

# TOWARDS A SEXUALLY FREE SOUTH AFRICA: A FEMINIST AND CONSTITUTIONAL DEFENCE IN FAVOUR OF LEGALISING PROSTITUTION THROUGH THE RIGHT TO BODILY INTEGRITY

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## 1 Introduction

In 2017 the South African Law Reform Commission (hereafter the Commission), published a Report in terms of which, the Commission recommended that prostitution should remain criminalised in South Africa.<sup>1</sup> This position is justified with reference to economics-based arguments, and the high rate of physical and sexual abuse endured by women in South Africa.<sup>2</sup> The Commission posits that decriminalisation will make women more vulnerable in light of the reasons outlined above.<sup>3</sup>

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1 South African Law Reform Commission Sexual Offences Adult Prostitution Project 107 Report first published in 2017.

2 As above.

3 South African Law Reform Commission Sexual Offences Adult Prostitution Project (n 1).

However, Section 12(2)(b) of the Constitution states that everyone has the right to security in, and control over his or her body.<sup>4</sup> It is in light of this right to bodily integrity, that I intend to argue that prostitution should be legalised.<sup>5</sup> Any constitutional order that affords the right to bodily integrity, should refrain from defining realms of acceptable sexual conduct or relations.<sup>6</sup> Drucilla Cornell identifies three essential elements, which she believes are basic minimum conditions for individuation, without which one can never embrace one's personhood to the fullest.<sup>7</sup> These conditions are:

- (1) Bodily integrity,
- (2) Access to means by which one can differentiate oneself from others, and
- (3) The protection of the imaginary domain.<sup>8</sup>

For purposes of this article I will focus on the first element, bodily integrity, and the last element, the protection of the imaginary domain. The protection of these two elements is a prerequisite to achieving sexual freedom.<sup>9</sup> Sex and sexual freedom are formative to human personality.<sup>10</sup> The imaginary domain mentioned above refers to a proverbial space 'of the as if in which we imagine who we might be if we made ourselves our own end'.<sup>11</sup> In other words, the imaginary domain is a space in our minds, where we contest everything society teaches and imposes; it is a space where we continually strive to come up with our identities, and how to live out those identities in society.<sup>12</sup> Therefore, the call for its protection should be understood to be a legal and moral obligation on all of us.<sup>13</sup> In this article I will argue that the decision to go into prostitution should be understood to have been made behind the proverbial veil mentioned above, whose intrusion would amount to the violation of one's imaginary domain.<sup>14</sup> For purposes of this article, sex in the sexual freedom mentioned above refers to an activity in which all human beings engage as sexual beings.<sup>15</sup>

Furthermore, I will argue that legalising prostitution can improve prostitutes' access to basic services, such as healthcare, the police and the courts. Moreover, I will argue that, based on the moral obligation to protect the imaginary domain, prostitution is another

4 The Constitution of the Republic of South Africa 1996 (hereafter the Constitution).

5 D Cornell *The imaginary domain: Abortion, pornography and sexual harassment* (2016) 3.

6 As above.

7 Cornell (n 5) 4.

8 As above.

9 Cornell (n 5) 5.

10 Cornell (n 5) 6.

11 D Cornell *At the heart of freedom: Feminism, sex, and equality* (1998) 7.

12 As above.

13 Cornell (n 11) 9.

14 Cornell (n 11) 5.

15 Cornell (n 5) 7.

way to manifest sexual freedom, and should form part of the moral community of all persons.<sup>16</sup> Throughout this article I will argue that women demand inclusion and recognition into the 'moral community of persons, as a matter of right'.<sup>17</sup> The aim of this article is to argue that when recognised as persons, women can be independent enough to have the freedom to determine their sexual lives, including what meaning and benefit to derive from their sexual relations.<sup>18</sup> Granted that Section 9 of the Constitution enshrines all of our rights to be treated equally as persons, women must be given rights and resources in line with them being equal persons.<sup>19</sup>

I will further argue that Section 12(2)(b) of the Constitution, to the extent that I relate it to prostitution, imposes a negative obligation on the state to refrain from refereeing sexual conduct.<sup>20</sup> This negative obligation applies only to the extent that the sexual conduct in question involves adults who freely consent thereto. Throughout this article, I will argue that women's vulnerability in prostitution is perpetuated by a continued criminalisation, and the Commission's recommendation to maintain the *status quo* does not help to improve the plight of women involved in prostitution. On the contrary, criminalisation victimises prostitutes, and endorses a social stigma associated with prostitution.<sup>21</sup> The Commission should have rather devoted its attention to finding solutions on how South Africa can undertake a process of legalising prostitution, and simultaneously address the exploitative nature of prostitution. I will also argue that by virtue of being a politically free society, women involved in prostitution should organise themselves politically, and not rely solely on legal remedies to advance their problems, but rather use political representation as their primary means by which to represent themselves. Have the remedies offered by the South African legal order been exhausted to provide utmost security for sexual freedom?

