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Rethinking Dignity and Exploitation in Human Trafficking and Sex Workers' Rights Cases

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Abstract: As forced migration increases dramatically due to such factors as climate change, rising conflict, and authoritarianism, more legal cases on human trafficking and sex work are sure to arise. To date, very few cases on these issues have been decided in international human rights tribunals, and they have been subject to extensive criticism, especially for their conflation of slavery, human trafficking, forced prostitution, and consensual sex work. This article analyzes recent jurisprudence from Europe and Africa to address this conceptual confusion and argue that tribunals must interrogate their use of the terms dignity and exploitation or risk further marginalizing already marginalized people.

Keywords: human trafficking; consensual sex work; dignity; exploitation; European Court of Human Rights

1. An Opening Vignette

About ten years ago, while conducting an ethnographic study in Arizona of undocumented migrants kept against their will in drop houses [1], a telling exchange happened when interviewing a federal law enforcement officer with expertise in human trafficking. I knew the interviewee, as we had previously collaborated on two separate projects on migration and trafficking, and I had attended an antitrafficking workshop that she had co-led. We were now talking about her role on a newly constituted drop house task force in Phoenix that was charged with tackling the proliferation of drop houses, especially in homes that had been abandoned due to the housing market collapse. Several times a week, law enforcement would find dozens of migrants, mostly from Mexico, being held against their will in residential homes that had been boarded up. Many were brutalized, and most were held as hostages until family members in the US would agree to pay ransom. When freed by a law enforcement raid, the migrants told chilling stories of killings, torture, sexual assaults, and other abuses.

Near the end of the interview, I asked whether the agent had ever seen any examples of human trafficking in their work; and she replied negatively. Here, an agent who was extremely well-trained in the definitions of human trafficking was not seeing human trafficking when she dealt with it daily. These migrants clearly met the three-prong international definition of trafficking victims with the method of trafficking, the means of trafficking, and the purpose. They were (1) harbored against their will (2) through force, coercion, or fraud for (3) exploitation (the UN Protocol [2] as well as the European Convention [3] define trafficking as "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs").

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But to her, most likely influenced by the vitriolic anti-immigrant rhetoric in Arizona, they were either merely victims or illegal migrants who were to be repatriated to Mexico as soon as possible. Since they were not identified as trafficking victims by law enforcement, they were not offered the social services or relief from deportation to which many were entitled.

This is not an isolated case, there is much confusion between conceptual categories of irregular and forced migrants, individuals being smuggled, and trafficking victims, and this confusion is often exacerbated by political rhetoric. The confusion increases dramatically when attempting to distinguish between consensual sex workers and sex trafficking victims, as some believe that no one would freely enter sex work. And it increases even further as many academics and activists have pushed to connect human trafficking with modern-day slavery. This move may have rhetorical punch [4], but most forced migrants who are exploited and even most trafficking victims do not look like slaves in the public imagination, especially when slavery is defined through the principle of ownership, as it has been in some recent international cases.

The confusion is compounded as a migrant may be willing to be smuggled at one part of their journey and then kept against their will and exploited (thus a trafficking victim) during another part [5]. Indeed, they might not even know their own status, i.e., whether they are kept against their will, unless they try to flee. For example, West African migrants are willingly smuggled through the Sahara Desert, only to be kept in detention facilities run by militias and criminal elements in North Africa, thus making them trafficking victims or even slaves. Once their ransom is paid or they escape, many make it to Europe by being smuggled in boats, only to become trafficking victims again if they are kept against their will in a drop house or in forced labor contexts.

It should not be too surprising then that legal tribunals also experience conceptual confusion. As one Australian justice bemoaned, "those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy" [6].

2. Introduction

These distinctions are critical as forced migration increases dramatically due to such factors as climate change, rising conflict, and authoritarianism. Forced migrants frequently face extreme types of exploitation from multiple actors [5,7], including human trafficking, forced prostitution, and labor exploitation. They are also more likely to take up consensual sex work.

Despite this urgency, as well as the plethora of articles, NGOs, and proclamations about human trafficking and sex work, very few cases on these issues have been decided in international human rights tribunals, and these have been subject to extensive criticism. For instance, the first major cases, the *Rantsev* case in the European Court of Human Rights (ECHR) and the *Njemanze* case in the ECOWAS Community Court of Justice (ECOWAS Court), have been critiqued by feminist scholars who argue that jurists have worsened the conceptual morass by conflating slavery, human trafficking, forced prostitution, and consensual sex work. While the recent ECHR case *S.M. v. Croatia* (2020) addressed some of these conceptual issues, major concerns remain, especially about the meaning of exploitation and dignity in such cases.

The ECHR will likely have additional chances to clarify what it means by exploitation and dignity, as well as to further clarify distinctions between trafficking, slavery, forced prostitution, and consensual sex work in two potentially landmark rulings. *M.A. and Others v. France* was declared admissible in 2023, but the merits have not yet been decided on. It deals with the criminalization of the purchase of sex in France, the so-called Nordic model of sex worker regulation. The complainants are 261 sex workers who argue that the Nordic model, which France adopted in 2016, compels them to practice their profession clandestinely and thus "exposes them to greater risks for their physical integrity and lives, and affects their freedom to define how they live their private lives" [8]. The French *Conseil d' État* held in 2019 that "prostitution is incompatible with human rights and dignity" [8],

while the sex workers conversely argue that it is the criminalization of the purchase of sex which violates their dignity and leads to exploitative conditions. Another case might be filed with a nearly identical fact pattern as the much-maligned *Rantsev* case [9]. Here, a Dominican migrant worker who traveled to Cyprus for work argues that she was forced to have sex in a Cypriot cabaret and was thus a trafficking victim and that Cyprus did not do enough to prevent her exploitation through trafficking.

