationships are not materially different from opposite sex ones which equally intrinsic to individual identity.¹⁹

Discrimination against gays and lesbians is usually informed by one of these four conceptions. However, their common thread is their express or implicit recognition of personality and identity. The common thread binding the fourteen protected conditions in section 8(2) of the interim constitution is likewise personality or identity.

3 The Need for Constitutional Protection

- 1 Gays and lesbians form a uniquely vulnerable category as far as discrimination and prejudice are concerned.²⁰ Irrational discrimination has been attributed to societal disapproval and disgust, their minority status, their deviation from the majority, the invisibility and non-obviousness of orientation, the scientific evidence of immutability which challenges the claims that orientation is voluntary, the embarrassment that generally still surrounds sex and sexuality, and the notion that young people's sexual orientation can be corrupted (see attached article).²¹
- 2 Discrimination on the ground of sexual orientation is not limited to gays and lesbians. Heterosexuals may also be targeted simply because they are perceived to display characteristics associated with gays or lesbians.
- 3 Discrimination on the ground of orientation displays the same basic features as discrimination on the grounds of race or gender. The correlation between these characteristics has been analysed as follows:

These [characteristics] include arguments from 'nature' - what is alleged to be natural, appropriate, ordained; arguments from biblical or other authority - the claim that liberation and assertion are immoral or godless (often, though not necessarily, linked to naturalistic arguments); arguments from inherent

¹⁹ Sexual Orientation and the Law, (note 15) 1516 - 18.

²⁰ Cameron (note 6) 456.

²¹ See Cameron, (note 6) 456-461.

impediments ('women are weaker or have less judgment'; 'blacks are inferior or have less ability at specified occupations or activities'); arguments based on the moral threat from attempts by women or 'other' races to change the existing order - in other words, change as a precursor of social or moral disintegration. These arguments have usually been accompanied by demeaning epithets and characterizations of women and of people on the grounds of their race. ... It is striking how many of these arguments, now superseded in the case of women and blacks, are still employed against gays and lesbians.²²

- 4 A cornerstone of our democracy is the notion that 'never again shall anyone be oppressed by another'.²³

Our single most important challenge is therefore to help establish a social order in which the freedom of the individual will truly mean the freedom of the individual. We must construct a people-centred society of freedom in such a manner that it guarantees the political liberties and the human rights of all our citizens. The provisions expressive of these noble goals already exist in the interim constitution. It will be the task of the Constitutional Assembly to revisit this issue to ensure that we have the necessary constitutional instruments that will guarantee that none can take away or in any way restrict the freedoms and rights of any of our people.²⁴

Our commitment as a nation to ridding ourselves of our iniquitous past must be inclusive. To do otherwise would undermine the fundamental principles on which we have commenced constructing the future.

- 5 In its submission to theme committee 4, the African Christian Democratic Party (ACDP) has targeted gays and lesbians, and seeks to exclude them from the promise of equal citizenship. This echoes the discarded bigotry of apartheid: that some members of our society, by virtue of innate features of their identity, shall be subjected to discrimination, prejudice and exclusion.
- 6 For gays and lesbians, their sexual orientation is a matter of unavoidable identity. It is most intimately and most definitively what they are as people. To subject them to licensed discrimination is to relegate them to the category of second class citizens.

²² Cameron, (note 6) 462.

²³ Mandela N.R., *Statement of the President of the African National Congress at his inauguration as President of the Democratic Republic of South Africa, 10 May 1994, A Time to Build...*, South African Communication Service, 1994.

²⁴ Mandela N.R., *State of the Nation Address*, Houses of Parliament, Cape Town, 24 May 1994.

4 The Submission by the ACDP 'Biblical Rights'

- 1 The African Christian Democratic Party (ACDP) has called for the future bill of rights to espouse a 'biblical approach to human rights'.²⁵ In the reports on group and human rights prepared by the South African Law Commission, Mr Justice Olivier similarly sought to find 'Christian' and church doctrinal support or authority for human rights.²⁶ 'Biblical rights' must by definition refer in the ACDP context to 'Christian rights'.²⁷ In the view of some, the concept of human rights protection as embodied in South Africa's new order is that it is unBiblical and unChristian; Professors Visser and Potgieter state that 'it has been demonstrated that the doctrine of human rights is not Christian (or Biblical) as far as its origin, foundation, nature and consequences are concerned'.²⁸

It is to be hoped that these factors will finally remove the cloak of Christian respectability that some are so eager to draw over the doctrine of human rights in order to camouflage its patently non-Christian facets. It must be emphasised that Christian concepts of rights, justice, freedom, equality, peace and fairness differ fundamentally from their apparent counterparts in the field of human rights. And because of the basic incompatibility of Christian principles such as humility, self-sacrifice, restraint and chastity with the human rights ideology which promotes maximum individual freedom to pursue even un-Christian practices, any endeavour to formulate a so-called 'Christian' bill of rights will fail and should not even be attempted. Consequently the bill of human rights must be seen for what it really is - a political and legal instrument mainly aimed at giving effect to the notions of *political* and *legal* justice of some kind and not as a means to achieve *Christian* justice'.²⁹

- 2 This approach accentuates the partisanship of the ACDP submission. In fact, a central justification for our bill of fundamental rights is precisely that political and legal justice are required to transcend the differences between religious denominations and sects, and create a just and stable social order in which human growth can flourish.

²⁵ ACDP Preliminary Submission regarding Constitutional Principle II (Fundamental Rights and Freedoms), Constitutional Assembly Theme Committee 4 Submissions Volume 2, paragraph 1.

²⁶ *Working Paper 25 Project 58: Group and Human Rights* (1989) 7-8, 185-198; the *Interim Report on Group and Human Rights* (1991) 203-249; see also Du Plessis, *Enkele Opmerkings oor die Christelike fundering (en verwerping) van Suid-Afrikaanse menseregtebedeling* (1990) LLD Thesis PU for CHE.

²⁷ Visser PJ & Potgieter JM, *Some Critical Comments on South Africa's Bill of Fundamental Human Rights*, 1994 (57) THRHR 493.

²⁸ Potgieter JM, *Gedagtes oor die nie-Christelike aard van menseregte* 1989 THRHR 386; Potgieter JM, *Menseregte - verwyder die skyn van Christelikheid* 1990 THRHR 413.

²⁹ Visser and Potgieter, (note 27) 494.

The ACDP's prescriptive and exclusionary approach

- 3 It is submitted that the Constitutional Assembly should not accept the ACDP's premise that a bill of rights should exclusively reflect 'biblical' or 'Christian rights' as defined by the ACDP. South Africa is not homogenous; it is a diverse society. This reality informs the interim constitution and especially its Chapter on Fundamental Rights. To adopt a bill of exclusively 'biblical rights' in our society would be tantamount to establishing and enforcing one religious teaching over another. This would conflict with the internationally recognised principle that the legislative and prescriptive powers of Church and State should be separated.³⁰

- 4 The principle of non-establishment has been most successfully entrenched in the American Constitution³¹ and has produced a broad jurisprudence. Similar provisions can be found in most international constitutions espousing democracy. In any diverse society the separation of church and State is central to solving often competing claims. The pivotal notion is that the State should not propagate, entrench or support the viewpoint of any one religious belief. The rationale for such a distinct separation has been stated as follows:

The social contract to end the war of all sects against all necessarily, by its very existence, 'distorts' the outcomes that would have obtained had that war continued. Public affairs may no longer be conducted as the strongest faith would dictate. Minority religions gain from the truce not in the sense that their faiths now may be translated into public policy, but in the sense that no faith may be. Neither Bible nor Talmud may directly settle, for example, public controversy over whether abortion preserves liberty or ends life.³²

The selective and inconsistent nature of the ACDP's claims

³⁰ See inter alia, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 1989 (49) Louisiana Law Review 1057; *Beyond the Establishment Clause: Enforcing Separation of Church and State through State Constitutional Provisions*, 1985 (71) Virginia Law Review 625; Hitchcock, J., *Church, State and Moral Values: the Limits of American Pluralism*, 1981 (44) Law and Contemporary Problems; Hall, TL., *Religion and Civic Virtue: A Justification of Free Exercise*, 1992 (67) Tulane Law Review 87; Smith SD, *Idolatry in Constitutional Interpretation*, 1993 (79) Virginia Law Review 583; Smith SD, *The Rise and Fall of Religious Freedom in Constitutional Discourse* 1991 (140) University of Pennsylvania Law Review 149; Gerety T, *Legal Gardening: Mark deWolfe Howe on Church and State: A Retrospective Essay*, 1986 (38) Stanford Law Review 595; Strossen N, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is there a Window for Free Speech in the Wall Separating Church and State?*, 1985 (71) Cornell Law Review 143; Levinson S, *Religious Language and the Public Square*, 1992 (105) Harvard Law Review 2041.

³¹ The Establishment Clause of the First Amendment to the American Constitution states that 'Congress shall make no law respecting the establishment of religion'; the Free Exercise Clause provides that 'Congress shall make no law prohibiting the free exercise [of religion]'.

³² Sullivan K., *Religion and Liberal Democracy*, University of Chicago Law Review 59 (1992) 198.

5 Visser and Potgieter³³ have clearly identified a series of rights contained in the interim Chapter of Fundamental Rights which they consider to be 'unbiblical':

- the express recognition, status and protection given to, *amongst others*, homosexuals, lesbians, bisexuals, transsexuals in terms of section 8(2); (our emphasis, the others not being identified)
- the effective elevation of idol-worship, satanism, occultism, witchcraft, atheism etcetera to the status of legitimate religious activities in terms of section 14(1);
- the possible recognition of polygamous marriages under section 14(3);
- the lawful distribution of pornography and blasphemous material as a legitimate exercise in freedom of expression under section 15(1);
- the running of gambling facilities and sex shops as a legitimate use of the freedom to engage in economic activity under section 26(1);
- the arguments in favour of abortion, suicide (euthanasia) and the abolition of capital punishment based on certain rights in the bill;
- the extensive rights conferred on suspects and convicts which will hinder reasonable police action in bringing suspected criminals to justice and make it more difficult for the state to punish convicts properly;
- the fact that no special right exists governing the protection of a *normal marriage* or family (our emphasis - polygamous marriages are mentioned in this context as abnormal.)

The argument of the ACDP to limit all rights exclusively to biblically inspired rights, however, confines itself almost entirely to a preoccupation with sexual orientation. Apart from a single cursory reference to abortion there is no reference to any other 'non-biblical' rights. This is strikingly selective, and gives rise to an anxiety that the ACDP's approach is not doctrinally consistent, but is based on mere prejudice. If the ACDP is serious about championing exclusively 'Biblically founded' rights, then it must surely specify a comprehensive list of rights which do not meet its criteria.