## 2 Constitutional rights versus public interests

Below I caution against over-reliance on legal action as a means of advancing the cause for legalising prostitution. However, it is still important to assess the efficiency of existing legal remedies in order to point out the flaws, and secondly suggest a way forward. In particular, I will assess whether women enjoy sexual autonomy and freedom any more than they did before the constitutional era. I will

16 Cornell (n 5) 14.

17 Cornell (n 11) 62.

18 As above.

19 The Constitution (n 4); Cornell (n 11) 62.

20 The Constitution (n 4).

21 Cornell (n 11) 12.

base my argument on the Constitutional Court judgment of *S v Jordan*.<sup>22</sup>

There is a qualitative difference between rights and public interests.<sup>23</sup> This is even more significant in South Africa, because we have a Bill of Rights, which gives special protection to particular individual rights.<sup>24</sup> The Bill of Rights affords this special protection while recognising their non-absolute nature, hence the Bill contains a limitations clause (Section 36), in terms of which these special rights may be limited.<sup>25</sup>

Section 36 provides:

1 The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom taking into account all relevant factors including

- (1) The nature of the right;
- (2) The importance of the purpose of the limitation;
- (3) The nature and extent of the limitation;
- (4) The relation between its nature and its purpose; and
- (5) Less restrictive means to achieve the purpose.

2 Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.<sup>26</sup>

Section 36 recognises that rights are a strong card, and thus cannot simply be taken away merely because doing so is in the general good to advance public interests.<sup>27</sup> This is not to suggest that the rights contained in the Bill of Rights can never be limited, not even to advance greater public interests.<sup>28</sup> Section 36 simply seeks to ensure that rights are not limited purely on the basis of a cost-benefit analysis.<sup>29</sup> This section reflects an understanding of the non-absoluteness of rights, in a way that accommodates their superior character.<sup>30</sup> This is why the Bill of Rights protects individuals from being coerced to sacrifice certain interests, even if that happens at the expense of some social cost.<sup>31</sup> This is why individuals cannot have their personal and sexual relations be interfered with, for the general good.<sup>32</sup> Therefore, when women demand to be sexual as they see fit, the demand is based on the understanding that they will still be

22 *S v Jordan* 2002 (2) SACR 499 (CC).

23 D Meyerson 'Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan*' (2004) 1 *Acta Juridica* at 138.

24 Meyerson (n 23) 139.

25 As above.

26 The Constitution (n 4).

27 Meyerson (n 23) 138.

28 As above.

29 As above.

30 As above.

31 Meyerson (n 23) 138.

32 As above.

accorded self-respect, as worthy members of society.<sup>33</sup> The delegitimisation of someone's sex curtails that individual's freedom, by imposing behavioural standards which do not accord with one's efforts aimed at individuation.<sup>34</sup>

The South African Constitution not only identifies rights entrenched in the Bill of Rights as being human rights, but democratic values as well.<sup>35</sup> This holistic approach is intended to prevent the reduction of democracy to a mere majority rule, to the detriment of minority groups.<sup>36</sup> It must be noted that minority does not only refer to numbers of a certain group in society, but the influence such a group has in determining its identity as a group, and that of its constituent individuals.<sup>37</sup> Given the holistic nature of the Bill of Rights, it is likely that its provisions may have to be enjoyed by individuals, even though that may cause discomfort with certain public interests.<sup>38</sup> Similarly, these rights cannot be limited simply because there is a legitimate state purpose to be advanced.<sup>39</sup> Even if it is found that there is a legitimate state purpose at stake, it may still be unjustifiable to limit a provision of the Bill of Rights.<sup>40</sup> Section 36 imposes a high standard to be met, before limiting a provision of the Bill of Rights.<sup>41</sup> Having established that the provisions of the Bill of Rights amount to trumps in their character, I now turn to assess the *ratio* of the *Jordan* case, in light of sexual freedom.

