

TRANSACTIONAL SEX: A SOCIOECONOMIC RIGHT ROOTED IN DIGNITY AND CONSENT

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In this paper the issue of transactional sex as a fundamental human right protected within the framework of articles 19 and 21 has been explored. The paper holds that transactional sex is a constitutionally protected economic right as an extension of human dignity and consent. The argument is premised on notion that Transactional sex is a form of labour similar to other kinds of labour and should be immune from state paternalism in the interest of justice. Since in Navtej Johar case it was held that consensual sex between adults is a matter of private autonomy any state action interfering that autonomy is unconstitutional, the paper extends the argument in favour of consensual sex in lieu of money and holds that every person has right to trade and profession subject to reasonable restriction. The legislations regulating transactional Sex in India are disproportionate in nature and don't fall under the exception of reasonable restriction provided under Article 19. As consensual sex is constitutionally valid act, Article 19(1) (g) poses no obstacle perform a constitutionally valid act for commercial purposes.

I. INTRODUCTION

An individual is always in a normative relationship with his self and the society which he lives in² and this interrelation works as a platform where rights and duties are manifested in an optimum harmonic arrangement. The evolution of a legal system is profoundly dependent on the identification and the remedying of certain gaps in such an arrangement. Liberalism is one such school of thought which considers an individual as its central point of analysis with respect to other institutions of the society and also attempts to mend such gaps.³ Any liberal society is characterised by its commitment to promote and protect the autonomy of its citizens. The autonomy of an individual entails that an individual is free to act in accordance with their choices and desires to the extent those very acts

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² J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 205 (2nd edn., 1960).

³ D.A.J. Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalisation of Prostitution, 5 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 127 (1979), ¶14.

don't infringe and impede the freedoms of others to the same.⁴ According to John Rawls, autonomy, which is crucially linked to the human rights theory, is nothing but an empirical assumption of capacities of individual (developed or undeveloped). Every person possesses a spectrum of capacities that enable him to develop (capacities),⁵ propel him into action, and in fact to act on higher-order plans of action whose objective is to enhance the life lived by an individual.⁶ Capacities in the present context mean the set of choices that an individual has which equip one to pursue a particular course of action to achieve optimum fulfilment in life.⁷ The width of the spectrum of these choices reflects the degree of autonomy an individual exercises.⁸

The choice of engaging in sexual intercourse with someone is a core expression of one's individuality.⁹ Sexual intercourse, sexual orientation, and gender identity are parts of an individual's most intimate and fundamental characteristics. The principles of liberty mandate that every person must have the freedom to consent for actions one engages in; the very idea of consent is effective only when the individuals have freedom to choose.¹⁰ According to Fienberg¹¹, there is a presumption in favour of liberty.¹² This means that every person has an interest in freedom of action and a presumptive right that this freedom should be protected unless it interferes with freedom of others.¹³ Freedom to engage in sexual intercourse by exercising one's choices and consent is entirely within the domain of one's personal space and no interference in this matter is justified in a liberal setup which respects freedom and dignity.¹⁴

In this course, the judgment declared by the Supreme Court in *Navtej Singh Johar v. Union of India*¹⁵ (Johar) in essence covers two the concepts of dignity and consent in the context of a sexual relationship. The Supreme Court emphasised that every adult is free to consent and to pursue one's life with liberty, dignity and privacy in matters of sexual expression.

"The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity

⁴ VANESSA MUNRO, SEXUAL AUTONOMY: THE OXFORD HANDBOOK OF CRIMINAL LAW (Markus D. Dubber and Tatjana Hörnle, 2014).

⁵ JOHN RAWLS, A THEORY OF JUSTICE 65-68 (1971).

⁶ *Id.*

⁷ *Id.*

⁸ M. MAHLER, F. PIM & A. BERGMAN, THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT (1975) ¶141.

⁹ BERTOCCI, THE HUMAN VENTURE IN SEX, LOVE AND MARRIAGE, IN TODAY'S MORAL PROBLEMS 218, 227 (1965).

¹⁰ *Id.*

¹¹ S. DE BEAUVOUR, THE SECOND SEX 712-43 (1949).

¹² *Supra* note 7.

¹³ JOEL FEINBERG, HARM TO OTHERS: MORAL LIMITS OF CRIMINAL LAW ¶248 (1984).