In doing so, the ACDP would also need to take issue with the right to freedom of religion (which may imperil the right to practise no religion, or to practise non-Christian or non-traditional religions), the right to freedom of expression and the other rights listed by Visser and Potgieter as offending 'biblical rights'.

6 Ironically it is the guarantee of freedom of expression which ensures that different religious points of view, including the particular conservative fundamentalist viewpoint espoused by the ACDP, can participate in public debate.³⁴ The Chapter on Fundamental Rights enshrines the right to express opposing views and to live different lifestyles. It cannot represent the views only of some conservative Christians, to the exclusion of all others. This would ignore the fertile pluralism of our society, the rich diversity of our lives and experiences, and endanger our

³³ Visser and Potgieter, (note 27) at 494.

³⁴ Sullivan, (note 32) 201.

commitment to transcending our discriminatory past.

Religious autonomy, freedom of religion and religious belief

- 7 The right to freedom of religion³⁵ and its concomitant guarantee against discrimination on account of religious conviction,³⁶ assists the South African government to pursue and endorse a democratic society. Democracy may clash with sectarian religious opinion. For example, a notion of an exclusively 'biblical approach' to human rights must face difficulty in relation to the right to gender equality, depending on the particular teachings of any one religious group:

Religious competition with the values of the secular civil order grows fiercer the more persuasive and integrated the religious practice. For example, when the Roman Catholic and some Protestant churches exclude women from the priesthood, they powerfully and visibly reinforce a social hierarchy rejected in the civil order. But such organisational autonomy is the price of free exercise, so long as it does not impede the functioning of the civil public order. Efforts to inject religious views of gender roles into the public school curriculum, for example, should be rejected.³⁷

It is precisely because there is no guarantee of a universal religious approach to gender equality that women require protection from state-sanctioned discrimination in a bill of rights. Similarly, the ACDP's condemnation of sexual orientation is not endorsed by all religions. Religious approaches are a matter for each religion. The roles and aims of church and State are not uniform, nor should they be.

- 8 Differences in human identity should never constitute legitimate grounds for exclusion and prejudice. Conversely, the separation between religious norm and what the bill of rights protects in its guarantees of equality and freedom protects religious minorities too:

For example, in holding that the clearly important state interest in public education should give way to a competing aim by the Amish to the effect that extended formal schooling threatened their way of life, the United States Supreme Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong'. A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."³⁸

³⁵ Section 14(1).

³⁶ Section 8(2).

³⁷ Sullivan (note 32) 220.

³⁸ *Wisconsin v Yoder* 406 US 205, 223-224 (1972).

Similarly, protecting the equality rights of the minority homosexual orientation does not interfere with the rights or interests of others, including the ACDP. On the contrary, it serves to underpin and support the values of equality and dignity for all. In addition, the right to freedom of religion guarantees that the ACDP and its supporters retain organisational autonomy and freedom.

Just as the free exercise of religion implies the free exercise of non-religion, so the ban on establishment of religion establishes a civil public order, which ends the war of all sects against all.³⁹

Religion and individual identity

- 9 We have submitted above that there is a common thread between the fourteen conditions enumerated in section 8(2) of the Chapter of Fundamental Rights. They all relate to matters of intrinsic personality and identity. Included in that list is the right not to be unfairly discriminated against on grounds of religion. Religious belief is now recognised also as a matter of individual identity, notwithstanding the fact that it is not considered immutable: '[O]ne's basic moral or religious convictions are (partly) self-constitutive and are therefore a principal ground ... of political deliberation and choice. To 'bracket' such convictions is therefore to bracket - to annihilate - essential aspects of one's very self.'⁴⁰

Just as the bill of rights should provide for the right of every citizen to embrace religious convictions, on the grounds that they are intrinsic to self-identity, the bill must provide that unfair discrimination on other grounds intrinsic to self-identity should be outlawed.

- 10 We ask of the ACDP only to accord to gays and lesbians the same respect for identity that they demand in relation to their own religious convictions. With the guarantee of the same constitutional protection, they are free to limit recognition of gays and lesbians, just as some religions continue, despite a secular bill of rights, to discriminate against women.
- 11 Affording equal protection to gays and lesbians does not impinge on the rights of supporters of the ACDP in any way. It is for that reason that rights are not absolute rights and are subject to the restrictions imposed by the limitations clause. Just as the protection the equality clause gives to 'religion' will not permit ritual sacrifice, nor the protection to 'race' a racist murder, so protection of 'sexual orientation' does not legitimate all sexual or morally reprehensible conduct.

³⁹ Sullivan (note 32) 222.

⁴⁰ Perry M., *Morality, Politics and Law : A Bicentennial Essay*, (1988) 181-82.

Denial of identity: subculture and gangsterism

- 12 The ACDP maintains that sexual orientation, in so far as it applies to homosexuals, is 'a lifestyle, or subculture, like gangsterism'.⁴¹ The ACDP poses the rhetorical question 'if we call on the protection of this one sub-culture, on what basis are other sub-cultures excluded[?]'.

The analogy between a homosexual lifestyle or culture and gangsterism is sadly misplaced, and indicates the judgmental and prejudiced view of the ACDP. Even under apartheid, the law in South Africa never went so far as to criminalise homosexual *lifestyle*. In so far as a gay and lesbian 'community' does exist, a single community culture or identity may not actually be identifiable.

However, such a culture is not unique, nor is it exclusive or criminal. The protection of sexual orientation refers to the *individual* identity of the constituent members of society at large, heterosexual and homosexual. The lifestyles of individual gay and lesbian people are as varied, unique and all-encompassing as those of any member of the heterosexual community. Gays and lesbians come from all walks of life, from all social, economic, religious and ethnic origins and backgrounds, are representative of and are found in every culture and nation in the world.

- 13 The existence of a gay or lesbian community does not make it a cohesive or exclusive community common to or representative of every gay and lesbian person. It is a well documented fact that the gay and lesbian community is notoriously uncohesive, and it has been suggested that the non-cohesive nature of the community is of itself grounds for constitutional protection of individual gays and lesbians.⁴²
- 14 In so far as any subculture is discernible, it should be protected, equally with religious cultures or lifestyles, under the right to culture and language in section 31 of the interim constitution.

5 Freedom of Choice

- 1 There is also another compelling reason to include sexual orientation in the equality clause. This is autonomy and individual choice. It is a value which goes to the heart of all democratic values of freedom and equality and one which should be nurtured in our new Constitution. In the end it relates to the "most

⁴¹ ACDP Preliminary Submission regarding Constitutional Principle II (Fundamental Rights and Freedoms), Constitutional Assembly Theme Committee 4 Submissions Volume 2, paragraph 4.

⁴² Cameron, (note 6).

comprehensive of rights and the right most valued by civilised men”, namely “the right to be let alone”.⁴³

The ability independently to define one’s identity that is central to any concept of liberty’ cannot be exercised in a vacuum; we all depend on the ‘emotional enrichment from close ties with others’⁴⁴

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a nation as diverse as ours, that there are many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.⁴⁵

- 2 As the American judge, Justice Jackson, eloquently wrote,⁴⁶ ‘we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organisation ... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.’

Judge Blackmun in *Bowers* went on to note that:

It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

- 3 The true challenge to the members of the Constitutional Assembly may be to provide a culture of justification for any limitation of the rights enshrined in the interim Constitution.⁴⁷

The final plea of Justice Blackmun in *Bowers v Hardwick* requires special attention:

I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves their most intimate relationships poses a far greater threat to the values most deeply

⁴³ *Bowers v Hardwick* (1986) 478 US 186, dissenting opinion of Blackmun J at 199, quoted with approval by the Full Bench of the Cape Provincial Division in *S v H*.

⁴⁴ *Roberts v United States Jaycees*, 468 US 609, 619 (1984) quoted with approval in *Bowers v Hardwick*, *supra*.

⁴⁵ *Bowers v Hardwick*, *ibid* at 205, quoted with approval in *S v H* 1993 (2) SACR 545 (C).

⁴⁶ *West Virginia Board of Education v Barnette*, 319 US 624, 641-642 (1943).

⁴⁷ Mureinik, *A Bridge from Where?*, (note 4) 32.

rooted in our Nation's history than tolerance and non-conformity could ever do.

- 4 In a South African context, the importance of protecting individual choice, even where volition is present, is summed up by Professor Cameron as follows:

It is obviously wrong to suggest that the law should protect life styles only where they involve no element of choice. Our constitution, if it is to have any meaning in creating a plural society in South Africa, must honour variant life styles, and where no harm to others is involved it must guarantee people's autonomy to make choices affecting their own lives. Yet it remains particularly repugnant and arbitrary from a moral point of view to discriminate against a person solely on the ground of a characteristic over which he or she has no choice. This is the case with sexual orientation.

6 Political Consensus

The Inkatha Freedom Party (IFP) and the Democratic Party (DP) have already supported the retention of sexual orientation in their submissions to Theme Committee 4. The African National Congress (ANC) is on record as supporting its inclusion. The National Party (NP) previously supported an oblique formulation on the grounds of 'natural characteristics'. Only the ACDP have called for the omission of the term from the equality clause. In our submission, there is no persuasive justification for altering the formulation contained in the interim constitution.

7 The Structure and Formulation of Equality Provisions

Open-ended, self-contained and enumerated formulations

- 1 The precise formulation of equality provisions in international human rights documents differs from instrument to instrument. However, a number of characteristics are identifiable. First, these instruments are developmental.

In the United Nations Charter for instance, human rights and fundamental freedoms are to be respected without distinction based on a limited number of grounds: race, sex, language, and religion. In the International Covenant on Economic, Social and Cultural Rights the rights enunciated are to be exercised without discrimination on the basis similarly of a fixed, though greatly expanded, list of grounds. In more recent international instruments, such as the Convention on the Rights of the Child, fixed lists of grounds have expanded even further. On the other hand, the Universal Declaration of Human Rights and the European Convention on Human Rights prohibit discrimination on the basis of a clearly open-ended or intermediate number of grounds. The Universal Declaration uses the words "without distinction of any kind such as...". The European Convention states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as...". The French versions of the Universal Declaration of Human Rights and the European Convention of

Human Rights use, in the place of "such as", "notamment".⁴⁸

2 International law continues to develop and expand the list of those grounds of discrimination deserving of heightened scrutiny.⁴⁹ Considering the developmental character of enumerated formulations of non-discriminatory conditions, the express inclusion of age and sexual orientation in our interim bill of rights represents a development in international human rights jurisprudence. However, the express enumeration of sexual orientation follows a trend in recognising sexual orientation as a ground of traditional and irrational discrimination.