These cases will hinge on the court's understanding of exploitation and dignity, and I argue below that the ECHR and other tribunals need to further interrogate their use of these terms, or they risk further marginalizing already marginalized people. To make this argument, I will first discuss the evolving jurisprudence on human trafficking in the ECHR focusing on the *Rantsev* and *S.M.* cases. While *S.M.* clarifies some of the conceptual confusion about human trafficking from *Rantsev*, it opens the door for widely varying understandings of exploitation and dignity, especially on sex workers' rights. Indeed, it will become clear that Rantsev and S.M. can be read as sex workers' rights cases, or at a minimum, the court appears to be primed to use the same legal analysis in both human trafficking and sex workers' rights cases. Since the ECHR has not yet delved deeply into sex workers' rights, I move to the ECOWAS Court in West Africa and the South African Constitutional Court to highlight the pitfalls that might plague such jurisprudence in the ECHR and elsewhere. I end with analyses of dignity and exploitation and call for heightened scrutiny of a tribunal's understanding of exploitation and dignity in cases involving marginalized people.

2.1. The European Court's Evolving Jurisprudence on Human Trafficking

The first major ruling on human trafficking in the ECHR was *Rantsev v. Cyprus and Russia* (2012) [10]. Oxana Rantseva, a 20-year-old Russian student, entered Cyprus on an "artiste" visa to work in one of their notorious cabarets, commonly known as places of sex work. To facilitate her travel, the owner of the cabaret had to apply for the visa with an employment contract, along with Rantseva's passport and medical certificate. Soon after her arrival, Rantseva left her employer, who ultimately located her in a nearby disco nine days later. The owner took her to a police station arguing that she had violated her employment contract and asked for her to be deported so he could hire another woman to fill her visa slot. The police concluded she had not violated her contract and returned her to the owner. He reluctantly accepted her back and took her to an apartment where she was allegedly held against her will by a cabaret employee. That night, she died in a fall from a fifth-story balcony while apparently trying to climb down using bed sheets. The Cypriot medical examiner concluded that no third party was involved in her death and her injuries occurred because of the fall "in circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest" ([10], para. 41). The Cypriot authorities conducted precious little investigation to determine if she was a victim of trafficking. Her father, Nikolai Rantsev, commissioned a new forensics report in Russia, which concluded that many of her injuries occurred before she fell. He then worked with a pro bono Russian NGO to seek redress. After unsuccessfully trying to open a case in Russia, he brought a case to the European Court of Human Rights, arguing that neither Russia nor Cyprus did enough to prevent the human trafficking of his daughter.

The European Court ruled in his favor, concluding that she was held against "her own free will" ([10], para. 316) that fateful night and was thus deprived of Article 5, which guarantees the Right to Liberty in the European Convention of Human Rights (European Convention), and that Cyprus did not conduct an adequate investigation in violation of Article 2, which guarantees the Right to Life. Cyprus was also found to have violated Article 4 (Slavery) because its artiste visa scheme did not protect against human trafficking. Russia violated Article 4 (Slavery) because they did not investigate whether she had been trafficked, including who recruited her in their country. As reparation, Cyprus was ordered to pay the father 40,000 Euros, and Russia was ordered to pay 2000 Euros. Subsequently,

Cyprus initiated an investigation into the artiste visa program and significantly changed its visa policies, though cabarets continue to be very popular.

Since trafficking is not explicitly mentioned in the European Convention, the court had to show how human trafficking is connected to Article 4 of the Prohibition of Slavery and Forced Labor. The first two sections read as follows:

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labor.

In its most criticized move, the European Court determined that human trafficking generally fits into Article 4, without explaining whether human trafficking met a specific part of the Convention's wording as being either "slavery", "servitude", or "forced or compulsory labor". The court merely said, "without any substantiation" ([4], p. 41), that "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership" ([10], p. 280), and thus, it fits into Article 4. By making this general equivalence, the court disregarded more recent, comprehensive, and nuanced definitions of human trafficking that emphasize the methods, means, and purpose of trafficking, such as the Council of Europe's Convention on Action against Trafficking in Human Beings (Cf. [11]).

Additionally, and recalling the opening vignette above, by focusing on the right to ownership, the court failed to carefully examine the fact pattern of the case. They did not ask at what points Rantseva was exploited or whether the exploitation was part of trafficking or outside the gambit of trafficking. For instance, was Rantseva a victim of trafficking or a migrant sex worker who was being exploited? What message about her condition was Rantsev communicating by leaving her work at the cabaret? If the case had been made about exploitation instead of slavery, the judgment would also extend protections to other forced migrants and consensual sex workers who are exploited but not trafficked. Stoyanava puts this metaphorically: "Once having started a 'dance' with the human trafficking argument, the court performed on an anti-prostitution and anti-immigration stage. The ECtHR should not have resorted to the human trafficking framework. Instead, it should have focused on the abusive practices covered by Article 4 of the ECHR" ([12], p. 194). These distinctions are critical. If someone is forced into sex work and is not allowed to leave, then the relationship is one of trafficking, which would fall into Article 4 according to *Rantsev*. But if someone is a consensual sex worker and thus not a trafficking victim, but experiences exploitation during their work, do they have remedies under the European Convention?

Exploitation as part of trafficking *and* outside of the scope of trafficking are clearly present as described by the Cypriot ombudsman in her study of sex workers in the cabarets. Many socioeconomically vulnerable people (mostly women) travel to Cyprus to work in the cabarets from Russia and Eastern Europe, and more recently, from the Dominican Republic, Philippines, and China [13]. Their work situation is not ideal. The European Court quoted the ombudsman's report: "Usually they are aware that they will be compelled to prostitute themselves. However, they do not always know about the working conditions under which they will exercise this job. There are also cases of alien women who come to Cyprus, having the impression that they will work as waitresses or dancers and that they will only have drinks with clients ('*consommation*'). They are made by force and threats to comply with the real terms of their work" ([10], para. 85). We would hope that the ECHR would have protections for these (mostly) women if they are exploited, even if they did not meet the legal standards of being trafficked and were forced migrants or consensual sex workers. (An early analysis by Allain (2010) concluded that "as a result of *Rantsev*, Member States of the Council of Europe now have an obligation to suppress not only slavery, servitude and forced labor, but any type of human exploitation on their territory" ([14], p. 227). I agree with the sentiment here, but I do not believe *Rantsev* leads to such a conclusion).