### 3 Does the Constitutional Court understand sexual freedom and sexual equality?

The *Jordan* case involved the challenge of the constitutional validity of the provisions of the Sexual Offences Act of 1957<sup>42</sup> (hereafter the Act), which outlaws commercial sex.<sup>43</sup> I will focus on Section 20 (1A)(a) of the Act which criminalises providing sex for a reward.<sup>44</sup> In particular the challenge was that the Act unjustifiably infringed upon the constitutional rights to equality, privacy and dignity.<sup>45</sup> This case was decided in terms of the interim constitution, however, in this

33 Cornell (n 5) 72.

34 As above.

35 R Robson 'Sexual democracy' (2007) 23 *South African Journal of Human Rights* at 409.

36 Robson (n 35) 412.

37 As above.

38 Meyerson (n 23) 144.

39 As above.

40 As above.

41 Meyerson (n 23) 143.

42 Sexual Offences Act 23 of 1957.

43 Meyerson (n 23) 145.

44 As above.

45 Meyerson (n 23) 144.

article, I will use the 1996 Constitution since the clauses in question are similar.

The majority and the minority decisions were based on the understanding that Section 11 is directed at the prostitute and not the customer.<sup>46</sup> The majority held that the section does not unfairly discriminate against women, nor infringe the right to privacy.<sup>47</sup> Given that the majority of prostitutes are women, it was argued that on that basis the section amounts to unfair indirect discrimination against women.<sup>48</sup> However, the majority held that the provision is justifiable, bearing the qualitative difference regarding the conduct of the merchant and that of the customer.<sup>49</sup> The court further held that, because the Act pursues an important and legitimate constitutional purpose (to outlaw commercial sex), whatever discrimination may occur as a result of this provision is not unfair.<sup>50</sup> However, the court did not apply the test it has always applied regarding equality challenges.<sup>51</sup>

The test was that the court firstly distinguished between mere differentiation and discrimination.<sup>52</sup> Direct discrimination occurs when there is express differential treatment on a specified or unspecified ground; indirect discrimination occurs when differential treatment on neither a specified ground nor unspecified ground amounts to discrimination on specified or unspecified grounds. Direct or indirect discrimination may or may not be unfair, depending on the impact of the discrimination, considering factors such as the position held by the complainant in society, and whether it has impaired their dignity.<sup>53</sup> Mere differentiation will not amount to an infringement of the right to equality, if there is a rational nexus to a legitimate government purpose. However, this does not apply when coming to discrimination; discrimination breaches the right to equality, unless it is found to not be unfair.<sup>54</sup> The preceding analysis makes it clear that the enquiry into whether there is discrimination is conducted apart from the enquiry to determine whether the discrimination is unfair, and the enquiry into whether such unfair discrimination is done separately to determine whether the unfair discrimination can be justified with reference to Section 36.<sup>55</sup> Rights are used instrumentally to serve an underlying purpose, and may suffer from being under-inclusive and over-inclusive in relation to their

46 As above.

47 Meyerson (n 23) 145.

48 As above.

49 As above.

50 As above.

51 As above.

52 As above.

53 Meyerson (n 23) 145.

54 Meyerson (n 23) 146.

55 As above.

rationale.<sup>56</sup> By this I mean protecting certain rights is only probabilistically related to a certain identified purpose, it does not mean that protecting that right will always result in that identified purpose.<sup>57</sup> However, certain interests are given special treatment even if interfering with them would be reasonable. Secondly, these interests get special protection, even when it is known that protecting them, will not always lead to the intended purpose.<sup>58</sup> This is so because judges, like all other decision-makers, are prone to err.<sup>59</sup> They will not always be in a position to accurately determine whether a particular restriction on a right is or is not consistent with the purpose of recognising that right in the first place.<sup>60</sup> Hence, the best way to promote underlying values of certain rights is to disable judges from conducting that enquiry.<sup>61</sup> Regarding sexual freedom, the judges should be weary of romanticising different sexuate beings into model minorities.<sup>62</sup> In *Minister of Home Affairs and Another v Fourie and Another*<sup>63</sup> this is exactly what happened. The judgment starts by saying: 'Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up a home together.'<sup>64</sup> In this case homosexual couples are presented as coupled, committed and domesticated into alternative but content families.<sup>65</sup> Homosexual couples are idealised versions of sexuality and relationships.<sup>66</sup> The danger with this development is that the jurisprudence regarding sexual freedom pivots around couples who, but for being lesbian or gay, are perfect.<sup>67</sup> The problem with this development, is also that it runs a risk of creating a separation from those who are deemed to be acceptable, from those who are not acceptable.<sup>68</sup>

