

Reinforcing or Challenging Stigma? The Risks and Benefits of ‘Dignity Talk’ in Sex Work Discourse

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Abstract The concept of ‘human dignity’ sits at the heart of international human rights law and a growing number of national constitutions and yet its meaning is heavily contested and contingent. I aim to supplement the theoretical literature on dignity by providing an empirical study of how the concept is used in the specific context of legal discourse on sex work. I will analyse jurisprudence in which commercial sex was declared as incompatible with human dignity, focussing on the South African Constitutional Court case of *S v Jordan* and the Indian Supreme Court case of *Budhadev Karmaskar v State of West Bengal*. I will consider how these courts conceptualise dignity and argue that their conclusions on the undignified nature of sex work are predicated on particular sexual norms that privilege emotional and relational intimacy. In light of the stigma faced by sex workers I will explore how a discourse, proclaiming sex work as beneath human dignity, may impact on the way that sex workers are perceived and represented culturally, arguing that it reinforces stigma. I will go on to examine how sex workers subvert the notion that commercial sex is undignified, and resist stigma, by campaigning for the right to sell sex with dignity. I will demonstrate that an alternative legal approach to dignity and sex work is possible, where the two are not considered as inherently incompatible, concluding with thoughts on the risks and benefits of using ‘dignity talk’ in activism and campaigns for sex work law reform.

Keywords Sex work · Prostitution · Human dignity · Stigma · Laclau and Mouffe · Discourse theory

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1 Introduction

If a person sells sex they are often perceived, in the public imagination, as having no dignity. The law echoes this and in a number of legal instruments and judicial decisions the practice of commercial sex¹ is derided as being incompatible with ‘human dignity.’ For example, it is declared that “prostitution...[is] incompatible with the dignity and worth of the human person” in the Preamble to the 1949 United Nations *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*. More recently, the Preamble to Canada’s Protection of Communities and Exploited Persons Act 2014,² suggests that “discouraging prostitution” is “important to protect human dignity” and a European Parliament resolution,³ passed on 26th February 2014, describes prostitution as a “form of slavery incompatible with human dignity.”

‘Dignity’ sits at the very heart of international human rights law and an increasing number of national constitutions, which has led to a vast literature exploring the concept in recent years. Much of the existing literature is focussed on mapping how the concept is used in different legal contexts [18–21, 35, 36, 38, 48, 57], exploring its historical development (for recent examples see [17] and [54]) and assessing its value as a legal and ethical principle [3, 29, 33, 39, 42, 49]. My aim in writing this article is to supplement the theoretical literature on dignity with an empirical study of how the concept is used, and its effects, when deployed in the specific context of legal discourse on commercial sex.

I will do this primarily through an analysis of the caselaw in which judges have engaged with the question of how participation in sex work impacts on a person’s dignity. My focus will be on two cases, the only ones (to my knowledge) in which commercial sex and dignity have been considered in any depth, namely the South African Constitutional Court case of *S v Jordan and others*⁴ (the *Jordan* case) and the Indian Supreme Court case of *Budhadev Karmaskar v State of West Bengal*⁵ (the *Budhadev Karmaskar* case). The courts, in both cases finding that commercial sex is thoroughly incompatible with human dignity, adopt a similar rhetoric asserting that “the dignity of prostitutes is diminished...by their engaging in commercial sex work”,⁶ and that “sex workers obviously cannot lead a life of dignity as long as they remain sex workers.”⁷

¹ I use the terms commercial sex, prostitution and sex work interchangeably to refer to the practice of exchanging sexual services for some form of consideration, normally money.

² This statute introduced a range of new prostitution related regulation into Canadian law including a criminal prohibition on the purchase of sex.

³ European Parliament resolution on sexual exploitation and prostitution and its impact on gender equality—<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0162+0+DOC+XML+V0//EN>. Accessed 18 June 2015.

⁴ [2002] ZACC 22.

⁵ [2011] 2 S.C.R. 925; [2011] 9 S.C.R. 680; [2011] 10 S.C.R. 577; [2011] 11 S.C.R. 397; [2012] 7 S.C.R. 881.

⁶ See note 4 at paragraph 74.

⁷ *Budhadev Karmaskar v State of West Bengal* [2011] 9 S.C.R. 680 (Order of August 2nd 2011) at page 685 (paragraph 11).

I am concerned in this article with studying the discursive effects of ‘dignity talk’ in these judicial decisions rather than with a normative analysis of whether selling sex is, in fact, ‘dignified’ behaviour or not. I begin the article by briefly outlining Laclau and Mouffe’s discourse theory [31] which is the theoretical framework I will be adopting to analyse the effects of ‘dignity talk’ in the caselaw. I will then introduce the concept of human dignity, exploring some of its variant meanings and the tensions that these create in its legal application. In particular, I will draw attention to the divergence in meaning between dignity’s use in human rights law as signifying a universal and inherent human worth and how this contrasts with historical usage of the term (and continuing colloquial use), which constructs worth and value as being conditional upon a person’s circumstances, behaviour and status.

In analysing the caselaw I will explore how the judges engage with these differing interpretations of dignity and consider the model of human sexuality that is depicted in their decisions. Against the background of marginalisation and social stigma faced by sex workers I will explore how a discourse, which proclaims commercial sex as incompatible with human dignity, impacts on how sex workers are perceived and represented culturally. When the courts proclaim that commercial sex violates dignity, I will argue, given the rhetorical association between ‘dignity’ and ‘humanness’, that this reinforces the stigmatising attitudes and stereotypes that portray sex workers as degraded and dehumanised.

In the final part of the article I will explore how sex workers respond to the characterisation of sex work as incompatible with dignity and show that through their own use of ‘dignity talk’, by campaigning for the right to sell sex with dignity, that they subvert the notion that sex work is undignified and, in doing so, resist stigma and marginalisation. Using the recent decision from the New Zealand Human Rights Tribunal in the case of *DML v Montgomery and M&T Enterprises Ltd* (the *Montgomery* case)⁸ I will demonstrate that an alternative legal approach to dignity and sex work is possible, in which the two are not considered to be incompatible. I will contrast the ‘sex working subject’ constructed in the *Montgomery* case with that depicted in the *Jordan* and *Budhadev Karmaskar* cases. The article concludes by examining the risks and benefits of using ‘dignity talk’ in sex work discourse and in campaigns for the reform of sex work laws.