2.2. S.M. v. Croatia (Grand Chamber, 2021)

In *S.M. v. Croatia*, the ECHR seemed eager to clear up the conceptual confusion from *Rantsev*, as Article 4 was not part of the initial complaint but was central to its ruling. The

complainant had asked the court to rule on a relatively minor procedural issue: the refusal to amend a criminal indictment which was alleged to amount to violations of Articles 3 and 8 [15]. The First Section or the Lower Chamber of the court, in their attempt to clarify conceptual distinctions from *Rantsev*, further muddied them, especially concerning consensual sex work. Croatia appealed the case to the Grand Chamber, which issued its more nuanced opinion in 2021 (Cf. [16]).

In 2012, then 22-year-old S.M., reported to the local police in Croatia that she had been forced into prostitution by T.M. T.M. had approached her through Facebook and offered to help her find a job because he claimed to know her mother. After building a relationship, T.M. asked her to provide sexual services for money to other men and give him half of the money. When S.M. resisted, he would threaten her and sometimes hit her. S.M. confided in a friend and then went to the police. It was found that T.M. was a former police officer with previous convictions for "procuring prostitution and rape" ([15], para. 20) and had previously served more than six years in prison. At trial, the court only heard from S.M., her friend, and T.M. It concluded that T.M. "had organized a prostitution ring into which he had recruited the applicant", but "it had not been established that he had forced or pressured her into prostitution, which was a constituent element of the offense he was charged with" ([15], para. 78). The court was especially concerned with some of the inconsistencies of S.M.'s testimony about the force that she was subject to. Appeals within Croatia were unsuccessful, including the attempt to revise the indictment to a lesser charge to obtain a conviction. It should be noted that in a separate legal process, S.M. was officially identified as a trafficking victim. A case was filed in the ECHR alleging that S.M.'s rights under Articles 3 (inhuman or degrading treatment or punishment) and 8 (respect for private and family life) were violated because the Attorney General's Office was not allowed to revise the charges and because opportunities to corroborate S.M.s testimony were missed, as several potential witnesses were not interviewed or asked to testify (Cf. [16]).

The First Section issued a decision in 2018 and found that S.M. had her rights violated under Article 4. To reach its decision, the Chamber added, with little analysis, the exploitation of prostitution to the expanding list of violations in Article 4, along with trafficking from *Rantsev*. "Trafficking and exploitation of prostitution threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention" ([15], para. 54). In their formulation, the "exploitation of prostitution" is not considered part of human trafficking but a separate type of activity that falls within Article 4. Once again, the court did not adopt the more nuanced three-prong definition of trafficking, and the court added more ambiguity, as they did not clarify whether "exploitation of prostitution" required coercion or could apply to consensual sex work.

An especially strong dissenting opinion by Judge Koskelo argued, inter alia, that the Chamber did not have the authority to amend the complaint to make this an Article 4 case. Further, they had mistakenly read "exploitation of prostitution" into the scope of Article 4 by confusing the three prongs of the contemporary definition of trafficking. The exploitation of prostitution of others and other forms of sexual exploitation are provided in trafficking definitions as examples of types of exploitation and thus part of the third prong, the purpose of trafficking. The Chamber's judgment instead moved these concepts to the first prong, the actual act of trafficking, thus having it fall within Article 4 (Cf. [16]). Thus, "the majority introduces an enlargement of the scope of that Article that is both significant and obscure" ([17], para. 18). Koskelo here also notes that the terms "exploitation of the prostitution of other or other forms of sexual exploitation" ([17], para. 31) were intentionally left undefined in other international legal instruments because of the wide range of regulatory frameworks and opinions on sex work in the Council of European states (see, for example [18]).

Croatia asked for a referral to the Grand Chamber (GC), which ruled in 2021. The GC addressed the biggest deficiency of the *Rantsev* case by holding that the European Court should rely on more recent definitions of human trafficking with their three prongs of

actions, methods, and purposes. The Grand Chamber agreed with the Lower Chamber that "exploitation of prostitution is an additional element of Article 4 and is not necessarily part of trafficking or slavery or servitude" ([15], para. 300). They also held that exploitation of prostitution requires coercion. However, the court added some confusion by seeming to bring exploitation of prostitution in through "forced or compulsory labor. . . irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context" ([15], para. 300). Future cases will need to further untangle the relationship between the exploitation of prostitution and forced labor ([16], p. 1059).

For my purposes, the Chamber's attempt to define "exploitation of prostitution" is more problematic. On the one hand, the Chamber clarified, *contra* the Lower Chamber, that the exploitation of prostitution requires force or coercion (relying on its only previous sex work case *V.T. v. France* 2007 [19]), and thus the Chamber frequently referred to "forced prostitution" as a violation of Article 4. However, the court opened up Pandora's box by looking at previous migrant labor cases, especially *Chowdury and Others* (2017), to define what is meant by force in the forced prostitution context. Two major claims are found here that make sense in the migrant labor context but are potentially problematic in the forced prostitution context. First, the court concluded that "force" can include "subtle forms of coercive conduct", such as socioeconomic conditions, and second, that previous consent is not enough to rule out forced labor ([20], p. 285).