¹⁴ *Id.*

¹⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. ,

*and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that has eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions.*¹⁶

Engaging in sexual intercourse is a personal decision of a person and criminalising it is an example of audacious state paternalism which dents the constitutional rights by violating individual autonomy and dignity. In liberal constitutions, the paternalistic interference is accepted only in case where it is necessitated by well-being of subjects.¹⁷ Otherwise the state intrusion merely reflects a paternalistic attitude which is unacceptable for the simple reason that it lacks moral justification.¹⁸ Criminalisation of consensual sexual intercourse – whether it is with the persons of same sex or in lieu of money – reflects this paternalism which is morally unjustified and constitutionally untenable.

Now the moot question that arises is that why should transactional sex between two consenting adults be outside the ambit of rights enunciated in Johar case. This question must be asked because after striking down the provision criminalising homosexual sexual intercourse between adults there is no justification to penalise transactional sex which involves monetary exchange in consensual sex between adults. If the state cannot interfere in sexual choices made by adults then it should also not interfere when such choices are exercised for economic purposes. The penalisation would give rise to a doctrinal inconsistency within the constitutional framework. Now in light of the ruling in this case, the position of consensual transactional sex warrants an expansive interpretation of right to freedom under Article 19 of the Constitution. In the Johar case, the apex court ruled that consensual sex between adults is protected under the constitutional framework. In light of the same, consensual transactional sexual intercourse must also be protected. As per Article 19(1)(g) of the Constitution, every Indian citizen has the freedom to practice any profession, or to carry on any occupation, trade or business and hence transactional sex between consenting adults must also come under the ambit of right conferred by virtue of Article 19. The dignity of labour in the field of transactional sex should not be dispensed with as their marginalisation is no longer consistent with Supreme Court jurisprudence. Unfortunately Indian laws viz. Immoral Traffic Prevention Act¹⁹ (ITPA) and the Indian Penal Code²⁰ severely penalise activities associated with transactional sex. This must be scrutinised in the post-Johar case paradigm.

¹⁶ *Id.*, ¶3.

¹⁷ Dale Carpenter, The Anti-Paternalism Principle in the First Amendment, 37 UNIVERSITY OF MINNESOTA LAW SCHOOL 579-651(2004).

¹⁸ Dan W. Brock, Harm to Self by Joel Feinberg; Paternalistic Intervention by Donald VanDeVeer, 98 ETHICS 3 550-565 (1988).

¹⁹ Immoral Traffic (Prevention) Act, 1956.

²⁰ Indian Penal Code, 1860.

II. EXISTING LEGAL FRAMEWORK REGULATING TRANSACTIONAL SEX

There are three prominent systems used across the world to regulate sex work. These are the system of Suppression or prohibition, the system of regulation or legalisation and the system of abolition or toleration.²¹ In the system of suppression, all the activities related to prostitution are criminalised including the activity of indulging into sex work. There are few exceptions where sex workers themselves are not arrested, however, that is in a very restricted sense.²² In such a system, apart from the prostitutes, anyone who indulges in promoting or facilitating the act is prosecuted.²³ The system of regulation concerns a situation where the state intervenes by way of a practical solution.²⁴ The state issues certain guidelines²⁵ under which the prostitution can be legal on account of acknowledgement of the fact that it has existed for a long time and shall continue to exist, and hence prohibition will not bear any positive outcome.²⁶ Finally, the system of abolition abolishes all the laws and rules regulating the practice of prostitution.²⁷ It criminalises parties engaging in sexual intercourse rather than the transaction they have engaged in. It decriminalise women's involvement and does not discriminate between voluntary and forced prostitution. This approach was adopted by United Nations convention in 1949.²⁸ In this framework, act such as brothel-keeping, living on earnings of prostitution, soliciting in public places are made punishable by law.

Indian policy resembles the abolitionist framework first enacted during British era.²⁹ At that time, the health of the army was the major concern and hence the government decided to ban prostitution. After attaining independence, the state went on to criminalise all those acts which are considered immoral and abhorrent in public perception.³⁰ Thus, ITPA allowed for toleration of red light areas on the premise that prostitution can be continued if it doesn't appear in public space. Further, the spirit and objectives of Suppression of Immoral Traffic Act³¹ were maintained in the 1986 Immoral Traffic (Prevention) Amendment Act where various technical changes were introduced. For example, the definition of

²¹ JODY MILLER, SOURCE BOOK ON VIOLENCE AGAINST WOMEN 462 (Claire M. Renzetti, Jeffery L. Edleson and Raquel Kennedy Bergen, 1st edn., 2004).