2 Laclau and Mouffe: Discourse Theory

In analysing the discursive effects of ‘dignity talk’ in the caselaw on commercial sex I will apply Laclau and Mouffe’s discourse theory [31]. This asserts that there is no objective reality existing outside of discourse given that “we are always internal to a world of signifying practices and objects” ([26] 7). In this framework, discourse does not simply represent the social but actively and continually constructs social meaning. Laclau and Mouffe emphasise the impossibility of a closed and reconciled society where meanings are fixed and instead embrace the “ultimate contingency of

⁸ 2014 NZHRR 6.

all social identity” ([26] 7). They point to the political realm as the place where meaning is shaped, with attempts made by different social and political actors to fix meaning and create hegemonies [31]. Meaning, however, can only ever be partially fixed as the “infinite of the field of discursivity” ([31] 113) means that there will always be space for dislocation, challenge and reformulation.

The meanings attached to the practice of human beings exchanging sex for money is heavily contested globally with countries around the world adopting varying, and often contrasting, political and legal responses to the issue.⁹ I proceed from the understanding that it is only at the level of discourse that the physical acts that occur between people involved in a commercial sex transaction are given any meaning, including the idea that they are incompatible with human dignity. That is not to say that the acts are not real physical, emotional and psychological experiences for the participants, but that the articulation of these experiences and the meanings given to them is a political, discursive process. My aim, therefore, is to understand how ‘dignity talk’, when deployed in sex work discourse, operates to frame the commercial sex encounter. I begin by accepting that sex is bought and sold in a myriad of different ways, rejecting the idea that prostitution has any fixed and unchanging character, including any essential impact on human dignity.

Discourse theory is a useful tool not only in exploring how meaning is attached to the notion of ‘sex work’ or ‘prostitution’ but also in studying the concept of human dignity, which is often criticised for being “vacuous” [3], “a squishy, subjective notion” [46] and for functioning “merely as a mirror onto which each person projects his or her own values” ([5] 332). Rather than accepting these criticisms as fatal to dignity’s usefulness as a legal concept or analytical tool, Laclau and Mouffe’s discourse theory embraces the idea that it is a discursive construction and, like any other signifier, its meaning will *always* remain contingent. By abandoning the search for the ‘true’ dignity, space is opened up to explore how different social actors, with differing agendas, construct its meaning.

An additional element of discourse theory that is key to my approach in this article is the notion of subject positions. When I use the term ‘sex working subject’, I again rely on Laclau and Mouffe, and reject the idea of a unified, rational and transparent subject in favour of a recognition that subject positions (of which a person can hold many) are discursively constructed ([31] 115). While Laclau and Mouffe accept that subject positions emerge through discourse they still account for a degree of political subjectivity in recognising the contingency of discursive structures ([31] 115). If discourse is never fixed and always open to ‘dislocation’ [30] then this means that subject positions, the products of discourse, are also never fixed and static and can be challenged, resisted and remade. My analysis will illustrate this process by showing how ‘dignity talk’, when used in different contexts and by different social actors, creates very different subject positions for sex workers.

⁹ Countries such as Sweden, Iceland and Norway (and most recently Canada and Northern Ireland) criminalise the purchase of sex but not the sale, some countries (e.g. USA) criminalise all parties involved in the commercial sex transaction and others have varying systems of decriminalisation (e.g. New Zealand, New South Wales Australia) and legalised state regulation (e.g. Turkey, Germany, Netherlands).

3 Human Dignity

3.1 Historical Overview

The word ‘dignity’ has a rich conceptual history being associated, at different periods in time, with varying ideas of what it means to be a human being. In Roman law, *dignitas*, meaning effectively status, is conferred upon individuals primarily by virtue of their holding certain public offices ([24, 54]). A person’s external social role is what endows them with dignity, making *dignitas* a concept that is conditional, unequal and hierarchical. Cicero is said to be the first to take the unequal and hierarchical notion of *dignitas* and universalise this as inhering equally in all human beings [14]. Hierarchy, however, is not entirely absent from this universalist approach to human dignity because it emphasises the superiority of the human being within the natural order. Cicero talks of the human’s ability to think and develop its mind while the “cattle and other animals...only thought is for bodily satisfactions”, concluding that “sensual pleasure is wholly unworthy of the dignity of the human race.”¹⁰

Christianity’s conception of dignity retains Cicero’s idea of elevated status as human beings are said to be made in the image of God [32]. Being made in the image of God makes human beings, unlike other living creatures, “capable of self-knowledge, of self-possession and of freely giving [themselves] and entering into communion with other persons.”¹¹ This connection between dignity and free will was secularised during the Enlightenment, with Kant’s writings, grounded in a vision of the human being as rational and in control of its own destiny, becoming “the most often cited non-religiously-based conception of dignity” ([35] 659). It was in the middle of the twentieth century, however, as a reaction to the horrors that took place during the Second World War, that dignity, as a philosophical ideal, gained increasing traction internationally becoming the cornerstone of a then emerging human rights law [35].

In international human rights law dignity is generally understood to represent the inherent inner worth of all human beings. The Preamble to the Universal Declaration of Human Rights (UDHR) refers to the “inherent dignity...of all members of the human family” and Article 1 goes on to proclaim that “all human beings are born free and equal in dignity and rights.” According to this construction, dignity inheres equally in every human being simply by virtue of being born as human. What is it, though, that provides the philosophical grounding for such an assertion? *Dignitas* is hierarchical, unequal and far from universal; a focus on autonomy and rationality is heavily criticised on the basis that humans possess rational capabilities in varying degrees [19, 39]; and theological arguments hold limited appeal in the secular liberal democracies of the West [3]. The notion of dignity in human rights law, as representing equal and inherent worth is, therefore,

¹⁰ Cicero, *De Officiis I* at 30 as quoted in [35] 657.

¹¹ *Catechism of the Catholic Church*, Part One: The Profession of Faith, Section 2: The Profession of the Christian Faith, Chap 1 Art 1, paragraphs 6, sub-paragraph 357 as quoted in [35] 658.

accused of being ‘free-floating’ ([10] 53) and having ‘no firm anchoring within a secular framework’ ([10] 58).