Chowdury involved 150 Bangladeshi laborers who had traveled to Greece to work in large strawberry farms. The workers worked extended hours, were not paid, were guarded by men with guns, and lived in substandard housing. They went on strike three times demanding their pay, and in one instance, 33 of them were shot. The Greek government only recognized those who were shot as trafficking victims, as the others were free to leave at any time. The European Court instead ruled that the treatment of all of them met the definition of forced labor under Article 4. It was forced even though they had previously provided consent and were technically free to leave. What compelled them to stay was that they had not been paid, their vulnerable condition, especially that they we undocumented, and that they were subject to arrest. This was a major victory for migrant workers' rights in Europe.

In the consensual sex work context though, these holdings can cut both ways. By calling into question previous consent and including more structural forms of coercion such as socioeconomic conditions, the court may have left the door open to make an argument that all prostitution is forced. At a minimum, consensual sex workers who freely enter the profession, with their consent, because of socioeconomic conditions, could possibly fit the definition of forced prostitution. As Hughes writes, "the question of whether there is a distinction between 'exploitation of prostitution' and 'forced prostitution' is one that is ultimately determined by whether one regards the former as inherently 'forced'. For those that regard at least some forms of prostitution as an exercise of choice there is a meaningful distinction, whilst for those that regard prostitution as inherently coerced there may be no distinction" ([16], p. 1059).

Recall that the court was trying to define the exploitation of prostitution when moving toward forced prostitution and that the Lower Chamber almost unanimously was willing to accept the exploitation of prostitution without qualifying it as forced (the dissenting opinion by Justice Villanova in the Grand Chamber's judgment would go further and hold that any form of prostitution is a form of slavery: "Human dignity cannot be paid for. The principle that the human body is not property also remains incompatible with its commodification (*res extra commercium*) and unsuited to the context of a contract of employment, which remunerates the persons concerned for their (physical or intellectual) efforts and not for making their own bodies available to others on the instructions of their employer." Villanova ends by quoting Victor Hugo's Les Misérables, "We say that slavery has vanished from European civilization, but it is not true. Slavery still exists, but now it applies only to women and its name is prostitution" [10]). From this, we should worry that

the court could grant that prostitution is by its nature exploitative, or that there is really no such thing as unforced prostitution.

In the same way, radically different approaches would be possible if the court had focused on exploitation, whether or not it was trafficking, as I suggested above in discussing *Rantsev*. A court could hold that sex work is per se exploitative, whether or not it is coerced.

As Stoyanova wrote of *Rantsev*, "It needs to be noted that the interpretative openness of the term 'exploitation' is wide enough to cover any forms of prostitution, even forms not involving coercion" [21]. Hughes (2022) suggests that one way of distinguishing between consensual and forced prostitution would be to take a deeper look at the relationship between Article 4 and dignity [16] (here, she draws on the court's statement found in Rantsev and cited approvingly in S.M. that "trafficking threatens the human dignity and fundamental freedoms of its victims and could not be considered compatible with a democratic society and the values expounded in the Convention" ([10], para. 281)). However, a move to dignity is potentially problematic, as a court could find that sex work, whether consensual or not, is against the dignity of the individual sex worker or even of society as a whole, as African courts have in recent cases.

3. Dignity and Exploitation in Recent Sex Workers' Rights Cases

To better understand the intersection of dignity, exploitation, trafficking, and sex work, I now turn to two well-known cases from African courts where these issues were at the forefront.

Dorothy Chioma Njemanze and Three Others V. The Federal Republic of Nigeria (2017) [22] from the ECOWAS Community Court of Justice (how the ECOWAS Court, a tribunal formerly devoted to economic cases between West African nations, was transformed into a significant human rights tribunal with very innovative rulings is discussed in Alter et al. [23]) was the first case to find violations under the very progressive Protocol for the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, known as the Maputo Protocol. Nigeria also was found to have violated the African Charter and several other international treaties and declarations.

Dorothy Njemanze is a Nigerian activist, Nollywood actress, investigative journalist, radio personality, and racecar driver. She formed the Dorothy Njemanze Foundation to fight violence against women and the overreach of law enforcement in the Nigerian capital of Abuja. The city had created a program to clean up the streets and fight human, trafficking to "sanitize"' the city. This authority was given to the Abuja Environmental Protection Board (AEPB), which tellingly has the responsibility "to rid Abuja and its environs of whatever will constitute public nuisance" and is also responsible for such tasks as "waste collection and disposal, landfill development, monitoring of cleaning contractors, [and the] maintenance of the central sewer lines" [24]. The AEPB worked with a local NGO called the Society Against Prostitution and Child Labor in Nigeria (SAPCLN) to eliminate street prostitution, with panel vans labeled with both AEPB and SAPCLN patrolling the streets of Abuja at night arresting any woman thought to be a prostitute. Many of the women were beaten and sexually assaulted by the authorities. Njemanze and her group spoke out about the program and started following the vans to monitor and record their actions.

One night in 2011, Njemanze was informed that members of a wedding party had been arrested and thrown in a van. She and other members of the wedding party followed the vans as more women were abducted off the street by plain-clothed officers. They followed the vans to the AEPB office and protested the arrests. One of the supervisors came out and said that "if it were up to him, he would also have arrested all the women who accompanied the first Plaintiff (Njemanze) to the police station because to him they looked like prostitutes" ([22], p. 5). As Njemanze walked to her car, another officer grabbed her breast and then forced her into one of the vans. When she tried to get out of the van, she was beaten by military officers, one of whom pulled his gun and threatened to kill her [22]. At several points during the confrontations, the women were called "ashawo" (a derogatory slang term for prostitute) by the law enforcement officers. After being released,

Njemanze and her colleagues attempted to start a formal investigation against the police, including contacting the National Human Rights Commission, with no success (for more information about these arrests and the context of the antiprostitution campaign in Abuja, see the film "Silent Tears" by The Open Society Initiative for West Africa and Amateur Heads Productions [25]).