3 The term appears in the legislation of 23 states in the United States of America. It also appears in the legislation of Australia, the European Community and elsewhere in North America. In such statutes, sexual orientation is understood as embracing an orientation, or being identified as having an orientation, for heterosexuality, bisexuality, or homosexuality.

In the Canadian case of *Haig v Birch*,⁵⁰ the fact that sexual orientation was not expressly included in the list of grounds of proscribed discrimination in section 3 of the Canadian Human Rights Act was considered. The Court held that, in interpreting the protected conditions, sexual orientation had to be read in, since it was an analogous ground of discrimination, and in subsequent cases homosexual orientation is accepted without comment as falling within the Canadian Human Rights Act.⁵¹

8 Conclusion

1 In view of the particular history of discrimination in South Africa we urge an enumerated formulation of the equality clause, expressly listing the existing fourteen grounds on which discrimination shall be outlawed.

2 It is true that race and gender have been at the core of discriminatory conduct in our country. But we note that both blacks and women have an electoral majority, and therefore at least the political means to counter discrimination. By contrast, minorities by definition lack decisive electoral power. Their protection therefore constitutes a test of our commitment to the constitutional fundamentals of equality and non-discrimination.

⁴⁸ Bayefsky, (note 1) 5.

⁴⁹ Bayefsky, (note 1) 24.

⁵⁰ 10. C.R.R. (2d) 287.

⁵¹ *Douglas v Canada* 12 C.R.R. (2d) 284.

- 3 Many minorities have also been notoriously uncohesive, often out of fear of victimisation and harassment. Such communities, partly as a matter of necessity deriving from the very fact that they have been victims of discrimination, have traditionally been inarticulate. This inability to counter discrimination effectively necessitates express protection. Accordingly, if race and gender are specifically included, and if a case can be established for the enumeration of those two conditions, then all recognised and historical discriminatory conditions should equally be included.
- 4 The present equality clause meets the aim of using simple and accessible language while enabling ordinary South Africans to assess whether a particular right or freedom has been infringed. In addition, this formulation best utilises the educative value of a bill of rights in identifying discriminatory conduct. Enumeration in our submission continues to be the best means of crystallising the bases on which discriminatory practices have in the past been perpetrated.

Kevan Botha

On behalf of the

NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY

Cape Town, 20 February 1995

NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY

PARTICIPATING ORGANISATIONS

Abigale Beaufort-West
Abigale Kimberley
Activate
Aids Support and Education Trust
AIDS Consortium
Association of Bisexuals, Gays and Lesbians
Cape Organisation for Gay Sport
Cape Town Pride Parade Committee
Community Aids Centre
CORSSPI, University of Durban Westville
Exit Newspaper
Gay Advice Bureau
Gay and Lesbian Organisation of Pretoria
Gay and Lesbian Organisation of the Witwatersrand
Gay and Lesbian Studies Forum
Gay and Lesbian Media Workers' Forum
Gay and Lesbian Funders' Forum
Gay Association of South Africa - OFS
Gays and Lesbians of Zimbabwe
Gay and Lesbian Organisation Witbank
Johannesburg Lesbian Forum
Johannesburg Pride Parade Committee
Kwa-Zulu Natal Gay Community
Lawyers for Gay and Lesbian Equality
Lesbian Action Project
Lesbians and Gays in the Transkei
NACOSA Law and Human Rights Reform Committee
Organisation of Lesbian and Gay Action
Oudtshoorn Abigale
Out in Africa Film Festival Committee
Outright Magazine
Port Elizabeth Gay and Lesbian Organisation
SABC Gay and Lesbian Rights Forum
STEP, Rhodes University
Sunday's Women
The Equality Foundation
The Pride Foundation

Township Aids Project

Transvaal Organisation for Gay Sport

Universal Christian Community Fellowship

University of Natal Sexual Orientation Working Group

SUBMISSION TO CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4 ON FUNDAMENTAL RIGHTS
on behalf of the

NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY

8 JUNE 1995

**SUPPLEMENTARY SUBMISSION ON
THE RIGHT TO EQUALITY**

SUMMARY

We draw the attention of the Theme Committee to the National Coalition for Gay and Lesbian Equality's First Submission on the Right to Equality (20 February 1995) which is included in Volume 8 of Submissions for the Theme Committee on Fundamental Rights.

In the accompanying supplementary submission we place the following additional points before the Theme Committee for consideration of its members:

1. The International Covenant on Civil and Political Rights is recognised as an example of universally accepted fundamental rights and freedoms. A recent decision by the United Nations Human Rights Committee has held that protection from discrimination on the grounds of sexual orientation is contained in and therefore enforceable through the rights conferred by the Covenant.
2. The recognition of sexual orientation as a ground for legislated nondiscrimination is not unique to the South African Interim Constitution. There is a considerable body of international human rights jurisprudence, statute and case law which acknowledges that discrimination on the basis of sexual orientation is incompatible with universally accepted fundamental rights and freedoms. We highlight some of the international legal developments in this regard.
3. A number of petitions received by the Constitutional Assembly attempt to equate sexual orientation with bestiality and paedophilia. This is misleading and grossly unfair. These activities do not fall within the recognised legal definition of sexual orientation. The retention of sexual orientation as a ground for nondiscrimination in the equality clause will in no way legitimise these activities.

A. Sexual Orientation Protection and the International Covenant on Civil and Political Rights

- 1 During the course of its deliberations on each of the rights to be included in the final constitutional text, Theme Committee Four is required to ensure compliance with the constitutional principles set out in the Fourth Schedule to the Interim Constitution.¹ Three of those principles impact on the guarantee of equality for all, including the gay and lesbian community.
- 2 The Constitutional Principles require that the legal system shall ensure the equality of all² before the law, that the Constitution shall prohibit racial, gender and all other forms of discrimination³, and that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.⁴
- 2.1 The Theme Committee has classified issues raised by political parties as either "non-contentious" or "contentious". We submit that there are cogent reasons for accepting the retention of sexual orientation as non-contentious, despite the position adopted by the African Christian Democratic Party (ACDP).
- 2.2 We submit that the Theme Committee should be guided by the peremptory requirements of each of these principles. As a matter of statutory interpretation, the use of the words "shall" in the text of the three principles mentioned leaves no room for any right which appears in the Interim Constitution to be included in less favourable terms in the final constitution.
- 2.3 We further submit that, with the exception of the ACDP, there is consensus amongst political parties that sexual orientation should be retained as a ground guaranteeing nondiscrimination.

¹ Section 71(1) of Act 200 of 1993.

² Principle V.

³ Principle III.

⁴ Principle II.

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- 2.4 Finally we draw the attention of the Theme Committee to persuasive international precedent which supports the assertion that nondiscrimination on grounds of sexual orientation has gained recognition as a universally accepted fundamental right.
- 3 Theme Committee Four has already unanimously accepted⁵ that instruments such as the International Covenant on Civil and Political Rights constitute examples of universally accepted fundamental rights and freedoms⁶. In October 1994 President Mandela signed the International Covenant on Civil and Political Rights and ratification is pending before Parliament. The ACDP have themselves conceded the Covenant as an example of universally accepted fundamental rights and freedoms.⁷
- 3.1 In this regard we wish to bring to the Committee's attention the recent ruling of the United Nations Human Rights Committee in the case of Toonen v Australia⁸. The case involved a challenge to the Tasmanian Criminal Code⁹ which criminalises various forms of sexual contacts between men, including all contacts between consenting adult homosexual men in private. At the time of the ruling all the states in Australia, with the exception of Tasmania, had already repealed similar laws and adopted nondiscrimination legislation including sexual orientation.
- 3.2 Article 2.1 of the Covenant provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political and other opinion, national and social origin, property, birth or other status."

⁵ See Constitutional Assembly Theme Committee 4 Reports, paragraph 7.3.1. of the Supplementary Report on Block 1 adopted on 20 March 1995.

⁶ Adopted by the General Assembly of the United Nations, by resolution 2200A(XI) on 16 December 1966 and entered into force on 23 March 1976.

⁷ Per Mr L Green MP recorded at paragraph 5.1.1. of the Minutes of Meeting of Theme Committee Four, 3 April 1995.

⁸ Communication No 488/1992 delivered by the Fiftieth Session on 31 March 1994

⁹ Sections 122(a), 122(c) and 123.

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- 3.3 Article 26 of the Covenant provides that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against any ground such as race, colour, sex, ... or other status."
- 3.4 In the case before the Human Rights Committee, Australia (as the State party) sought the Committee's guidance as to whether sexual orientation should be interpreted as included in the term "other status" for the purposes of article 26 of the Covenant which specifies prohibited grounds for discrimination. The committee ruled that the reference to "sex" in articles 2.1 and 26 should be taken as including sexual orientation.
- 3.5 The ruling of the Human Rights Committee is persuasive in respect of member states who have adopted the International Covenant on Civil and Political Rights. The recognition of sexual orientation as a ground for nondiscrimination therefore forms part of the body of internationally accepted fundamental rights and freedoms which have been accepted as a point of reference for the decisions of Theme Committee Four.
- 4 Similar provisions are to be found in the African Charter of Human and People's Rights¹⁰ (the Banjul Charter) which provides that "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race ... sex, ... or other status".

B. Other International NonDiscrimination Legislation

- 5 The right to nondiscrimination on numerous grounds, including sexual orientation is increasingly gaining wide international recognition.
- 5.1 Anti-discrimination legislation based on grounds which include sexual orientation has already been adopted in many countries. These include Norway¹¹, France¹², Denmark¹³,

¹⁰ Article 2.

¹¹ General anti-discrimination provisions were adopted in Norway in 1981, France in 1985 and Denmark and Sweden in 1987. In addition, "incitement to hatred against homosexuals was made a criminal offence in Norway in 1981, Sweden and Denmark in 1987 and Ireland in 1989.