The idea that a signifier such as ‘dignity’ could be ‘free-floating’ is no surprise to discourse theorists, such as Laclau and Mouffe, who proceed from the basis that there is no central transcendental ground for any signifier ([31] 112). ‘Dignity’ appears to be the ultimate ‘floating signifier’ ([31] 113) in the sense that it is infinitely malleable and can hold within it vastly different ideas, worldviews, philosophies and theologies. Its ability to act as such a ‘floating signifier’ was precisely why it was chosen as the founding principle of the UDHR because it provided ‘a theoretical basis for the human rights movement in the absence of any other basis for consensus’ ([35] 677). Shultziner calls this ‘symbolic representation’ in the sense that “human dignity is used as a linguistic symbol that can represent different outlooks, thereby justifying concrete political agreement on a seemingly shared ground” ([56] 78). By embracing contingency in meaning and abandoning the search to uncover the truth or core of ‘dignity’, the analysis must shift to how the signifier is used and what it does.

3.2 Inherent Worth v Conditional Value

While international human rights law attempts to fix the meaning of dignity as representing the inherent inner worth of all human beings, when the word is used in everyday language it has quite different connotations. In colloquial usage dignity is rarely used to signify a quality that is held universally and equally by all human beings and is instead considered to be conditional, with certain behaviours and life circumstances labelled as ‘dignified’ and others as ‘undignified’. Mattson and Clark identify “dignity as virtuous comportment” as one of the meanings given to dignity in concept and practice in which “dignity is socially constructed around the presentation of the individual’s *self* and the reciprocal response of others” ([34] 307). This creates significant tension in the use of ‘dignity talk’ because if dignity inheres in us all equally by virtue of being born human (as human rights law posits) then it cannot, at the same time, be conditional on how we behave or how we live. Sershow refers to this “precarious semantic combination” ([55] 35) as a “strange relation of calculable and incalculable value and worth” ([55] 34) where dignity “presents itself at once as something absolutely unconditional and absolutely conditional” ([55] 35). When ‘dignity’ is used in a conditional sense it retains a strong connection to the ancient rank-based *dignitas*, which, as discussed, is associated with status, hierarchy and differential moral value.

Whitman and Waldron ([58–60]) have previously argued that the universal notion of human dignity is a result of a “levelling up” process whereby the dignity that was once reserved for those holding high status in society now applies to everyone such that “when we attribute rights by people in virtue of their dignity, we do so on account of some high rank we hold them to have” ([58] 216). Hennette-Vauchez has taken this thesis one step further and suggests that not only does the universal idea of dignity have its roots in the inegalitarian *dignitas* but that these “inegalitarian elements are still at play in contemporary dignity jurisprudence” ([24] 55). She demonstrates that the human dignity principle, in certain contexts,

retains a close resemblance to *dignitas* in the sense that it functions primarily to ground obligations rather than to protect individual rights. While *dignitas* was concerned with protecting social and professional statuses the human dignity principle now operates to protect the status of “humanity as a matter of rank” ([24] 38). This means that “the human dignity principle is not all about human rights” ([24] 56) and jurisprudence on the dignity of commercial sex provides a cogent example of why this is the case.

4 Dignity and Commercial Sex: The Jurisprudence

In the Canadian *Prostitution Reference* case,¹² which considered the constitutionality of two of Canada’s prostitution laws,¹³ Justice Lamer stated that “prostitution, in short, becomes an activity that is degrading to the individual dignity of the prostitute.”¹⁴ Apart from a rather reductive description of a stereotypical “pimp/prostitute relationship” involving forced drug addiction and acts of physical violence immediately preceding the dignity pronouncement, there is no elaboration in the case as to precisely how or why commercial sex degrades the dignity of the prostitute. While some sex workers may sell sex in circumstances described by Justice Lamer, to suggest that coercion and violence is inherent in all forms of commercial sex is not supported by empirical research on the sex industry (see e.g. [7, 11, 50]).

In the case of *Tremblay v France*¹⁵ the European Court of Human Rights declared ‘forced prostitution’ to be incompatible with human dignity but declined to make any comment on ‘unforced’ or voluntary prostitution, acknowledging that “there was no European consensus on how prostitution should be viewed.”¹⁶ My analysis, therefore, focuses on just two cases, the South African Constitutional Court case of *Jordan*¹⁷ and the Indian Supreme Court case of *Budhadev Karmaskar*,¹⁸ which are the only examples of caselaw (to my knowledge) in which judges consider in detail whether commercial sex, in and of itself, is compatible with human dignity.

4.1 The *Jordan* Case

There were three appellants in the *Jordan* case who had all been convicted of prostitution related offences—a brothel owner, an employee of the brothel (receptionist) and a sex worker who provided a “pelvic massage”¹⁹ to an undercover

¹² [1990] 1 S.C.R. 1123.

¹³ Communicating in a public place for the purposes of prostitution (s. 213(1)(c) Criminal Code) and keeping a bawdy house (s. 210 Criminal Code).

¹⁴ See note 12 at page 1194.

¹⁵ Application no. 37194/02 (judgement of September 11, 2007, unreported)—see Case Comment [15].

¹⁶ *Ibid.*

¹⁷ See note 4.

¹⁸ See note 5.