With the help of a pan-African NGO, the Institute for Human Rights and Development in Africa, Njemanze and three colleagues brought a case to the ECOWAS Court, which held that Nigeria violated numerous provisions of numerous international instruments. Substantively, these included the first ruling in the African system on violence against women under the Maputo Protocol; violations of the due diligence to "investigate, prosecute, and punish" violators of human rights; cruel, inhumane, and degrading treatment; and arbitrary arrest. The state also found that the Nigerian penal code had been applied in a discriminatory manner because the AEPB (with the help of SAPCLN) was patrolling the streets looking only for women. Any men who were on the streets late at night were not considered prostitutes and were not arrested.

Two aspects of the judgment are of special interest to my argument. First, the court determined that calling the women "ashawo" was "humiliating, derogatory and degrading" and thus an affront to the women's dignity under Article 5 of the African Charter of Human Rights. It was an affront to dignity because Nigerian law enforcement "failed to provide any reasonable justification for its allegation and use of such degrading word on the plaintiffs" ([22], p. 40). In other words, if the women were sex workers, then the use of the derogatory term would likely not be a violation. A derogatory term could be applied to one group of women but not another.

Indeed, the entire case seems to hinge on whether the women were sex workers. The court writes, "the issue to be addressed is whether or not the Defendant has shown reasonable ground upon which to base their assertion that the Plaintiffs are prostitutes" ([22], p. 36). One can read the judgment to mean that if the plaintiffs were sex workers, their arrest and most of their ill-treatment would not be a violation of their human rights. Nigeria in its filings claimed they were sex workers and thus a nuisance and against African values. The country went so far as to argue that because they were prostitutes, human rights standards did not apply to them. The judgment does not explicitly agree with that stance, but sadly, it does not directly refute Nigeria's claim. As O'Connell [26] argues, according to the judgment and quoting the plaintiffs' own filing, "there are two types of women, namely, those women who are humiliated by even the perception that they may be an *ashawo* ('prostitute'), and those women who in fact *are* sex workers. Rather than align themselves with the rights of *all* women, including sex workers who are women, the plaintiffs rebuffed the state's allegations that this case concerned sex work" (p. 516). The court did not criticize the government for rounding up sex workers, nor did they even discuss the government's claim that sex workers were not entitled to international human rights. "The state made no attempt to deny that it condones the arbitrary arrest of women by its agents, revealing that in practice its officers are free to make judgments about who is and who is not a prostitute based on profiling, stereotypes, and individual bias" ([26], p. 518). The court missed an opportunity to address how vague laws empower law enforcement to target disfavored groups (see the infamous case of Monica Jones in Arizona who was arrested for "manifesting prostitution" [27,28]). They even could have held that speech that is an affront to dignity could lead to violence and law enforcement overreach. Finally, the court disregarded the plaintiff's request for innovative reparations that could have addressed the societal acceptance of discrimination and violence against women, as well as the training of law enforcement officials on such issues. Instead, the state was only ordered to pay monetary damages.

3.1. Jordan v. South Africa (2002): Upholding the Dignity of Sexuality

In *Jordan* v. *South Africa* (2002) [29], three women who worked at a brothel (a sex worker, the owner, and the receptionist) appealed their convictions under the Sexual Offences Act 23 of 1957, which criminalized the provision of sex for reward and brothel-keeping. Notably, the law punished the selling of sex and not the purchase of sex, so it was the opposite of the Nordic model. The appellants claimed that their rights to privacy and freedom from discrimination and dignity were infringed. The judges unanimously concluded that the prostitution provision does not infringe on the rights to human dignity, and that if it does limit the right to privacy, such limitation is justifiable. On the question of discrimination, a narrow majority held that South Africa's sex work law was gender-neutral because it did not explicitly treat men and women differently. The minority though held there was *de facto* discrimination, as the purchasers of sex are usually men and the providers of sex are usually women. To punish one without the other, especially as the court imagined two people engaged in a sexual act would have a "differential impact between prostitute and client" that is "linked to a pattern of gender disadvantage" ([29], para. 60). (Throughout the Constitutional Court's opinion, there is significant deference to the legislature to decide how best to regulate sex work from a range of choices that other countries have decided. A draft bill was introduced in 2022 to decriminalize sex work.)

The challenge to the right to dignity was not discussed in the majority opinion, except to say that they agree with the minority opinion that the challenge to the right to dignity (as well as those on freedom of person, privacy, and economic activity) "must fail". As for the discussion of human dignity, which was unanimously accepted although it was in the minority opinion, it is remarkable for its brevity, consisting of fewer than 400 words, and it has been met with hundreds of pages of critique. To flesh out the court's understanding, we will also need to consider their justification as to why the right to privacy was not violated.

The discussion of dignity begins with universalist and essentialist language that intimately connects bodily dignity with human dignity. "Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic" ([29], para. 74). This bodily dignity is not "something to be commodified" (of course, one could argue as the young Karl Marx did that all labor is commodification of bodies) and "the very nature of prostitution is the commodification of one's body" ([29], para. 74). So, to the extent that criminalization of sex work infringes on dignity, it is due to the prior infringement of dignity by the sex worker who chooses such a profession. The court understands "that prostitutes may have few alternatives to prostitution" but still blames the infringement of dignity on those who are "engaging in commercial sex work" ([29], para. 74). Of course, criminalization does not give free rein to law enforcement or the purchaser of sex work to do what they want, sex workers maintain their inherent dignity and human rights. This is what I call the dignity two-step, the simultaneous taking away and granting of dignity.