The danger I spoke about in the paragraph above, is illustrated in the *Jordan* case. The court attempted to contrast sex work and sex workers with homosexual people.<sup>69</sup> It is noteworthy to point out that in this case, the court upheld the provisions of the Sexual Offences Act, in terms of which criminal sanctions are levelled at the prostitute, as an attempt to outlaw commercial sex.<sup>70</sup> The court upheld the heteropatriarchal practise of holding women responsible

56 Meyerson (n 23) 147.

57 Meyerson (n 23) 146.

58 As above.

59 As above.

60 Meyerson (n 23) 147.

61 As above.

62 Robson (n 35) 420.

63 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

64 Robson (n 35) 420.

65 As above.

66 As above.

67 Robson (n 35) 421.

68 As above.

69 Robson (n 35) 422.

70 As above.

for their sexual conduct in a way that men are not.<sup>71</sup> A demand for sexual freedom is a demand for women to obtain sexual happiness, without being concerned with some indignation from society and its institutions.<sup>72</sup> Women using their sexuality to obtain some economic advantage is as a result of gender inequality.<sup>73</sup> However, this is just one side of this multifaceted coin. Many young women consider their ability to use their sexuality as agentive.<sup>74</sup> Many women view their sexuality as a positive resource, and again, this is just one side of the narrative.<sup>75</sup> The principled argument here is that we live in a society wherein people lack resources to satisfy some or other of their desires. This can range from getting money to buy groceries, to money to go to expensive clubs, wear expensive branded clothes etc. therefore, women's sexuality serve as a means for many to attain all of these.<sup>76</sup> Thus, a sexual encounter need not take place simply between people who intend to make other life decisions together.<sup>77</sup> Therefore, the court erred in holding that prostitutes enjoy a diminished constitutional status, not because of the legislative provision, but because of their own unconstitutional sexual intercourse.<sup>78</sup>

Given that feminist thinkers have always dedicated their work towards understanding and "transforming the erotic relations that lie at the root of all social and political formations,"<sup>79</sup> the existence of heteropatriarchal practices and laws make it impossible for truly ethical relations to exist.<sup>80</sup> Laws that aim to transform society in the name of justice, need to have at their core, the ethical duty to transform erotic relations, as part of a broader process of democratisation.<sup>81</sup> The sexual exploitation of women needs to end, and it can only end if, firstly, women are no longer made to account for their sexual conduct in ways not expected of men, and secondly, if they are given the social, economic and political autonomy to determine the realms of their sexual conduct.<sup>82</sup> The transformative aspirations of our Constitution, are hampered by its own failure to address and transform the exploitative and discriminatory erotic relations.<sup>83</sup>

71 Cornell (n 5) 173.

72 Cornell (n 5) 172.

73 D Smith 'Promiscuous girls, good wives, and cheating husbands gender inequality, transitions to marriage, and infidelity in southeastern Nigeria' (2010) 83 *Anthropological Quarterly* 123-152.

74 Smith (n 73).

75 As above.

76 Smith (n 73) 15.

77 Robson (n 35) 422.

78 Robson (n 35) 415.

79 D Cornell & SD Seely *The spirit of revolution: Beyond the dead ends of man* (2016) 23.

80 Cornell & Seely (79) 23.

81 As above.

82 Cornell & Seely (n 79) 24.

83 As above.



## 4 How can we best undertake a process of legalising prostitution, but simultaneously recognise the exploitative nature inherent in prostitution?

### 4.1 Introduction

The primary focus of this section is to point out that women involved in prostitution need not be reduced to being regarded as helpless victims who need to be defended, nor are they mere ‘bad’ girls who have deliberately positioned themselves in a position to enjoy a diminished constitutional status. In this section I argue that legalising prostitution is but one aspect of a much broader undertaking to democratise our country and ensure equal and equitable access to rights, resources and all other means necessary for citizens to enjoy the benefits of democracy.<sup>84</sup> I contend that political representation, rather than legal action, should be the primary means of intervention in improving the plight of all the women involved in prostitution.<sup>85</sup> I will briefly outline submissions made to the Commission tasked with investigating the feasibility of legalising prostitution in South Africa.