¹⁹ See note 4 at paragraph 34.

police officer, presumably immediately before she was arrested. The appellants argued that the criminalisation of prostitution breached a number of their rights guaranteed under the constitution including their rights to privacy, dignity and gender equality. The Court split (six/five) on the issue of gender equality with the majority finding that South Africa's prostitution law was gender neutral because it "punishes both female and male prostitutes"²⁰ and that "the stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in."²¹

The minority disagreed and in an opinion written by Justices O'Regan and Sachs, held that the effects of the prostitution law, where sex workers (predominantly female) were criminalised and purchasers (predominantly male) were not, indirectly discriminated against women. The minority's opinion on gender equality is premised on the moral double standard where "she [the sex worker] is fallen, [while] he [the purchaser] is at best virile, at worst weak."²² That the prostitution law perpetuates these double standards and "archetypal presuppositions about male and female behaviour"²³ has, according to the minority, "the potential to impair the fundamental human dignity and personhood of women."²⁴

While the minority was of the view that South Africa's prostitution laws impaired the dignity of all women because of its reinforcing of a moral double standard in sexual relations, they decline to find that the law harmed the dignity of sex workers specifically. Contrary to the findings on gender equality, the Court was unanimous that the challenge on dignity grounds had to fail. The majority offer no reasons of their own for the findings on dignity and simply record their agreement with Justices O'Regan and Sachs, in their handling of the matter.²⁵ The minority declare that "to the extent that the dignity of prostitutes has been diminished, the diminution arises from the character of the prostitution itself."²⁶ Prostitution is characterised in the judgment as "indiscriminate and loveless"²⁷ and it is noted that "the sex worker empties the sexual act of much of its private and intimate character."²⁸ They also acknowledge that sex workers are "social outcasts"²⁹ and that "by using their bodies as commodities in the marketplace, they undermine their status and become vulnerable."³⁰ Using one's body as a commodity is also said to "devalue" the "fundamental dignity of the human body", which the Constitution of South Africa aims to protect.³¹

²⁰ Ibid. at paragraph 15.

²¹ Ibid. at paragraph 16.

²² Ibid. at paragraph 65.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid. at paragraph 1. In a judgement that runs to 88 pages the arguments on dignity are given just one paragraph of consideration by the minority.

²⁶ Ibid. at paragraph 74.

²⁷ Ibid. at paragraph 83.

²⁸ Ibid.

²⁹ Ibid. at paragraph 66.

³⁰ Ibid.

³¹ Ibid. at paragraph 74.

The *Jordan* case does not go so far as to suggest that sex workers lose their human dignity by engaging in commercial sex, making it clear that prostitutes must be “treated with respect by law enforcement officers”³² and “with dignity by their customers.”³³ However, the juxtaposition of these pronouncements alongside the declaration that “the dignity of prostitutes is diminished”³⁴ highlights the tensions discussed previously between dignity as representing inalienable inner worth and at the same time as being conditional on a person’s behaviour. Sex workers, according to the court in the *Jordan* case, are at once ‘undignified’ by their engaging in commercial sex but at the same time worthy of being treated with dignity. This is an example of what Sershow describes as dignity’s “strange relation of calculable and incalculable value and worth” ([55] 34).

The *Jordan* case was criticised by some South African scholars ([4 37]) because of its failure to apply an understanding of dignity in line with the South African constitution, which proclaims in Article 10 that “everyone has inherent dignity.” Barrett, for example, argues that the Court specifically relied on a conception of human dignity more closely aligned with *dignitas*, in which factors such as “behaviour, status, or culpability” determine worth and value rather than a universal human dignity that is inherent and inalienable ([4] 539). Meyerson agrees, noting that the judgement elucidates an understanding of dignity “more concerned with conduct which can be described as ‘beneath one’s dignity’” ([37] 150). The *Jordan* case is also used by Hennette-Vauchez as an illustration of how the human dignity principle operates to constrain behaviour and impose obligations in the name of protecting the dignity of humanity [24]. Using the concept of human dignity to justify constraint on the behaviour of sex workers is also evident in the Indian Supreme Court case of *Budhadev Karmaskar*, which deploys an almost identical rhetoric to the South African court in *Jordan*.

4.2 The *Budhadev Karmaskar* Case

The *Budhadev Karmaskar* case originated as a criminal appeal taken by a man who had been convicted of the brutal murder of a sex worker in Kolkata. The appellant’s appeal was dismissed on the 14th February 2011³⁵ and the Supreme Court converted the case *suo moto* (on its own motion) into a public interest litigation on the issue of the “rehabilitation of sex workers.” The Court expresses concern for the welfare of sex workers and declares that “prostitutes also have a right to live with dignity... since they are also human beings.”³⁶ The (female) sex worker is depicted as a victim who sells sex not because “she enjoys it but because of poverty”³⁷ and the Court urges society to “have sympathy towards the sex workers and not look down

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ [2011] 2 S.C.R. 925 (Order of 14th February 2011).

³⁶ Ibid. at page 930.

³⁷ Ibid. at page 926.

upon them.”³⁸ The solution, suggested by the Supreme Court, to the plight of sex workers in India is to direct the government “to prepare schemes for giving [them] technical/vocational training”³⁹ as an alternative to continuing in the “flesh trade.”⁴⁰ The Court constituted a Panel consisting of Senior Advocates and representatives of various NGOs, including the Durbar Mahila Samanwaya Committee (DMSC),⁴¹ to investigate the issues, liaise with Central and State governments, and report back to the Court on how best to ensure the “rehabilitation of sex workers.”

In its initial instructions to the Panel, the Court directed it to consider, not only the rehabilitation of sex workers who wanted to leave sex work, but also how to create “conditions conducive for sex workers who wish to continue working as sex workers with dignity.”⁴² In framing the Panel’s terms of reference this way it appeared that the Supreme Court did *not* consider commercial sex to be incompatible with human dignity, which would have represented a significant departure from the findings in the *Jordan* case. The Panel’s terms of reference, however, are misleading and the Court’s position is categorical, expressed many times in the various Orders⁴³ issued as part of the case, that sex work is fundamentally incompatible with human dignity. For example, the Supreme Court in their Order dated 2nd August 2011 said this:

“We are of the opinion that sex workers obviously cannot lead a life of dignity as long as they remain sex workers. Sex among human beings is different from sex among animals. Sex in humans has a cultural aspect to it also, and is not just a physical act. A sex worker who has to surrender her body to a man for money obviously is not leading a life of dignity. Ordinarily, no woman will willingly surrender her body to a man unless she loves and respects him.”⁴⁴

Like in the *Jordan* case, the Indian Court’s rhetoric exposes the tension between dignity as representing inherent inner worth versus the idea that a person’s dignity is conditional upon their behaviour. Despite the assertions that sex work, by its very nature, is beneath human dignity the Court, at the same time, stresses that sex workers “are also human beings.”⁴⁵ The Court insists, on the one hand, that sex

³⁸ Ibid.

³⁹ Ibid. at page 930.