Sweden, Ireland¹⁴, the Netherlands¹⁵, Belgium and some Lander in Germany¹⁶. The guarantee of equal treatment for all citizens in the Spanish Constitution¹⁷ is interpreted to include discrimination on the grounds of sexual orientation. The European Court of Human Rights has confirmed the principle of nondiscrimination in important judgments.¹⁸ In addition the European Union has consistently adopted sexual orientation as a ground for nondiscrimination¹⁹ and has recommended that all member states are "under obligation to apply the fundamental principle of equal treatment, irrespective of each individual's orientation, in all legal provisions already adopted or which may be adopted in future."²⁰

5.2 In the United States of America, the following States²¹ have adopted nondiscrimination

¹² The French Law of 25 July 1985 inserted the words "sex", "family situation" and "moeurs" (translated morals, habits, lifestyle including sexual orientation) into the anti-discrimination provisions of the French Penal Code and the Code of Criminal Procedure. The same protection provisions have been included in the Code of Labour Law. Anti-discrimination laws are applicable to the armed forces and the civil service.

¹³ "Sexual orientation" was inserted on 1 July 1987 in Law 289 of 9 June 1971 which forbids discrimination on the grounds of race etc. Sexual orientation was also included in the anti-discrimination provisions of the Danish Penal Code.

¹⁴ The Prohibition of Incitement to Hatred Act 1989 makes it a criminal offence to incite hatred on the grounds of sexual orientation.

¹⁵ The Dutch Law of 14 November 1991 which came into effect on 1 February 1992 amended the nondiscrimination provisions of the Dutch Penal Code to include nondiscrimination on the basis of "heterosexual and homosexual orientation". Anti-discrimination laws generally cover areas relating to employment, goods and services and verbal abuse. The Dutch and Belgian proposals explicitly cover indirect discrimination as well.

¹⁶ For example Brandenburg.

¹⁷ Article 14.

¹⁸ See *Modinos v Cyprus*, Case number 7/1992/352/426, Series A Vol 259 (22 April 1993), *Norris v Ireland*, Case number 6/1987/129/180, Series A Vol 142 (30 November 1987) and *Dudgeon v United Kingdom*, 22 October 1981, Series A Vol 45.

¹⁹ Waaldijk & Clapham (eds), *Homosexuality: A European Community Issue*, Martinus Nijhoff Publishers, Dordrecht (ISBN 07923 2038 7(1B)). Waaldijk notes that there is a progressive implementation of nondiscrimination provisions in relation to homosexuality across Europe.

²⁰ Official Journal of the European Communities, 18 February 1994.

²¹ Harvard Law Review Vol 106, 1905, quoting the Equal Employment Advisory Council, *EEAC Analysis of State Laws Banning Discrimination Based on Sexual Orientation* 1-13 (1992).

provisions which specifically include sexual orientation: Alaska²², Arizona²³, California²⁴, Colorado²⁵, Connecticut²⁶, the District of Colombia²⁷, Florida²⁸, Georgia²⁹, Hawaii³⁰, Illinois³¹, Iowa³², Louisiana³³, Maine³⁴, Maryland³⁵, Massachusetts³⁶, Michigan³⁷,

²² Anchorage, January 1993.

²³ Phoenix and Tuscon, Chapter 17, February 1977.

²⁴ Labour Code, September 1992, and local laws in respect of Berkeley (Chapter 13.28., November 1978), Cathedral City (Chapter 11.66), Cupertino (Res No 3833, February 1975), Davis (Chapter 7A, February 1986), Hayward, Laguna Beach (Ch. 1.07, May 1984), Long Beach (Ch. 5.09), Los Angeles (Ch. IV, Art 12, June 1979), Mountain View (Res No. 10435, March 1975), Oakland (Art 20, Ord No 10427, January 1984), Palo Alto, Riverside, Sacramento (Ch. 14 Ord No 86-042, April 1986), San Diego (Secs 52.9601 to 9615), San Francisco (Art 33, Sec. 3301, Admin Code, October 1987), San Jose (Res No 58076, February 1985), Santa Barbara (Chs 9.126, 9.130, August 1979), Santa Cruz (Res No 15-246, April 1983), Santa Monica (Res Nos 781-81, Ch 9, Secs 4900-10), West Hollywood (Ord Nos 7,22, 77U, November 1984), San Mateo County (August 1975), Santa Barabara County (Sec 2.94, October 1982), Santa Cruz County (July 1975).

²⁵ Exec Order 90, and local laws Aspen (Ch. 13, Secs 13-98, November 1977), Boulder (Tit 12, City Charter, 1988), Denver (Sec 28-91, December 1983), Telluride (1993), Boulder County and Morgan County.

²⁶ Ch. 815, Sec 46a-60, and local laws Hartford (Secs 2-276, February 1979), New Haven and Stamford.

²⁷ Sec 1-2541(c), December 1977.

²⁸ Including local laws in respect of Key West, Miami Beach, West Palm Beach (Empl Plan 1990), Hillsborough County (Human Rights Amendment 91-9, May 1991) and Palm Beach County.

²⁹ Including Atlanta (City Charter, 1973, Ga. L. 2188, March 1986).

³⁰ Tit. 21, Secs, 368-1, 378-2, 1991) and Honolulu (Ord No. 88-16, February 1988).

³¹ Civ Serv R. Interp, November 1981, and Champaign (Ch. 13, Ord No. 77-222, July 1977), Chicago (Ch. 199, Dec 1988), Evanston (Ch. 5, 1980), Oak Park, Urbana (Ch. 12, Sec 12-1, 1979) and Cook County.

³² Including Ames, Iowa City (Ch. 18, Sec 18-1, 1977).

³³ Including New Orleans.

³⁴ Including Portland.

³⁵ See also Baltimore (art. 4 Secs 9(16), 12(8); Ord No. 187, June 1988), Gaithersberg (June 1987), Rockville (Ch. 11, Sec 11-1), Howard County (October 1975), Montgomery County (Ch. 27, Sec 27-1, September 1984).

Minnesota³⁸, Missouri³⁹, New Jersey⁴⁰, New Mexico⁴¹, New York⁴², North Carolina⁴³, Ohio⁴⁴, Oregon⁴⁵, Pennsylvania⁴⁶, Rhode Island⁴⁷, South Dakota⁴⁸, Texas⁴⁹, Utah⁵⁰, Vermont⁵¹, Virginia⁵², Washington⁵³ and Wisconsin⁵⁴.

³⁶ Chs 151B, 272, November 1989, and Amherst (Citizens Comm., May 1976), Boston (Tit 12 Ch. 40, July 1984), Cambridge (Ord No. 1016, September 1984), Malden (Art IV, Sec 16.13, February 1984) and Worcester.

³⁷ Civ Serv R Interp, Mar 81, and Ann Arbor (Tit IX, Ch. 112, Jul 72), Birmingham, Detroit (Ch. 27, Feb 79), East Lansing (Ch. 4, Sec 1.120, Mar 72), Flint (Ch. 2), Saginaw (Art 3, May 84) and Ingham County (EOE Plan, May 87).

³⁸ Minn. Laws Apr 93, and Marshall (Apr 75), Minneapolis (Tit. 7, Chs 139, 141, Dec 75), St Paul (Ch. 183, Jun 90), Hennepin County (EEO Policy, 1974).

³⁹ Kansas City (EOE Plan), St Louis.

⁴⁰ Secs 10:2-1, 11:17-1, Jan 92 and Essex County.

⁴¹ Exec Order 85-15, Apr 83.

⁴² Exec Orders 28, 28.1, Nov 83, and Albany, Alfred (Art II Sec. 1, May 74), Brighton (Empl Policy), Buffalo (EEO Ord, Mar 84), East Hampton (Aff Action Plan) Ithaca (Chs 28, 29, 1982), New York City (Tit B Ch 1, Sec 7.2 Admin Code, Feb 86), Rochester (Sec 83-58, Dec 83), Syracuse (Local Law No 17, 1990), Troy (sec 2-20, Jan 79), Watertown, Suffolk County (Sec 89-1, Mar 88), Tompkins County (Art 24).

⁴³ Also Chapel Hill (Art IV, Sep 75), Durham (Proclamation, Jun 86), Raleigh (Sec 4-1004, Jan 88).

⁴⁴ Exec Order 83-64, Dec 83, and Columbus (Ch. 2325, Aug 84), Cincinnati, Dayton (Oct 84), Yellow Springs (Sec 29, Town Charter, Nov 79), Cuyahoga County (Aff Action Res, Dec 81).

⁴⁵ See also Portland (res 31510; Ord No 139639, Dec 74 and May 87).

⁴⁶ Exec Order, Jan 88; Harrisburg (Art 725, Mar 83), Lancaster (Ord No 11, May 91), Philadelphia (Ch 9-110, Aug 82), Pittsburgh (tit VI, Art V. Ch. 651, Apr 90), York (1993) and Northampton County (Policy Statement).

⁴⁷ Exec Order 85-11, May 85.

⁴⁸ Minnehaha County (County Emp Pol Manual, May 79).

⁴⁹ See Austin (Ch. 7-4, Arts II to IV, Jul 75), Houston (June 84).

⁵⁰ Salt Lake City.

⁵¹ Tit. 21, Sec 495, 1992 and Burlington (Jun 85).

⁵² Alexandria (Ord No. 3498, Oct 88), Arlington County (Jun 84).

- 5.3 More recently anti-discrimination laws on grounds of sexual orientation have been passed in Australia (in New South Wales, Northern Territory, South Australia and are pending in Tasmania). In Canada, Ontario, Quebec, Manitoba, British Columbia, Nova Scotia and the Yukon Territory have anti-discrimination laws⁵⁵. Recently Israel passed a non-discrimination law pertaining to employment, including employment in the armed forces⁵⁶.

C. Bestiality and Paedophilia Excluded from term Sexual Orientation

- 6 We have noted with concern that a number of petitions by members of the public equate sexual orientation with practices such as bestiality and paedophilia. The ACDP has gone further, noting that "The ACDP states clearly that homosexual and lesbian behaviour, paedophilia, bestiality, sado-masochism and other sexual orientations of their ilk are not analogous to true status"⁵⁷. This is misleading, factually incorrect and grossly unfair. This is a matter which also concerned some members of the negotiating parties at the Multi Party Negotiating Forum in writing the Interim Constitution. Accordingly we set out the reasons which we put forward at the World Trade Centre and which were accepted by the Negotiating Forum which specifically exclude paedophilia and bestiality from the definition of the term sexual orientation.

Sexual Orientation: the legal meaning to be attributed to the term

- 6.1 Despite diligent search we have been unable to find a single instance in any jurisdiction employing the term *sexual orientation* which includes in the definition of sexual orientation paraphilia activities such as zoophilia (bestiality), paedophilia (sexual activity

⁵³ Exec Order 85-09, Dec 85, including Olympia (Ord No 4692, Jun 86), Pullman (Ord No. B-271; Tit 15, Fair Hous Code, Dec 81), Seattle (Chs. 14.04, 14.08; Ord No. 111714, Sep 73 and 1984), Clallam County (art X, Pers System, Nov 76) and King County (Ch. 12.18, 1988).