### 4.2 Overview and analysis of submissions to the Commission

Relating to recognising prostitution as work, Sex Worker Education Advocacy Taskforce (SWEAT) argues that sex workers’ vulnerability will be protected by the provisions made available by labour law.<sup>86</sup> This submission reflects an appreciation that the plight of sex workers can only get worse. It also indicates that it is a mockery of our constitutional aspirations, to deny legal protection to those members of our society who are so vulnerable.<sup>87</sup> SWEAT further contends that criminalisation infringes on prostitutes’ dignity in two respects: Firstly, it does not respect the choice of a woman to use her body to earn an income, and secondly, criminalisation denies what is often a vulnerable and poor group a means by which they can see to their livelihood.<sup>88</sup> This submission is reflective of two important arguments. Firstly, it relates to the ownership of women’s bodies (autonomy), and supports the argument I make throughout this article, that it should be left to individuals to determine what pleasure to derive from their various sexual relations, and so too it should be up to the individual to decide what value (financial or

84 The Constitution (n 4).

85 Cornell (n 5 above) 96.

86 South African Law Reform Commission Report (n 1).

87 As above.

88 As above.

otherwise) to attach to their various sexual activities. Secondly, this submission relates to the economic independence derived from prostitution. Women involved in prostitution use the money they earn to fulfil a variety of their needs, ranging from buying basic necessities, to buying luxurious clothing.<sup>89</sup> What is important is that they are able to fulfil some or other need from their earnings, which they otherwise would not have been able to afford.

On the other hand, the Family Policy Institute contends that if prostitution is chosen from a limited range of options, it cannot be considered to have been made freely and voluntarily.<sup>90</sup> This may be true, but the purpose of this article is to argue that those women making the choice to go into prostitution, are very much members of our society, and are entitled to constitutional protection.

The Christian Lawyers Association of South Africa argues that legalising prostitution, and even referring to it as sex work, does nothing to address the violence and exploitation endured by women, and the related stigma surrounding prostitution.<sup>91</sup> The Association contends that legalising prostitution runs the risk of institutionalising sexism and sexual harassment.<sup>92</sup> In the Association's view, prostitution is paid rape and thus dehumanises women.<sup>93</sup> I agree that prostitution is inherently exploitative and violent, however, I disagree that this violence and exploitation will occur as a result of legalisation. As things stand, women have no legal recourse for any violation they endure while at work. Designing a legal framework to cater for women in prostitution will only improve the situation, such as by improving access to courts, health facilities, pension fund schemes and other benefits provided by labour law.<sup>94</sup>

The Islamic Forum Azadville posits that any proposal to legalise the prostitution industry is not practical.<sup>95</sup> Therefore, more stringent measures should be introduced to further outlaw the industry. The Forum argues that arguments in favour of legalisation are based on economic-based reasoning, but all other crimes are committed with an economic motive.<sup>96</sup> According to the Forum, car hijackings and bank robberies are committed to improve the offender's economic position, however, the potential economic gain does not make the crimes more desirable.<sup>97</sup> This submission equates a conscious decision to use one's body sexually to earn an income, to that of robbers who hijack other people's belongings. What is problematic about this is

89 South African Law Reform Commission Report 107 (n 1).

90 As above.

91 As above.

92 As above.

93 As above.

94 As above.

95 As above.

96 South African Law Reform Commission Report 107 (n 1).

97 As above.

that to have sex for financial purposes does not rob anyone of their belongings. This submission does not appreciate that having sex gives expression to some of the decisions made in one's imaginary domain and has nothing to do with stealing from other citizens. Furthermore, this submission does not establish a *nexus*, to indicate how transactional sex is similar to, or comparable to car hijackings

Some people made submissions that by legalising prostitution, the state abdicated its responsibility to provide basic services, and empower its citizens.<sup>98</sup> I disagree with this contention, because legalising prostitution will improve prostitutes' access to already existing services. Furthermore, legalisation will ensure that more citizens enjoy constitutionally enshrined rights to equality, dignity, bodily integrity and privacy.

My response to these submissions is that women, who are currently barred from enjoying constitutional protection, will have a safer environment to work in if prostitution is legalised.<sup>99</sup> Furthermore, women involved in prostitution are held sexually liable differently from men, simply because they are women. This is partly why legalisation will create a more just society.