⁴⁰ [2011] 9 S.C.R. 680 (Order of August 2nd 2011) at page 685.

⁴¹ The DMSC is the world’s largest sex worker rights organisation, based in Kolkata, with over 60,000 members. See www.durbar.org. Accessed 18 June 2015.

⁴² The Panel’s terms of reference were set by Order dated 19th July 2011 (unreported). The terms are reproduced in an affidavit submitted to the Supreme Court by the Government of India dated 17th April 2012. See paragraph 3. Copy available at http://www.lawyerscollective.org/files/GOI%20affidavit%2017_4_12.pdf. Accessed 18 June 2015.

⁴³ The case came before the court a number of times to allow the Panel to report back on its progress and to enable the judges to issue any relevant Orders for implementation of the Panel’s recommendations. See note 5 for citations of all reported Orders.

⁴⁴ [2011] 9 S.C.R. 680 (Order of August 2nd 2011) at page 685 (paragraphs 11–12).

⁴⁵ Order of 14th Feb 2011 at page 926.

workers should be respected and society “should not look down upon them”⁴⁶ while concurrently declaring that they are “not leading a life of dignity.”⁴⁷ Yet again, there is an element of contradiction in these pronouncements and it highlights the slippage between the two conceptions of dignity previously discussed.

When the Indian court declares that “sex among human beings is different from sex among animals”⁴⁸ they alert us to the fact that their judgements on the dignity of sex work is predicated on a particular interpretation of appropriate and ‘dignified’ human sexual interaction. The *Jordan* case similarly reifies certain sexual norms and a particular model of human sexuality emerges from the caselaw grounded in the courts’ use of ‘dignity talk’.

5 Dignity and Human Sexuality

One effect of ‘dignity talk’ in the *Jordan* and *Budhadev Karmaskar* cases is the reification of a certain view of human sexuality that situates the sexual act as a practice that should transcend sensual bodily pleasure and be grounded in a deeper emotional connection based on love. In the *Jordan* case it is the fact that commercial sex is “indiscriminate and loveless”⁴⁹ that appears to make it incompatible with human dignity and it is noted that the sex worker “is not nurturing relationships or taking life-affirming decisions about birth, marriage or family”, which are worthy of constitutional protection, instead, “she is making money.”⁵⁰ The vision of human sexuality that is constructed in the *Jordan* case has been described as a “sanitised, pastoral picture of sex” ([22] 235) and “a very Victorian morality” ([9] 400). The depiction, in particular, of female sexuality creates a good woman/bad woman (Madonna/Whore) dichotomy where expressions of female sexuality within the confines of an “intimate and meaningful human relationship”⁵¹ are ‘dignified,’ in contrast to commercial sex acts, which are “indiscriminate and for reward.”⁵²

Similar sexual values are evident in the *Budhadev Karmaskar* case when the Court suggests that ‘dignified’ human sexuality should transcend the physical act, because “sex in humans has a cultural aspect to it,”⁵³ and be experienced as part of a loving relationship. Female sexuality is reduced and essentialised as wholly passive as women “surrender” their bodies to their male partners and the Court sets up the very same good woman/bad woman dichotomy that is evident in the *Jordan*

⁴⁶ Ibid.

⁴⁷ See note 44.

⁴⁸ Ibid.

⁴⁹ See note 4 at paragraph 83.

⁵⁰ Ibid.

⁵¹ Ibid. at paragraph 79.

⁵² Ibid. at paragraph 83.

⁵³ See note 44.

case when it says that sex workers “are not bad persons”, rather, “unfortunate girls who have been forced to go into this flesh trade due to terrible poverty.”⁵⁴

It is my argument that the signifier ‘dignity’ is a key rhetorical device in de-emphasising (even denigrating) human corporeality, both within and beyond the realm of sexuality. That a ‘dignified’ human being is one that transcends the body is consistent across dignity’s varying interpretations. *Dignitas* was concerned with external social function and role; Christianity’s notion of human dignity rests on the human’s likeness to God, a being without body; and Kant’s philosophy is grounded in the cerebral quality of rationality. In its colloquial usage we often think of ‘dignified’ behaviour as behaviour that is restrained and where our animal bodies and raw emotions are tamed and controlled. Even in human rights law itself Oliver notes that the ‘human rights subject’ is described “in the most abstract terms” as “equal in rights and dignity” and “endowed with reason and conscience”, but without a single reference to corporeality“ ([41] 94–95).

Given dignity’s uneasy relationship with the body it is perhaps unsurprising that the courts in these cases associate ‘dignified’ sexual interaction with relational and emotional intimacy. Adler contends that the courts fasten ‘dignified sex’ to relatedness as a way to discharge the “shame, terrors and anxieties associated with sex” ([2] 31), including its connection to our animal bodies. Instead of declaring all sex to be undignified, however, her theory is that we create hierarchies of sexual conduct and “siphon off sex that occurs in the context of an enduring relation from its deprived counterpart” ([2] 38). The “deprived counterpart” being “utterly self-regarding, unrelated, animalistic sex” ([2] 38). In this respect ‘dignity talk’ has a sanitising effect where the “messiness, complexity...and [possibility of] pleasure for pleasure’s sake” in sexual contact is denied ([22] 235).⁵⁵

By adopting a discourse which positions relational intimacy as ‘dignified’ the caselaw “inherently degrades sex that occurs outside of the normatively prized context” ([2] 31) and a hierarchy of sexual conduct is created with commercial sex lying firmly at the bottom. It is my contention that this denigration of commercial sex as a practice has an impact on how those who undertake it are perceived, especially in light of the existing stigma that sex workers face. How does a discourse, which depicts sex work as incompatible with dignity, influence the construction of the sex working subject?

6 ‘Dignity Talk’, Stigma and the Sex Working Subject

While Bell reminds us that the “flesh and blood female body engaged in some form of sexual activity for some form of payment has no inherent meaning” ([6] 1) she goes on to argue that it has been produced, through modern discourse, as “the other

⁵⁴ [2011] 9 S.C.R. 680 (Order of August 2nd 2011) at page 685–686 (paragraph 14).