⁵⁴ Ch. 111, Secs 111, 32-36, Mar 82) and Madison (EO Ord, Jul 79), Milwaukee (Ch 109-15, Dec 87), Dane County (Chs 19, 31, 74, 1986-7).

⁵⁵ Bruni L & Others, *Index on Censorship - Gay Legislation* (1995), 195 - 196.

⁵⁶ Equal Opportunities in Employment Law, 1992.

⁵⁷ ACDP Submission to Theme Committee 4 on the Right to Equality, page 13.

with minors) or sex with imbeciles and idiots. Our own research indicates that sexual orientation is the preferred terminology and is consistently employed in numerous jurisdictions to describe only the sexual orientation of heterosexuals, bisexuals and homosexuals.

- 6.2 In all jurisdictions in respect of the legislation referred to above, where the rights of gays and lesbians to equal protection of the law are defined, the term sexual orientation is used. In the case of all of these statutes, sexual orientation is understood as embracing an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality.
- 6.3 In the Canadian case of *Haig v Birch*⁵⁸ the omission of sexual orientation from the list of proscribed grounds of discrimination in s3 of the Canadian Human Rights Act was considered. The Court held that sexual orientation had to be read in, in interpreting the protected conditions, it being an analogous ground of discrimination.
- 6.4 There is no suggestion whatsoever in the body of international case law or statute law that sexual orientation refers to anything other than heterosexuality, homosexuality and bisexuality.
- 6.5 The terms *sexual orientation*, *homosexual orientation* and *heterosexual orientation* have already received judicial recognition in South African case law in the case of *S v H*⁵⁹ where two senior judges stated that-

"What, in my view, also renders the criminalisation of consenting, adult, private, homosexual acts particularly repugnant is that the free mutual expression of erotic attraction between adult members of the same sex is proscribed even though such orientation may indeed be immutable. There are cases in our Courts where it has been accepted that, in particular cases, homosexual orientation is congenital and that it might well-nigh be impossible to change such orientation."

⁵⁸ 10. C.R.R. (2d) 287.

⁵⁹ 1993 (2) SACR 545 (C).

"... there appears to be a growing body of psychological opinion that such [homosexual] orientation is immutable and a product of psychological or genetic factors. Whilst immutability of homosexual orientation would make the criminalisation of adult, private, consensual homosexual acts even more undesirable, this does not detract from the broader and more fundamental consideration, already alluded to, that principles of equality, privacy, autonomy, and the absence of public harm militate strongly against criminal proscription of such acts."

"...this of course depends on the context in which the privacy argument is employed. It is certainly relevant in the field of the criminal law where, even in the case of heterosexual orientation, a limit is placed on the public expression of eroticism. Considerations of equality, however, would demand that no greater limitation be placed on homosexual erotic expression than on heterosexual erotic expression."

- 6.6 Significantly, the learned judges make the following qualifications with reference to homosexual orientation-

"I would stress that this judgement deals solely with the case of homosexual acts performed in private by consenting male adults" (emphasis in the original).

"One possible qualification needs to be mentioned. This judgement deals only with the position in society as it normally functions. There may be special situations where a legitimate societal interest might justify a different view being taken of private sodomy, even between consenting adults. The position of prison inmates comes to mind. There may well be others."

- 6.7 The employment of the term sexual orientation in the final constitutional text will therefore not apply beyond the scope of the definition set out above.
- 6.8 Bestiality and paedophilia are regarded as pathological paraphilia activities in psychiatry. Compelling reasons for the exclusion of paraphilias from the definition of sexual orientation are:

- 6.8.1 the equality clause in the Interim Constitution refers to the protection against unfair discrimination. This limits the category of discrimination to a value judgement which may be interpreted by the Courts. As demonstrated in S v H, our judges are sensitive to the limitations of consensual sexual conduct.
- 6.8.2 the limitations clause⁶⁰ allows for the limitation of the protected conditions enumerated in the equality clause, by law of general application, to the extent that it is reasonable or justifiable in an open and democratic society based on freedom and equality; in no jurisdiction displaying the criteria of an open and democratic society are bestiality, non-consensual sex (as with imbeciles) or paedophilia tolerated or sanctioned.
- 6.8.3 the legitimate interests of society referred to by the Cape judges will therefore still acquire judicial relevance and recognition in a constitutional state and may be taken into consideration in determining the extent of protection afforded by a protected condition.
- 6.8.4 The paraphilias of bestiality and paedophilia, in contradistinction with heterosexuality, bisexuality and homosexuality, are considered pathological in psychiatry.⁶¹ This is another compelling reason for the natural exclusion of these behaviours from the term sexual orientation. In psychological terms non-pathology would require the elements of erotic activity with (i) consenting, (ii) human, and (iii) adults as definitive. Any conduct where one of these three elements is not present would render the erotic activity pathological and therefore unlikely to survive judicial scrutiny in a constitutional state.
- 6.8.5 the elements of 'consensual' and 'adult' in relation to sexual behaviour have gained recognition in our case law and the criteria for consent is a matter of evidence; crimes constituting a malum in se and where consent is absent or impossible to obtain or where a victim is present cannot be said to be reasonable and acceptable in an open and democratic society or to fall within the parameters of adult consensual behaviour.
- 6.8.6 Just as the protection the equality clause gives to 'religion' will not permit ritual sacrifice, or the protection to 'race' a racist murder, so too according protection to 'sexual orientation' will not legitimate deviant, abusive or otherwise legally repugnant conduct.

⁶⁰ Section 33(1) of Act 200 of 1993.

⁶¹ Diagnostic and Statistical Manual (DSM III) of the American Psychiatric Association, 1980.

- 6.9 Sexual orientation should be retained as the terminology used in the final constitutional text as it has the distinct advantage of-
- 6.9.1 recognition within the statutes of other jurisdictions, without any expansionist definition beyond heterosexual, homosexual and bisexual orientations;
 - 6.9.2 existing reference and limitation in our own case law;
 - 6.9.3 neutrality and equality because the concept includes heterosexuality, bisexuality and homosexuality as the protected non-discriminatory conditions;
 - 6.9.4 correctly incorporating the concepts of personality, identity and erotic intimacy without any secular, theological or medical bias concentrating only on sexual behaviour.
- 7 Accordingly we submit that the term sexual orientation does not include and will never be suggested or interpreted to include bestiality, paedophilia or sex with imbeciles or idiots. Sexual orientation has a definite legal meaning already received into South African case law and recognised by statutory and judicial sources in other jurisdictions. In our respectful submission there are thus no substantive objections in supporting its inclusion in these terms in the final constitutional text.

Kevan Botha
for the NATIONAL COALITION
FOR GAY AND LESBIAN EQUALITY

Johannesburg
8 June 1995

APPENDIX B

COMPARATIVE INTERNATIONAL HOMOSEXUAL LEGISLATION¹

AUSTRALIA

Some of the states recognise that the age of consent for both homosexual and heterosexual intercourse should be the same, and accordingly it is 16 years.²

However there are certain states who still apply different standards for the age of consent. In these states the age of consent is 16 years for heterosexual intercourse, and 18 years for homosexual intercourse.³

Other states allow for lesbian and heterosexual relationships to be treated the same, whilst discriminating against homosexual men.⁴

Perhaps the most interesting provision is that of Tasmania, wherein homosexuality has been illegal for men.

Section 122 of this state criminalises

sexual intercourse ... against the order of nature.

However in 1994 the United Nations Human Rights Commission ruled that the criminalisation of homosexual conduct on the grounds of public health and morality could not be justified.⁵

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1. All information following is gleaned from Bruni, L & Others. *The Index on Censorship* 1. 1995. pages 195 - 204.
 2. South Australia and Queensland.
 3. Capital Territory.
 4. Northern Territory and New South Wales.
 5. *Toonen v Australia* 488/192

Australian Federal Legislation stipulates that the states are generally responsible for enforcing criminal law. However on 9 December 1994 a Federal Sexual Privacy Act was passed. This act now guarantees consenting adults protection from unreasonable legal interference.

Homosexuals have been able to serve in the Australian armed forces since 1992.

Asylum will be granted to those facing persecution on the grounds of their sexuality. Additionally, homosexual relationships have been legally recognised in immigration law since 1991.

Anti-defamation/anti-discrimination laws exist. However, homosexual relationships are discriminated against in the following areas:
Residence permits; adoption; and fostering.

AUSTRIA

Homosexual relations have been legal for men and women since 1971.

Homosexual prostitution has been legal since 1989.

Section 209 of the Austrian penal code makes intercourse between a man over 19 and a boy under the age of 18 years illegal with a penalty of up to five years imprisonment.

Boys between the ages of 14 and 18 years may legally have intercourse.
Both lesbian and heterosexual relations are permitted over the age of 14 years.

Section 220 of the penal code prohibits advocacy or approval of homosexuality (both male and female) in print, in a film or otherwise in public.

Section 221 prohibits foundation or membership of an association that encourages “homosexual lewdness”. Contravention of Sections 220 and 221 can result in a prison sentence of up to six months.

Amendments to section 220 and the repeal of section 221 are expected in the next legislative session.

Sections 220 and 221 were originally introduced during the period of Nazi rule of Austria. There were few prosecutions under these sections, but the Supreme Court indirectly referred to section 220 in the course of reaching its judgement that the representation of homosexual acts is hard core pornography, and therefore illegal.⁶

BOTSWANA

Homosexual relations are illegal for men, however lesbian relations are legal as there are no specific prohibitions against lesbian relationships.

The penal code states that

Carnal knowledge against the order of nature

is prohibited.

The penalty for contravention of this code is up to two years' imprisonment.

CANADA

Under Federal Law, anal intercourse between consenting adults over 18 years of age has been legal since 1988. The definition of sexual offenses now rests on the age of the participants, and the power relations between the partners. The wording of sexual offenses laws is gender neutral.

6. An example of the application of this precedent occurred in 1990 when Austrian customs officials confiscated AIDS information material which contained explicit safer sex information for homosexual men.

Homosexuals are not prohibited from serving in the military.⁷

Anti-defamation/anti-discrimination laws exist in Ontario, Quebec, Manitoba, British Columbia, Nova Scotia, and the Yukon Provinces. The Canadian Charter of Rights and Freedoms (1982) includes sexual orientation.

FRANCE

Homosexual relations have been legal for men since 1791. Lesbian relations are also legal.

Homosexuals are permitted to serve in the armed forces.

Since 1982 homosexual, and heterosexual relations are all permitted over the age of 15 years.