The court's understanding of sex work comes further into focus in the discussion of the right to privacy. The plaintiffs claimed that being arrested for engaging in consensual sexual relations violated their right to privacy, which includes the right to make "meaningful decisions about deeply personal and intimate aspects of their life" ([29], para. 77). While this personal and intimate act involves a commercial dimension, it is, they argue, similar to the payment from a patient to a doctor, which does not change the expectations of privacy. The court emphasized instead that the commercial nature of sex work radically changes the dynamic of the sexual act itself. "The prostitute makes her sexual services available to all and sundry for reward, depriving the sexual act of its intimate and private character" ([29], para. 78). It follows then that the Sexual Offences Act upholds the dignity of sex, at least sex that is "intimate and private", while the sex within a sex work relationship is not deserving of a significant level of privacy. The court lays out several ways that the sex in sex work is different from the type sex (supposedly in marriage) which would be deserving of the right to privacy. The sex in sex work is "indiscriminate and loveless" and does not include "deep

attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life. By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money" ([29], para. 83). By criminalizing certain types of sex, such as commercial sex acts, the state also furthers its previously discussed interest in preserving the dignity of sex. The state is protecting sexuality from being undignified: "the right to privacy, therefore, serves to protect and foster that dignity" ([29], para. 81).

As for the argument that criminalizing sex work would enhance the stigmatization of sex workers, the court holds, analogously to its argument on dignity, that it is the sex worker who is stigmatizing themselves. And if this makes them more vulnerable, again that is the consequence of their decisions. "By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable" ([29], para. 66).

Many critics have pointed out that the court is holding up a certain ideal of sex, one that is a "very sanitized, pastoral picture of sex", which elides many of the lived realities of sex, such as its "messiness, complexity, its uneasy play with danger, its excess and pleasure for pleasure sake" ([30], p. 233). And its view of sex work is "predicated on a particular moral and social view of the nature of prostitution, which is, of course historically and culturally contingent" ([31], p. 61). The court has created two caricatures, one of sex in a consensual, presumably married relationship, and one of sex workers. With the court's logic, the state could ban sex clubs, private orgies, or quick hookups, as well as any sex without emotion, which just might include some marital relationships.

The court's arguments boil down to asserting that sex workers, like all individuals, may have inherent dignity, but the state can regulate their work because it does not fit the court's vision of ideal sex. The court concedes that many sex workers face limited life choices, which implies that their dignity is already tenuous, and they are already stigmatized and vulnerable. But if they choose to engage in actions that do not fit the court's standard of sexual practice, they are responsible for their further loss of dignity and privacy, as well as their increased stigmatization and vulnerability.

3.2. Paternal Ignorance and the (Near Infinite) Realities of Sex Work

The judges in *Jordan* and other cases embrace a Victorian view of sex work ([32], p. 400) that hinges upon a collage of stereotypes that make up what has been called the "prostitute imaginary" [33]. These stereotypes are mostly ignorant of the contemporary realities of sex work. Indeed, it is hard to imagine any other area of law where judges are more ignorant of the lived realities of the people whose fate they are deciding. Just a cursory glance at the writings or talks of sex workers belies the views of judges (see, for example, 25–27). Here, I briefly discuss a few aspects of the reality of contemporary sex work to give a sense of the "prostitute imaginary": (1) the heterogeneity of contemporary sex work, (2) consent and coercion, and (3) the effects of decriminalization. My purpose is not to be exhaustive (the reader can consult many excellent sources or talk to sex worker rights organizations in their community for more information) but to call into question the assumptions that underly so much of the law in this area and then explore why judges and others ignore these realities.

First, none of the tribunals seriously considered the heterogeneity of sex work in the twenty-first century, nor, at least from the case record, did they even ask what type of sex work each of the impacted individuals was engaged in. As Nussbaum (1998) famously wrote, "prostitution is not a single thing" ([34], p. 700). Contemporary sex work includes such diverse jobs as survival sex, erotic massages, cam-girls and boys, high-end call girls, phone sex operators, pornography actors, sugar babies, sex for barter, and dominatrices. Of course, there are some who are street workers engaged in the classic pimp–prostitute relationship, but this is far from the norm, and such relationships seem to be much less

exploitative than popular stereotypes, e.g., [33,35,36]. And many, perhaps most, sex workers over time will engage in several different forms of sex work and will move in and out of sex work. Of course, each of these will involve different dynamics between sex worker and client, as well as different risks, vulnerabilities, and possibilities for exploitation.

A very common stereotype is that sex workers are coerced into sex work and lack agency in their relationship with their clients. Accounts by sex workers themselves reveal a wide variety of motives for entering sex work, almost all of which involve consent [33]. The second claim of coercion misreads the reality of most relationships between sex workers and clients. The South African Court claimed that "the prostitute makes her sexual services available to all and sundry for reward" ([29], para. 83). But such a condition is more the exception than the rule. A cursory glance at the accounts of sex workers finds they regularly vet their clients and place limits on what they are willing to do [33,37]. Similarly, the conclusion of the same judges that sex work "depriv(es) the sexual act of its intimate and private character" ([29], para. 83) may be true in some cases, often in survival sex, but testimonies often describe the intimate relationships that sex workers establish with their clients. Most purchasers of sex are not looking merely for physical pleasure but for such things as intimacy, companionship, or validation. Some sex workers even see their roles as lay therapists practicing mental or physical therapy. Scholars increasingly see sex work as a type of emotional or affective labor that has significant affinities with, for example, hair stylists, maids, bartenders, caregivers, and tour guides. For each of these, the workers and clients navigate performative and authentic intimacy that shifts over time; see, for example, [38,39].