#### **4.3 Recognising the agency of women in a politically free society**

Granted that women form part of a free and democratic society, they need to be recognised as a source of their own evaluations and representations of how they intend to live out their sexuality.<sup>100</sup> A politically free society is underpinned by the shared understanding that everyone has an obligation not to exclude others from a community of moral persons.<sup>101</sup> Furthermore, all individuals in a politically free society have equal intrinsic value.<sup>102</sup> This equality of value must be recognised by the law and other institutions of society.<sup>103</sup> The political representation I call for in this section, will ensure that women involved in prostitution will make known a world that has no reason to be noticed.<sup>104</sup> As a country undergoing political rehabilitation, given our oppressive history, it is important to question all naturalised differentiations in order to reconstruct an inclusive political atmosphere, in which all persons are believed to be capable of generating their own life plans.<sup>105</sup>

98 As above.

99 The Constitution (n 4).

100 Cornell (n 11) 18.

101 Cornell (n 11) 18.

102 As above.

103 As above.

104 Cornell & Seely (n 79) 24.

105 Cornell (n 11) 18.

This argument seeks to point out that no one should ever have to be legally captured by their appointed position in the social hierarchy.<sup>106</sup> As such no one's prospects in life should ever be determined by the exercise of their sex.<sup>107</sup>

The Report published by the Commission, although containing relevant concerns, is based on submissions of interest groups talking about sex work or prostitution. Not enough voice is heard from sex workers representing themselves. The Report is about them, but in the main, without their true involvement. A politically free individual should be individuated enough to represent herself, and make her claim to society, without having to refer to her social status.<sup>108</sup> Women's demand upon society is to be given a space to re-enliven themselves socially.<sup>109</sup> Women's bodies are theirs to claim as they see fit.<sup>110</sup> The state therefore has a duty, to rid our society of norms of heterosexual monogamy as the only acceptable organisation of life.<sup>111</sup> The state needs to refrain from trying to give shape to women's intimate lives. To bring the matter home, the contentions relating to legalising prostitution can be set at ease, when political representation (such as through forming unions) who will consist of, and act on behalf of women involved in prostitution.<sup>112</sup> Most importantly, when there is space for everyone to explore their imaginary domain, and nurture our sex, we would have achieved some form of political legitimacy.<sup>113</sup>

Many South Africans believe in the principle of *Ubuntu* in terms of which every member of society is regarded as being important.<sup>114</sup> By *ubuntu* I am referring to what has been described as a 'world-view of African societies and a determining factor in the formation of perceptions which influence social conduct.'<sup>115</sup> *Ubuntu* is also known as the African philosophy of life, which represents humanity, humaneness and morality.<sup>116</sup> *Ubuntu* is more than a social ideology.<sup>117</sup> It represents the very essence of being a human being.<sup>118</sup> The Bill of Rights, particularly Sections 9 (the equality clause), 10 (right to human dignity), 11 (right to life), give expression to *ubuntu*

106 Cornell (n 11) 19.

107 As above.

108 As above.

109 As above.

110 Cornell (n 11) 21.

111 As above.

112 Cornell (n 5) 96.

113 Cornell (n 11) 27.

114 Robson (n 35) 421.

115 Y Mokgoro 'Ubuntu and the law in South Africa Paper' delivered at the first Colloquium Constitution and Law held at Potchefstroom on 31 October 1997. This Paper was first published by the Konrad-Adenauer-Stiftung in their Seminar Report of the Colloquium Johannesburg 1998.

116 As above.

117 Mokgoro (n 115).

118 As above.

as defined above. *Ubuntu* entitles every member of society unconditional respect, and I believe that upholding *ubuntu* can help rehabilitate women's impoverished dignity.<sup>119</sup> It is unfortunate that in the *Jordan* case, the court does not make reference to *ubuntu*, even though the same court has previously referred to this principle, to arrive at some of the groundbreaking judgments, such as the *Makwanyane*<sup>120</sup> judgment, in terms of which death could no longer be used as a form of retribution.<sup>121</sup> I argue that even if it were to be accepted that women involved in prostitution enjoy a diminished status in the eyes of society because of their doing, they still possess an intrinsic worth that is owed to them simply because they are human.<sup>122</sup> The fundamental argument I make here, is that no one should be denied legal protection, based on other people's idea of a community.<sup>123</sup> Considering that we are a nation trying to rid itself of its oppressive past, we should safeguard against associating a certain sexual organisation with democracy.<sup>124</sup> This is because what needs protection is the sexual manifestation and not merely the origins thereof.<sup>125</sup> After all, any democratic state should refrain from conceptualising itself as a role-player in sexual arrangements, and similarly should not declare particular sexual manifestations as being more consistent with itself, because that runs a risk of marginalising other sexual arrangements.<sup>126</sup>

## 5 Can opposition against legalising prostitution yield to bodily integrity, in favour of legalisation?

### 5.1 Introduction

In this section, I will argue that with a renewed understanding of the right to bodily integrity, society can cease to view prostitutes as offenders whenever they engage in commercial sex.<sup>127</sup>

119 Robson (n 35) 421.

120 *S v Makwanyane* 1995 (3) SA 391 (CC).