Anti-defamation/anti-discrimination laws exist and these extend to the armed forces and the civil service.

GERMANY

Homosexual relations have been legal for men since 1968 in DDR and 1969 in FDR.

Lesbian relations are legal.

Homosexuals are able to serve in the armed forces but are not considered to be sufficiently suitable to serve as senior officers.

Male homosexual, lesbian and heterosexual relations are all permitted over the age of 14 years and this was legislated in 1994. There are however provisions to deal with improper seduction

7. This has been since 1992.

of people under 16 years.

Unmarried cohabitation for same-sex couples is recognised for various legal purposes.

According to the 1991 Aliens Law

if necessary to avoid extraordinary hardship,

a foreigner involved with a national of the same sex may obtain a residence permit.

There have been reports of physical violence against homosexuals, but these incidents are probably related to neo-fascist and ultra-nationalist groups.

GREAT BRITAIN & NORTHERN IRELAND

Homosexual relations are legal, but only if they take place in private. Additionally there should be not more than two men participating who must be over the age of 18 and they must be outside of the armed forces and the merchant navy.⁸

It is an offence for a man to solicit another man to perform a homosexual act.⁹

It is also a criminal offence to invite, encourage or facilitate a man to have anal intercourse with another man.¹⁰

Male homosexual, lesbian and heterosexual relations are permitted over the age of 16 years in England, Scotland and Wales. Lesbian and heterosexual relations permitted at 17 years in Northern Ireland.¹¹

8. Since 1967 in England and Wales ; 1980 in Scotland ; 1982 in Northern Ireland ; 1983 in Guernsey, Alderney and Sark ; 1990 in Jersey ; 1992 in the Isle of Man ; 1992 in Gibraltar.

9. Section 32 of the Sexual Offences Act 1956 makes it an offence in England and Wales for a man to persistently solicit or importune in a public place for immoral purposes and to procure or commit an act of gross indecency (which is defined as being an act committed in a public place)

10. Section 4 of the Sexual Offences Act 1967 makes it an offence to procure a man to have anal sex with another man.

11. Under the Criminal Justice Act 1994.

Separate legislation is required to reduce the age of consent in the Isle of Man and the Channel Islands (homosexuals must be over 21 years).

In England and Wales this is regulated by the Sexual Offenses Act of 1967.

In Scotland the Criminal Justice Act of 1980.

In Northern Ireland the Homosexual Offenses Order of 1982.

In the Isle of Man the Sexual Offenses Act of 1992.

Local Authority bylaws have also been used to prosecute homosexual men.¹²

Under the Criminal Justice Act 1994 homosexuality is no longer a criminal offence, however, it continues to hinder progression within the armed forces.

There are still aspects of discrimination that are extremely obvious. For example a homosexual partner cannot be allowed to enter or stay in the country on the basis of a relationship with a citizen of the United Kingdom. Fostering by homosexual couples is legally possible but entirely dependent on the social services departments of local authorities.

Until 1992 homosexuality prevented appointment to senior positions in the Civil and Diplomatic Services.

In March 1993 the House of Lords upheld the convictions of 15 men who had been found guilty of committing actual bodily harm by engaging in consensual sado- masochistic sex.¹³

The Criminal Justice Act 1994 has redefined "forcible buggery" as "rape" and the Act has also given police additional powers to obtain intimate body samples.

12. For example, in the London Borough of Richmond, it is an offence to remain in a public lavatory for *"longer than is necessary"*.

13. The men were sentenced to up to four and a half years imprisonment. The securing of the convictions was based on video evidence from recordings made by the accused for their own purposes. The case is that of *R v Brown*.

ISRAEL

Since 1988 homosexual relations have been legal for men.¹⁴

Lesbian relations are also legal.

Israel grants asylum to those facing persecution on the grounds of their sexuality.

Equal Opportunities in Employment Law of 1992 states that sexual orientation is insufficient grounds for dismissal. This law also applies to the armed forces, and accordingly homosexuals would not be prohibited from serving in the armed forces.

ITALY

Homosexual relations have been legal for men since 1889.

In 1792 states under French influence had legalised homosexuality, however, the law on “public decency” has been used against homosexual men in certain instances.

Lesbian relations are legal.

Since 1889 the age of consent for homosexuals and heterosexuals has been 14 years of age. However, there is a prohibition against sexual contact with a person between 14 and 16 years if the young person is deemed to be sexually ignorant or “morally pure”.

Law 1008 of 1985 deems homosexuality

an imperfection which makes men unfit for military service.

14. Prior to 1988 there was a sanction of up to ten years imprisonment for male homosexuality, although a policy of non-prosecution operated.

Municipal registration and record offices define a family as being

a group of cohabiting persons tied by bonds of affection

without specifying that partners must be of the opposite sex. This therefore is a very broad interpretation introduced by the government in 1989.

KENYA

Lesbian relations are legal.¹⁵

Homosexual relations are illegal for men.

Sections 162 and 165 of the penal code deal with

carnal knowledge against the order of nature

and "attempted homosexual acts".

MOZAMBIQUE

Homosexual relations are illegal for men.

Lesbian relations are legal.

Sections 70 and 71 of the penal code provide penalties for homosexuality of up to three years' imprisonment in "re-education" institutions where forced labour is used.

NETHERLANDS

Homosexual relations have been legal for men since 1811. Lesbian relations are legal.

Since 1974 homosexuals have been able to serve in the armed forces.

The age of consent has been 16 years for homosexuals and heterosexuals since 1971.

15. Although lesbian relations are deemed to be legal in Kenya, the government refused to allow any discussion of lesbian issues at the 1985 United Nations Women's Conference.

Asylum is granted by the Netherlands to those facing persecution on grounds of sexuality.

A foreigner living in a permanent non-marital relationship with a Dutch national for a period exceeding 3 years may acquire Dutch nationality.

Since 1991 local authorities have officially registered homosexual partnerships, however homosexuals have no automatic access to pension, inheritance, tax and adoption rights which are attributed to married couples. There is however no discrimination in relation to rent protection; income tax; social security; and parenthood.

NIGERIA

Homosexual relations are illegal for men.

Lesbian relations are legal.

Article 214 renders

carnal knowledge of another person against the order of nature

a felony. This effectively ensures that buggery is a felony, and anyone who allows someone to commit buggery with him/her is guilty of a crime. This article carries a penalty of 14 years imprisonment.

Section 217 prohibits attempted, and actual "gross indecency". This article carries a penalty of 3 years imprisonment.

SAUDI ARABIA

Homosexual and lesbian relations are prohibited by law. The penalty for contravention of this is death.

SPAIN

Homosexual relations have been legal for men since 1822.

Under the Franco regime the age of consent for homosexual men was raised to 23 and harsh “public morality” laws were enforced.

Homosexuals have been able to serve in the armed forces since 1978.

Since 1978 the age of consent has been standardised at 12 years for homosexual and heterosexual persons.

Article 14 of the Constitution theoretically guarantees all citizens equal treatment.¹⁶

SWAZILAND

Homosexual relations are illegal for men and women.

The prohibitory legislation is found within the common law wherein the criminal offence of sodomy applies to both males and females and prohibits persons of the same sex engaging in a sexual relationship. The sanction imposed by the legislation is either imprisonment or a fine. It is noteworthy that the last offence was tried in 1983.

SWITZERLAND

Since 1942 lesbian and homosexual relations have been legal.

Homosexuals are able to serve in the armed forces.

The age of consent for homosexuals and heterosexuals is 16 years. A person under the age of

16. However, despite the fairly lenient legal position, two lesbians were arrested and detained by police in Madrid in 1986 for kissing in the street. Their detention was for a period of 48 hours.

14 years is not deemed to have criminal capacity with regard to matters involving sexual behaviour. When a person is between the ages of 14 and 16, homosexual behaviour is not an offence as long as the older partner is no more than three years older than the younger.

In 1993, a national referendum was held, and as a consequence all discrimination against homosexuality was removed from the Federal Penal Code.

UNITED ARAB EMIRATES

Both homosexual and lesbian relations are illegal.

Homosexual acts are regarded as “unnatural offenses” and “obscene acts”. Openly displayed homosexuality is described as

conduct at odds with morality.

The penalty for contravention of the “unnatural offenses” provision is 14 years imprisonment.

UNITED STATES

The states are generally responsible for enforcing criminal law. Prior to 1961 every state criminalised “sodomy” which was defined as an offence which almost always applied to the performance of both anal and oral sex.

Despite the fact that there are very few prosecutions under Sodomy laws, they are invoked at times to ensure the limitation of other rights.¹⁷

The United States Government operates on a “don't ask, don't tell” policy with regard to homosexuals being in the armed forces.

However, the following directives relating to the discharge of homosexuals from the military

17. For example in 1993 the sodomy laws were referred to by a court which proceeded to declare a lesbian mother unfit to retain the custody of her son.

are still in force.

Army Regulations 635-100 and 635-212.

Air Force Navy Instruction 1900-90.

Marine Corps Separation and Retirement Manual 6016-6018.

Sodomy laws have been repealed or invalidated by courts in the following states:

Alaska; California; Colorado; Connecticut; Delaware; District of Columbia; Hawaii; Illinois; Indiana; Iowa; Kentucky; Maine; Massachusetts (if in private); Michigan; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Texas; Vermont; Washington; West Virginia; Wisconsin and Wyoming.

The majority of constitutionally based litigation with regard to homosexual law reform has attempted to use "right to privacy" concepts derived from the major United States Supreme Court decisions on reproductive rights of the 1960's and 1970's to prohibit discriminatory legislation.

Homosexuality is also no longer grounds for banning entry to the United States.

Anti-discrimination laws exist in California; Connecticut; New Jersey; New York; Massachusetts; Vermont and Wisconsin.

ZAIRE

Homosexual, and lesbian relations illegal.

Homosexuality is prosecuted under the following sections relating to crimes against family life: Sections 168 and 169 refer to assaults against a person and carry sanction of 5 years imprisonment.

Section 170 punishes rape, and carries a sanction of 40 years.

ZAMBIA

Homosexuality is illegal.

Sections 155-158 prohibit homosexuality and prescribe a penalty of 14 years' imprisonment for transgressions.

ZIMBABWE

Homosexual relations are illegal.

The sanction against acts committed between consenting adults is usually a fine.