Finally, judges, legislators, and others seem to be ignorant of the impacts of the criminalization and decriminalization of sex. They cannot conceive of decriminalizing sex work, with only New Zealand adopting a full decriminalization model. Nonetheless, the overwhelming majority of expert reports recommend decriminalization (for overviews, see [40,41]), and a large number of empirical studies find that the criminalization of sex work, including the Nordic model that only punishes the buyer of sex, has deleterious effects on sex workers and others [42]. Criminalization reduces sex workers' agency in their relationship with clients, as they are driven underground and are less able to negotiate the conditions of their employment [39]. The evidence from New Zealand's full decriminalization model shows that it reduces social harm, provides greater autonomy and empowerment, reduces stigmatization, and improves the relationship between sex workers and law enforcement officials [43,44]. In short, contra the cases discussed above, decriminalization increases the dignity and reduces the exploitation of sex workers [39].

Often, opponents of human trafficking argue that the criminalization of consensual work will aid antitrafficking efforts. Yet, the empirical evidence suggests that decriminalization has a positive effect on antitrafficking efforts (i.e., [45]). Criminalization "instill(s) fear of law enforcement within sex workers" and thus deprives law enforcement of an "underused resource in locating and helping victims of trafficking", as sex workers "may have more access to potential trafficking victims than anyone else". Further, criminalization, because it makes sex work a clandestine activity, also increases the risk of becoming a victim of human trafficking [45].

3.3. Paternal Ignorance

I will briefly discuss two possible explanations for the judges' ignorance of the lived realities of already vulnerable people. First, it is likely an example of what has been called paternal ignorance [46] or the White savior complex [27]. In the rush to save vulnerable individuals, the so-called rescuers do not take adequate time to understand the context, nor do they take the time to listen to the people they are trying to save [47], cf. [48]. Sex workers and other marginalized individuals are often seen merely as victims who are supplicants for assistance and not seen as complete individuals who can teach from their experience ([49], ch. 7). As one Catholic thinker wrote, "many of these groups represent

their work as a cosmic battle against evil forces, yet important structural critiques are ignored in the urgency to rescue women and children" ([50], Synopsis).

When confronted with the testimonies of sex workers saying that they are exercising their consent and that they would prefer sex work over other options, many of those who seek to rescue them hold on to the "prostitute imaginary" and argue that this may be their view, but they are living a type of false consciousness. Haker, for example, argues that sex workers play a part in satisfying their clients, and this becomes a fundamental part of their identity: "Even though her self-identity does not matter at all, a sex worker must still create and maintain the illusion of authenticity.. . . In other words, it requires her to make the sexual service appear to be a personal encounter rather than the mere use of her body parts in exchange for money" ([51], p. 235).

Second, it is the very idea of sex work that seems to be anathema—the selling of sex; the commodification of one's body—undignified, and against African values or societal values more broadly. So, it is not the specific context that seems to be important. Instead, it is the more general context of selling sex that seems to be the crux, and it seems to do two things. However, if the judges are seeking to uphold the overall dignity of sexuality, they are relying on a specific form of what is called objective dignity, and they are not seriously considering the heterogeneity of contemporary sex work.

3.4. The Dignity Two-Step

By rooting the argument for criminalization in dignity, most activists and judges, especially in the two African cases above, follow what I call "the dignity two-step." Interrogating this analytical move is crucial considering the increasing importance of dignity arguments in human rights law, including in human trafficking and sex workers' rights cases.

Dignity is not some additional content in human rights law but its central concept [52], and yet it continues to escape serious scrutiny especially by jurists [31,53]. Indeed, dignity seems to be used somewhat carelessly: "In a single opinion a court may rely on multiple meanings of dignity, which sometimes will point in different directions or emphasize very different values" ([53], p. 189). For this analysis, I draw on recent frameworks of dignity by Malby [54], Rao [53], and Yacoub [55] to distinguish between three types of dignity: objective dignity, subjective dignity, and inherent dignity.

Inherent dignity comes to the fore in the human rights documents drafted in the wake of World War II. It is a quality and a right that inheres in each person because they are a person [53]. As Article 1 of the Universal Declaration of Human Rights [56] states, "All human beings are born free and equal in dignity and rights." Objective dignity is an older version of dignity that dominated from ancient times up through the Enlightenment with its focus on *dignitas*. It is grounded in what a society or powerful individuals consider to be dignified. It is a judgment of someone's life choices about what is best for them and for society. "Dignity may require behaving, for example, with self-control, courage, or modesty. This dignity embodies a particular view of what constitutes the good life for man, what makes human life flourish for the individual as well as the community" ([53], p. 187). Finally, subjective dignity is the dignity that someone feels about their own life choices based upon their own life experiences. Subjective dignity is a claim by the affected individual about what is dignified for them. This is the dignity of marginalized groups when standing up and claiming their rights against an oppressive society.

In part because it grounds most human rights documents, very few judges or courts today will ever claim that someone lacks inherent dignity. However, in previous centuries, there were those who were considered sub- or semihuman and lacked full inherent human dignity.

The debate then would seem to be between subjective claims of what is dignified for an individual or group versus what jurists and others claim is objectively dignified. The jurists in *Njemanze* adopt objective dignity, where they are the arbiters of individual and social dignity. Sex work is said to be against social or African values. Subjective dignity might be considered in such cases, but it would be nearly impossible to outweigh society's

conception of objective dignity. The justices in *Jordan* and the concurrence by Villanova in *S.M.* conceded that because of socioeconomic conditions, sex workers often have limited life choices. In such cases, turning to consensual work could be a rational choice that would increase a person's dignity and autonomy. Nevertheless, in both cases, the jurists held that objective dignity trumps claims of subjective dignity.

Here, jurists engage in what I call the "dignity two-step". When they minimize claims of subjective dignity and lean on objective dignity, they are usually quick to point out that they are not saying that the affected individuals do not have their inherent dignity as persons or that the affected individuals do not have rights. The *Jordan* court claimed the sex workers were harming their and society's dignity, but that does not mean that the police and their clients can freely infringe on their human rights. The tragic exception to the common (almost banal) practice of granting inherent dignity is in *Njemanze*, where Nigeria argued that because the plaintiffs were sex workers, human rights do not apply to them. The fact that such a claim was not quickly rebuked in the strongest terms by the court is disturbing, as it goes against the very foundation of modern human rights.