121 Robson (n 35) 421.

122 As above.

123 Robson (n 35) 423.

124 Robson (n 35) 425.

125 Robson (n 35) 424.

126 Robson (n 35) 428.

127 Cornell (n 5) 119.

## 5.2 Analysing the right to bodily integrity to protect various sexual manifestations

The right to bodily integrity, in as far as I relate it to sexual freedom, should be interpreted so as to enhance and redefine social equality.<sup>128</sup> Furthermore, as part of a transformative undertaking, it is necessary to interrogate the sexual in a context much broader than through the prism of established relationships such as marriages and other civil unions.<sup>129</sup> To outlaw commercial sex violates the right to bodily integrity of prostitutes because this right protects everyone from arbitrary arrest and detention.<sup>130</sup> My argument in this section is that using the right to bodily integrity as the basis for legalising prostitution should form part of the broader process of democratisation, in order to create room for sexual freedom.<sup>131</sup> Prostitution is one aspect of sexual freedom. Bearing in mind the above discussion about the *Jordan* case, it is worth noting that women's demand for sexual freedom begins with the demand to be freed from the use of gender comparison as the ideal of equality.<sup>132</sup> The 'merchants' referred to in the judgment are women, and the legal provisions outlawing commercial sex is able to strike at them because they are women. However, the customer is difficult to detect, again because the customer is male. As a result, the body of the man, is assured some protection, and this is the consequence of the law by striking at the merchant.

## 5.3 The recognition of the imaginary domain to advance the right to bodily integrity

The Constitutional rights to bodily and psychological integrity were upheld in the matter of *Christian Lawyers Association v Minister of Health*.<sup>133</sup> The applicants sought to challenge the validity of the Choice on Termination of Pregnancy Act, but the challenge was unsuccessful.<sup>134</sup> The applicants argued that the termination of pregnancy violated the right to life, entrenched in Section 11 of the Bill of Rights.<sup>135</sup> The court dismissed this argument, and held that Constitutional rights applied to natural persons, and not unborn

128 Cornell (n 11) 1.

129 Robson (35) 409.

130 C Mgbako and others 'The case for decriminalisation of sex work in South Africa' (2013) 44 *Georgetown Journal of International Law* at 1423.

131 Robson (n 35) 410.

132 Cornell (n 11) 3.

133 MK Radebe 'The unconstitutional criminalisation of adult sex work' mini-article submitted in partial fulfilment of the requirements for the Degree Magister Legum (LLM), University of Pretoria (2013) at 13 (on file with the author).

134 As above.

135 Radebe (n 133) 13.

foetuses.<sup>136</sup> This case referred to above, indicates an attempt by some members of society to use criminal law to enforce morality.<sup>137</sup> This is the criminalisation of victimless conduct.<sup>138</sup> I argue that when making or interpreting laws, there must be a justification for why it is justiciable for the law to intervene by regulating private immorality, notwithstanding the fact that such immorality does not cause any immediate or foreseeable harm to anyone.<sup>139</sup>

In the case of *Teddy Bear Clinic for Abused Children & Others v Minister of Justice & Others*<sup>140</sup> the High Court held that the criminalisation of consensual sexual intercourse between minors (of ages 12-15) violated the Constitution.<sup>141</sup> The court held that criminalisation infringed on children's rights to dignity, privacy and autonomy.<sup>142</sup> The argument that minor children would not be able to make sound sexual decisions at their level of maturity, was countered by those who argued that children already engage in sexual activities, and it would be more productive to teach them about sex, rather than criminalise their sexual activities.<sup>143</sup> This judgment was confirmed by the Constitutional Court.<sup>144</sup>

The *Teddy Bear* judgment makes one wonder why adult commercial sex is still criminalised in South Africa.<sup>145</sup> I argue that a continued criminalisation of adult commercial sex violates the Constitutional rights to human dignity, privacy, and the right to bodily and psychological integrity.<sup>146</sup> I argue that the law needs to concern itself with protecting everyone's sphere of intimacy and autonomy, because the decision to live out one's individuation as being homosexual, bisexual, heterosexual or to belong to any other identifying associational category, is made in that sphere.<sup>147</sup> Engaging in sexual activities is a decision made in the sphere I mention above, and the law should not interfere, if the decision is made by an adult who can consent. The same protection afforded to minor children is what I argue women involved in prostitution deserve.<sup>148</sup> My argument is that by protecting the imaginary domain, the law would have afforded women the right to bodily integrity to do as they see fit with their bodies. This protection should form part of democratising sexual relations, by re-assessing social, historical and cultural norms

136 As above.

137 As above.

138 As above.

139 As above.

140 *Teddy Bear Clinic for Abused Children & Others v Minister of Justice & Others* (CCT 12/13) [2013] ZACC 35.