APPENDIX C

WORLD CHARTER FOR PROSTITUTES' RIGHTS

International Committee for Prostitutes' Rights

LAWS

Decriminalize all aspects of adult prostitution resulting from individual decision.
Decriminalize prostitution and regulate third parties according to standard business codes. It must be noted that existing standard business codes allow abuse of prostitutes. Therefore, special clauses must be included to prevent the abuse and stigmatization of prostitutes (self-employed and others).
Enforce existing criminal laws against fraud, coercion, violence, child sexual abuse, child labor, rape and racism everywhere and across national boundaries, whether or not in the context of prostitution.
Eradicate laws that can be interpreted to deny freedom of association or freedom to travel to prostitutes within and between countries. Prostitutes have the right to a private life.

HUMAN RIGHTS

Guarantee prostitutes all human rights and civil liberties, including the freedom of speech, travel, immigration, work, marriage and motherhood and the right to unemployment insurance, health insurance and housing.
Grant asylum to anyone denied human rights on the basis of a 'crime of status', be it prostitution or homosexuality.

WORKING CONDITIONS

There should be no law which implies systematic zoning of prostitution. Prostitutes should have the freedom to choose their place of work and residence. It is essential that prostitutes can provide their services under the conditions that are absolutely determined by themselves and no-one else. There should be a committee to insure the protection of the rights of prostitutes and to whom prostitutes can address their complaints. This committee must be comprised of prostitutes and other professionals, like lawyers and supporters. There should be no law discriminating against prostitutes associating and working collectively in order to acquire a high degree of personal security.

HEALTH

All women and men should be educated to have periodical health screening for sexually transmitted diseases. Since health checks have historically been used to control and stigmatize prostitutes, and since adult prostitutes are generally even more aware of sexual health care than others, mandatory checks for prostitutes are unacceptable unless they are mandatory for all sexually active people.

SERVICES

Employment, counselling, legal and housing services for runaway children should be funded in order to prevent child prostitution and to promote child well-being and opportunity.
Prostitutes must have the same social benefits as all other citizens according to the different regulations in different countries.
Shelters and services for working prostitutes and re-training programs for prostitutes wishing to leave the life should be funded.

TAXES

No special taxes should be levied on prostitutes or prostitute businesses. Prostitutes should pay regular taxes on the same basis as other independent contractors and employers, and should receive the same benefits.

PUBLIC OPINION

Support educational programs to change social attitudes which stigmatize and discriminate against prostitutes and ex-prostitutes of any race, gender or nationality.
Develop education programs which help the public to understand that the customer plays a crucial role in the prostitution phenomenon, this role being generally ignored. The customer, like the prostitute, should not, however, be criminalized or condemned on a moral basis.
We are in solidarity with all workers in the sex industry.

ORGANIZATION

Organizations of prostitutes and ex-prostitutes should be supported to ensure further implementation of the above charter.

TABLE OF CASES

Anchor Publishing Co (Pty) Ltd and Another v Publications Appeal Board 1987 (4) SA 708 (N)

Baptie v S 1963 1 PH

Board of Regents v Roth 408 US 564

Bonner v Lushington (1893) 57 JP 168

Bowers v Hardwick 478 US 186 (1986)

Carnill v Edwards 1953 1 All ER 282

de Munck 1918 1 KB 635

de Ruiter (1880) 44 JP 90

Einstadt v Baird 405 US 438

Executors of McCorkindale v Bok NO (1884) 1 SAR 202

Gay Law Students Association v Pacific Telephone & Telegraph (California Supreme Court) S.F 23625 (1979)

Green v Fitzgerald 1914 AD 88

Griswold v Connecticut 381 US 479 (1965)

Horn v The State A452/86 TPD

Hunter et al v Southam Inc. 1985 11 DLR (4th) 641

Jaga v Donges NO 1950 (4) SA 653 (AD)

R v Baxter 1928 AD 430

R v C 1955 (2) SA 51 (T)

R v DeMunck 1918 (1) K.B. 635

R v Curtis 1926 CPD 385

R v F 1958 (4) SA 300 (T)

R v Gough and Narroway 1926 CPD 159
 R v K 1983 (1) SA 65 (CPD)
 R v Kam Cham 1921 EDC 327
 R v Marais (1889) 6 SC 367
 R v Oakes (1986) 1 SCR 103 50CR (3d) 1
 R v P 1958 (2) PH H294 (GW)
 Re R L Crain Inc. v Couture (1984) 6 DLR (4th) 478
 R v Van Niekerk 1919 TPD 185
 R v Videoflicks (1984) 14 DLR 17
 R v Webb 1964 (1) QB 357
 S v C 1983 SA 361 (T)
 S v C 1987 (2) SA 76 (W)
 S v C 1992 (1) SACR 174 (W)
 S v E 1992 (2) SACR 625 (A)
 S v H 1959 (1) SA 343 (C)
 S v H 1986 (4) SA 1095 TPD
 S v H 1988 (3) SA 545 A
 S v H 1993 (2) SACR 553 (C)
 S v K 1973 (1) SA 87
 S v K 1995 (2) SACR 555 (O)
 S v L 1991 (2) SACR 329 (C)
 S v M 1970 (4) SA 647 (N)
 S v M 1979 (2) SA 167 (T)
 S v M 1984 (4) SA 111 (T)

S v M 1990 (2) SACR 514 (E)

S v Makwanyane and Another 1995 (2) SACR 1 (CC)

S v Matsemela 1988 (2) SA 254 (T)

S v R 1992 (1) SACR 495 (ZH)

S v R 1993 (1) SACR 209 (A)

S v V 1967 (2) SA 17 (E)

S v V 1991 (1) SACR 68 (E)

S v V 1993 (1) SACR 736 (O)

S v V 1994 (1) SACR 598 (A)

S v W 1975 (3) SA 841 (T)

State v Saunders 381 A. 2d (NJ 1977)

Toonen v Australia 488/192

Van Rooyen v Van Rooyen 1994 (2) SA 325 (W)

Venter v R 1907 TS 910

Virginia Pharmacy Bd v Virginia Consumer Council 425 US 748 (1976)

Volschenk v Volschenk 1946 TPD 486

Webb 1964 1 QB 357

BIBLIOGRAPHY

ACTON, William. (1968). Prostitution. Macgibbon & Kee: London.

ALBERTYN, Catherine and Kentridge, Janet. (1994). "Introducing the right to equality in the interim constitution". South African Journal on Human Rights. Centre for Applied Legal Studies. University of the Witwatersrand: Johannesburg.

ALHEIT, K. (1989). "Prostitution". in: Codicillus. (30:1) p.69-70.

"Contravention of S 20 (1) (a) of the IMMORALITY ACT 23 OF 1957".

APPELGRYN, M. S. (1972). "Prostitusie in die Zuid Afrikaanse Republiek" 13 Codicillus (26).

"Discovery of diamonds and gold causing a rush of prostitutes".

ARIES, Phillipe and Bejin, Andre. (1985). Western Sexuality: practice and precept in past and present times. Blackwell: Oxford.

AARONSON, D. E., Dienes, C. T. and Mushero, M. C. (1984) Public Policy and Police Discretion, Processes of Decriminalisation. Clark Broadman Co. Ltd: New York.

BARNETT, Walter. (1971) "Corruption of morals: the underlying issue of the pornography commission report". in: Arizona State University Law Journal. (19:2).

BASSON, Dion. (1994) South Africa's Interim Constitution - Text and Notes. Juta & Co: Cape Town.

BOSWELL, John. (1980) Christianity, Social Tolerance, and Homosexuality. University of Chicago Press: Chicago.

BRONITT, Simon. (1995). "Legislation comment: protecting sexual privacy under the criminal law - Human Rights (Sexual Conduct) Act 1994 (CTH)". in: Criminal Law Journal. (19) p. 222.

BRUNDAGE, J. A. (1987). Law, Sex and Christian Society in Medieval Europe. University of Chicago Press: Chicago.

BRUNI, L. and Others. (1995). Index on Censorship - Gay Legislation. (1) p. 195 - 204.

BULLOUGH, V. (1964). The History of Prostitution. Prometheus: Buffalo.

BULLOUGH, V and Bullough, B. (1987). Women and Prostitution. Prometheus: Buffalo.

BURCHELL, Jonathan and Milton, John. (1991). Principles of Criminal Law. Juta & Co, Ltd: Cape Town.

BUTLER, Josephine. (1987). "Letter to my Countrywomen". in: The Sexuality Debates. Routledge & Kegan Paul: New York.

CACHALIA, Azhar et al. (1994). Fundamental Rights in the New Constitution. Juta & Co: Centre for Applied Legal Studies.

CAIN, Joyce P. (1991). "Massachusetts 1989 sexual orientation nondiscrimination statute". in: Law and Sexuality - a Review of Lesbian and Gay Legal Issues. (1) p. 285 - 313.

CANTARELLA, Eva. (1992). Bisexuality in the Ancient World. Yale University Press: London.

COCKRAM, G-M. (1987). Interpretation of Statutes. 3rd Edition. Juta & Co, Ltd: Cape Town.

COHEN, David. (1991). Law, Sexuality, and Society. Cambridge University Press: Cambridge.

CRITES, L. (1976). The Female Offender. Massachusetts: Lexington Books.

CRONJE, G. and Van Der Walt, P. J. (1978). Deviancy in Society: a Crimino-pathological approach. Pretoria: University of South Africa.

DAVIES, M. (1969). Probationers in their Social Environment. HMSO: London.

DE KLERK, A. (1991). "The right of prostitutes and other persons to enter harbours". in: Tydskrif vir die Suid Afrikaanse Reg. (2) p. 334-342.

DEVENISH, George. (1995). "An Examination and Critique of the Limitation Provision of the Bill of Rights Contained in the Interim Constitution". South African Public Law. (10) p. 131 - 144.

DEVLIN, Patrick. (1965). The Enforcement of Morals. Oxford University Press: London.

DONALDSON, Stephen. and Dynes, Wayne R. (1992). Homosexuality in the Ancient World. Garland Publishing: New York.

DOVER, K. (1974). Greek Popular Morality in the Time of Plato and Aristotle. Blackwell: Oxford.

DUMAS, Lorena. (1991). "The sexual orientation clause of the district of Columbia's human rights act". in: Law and Sexuality - a Review of Lesbian and Gay Legal Issues. (1) p. 267 - 284.

DU PLESSIS, Lourens M. (1994). "Whither Capital Punishment and Abortion under South Africa's Transitional Constitution". South African Journal of Criminal Justice. (7) p. 145 - 163.

DU PLESSIS, Lourens M. (1994). "The Genesis of the chapter on Fundamental Rights in South Africa's Transitional Constitution". South African Journal of Criminal Justice. (9) p. 1 - 21.