⁵⁵ The judicial attempts to ‘dignify’ sex when it takes place in the context of an enduring relationship is not only to be found in the caselaw on commercial sex. See [1] and [22] for a discussion of how the same reasoning is applied in cases, from the US and South Africa, where sodomy laws are struck down as unconstitutional.

of the other: the other within the categorical other, “woman”” ([6] 2).⁵⁶ She situates the formation of the “prostitute body” within wider discourses of the feminine “which separate the female body into the reproductive body and the un(re)productive body” ([6] 41) and “dichotomizes the female into the “good” and “bad” woman” ([6] 2). Purity and virtue become associated with the “good woman”, who is first and foremost a wife and mother and the “bad woman”, the whore, uses her sexed body “in a way wholly inconsistent with her gender identity” ([40] 127). That sex workers transgress the bounds of respectable sexual conduct and womanhood leads to the imposition of the ‘whore stigma’ [44], which has the effect of reducing the sex worker “from a whole and usual person to a tainted, discounted one” ([23]: 12). Bruckert notes that the “occupational stigma” related to sex working, unlike other “tainted” jobs, becomes a “personal attribute...beyond the sphere of work” so that it “is constructed as a master status that has permanence across social *space*...[and] *time*” ([12] 58). The whore stigma then eclipses everything else about the sex worker “so that what the individual *does* is read as who she *is*” ([13] 47).

While Goffman’s original articulation of stigma situated it as a phenomenon that was experienced at the individual level in interactions between stigmatised persons and “normals,” Bruckert and Hannem identify the notion of structural stigma where it is also “embedded in societal structures and institutions and enacted on populations via regulatory and legal policy” ([13] 49). O’Connell Davidson notes that “the status of prostitutes (women in particular) as Other is often enshrined in law, and they have historically been and still are frequently subject to controls which would not be imposed upon full, juridical citizens” ([40] 129). The examples she gives include requirements to register with the police, being forced to undergo medical examinations and having their freedom of movement restricted, all legal controls that remain commonplace for sex workers around the world (for examples of legal controls used against sex workers in a UK context (see [45, 51–53]).

In analysing the impact of ‘dignity talk’ in the judicial decisions on commercial sex, it is crucial to remain aware of the “material-rhetorical context into which the...text is projected” ([25] 108), which is a context in which sex workers are highly stigmatised. Stigma, according to Goffman, has a dehumanising effect on the stigmatised where “we believe the person with a stigma is not quite human” ([23] 15). When a discourse is deployed that depicts a stigmatised group, such as sex workers, as having their dignity eroded, the risk is that this simply reinforces the dehumanising effect of the stigma and feeds the belief that “[sex] work renders [sex workers] inhuman. They are “fallen women”, and what they have fallen from is humanity itself” [8].

‘Dignity talk’ reinforces stigma in this way because ‘dignity’ has such strong rhetorical associations with ‘humanness’ and is recognised as one of those qualities that makes us uniquely human, setting us apart from the rest of the animal world. We see this notion reflected in the *Budhadev Karmaskar* case where the Court notes that under Article 21 of the Indian Constitution, which protects life and personal

⁵⁶ Sex is sold by people of all genders and yet discourse on commercial sex (including the jurisprudence being explored in this article) is highly gendered with a focus almost exclusively on cis-gendered female sex workers.

liberty, that “the word ‘life’ has been interpreted...to mean a life of dignity, and not just an animal life.”⁵⁷ Justices O’Regan and Sachs in the *Jordan* case similarly articulate this connection between dignity and humanness when they say that the South African Constitution “values human dignity which inheres in various aspects of what it means to be a human being.”⁵⁸ It is being invested with ‘dignity’, according to the UDHR, that makes human beings worthy of the protection afforded by human rights laws. If having dignity is such a defining aspect of humanness then the suggestion that “sex workers obviously cannot lead a life of dignity”⁵⁹ and that “the dignity of prostitutes is diminished...by their engaging in commercial sex work”⁶⁰ may have a subtly dehumanising effect that simply reinforces the stigma that they routinely face.

It is not my contention that the judges in the South African Constitutional Court or the Indian Supreme Court intended in their judgements to construct or represent sex workers as dehumanised subjects. Both courts emphasised that sex workers should, in fact, be treated with respect as human beings. Their unequivocal assertion, however, that sex work is ‘undignified’ is a form of rebuke and it classifies the practice of commercial sex as incompatible with our status as human beings. While this does not necessarily imply that sex workers, as individuals, are less than human I would argue that it may reinforce stigma by framing the activities they undertake as ‘non-human’ or ‘animal-like’. It is important to remember that the stigma faced by sex workers is not based on innate characteristics like skin colour or ethnic origin but is grounded entirely in the fact that they sell sex. If Bruckert and Hannem are right and the ‘whore stigma’ operates “so that what the individual *does* is read as who she *is*” ([13] 47) then proclaiming the activity of selling sex as ‘beneath human dignity’ has the potential to reinforce harmful cultural attitudes in which sex workers are perceived as degraded and dehumanised.

Giving up sex work, or being “rehabilitated”, then becomes the condition that must be fulfilled in order for sex workers to restore their dignity as human beings. This is evident in the *Budhadev Karmaskar* case where the Court’s proposed solution to the difficulties faced by sex workers is the provision of “technical training” that will allow them to “earn their livelihood through their technical skills instead of selling their bodies”, which will eventually “enable them to live a life of dignity.”⁶¹ Again, I would argue that these remarks perpetuate the stigma faced by sex workers by suggesting that a “life of dignity” is only possible when they submit to being rescued and rehabilitated and, ultimately, stop selling sex.⁶² But is rescue and rehabilitation really what sex workers want?

⁵⁷ [2011] 10 S.C.R. 577 (Order of 24th August 2011) at page 580 (paragraph 1).

⁵⁸ See note 4 at paragraph 74.

⁵⁹ See note 7.

⁶⁰ See note 6.

⁶¹ [2011] 9 S.C.R. 680 at page 686 (paragraph 15).