We must ask though what work [57] this two-step does as a governmental apparatus. In other words, what does it accomplish in the real world beyond the case at hand? I argue that the dignity two-step allows the othering of already marginalized people in good conscience. Inherent dignity is supposed to have a leveling effect, where everyone, despite their particular characteristics, has dignity that is to be respected. Nonetheless, the two-step combines this with objective dignity, which is inherently hierarchical (Cf. [58]). Some subjective conceptions of dignity are deemed to be wrong in comparison with objective dignity. The risk is that this is not just saying that someone holds a different moral view but that they do not have enough reason, or that a very fundamental part of themselves is undignified. They are undignified. Or, as Bonthuys writes of the Jordan case, "This argument opens the door to assertions that people who choose to behave in ridiculous and undignified ways could be treated as having a lesser degree of inherent dignity" ([32], p. 398). When working with vulnerable populations, we need to be very careful about any process that chips away at inherent dignity, which "carries the whole burden of being the fountainhead from which the equal rights of man follows" ([59], p. 8). The work of the dignity two-step can be to further marginalize marginalized people.

The granting of inherent dignity allows the jurist to claim that they are not denying the individual their human rights, just the opposite. This allows othering in good conscience and softens the blow of the second step, denying their subjective dignity. It also potentially further justifies paternal ignorance or the White savior complex. If someone has inherent dignity, they are worth saving, and they should be saved from the indignity in which they find themselves. Their subjective dignity claims could also be used as further evidence of their false consciousness, that no dignified person would choose such a life, and thus, they are not the best arbiters for what is best for them.

Soirila [58] argues that because this othering process is such a critical part of legal uses of dignity, it should be avoided in legal decisions. Instead, courts should make decisions based on less philosophical rights, such as the right to health, the right to food, or the right to free speech. However, in the case law under consideration here, the arguments are already framed in terms of dignity. Thus, it cannot be eschewed and must be interrogated.

4. Conclusions: A Call for Heightened Scrutiny

A first premise that all judges and commentators seem to agree on is that sex workers, trafficking victims, and forced migrants are especially vulnerable, and courts have special duties toward vulnerable populations, e.g., [60]. For instance, the concurrence of the Grand Chamber in *S.M.* wrote about how a human rights court must be flexible "to ensure the voices of the dispossessed and vulnerable are heard" ([15], p. 97). Many courts, such as in the jurisprudence on the Equal Protection Clause in the U.S., have adopted a system of tiered scrutiny where disfavored groups are due heightened protection. Laws affecting marginalized groups and more fundamental rights are subject to more intense scrutiny

to determine if they are justified. I go further and argue that human rights tribunals should adopt heightened scrutiny when they are addressing abstract formulations, such as objective dignity or invisible ideologies that could be based on current political rhetoric, both of which can draw them away from the lived realities of vulnerable people. They should take steps to patiently listen to the voices of the affected individuals and provide heightened scrutiny to protect vulnerable people [61]. This constellation of cases involving sex workers, (potential) trafficking victims, and forced migrants of all types is especially fraught and seems ripe for such heightened scrutiny.

Based on my analysis of human trafficking cases, like *Rantsev* and *S.M. v. Croatia*, courts should make exploitation the foundation of such cases. While it remains important to clearly distinguish between human trafficking, slavery, forced prostitution, and other types of forced labor, a critical question should be whether, despite the categorization of the person, they are being exploited. For instance, in the potential ECHR case involving Charo, the Dominican migrant who claimed to have been trafficked into prostitution in Cyprus, the first analysis should be whether her situation meets the definition of human trafficking, and if it meets the standard, which parts of her treatment equate to trafficking. If the situation does not equate to trafficking, was she a victim of exploitation, and if so, which parts of her situation meet the legal standards for exploitation? For example, states should not only determine if trafficking exists, but whether there is "a seriously exploitative labor condition" ([4], p. 42). (Consider the Tang case from Australia [6], the first under the antislavery provisions in Australian criminal law. Five Thai women claimed that their labor conditions in a brothel were tantamount to slavery. They had each been sex workers in Thailand and came to Australia to continue to carry out consensual sex work. They did not complain that they were sex workers or about their general conditions but about the fact that the brothel owner kept them in debt for their "purchase" of USD 45,000. Once they paid off their debt, they were able to choose their own hours and accommodations. Indeed, after their debt was paid off, two of the women stayed on at the brothel. The court ruled that the original condition of employment was tantamount to slavery because it met the principle of ownership, as they had basically been purchased and their debt was such that they lacked freedom.)

As for dignity, heightened scrutiny would urge listening patiently to subjective claims. The courts should be very reluctant to rely on objective dignity when the affected individuals are not claiming their dignity is compromised, as well as when there is plenty of evidence that regulation leads to significant societal harm. Just as importantly, they should ask whether they are chipping away at someone's inherent dignity when claiming they lack proper dignity or are suffering from false consciousness. Courts have made decisions with very little analysis of the facts of cases or without even much understanding of an individual's actions. And, as we saw with the opening vignette from Arizona, as well as the ECOWAS Court in Njemanze, legal officers will often be influenced by current political rhetoric. Deploying paternal ignorance, they may make decisions to save individuals from their own actions and claim that a marginalized person's view of their own best life is based upon false consciousness. Before making such conclusions, a tribunal should interrogate its assumptions and patiently listen to the marginalized person's testimony.

Without such analyses, tribunals devoted to championing the dignity of marginalized peoples and addressing their exploitation risk further marginalizing the marginalized.

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