EVANS, Hilary. (1979). The Oldest Profession - an Illustrated History of Prostitution.

David & Charles: London.

FEINBERG, Joel. (1990). Harmless Wrongdoing - the Moral Limits of the Criminal Law.

Oxford University Press: New York.

FEINBERG, Joel. (1986). Harm to Self - the Moral Limits of the Criminal Law. Oxford

University Press: New York.

FINE, D. (1992). Lesbian and Gay Rights. (Number 8 in "The Developing Justice Series")

UCT Printing Unit: Cape Town.

FREED, Louis Franklin. (1942). The Problem of European Prostitution in Johannesburg: a sociological survey. Thesis D.Phil. - Universiteit van Pretoria.

GARDINER, Frederick.G. and Lansdown, Charles.W. H. (1946). South African Criminal Law and Procedure. Vol 11. Juta & Co: Cape Town.

GASTIL, Raymone. (1976). "The moral right of the majority to restrict obscenity and pornography through the law". in: ETHICS. (86).

GEVISSER, Mark and Cameron, Edwin. (1994). Defiant Desire - Gay and Lesbian Lives in South Africa. Ravan Press: Johannesburg.

- GIBSON**, Mary. (1988). "Prostitution laws after Italian Unification: the role of 'Regulationist' and 'Abolitionist' elites". in: Criminal Justice History. p. 105.
- GREEN**, Richard. (1992). Sexual Science and the Law. Harvard University Press: London.
- GREY**, Anthony. (1992). Quest for Justice - Towards Homosexual Emancipation. Sinclair-Stevenson: London.
- HAHLO**, H. R. and Kahn, Ellison. (1968). The South African Legal System and its Background. Juta & Co: Cape Town.
- HALL**, G. M. (1933). Prostitution: a survey and challenge. London: Williams & Norgate.
- HARRIS**, J. W. (1980). Legal Philosophies. Butterworths: London.
- HEALEY**, Emma and Mason, Angela. (1994). Stonewall 25: the making of the lesbian and gay community in Britain. Virago: London.
- HEPPLE**, Bob and Szyszczak, Erika M. (1992). Discrimination: the limits of law. Mansell Publishing Limited: New York.
- HEREK**, Gregory M. (1991). "Myths about sexual orientation: a lawyers guide to social science research". in: Law and Sexuality - a Review of Lesbian and Gay Legal Issues. (1) p. 133 - 172.

HILTON, A. (1991). "Back to the branches". Work in Progress. (84) p. 30-31 Sep.

"Policy Discussions on Abortion and Prostitution with Enormous Implications for Women's Rights".

HOFFMAN and Zeffert. (1988). The South African Law of Evidence. 4th Edition.

Butterworths: Johannesburg.

HOIGARD, Cecilie. and Finstad, Liv. (1992). Backstreets - Prostitution, Money, and Love.

Polity Press: Cambridge.

HONORE, Tony. (1978). Sex Law. Duckworth: London.

HOSTEN, W. J. et al. (1995). Introduction to South African Legal Theory. Butterworths: Durban.

IDSOE, O. and Guthe, T. (1967). "The rise and fall of the Treponematoses - ecological aspects and international trends in venereal syphilis". in: British Journal of Venereal Disease. p. 227 - 241.

JAMES, Jennifer. (1973). The Law and Commercial Sex. Unpublished MS.

JEFFERSON, Thomas. (1955). Notes on the State of Virginia. ed William Peden. W.W. Norton: New York.

- JEFFREYS**, Sheila. (1987). The Sexuality Debates. Routledge & Kegan Paul. London.
- JOHANNESSEN**, Lene. (1994). "Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards". in: South African Journal on Human Rights. (10:2). Juta & Co: Cape Town.
- KADISH**, Sanford H. (1983). Encyclopaedia in Crime and Justice. Vol. 2 and 3. The Free Press: New York.
- KIEFER**, O. (1934). Sexual Life in Ancient Rome.
- KNUTSON**, J. D. (1980). Homosexuality and the Law. The Haworth Press: San Francisco.
- KRUGER** and Currin. (1994). Interpreting a Bill of Rights. Juta & Co Ltd: Cape Town.
- KUNKEL**, Wolfgang. (1966). An Introduction to Roman Legal and Constitutional History. Oxford: London.
- LAMBERT**, M. and Szenat, H. (1994). "Greek 'Homosexuality': whither the debate?" in: Akroterion XXXIX. p. 46 - 63.
- LECKY**, W. E. H. (1897). History of European Morals from Augustus to Charlemagne. Longman: London.

- LIND**, Craig. (1995). "Sexual Orientation, Family Law and the Transitional Constitution". South African Law Journal. (112:III) p. 481 - 502.
- LOTTER**, Sunette. (1994). "Decriminalisation: a principled approach" in: Consultus. (7-2) p. 130-132.
- LLOYD**, D. (1987). The Idea of Law. Penguin Books: London.
- McCALL**, Andrew. (1979). The Medieval Underworld. Hamish Hamilton: London.
- MACNAMARA**, D. E. J. and Sagarin, E. (1978). Sex, Crime and the Law. The Free Press: New York.
- MARCUS**, Tessa, Oellerman, Karen and Levin Nonceba. (1995). AIDS Education and Prevention - a Feasibility Study for a Pilot Intervention with Commercial Sex Workers and Long Distance Truck Drivers in the Natal Midlands. University of Natal: Pietermaritzburg.
- MCLEOD**, E. (1982). Women Working: prostitution now. Croom Helm: London.
- MILL**, John Stewart. (1901). "On liberty". in: Utilitarianism, Liberty and Representative Government. Longman: New York.
- MILTON**, J. R. L. (1988). "The sexual offences act". in: South African Criminal Journal. (2) p. 269.

MILTON, J. R. L. (1988). South African Criminal Law and Procedure: Volume III Statutory Offences. Juta & Co: Cape Town.

MILTON, J. R. L. (1991). "The young man's defence". in: The South African Journal of Criminal Justice. (4) p. 172.

MILTON, J. R. L. (1996). South African Criminal Law and Procedure pending publication.

MILWIDSKY, Charlene Carol. (1984). A Criminological Study of Adult European Prostitution in Johannesburg. UNISA.
M.A Thesis on Prostitution.

MOHR, Richard D. (1988). Gays/Justice - a Study of Ethics, Society, and Law.

NASMITH, David. (1890). Outline of Roman History from Romulus to Justinian.
Butterworths: London.

PARKER, G. (1983). "The legal regulation of sexual activity and the protection of females".
21 Osgoode Hall Law Journal. (187).

PATEMAN, Carol. (1988). "What's wrong with prostitution". The Sexual Contract. Polity
Press: United Kingdom.

PEARSON, Michael. (1972). The age of consent - Victorian Prostitution and its Enemies.

David & Charles: London.

PIENAAR, D. (1991). "Prostitusie: wettig dit en jykeer siektes, maar duld sonde". in: Die Kerkbode. (147:10) p. 6-7.

POSEL, D. and Posel, R. "A feminist contextualisation of prostitution in contemporary society: the impact of AIDS".

POSEL, R. (1989). "Continental women and Durban's social evil, 1899-1905". in: Journal of Natal and Zulu History. (12) p. 1-13.

RABIE, M.A. (1985). Punishment - an Introduction to the Principles. Lex Patria Publishers: Cape Town.

RAUTENBACH, I. M. and Malherbe, E. F. J. (1994). What does the Constitution say?
The Faculty of Law, Rand Afrikaans University: Johannesburg.

REIMAN. (1976). "Privacy, intimacy and personhood". in: 6 Philosophy and Public Affairs (26).

RICHARDS, D. A. J. (1979). "Commercial sex and the rights of the person". 127
University of Pennsylvania Law Report. (1195) p. 1219-22.

RICHARDS, D. A. J. (1979). "Sexual autonomy and the constitutional right to privacy. A case study in human rights and the unwritten constitution". in: 30 Hastings Law Journal. (701).

ROBERTS, Nickie. (1993). Whores in History. Harper Grafton: London.

ROGERS, Robert Samuel. (1935). Criminal Trials and Criminal Legislation under Tiberius. American Philological Association: Connecticut.

ROOK and Ward. (1993). Rook and Ward on Sexual Offences. Sweet & Maxwell: London.

RUSSELL, Bertrand. (1935). Sceptical Essays. George Allen & Unwin Ltd: London.

SANGER, W. W. (1910). The History of Prostitution: it's extent, causes and effects throughout the world. New York: Medical Publication. p. 35.

SCOTT, G. (1936). A History of Prostitution from Antiquity to the Present Day. (53) no. 8.

SEIDMAN, Robert. (1966). A Sourcebook of the Criminal Law of Africa. Sweet & Maxwell: London.

SHRAGE, Laurie. (1994). Moral Dilemmas of Feminism. Routledge: London.

SNYMAN, C. R. (1984). Criminal Law. Butterworths: Durban.

STATE PRESIDENT'S COUNCIL. (1985). Vol 1. "Report of the Ad Hoc Committee of the State President's Council on the Immorality Act (August 1985)".

STEPHEN, James Fitzjames. (1967). Liberty, Equality, and Fraternity. Cambridge University Press: Cambridge.

SYMANSKI, Richard. (1981). The Immoral Landscape - Female Prostitution in Western Societies. Butterworths: Toronto.

TONG, R. (1989). Feminist Thought. A Comprehensive Introduction. Unwin Hyman: London.

DIE UNIE (1989). Wettige Prostitusie? (86:3) p. 62-63.

"Rejects a motion by a student body from Stellenbosch towards legalising prostitution".

VAN DIJK and Van Hoof. (1991). Theory and Practice of the European Convention of Human Rights Kluwer Tax & Law Publishers: Netherlands.

VAN ONSELEN, C. "Prostitutes and proletarians 1886-1914". Studies in the Social and Economic History of the Witwatersrand 1886-1914. (103).

VAN WYK, Dugard . De Villiers and Davis. (1994). Rights and Constitutionalism -The New South African Legal Order. Juta & Co: Cape Town.

WALKER, N. (1970). Crimes and Punishment in Britain. Edinburgh University Press: Edinburgh.

WILLCOX, R. R. (1962). "Prostitution and venereal disease - proportion of venereal disease acquired from prostitutes in Asia: a comparison with France, the United Kingdom, and the United States of America". in: The British Journal of Venereal Disease. (38) p. 37 - 42.

WILLCOX, R. R. (1976). in Sexually Transmitted Diseases. ed. R.D. Catterall & C.S. Nichols. London: Academic Press.

WOOLSTON, Howard B. (1921). Prostitution in the United States. New York: Century.