141 Radebe (n 133) 13.

142 Radebe (n 133) 13.

143 As above.

144 As above.

145 As above.

146 As above.

147 Cornell (n 5) 100.

148 Radebe (n 133) 14.

regarding gender inequality.<sup>149</sup> Legalising prostitution will ensure that the state refrains from endorsing a certain view of sexual morality, especially considering how diverse South Africa is.<sup>150</sup> The *Jordan* case as discussed earlier endorsed societal stereotypes regarding women involved in prostitution.<sup>151</sup>

To argue that society discriminates against men and women involved in prostitution similarly, is to attempt to rewrite history. Historically women's sexual choices have always been legitimate to the extent that they were approved of by masculinity.<sup>152</sup> The focus of this article does not include the experiences of male prostitutes, or female customers. This judgment was couched in historically imposed sexual biases.<sup>153</sup> Even if the court is correct in saying society inherently looks down on prostitution, there is a duty to advance a public constitutional culture, in terms of which citizens agree on what is just, notwithstanding disagreements on important life values.<sup>154</sup> Feminist anthropologists have never truly discovered a time in history, where women were fully equal with men.<sup>155</sup> Therefore, invalidating a woman's sexual conduct is rooted in the sexism our Constitution seeks to eradicate.<sup>156</sup> By virtue of declaring the provisions of the Bill of Rights to also be constitutional values, their protection may sometimes require that they be placed above popular morality.<sup>157</sup> This is how the protection of the imaginary domain and bodily integrity can be ensured.<sup>158</sup>

## 6 Conclusion

In this article I outline the importance of bodily integrity and the imaginary domain in the process of individuation.<sup>159</sup> I also indicate that the protection of these elements of individuation is a prerequisite to attaining sexual freedom.<sup>160</sup> Sexual freedom and sexuality are formative to moulding one's personality.<sup>161</sup> Throughout this article I sought to emphasise that a decision to have sex, never mind the reason, is made beyond the proverbial veil, or the imaginary domain, an area where we battle with ideas of how to live out our

149 Cornell (n 11) 1.

150 As above.

151 *S v Jordan* 2002 (2) SACR 499 (CC) 16.

152 Cornell (n 11) 9.

153 Cornell (n 11) 10.

154 Cornell (n 11) 11.

155 Cornell (n 11) 14.

156 Radebe (n 133) 16.

157 Radebe (n 133) 23.

158 Radebe (n 133) 25.

159 Cornell (n 5) 4.

160 Cornell (n 5) 5.

161 Cornell (n 5) 6.



lives.<sup>162</sup> As such, this domain should never be invaded because its sanctity demands privacy, if it is to be useful to the individual concerned.<sup>163</sup> I acknowledge that prostitution is inherently exploitative and dangerous, but instead of criminalising it, I believe that creating a sexually-tolerant society can be beneficial for all, as part of transformative constitutionalism.<sup>164</sup> When we have transformed our political landscape enough, we will be able to afford women a space to live out their sex and sexuality, and not fear any shame or be marginalised.<sup>165</sup> Section 9 of the Constitution (the equality clause) should be used as a moral compass, to prevent any further marginalisation of minority groups.<sup>166</sup> This clause embodies a memory of the oppressive past, a place we should never revisit, but also contains a promise to a future marked with tolerance of difference, and a political and social culture of respecting the intrinsic worth of all human beings irrespective of their social status (both actual or perceived).<sup>167</sup> This is how I believe legalising prostitution can begin, but more importantly, allowing for sexual freedom by protecting bodily integrity and the imaginary domain.<sup>168</sup>

162 Cornell (n 5) 5.

163 As above.

164 Cornell (n 5) 6.

165 Robson (n 35) 424.

166 The Constitution (n 4).

167 Cornell (n 11) 25.

168 Cornell (n 5) 4.