⁶² The Court initially sought representations on how to create “conditions conducive for sex workers who wish to continue working as sex workers with dignity”, implying that rescue and rehabilitation was not a prerequisite for sex workers to live with dignity. After submission of an affidavit (see note 42) from the Indian government expressing concern that this was tantamount to “encouraging prostitution” the Panel’s terms of reference were amended such that any reference to sex workers continuing in sex work was

7 Sex Workers Respond: ‘Dignity Talk’ in Sex Worker Rights Discourse

Sex workers are keenly aware of how they are perceived and represented as degraded and debased, devoid of dignity. Kempado notes that several of the sex workers she interviewed in the Caribbean island of Curacao “held the impression that they were viewed by the larger society purely as sex objects or drug addicts who were lacking dignity and self-respect” ([28] 136) and a group of Indian sex workers note that “though born as humans [they] are not regarded as such” ([43] 200). The sex worker rights movement began to organise in the 1970s and it has developed into a worldwide movement that unites sex workers from different cultural backgrounds with a variety of experiences in sex work [27]. While the constituent groups in each region of the world have their own particular focus, the movement is broadly united in its campaign for the repeal of criminal laws against commercial sex and for the legal protection of sex workers.⁶³ The movement attempts to dislocate the prevalent meanings given to commercial sex as an inherently violent and/or deviant practice and resists the cultural representation of sex workers as social outcasts [27].

Some sex worker rights groups put the concept of dignity at the heart of the organisation’s mission statement or vision. Despite the varying cultural contexts in which different sex worker groups operate, there is remarkable similarity in how they use the concept to frame their political goals. Examples include the Kolkata based DMSC (Durbar Mahila Samanwaya Committee) whose mission is “to establish, promote and strengthen the rights, dignity, social status, and improvement of the quality of life of all sex worker communities”⁶⁴ and Edinburgh based SCOT-PEP (Scottish Prostitutes Education Project), an organisation that is “committed to promoting health, dignity and human rights for all involved in sex work”.⁶⁵ What is important to note about how the term dignity is employed in these examples is that the organisations are calling for the rights of sex workers to live and work *with dignity*. In other words, sex worker rights discourse, contrary to the judicial decisions discussed above, frames sex work as entirely compatible with a person’s human dignity.

One organisation that explains in more detail how it conceptualises ‘dignity’ is the Sex Worker Outreach Project (SWOP), the largest sex worker rights group in the United States, which has Chapters operating in fifteen different States and cities.⁶⁶ Each Chapter must sign up to the SWOP Agreements, which set out the organisation’s values and principles, including its view on ‘dignity’. The SWOP

Footnote 62 continued

removed. In a conjoined Order to the one in which the Panel’s terms of reference were varied Justice Gyan Sudha Misra was at pains to point out that the Court was in no way advocating the acceptance and recognition of sex work or encouraging sex workers to continue working “as it cannot be denied that the profession of sex trade is a slur on the dignity of women.” See [2012] 7 S.C.R. 881.

⁶³ See Global Network of Sex Work Projects. www.nswp.org. Accessed 18 June 2015.

⁶⁴ DMSC, The Durbar Mission. Available at <http://durbar.org/html/profile.aspx>. Accessed 18 June 2015.

⁶⁵ SCOT-PEP, Home Page. Available at <http://www.scot-pep.org.uk/>. Accessed 18 June 2015.

⁶⁶ See <http://www.swopusa.org/about-us/chapters/>. Accessed 18 June 2015.

argues that “[i]n the past “respect” and “dignity” were used against sex workers and other “un-pure” women to kill or imprison them” and through their activism they “choose to reclaim these words and give them renewed meaning.”⁶⁷ The inclusion of the term ‘other “un-pure” women’ points to a religious-moralistic understanding of dignity as being responsible for harm done to sex workers. An “honor[ing] of the unique diversity that is intrinsic in all people”⁶⁸ is the renewed meaning given to dignity in the SWOP Agreements, which is in line with the meaning assigned to it in mainstream human rights discourse. By honouring ‘unique diversity’, the equal worth and value of everyone is recognised regardless of their individual attributes, life experiences and backgrounds. The SWOP is attempting here to replace a moralistic reading of the human dignity principle with a universal and democratic interpretation. Sex workers’ dignity, according to SWOP, is not determined by *what they do* but by *who they are*—it is unconditional. The SWOP Agreements depict a sex working subject that is resisting marginalisation and secure in its place as an equal human being with dignity.

While sex worker rights activists adopt ‘dignity talk’ as a way to directly engage with (and resist) a discourse, which constructs commercial sex as incompatible with dignity, it is also used as a tool to bolster their own political campaigns, which call for the decriminalisation of sex work. The concept is most frequently invoked in sex worker rights discourse alongside complaints of the discrimination, stigma and harassment experienced by sex workers. For example, Canadian sex worker rights organisation, Chez Stella, argues that “stigmatization has a major influence on the lives” of sex workers and “compromises their dignity” [16]. The stigma and harassment experienced by sex workers, it is argued, is the direct result of the criminalisation of sex work and South African sex workers say that criminalisation “offer[s] no dignity to women”⁶⁹ and “exposes sex workers...to massive indignities through their interaction with police and other state agents.”⁷⁰

Decriminalisation of sex work and efforts to reduce stigma and marginalisation are then posited as the material change in conditions that are required to enable sex workers to live and work with dignity. The solutions presented by the DMSC to enable sex workers to “earn a little dignity and self respect” include “legal recognition for [their] profession” and “to make [their] professional environment more humane” ([43] 203). Dignity, therefore, is not restored in sex workers through rehabilitation but by removing criminal laws, altering societal attitudes towards them and improving their working conditions. Another group of US based sex workers, Prostitutes of New York (PONY), concur and argue that sex workers “do not want to be turned away from sex work—they want their rights and dignity as sex workers protected and respected” [47]. An illustration of how the decriminalisation

⁶⁷ See SWOP Agreements. Available at <http://www.swopusa.org/about-us/swop-agreements/>. Accessed 18 June 2015.

⁶⁸ Ibid.

⁶⁹ Sisonke (South African Sex Worker Movement) and SWEAT (Sex Workers Education and Advocacy Taskforce). ‘Decriminalisation of Sex Work—the only legal arrangement which offers dignity to women’. May 14th 2012. Unpublished, copy held on file and available from author. Page 10.

⁷⁰ Ibid.

of sex work and a commitment to improving social attitudes towards commercial sex can create a very different legal approach to the dignity of sex workers, than the cases previously discussed, is provided by the New Zealand Human Rights Tribunal in the *Montgomery* case.⁷¹

8 An Alternative Approach: The *Montgomery* Case

In 2003 the New Zealand Parliament passed the Prostitution Reform Act, which decriminalised adult sex work and aimed to “create a framework that safeguards the human rights of sex workers.”⁷² The Act decriminalised the selling and buying of sex on the streets as well as creating a system of Small Owner Operated Brothels (SOOBs), where up to four sex workers can work collectively from an indoor premises without requiring a license. Any person seeking to open a larger brothel, where more than four sex workers will be working requires a Brothel Operators Certificate, which certifies them as a suitable person to exercise control over sex workers in the workplace. Sex workers operating in managed premises have access to labour rights and human rights protection and can pursue claims before the courts, like any other worker or employee.

A female sex worker, who was working at a brothel in Wellington called the Kensington Inn, made a complaint of sexual harassment against Aaron Montgomery, the manager of the brothel. When workers begin working at the brothel, information about them, including details about their bodies and the services they are willing to provide, are noted on a card at reception in case enquiries are made by clients. There is, therefore, no requirement for brothel managers to repeatedly ask sex workers about their intimate body parts or the sexual services they offer, which Mr Montgomery did repeatedly to this particular sex worker. The Tribunal found that Mr Montgomery “enjoys controlling women and at times humiliating them”⁷³ and that his comments created a “demeaning and hostile work environment”⁷⁴ for the complainant, which culminated in her leaving her employment at the Kensington Inn. Upholding the complaint of sexual harassment the Tribunal awarded the sex worker compensation of \$25,000 for “humiliation, loss of dignity and injury to feelings.”⁷⁵ In compensating the sex worker for loss of dignity, the implication is that her dignity was left intact by her involvement in commercial sex and only affected by the unlawful sexual harassment.

In justifying the award for loss of dignity, the Tribunal referred to the Canadian Supreme Court case of *Law v Canada*⁷⁶ where Justice Iacobucci stated that human dignity “means that an individual or group feels self-respect and self-worth”, that it is “concerned with empowerment” and that it “is harmed when individuals and

⁷¹ See note 8.

⁷² s.3 Prostitution Reform Act 2003.

⁷³ See note 8 at paragraph 92.

⁷⁴ *Ibid.* at paragraph 119.1.

⁷⁵ *Ibid.* at paragraph 138.

⁷⁶ [1999] 1 SCR 497.

groups are marginalized, ignored, or devalued.”⁷⁷ So, in the *Montgomery* case, the Tribunal situates the “loss of dignity” not in the sex worker’s involvement in commercial sex per se but in the harmful experiences that occurred while she was selling sex. The focus shifts from a concern with how sex workers’ actions impact on their dignity, like in the *Jordan* and *Budhadev Karmaskar* cases, to how their dignity is affected by their treatment at the hands of others. If the Tribunal had adopted the view that the complainant’s human dignity was already diminished by her involvement in commercial sex, as the other courts chose to do, then this precludes a complete recognition of the harm caused by Mr Montgomery’s actions. After all, how can a subject whose dignity is already diminished by selling sex maintain a sufficient sense of self-worth such that sexual harassment or other wrongs can be recognised? And how can a subject that is already stigmatised as degraded and undignified be any further marginalised, ignored or devalued? The Tribunal in the *Montgomery* case resists any stigmatising discourse and constructs a humanised sex working subject, concertedly asserting the rightful place of sex workers as equal human beings who “have the same human rights as other workers.”⁷⁸

9 Conclusion

My aim in writing this article has been to explore both the risks and benefits of ‘dignity talk’ in sex work discourse. I have been critical of the use of ‘dignity talk’ in the *Jordan* and *Budhadev Karmaskar* cases because of the confusion it creates between recognising dignity as inherent and inalienable while, at the same time, suggesting that a person’s dignity is conditional upon how they behave. The judgement that commercial sex is incompatible with human dignity, because it is a debasement of human sexual interaction, rests on particular sexual norms that privilege sexual expression experienced within loving and enduring relationships. I have argued that a discourse of this nature, which suggests that sex workers’ dignity is reduced through participation in commercial sex, has the effect of reinforcing stigma and perpetuating harmful stereotypes that frame sex workers as degraded and dehumanised.

One of the benefits of ‘dignity talk’ is its ability to become an act of recognition, an acknowledgement that sex workers are equal and valued members of the human species. This is evidenced in its use by the sex worker rights movement where sex workers assert their dignity as human beings and demand that this be respected and protected without any form of rescue and rehabilitation. This subverts the notion that commercial sex is incompatible with human dignity and becomes an act of dislocation where the signification of prostitution as undignified is challenged, opening up space for new discourses and political possibilities to emerge. These

⁷⁷ Ibid. at paragraph 53.

⁷⁸ See note 8 at paragraph 146.

new political possibilities, as shown in the *Montgomery* case, can include increased access to legal rights and protection from abuse and harassment.

When considering the value of adopting ‘dignity talk’ in campaigns for sex work law reform, activists should consider not only the benefits but also the risks identified, in particular, the propensity for ‘dignity talk’ to construct or reinforce a degraded and dehumanised subject position. When the sex worker rights movement argues that sex workers’ dignity is violated through criminalisation and can be restored through a process of social and legal change⁷⁹ this continues to allow for the possibility of a dehumanised subject to emerge. While sex workers’ dignity (humanness) is now dependent on the actions of the state (through the enforcement of its criminal laws) rather than being affected by their involvement in commercial sex this discourse still constructs dignity as conditional and depicts sex workers as having none.

That does not mean that ‘dignity talk’ should never be used in political campaigns for sex work law reform. Indeed, there are clear political advantages for doing so in certain contexts, for example, in countries where constitutional protections are grounded in the human dignity principle. Rather, activists should remain alert as to *how* they use ‘dignity talk’ and may want to argue that legal and social change is essential not to restore dignity to sex workers, but as a way to recognise that sex workers have always had, and will never lose, their dignity as human beings.

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⁷⁹ E.g. “Reform of the currently criminalised legal status of South Africa’s sex industry is clearly the way to bring dignity to women involved in that industry”. See note 70.

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