²² ABRAHAM SION, PROSTITUTION AND THE LAW 43 (1st edn., 1997).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*; These guidelines include registration of brothels, regular check-up of sex workers and taxation.

²⁶ Jean D'Cunha, *Prostitution Laws: Ideological Dimensions and Enforcement Practices*, 27 ECONOMIC AND POLITICAL WEEKLY 17 (1992)

²⁷ *Id.*

²⁸ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

²⁹ K. BALLHATCHET, RACE, SEX AND CLASS UNDER THE RAJ: IMPERIAL ATTITUDES AND POLICIES AND THEIR CRITICS 1793-1905 (1980).

³⁰ See K I Vibhute, *Consensual Homosexuality and the Indian Penal Code: Some reflections on interplay of law and morality*, 51 (i) JOURNAL OF INDIAN LAW INSTITUTE 3, 2009.

³¹ *Id.*

prostitution was changed from “*when a girl or woman offers here body for promiscuous intercourse for hire*” to “*the sexual exploitation or abuse of persons for commercial purposes*”.³² Immoral Traffic (Prevention) Act also takes a more serious approach towards trafficking of minors, and introduces the requirement of two female police officers being mandatorily present during brothel raids.³³ Only female police officers are now supposed to interrogate women and girls who have been removed from brothels.³⁴

In the present context, even though transactional sex *per se* is not a crime, related activities are under the radar of Immoral Traffic (Prevention) Act, 1956 which penalises activities such as the keeping of a brothel or allowing premises to be used as a brothel.³⁵ Living on the earnings of prostitution,³⁶ procuring, inducing or taking [person] for the sake of prostitution,³⁷ and seducing or soliciting for purpose of prostitution³⁸ are offences under Immoral Trafficking (prevention act). These provisions are often used against sex workers who indulge in sexual relationship for the sake of earning.³⁹ Moreover the recent Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 imports the definition of ‘trafficking of persons’ from Section 370, IPC.⁴⁰ Interestingly, this definition includes ‘any form of sexual exploitation’ which is also rigorously applied to sex workers.⁴¹ Therefore, even though transactional sex *per se* is not viewed as a crime, these provisions hinder the prospects of transactional sex as an economic opportunity. These legislations are sufficient to present a glimpse of how complex the law is regarding transactional sex in India. In its current form, the law on sex work is ambiguous. The distinction between people who are exempted from its application and those who are not often overlaps. Although the legislative intent of ITPA was to decriminalise sex work, it has yielded negative outcomes for women indulged in sex work due to enigmatic character of act.⁴² The combined effect of these circumstances has resulted into complete denial of women’s choice to indulge into sex work. Even if a woman wants to earn money by sex work she would not be able to do it due to existence of such fettering provisions. This implies that these provisions are directly prohibiting a woman form indulging in sex work.

³² Immoral Traffic (Prevention) Act, 1956, §2(f).

³³ Immoral Traffic (Prevention) Act, 1956, §15.

³⁴ *Id.*, §5(a).

³⁵ *Id.*, §3.

³⁶ *Id.*, §4.

³⁷ *Id.*, § 5.

³⁸ *Id.*, § 8.

³⁹ Prabha Kotiswaran, *How Did We Get Here? Or A Short History of the 2018 Trafficking Bill*, July 21, 2019, available at <https://www.epw.in/engage/article/how-did-we-get-here-or-short-history> (Last visited on December 10, 2019).

⁴⁰ Indian Penal Code, 1860, §370.

⁴¹ *S. Naveen Kumar v. State of Telangana*, 2015 SCC OnLine Hyd 154 .

⁴² *Supra* note 16, 61.

Now the question is how *Navtej Johar* case changes the landscape. As the case recognises consensual sex as fundamental right within the mold of right to dignity equality and privacy there is no constitutional reason which can put bar on such sex in exchange of money. The case lays emphasis on notions of consent and dignity and transactional sex intersects with both these notions. Transactional sex as an economic activity must be free from any kind of hindrance from the state in the light of the *Johar* judgment. To articulate the interrelation of transactional within the fabric of dignity and consent, first of all, it must be shown that transactional sex fits within the liberal theoretical framework where it is considered as a form of labour which is dignified and consensual. The paper proceeds on the premise that *first*, since transactional sex work (by sex work it doesn't refer only sexual act but everything related to it in commercial context) falls within the ambit of socio-economic rights, a subset of dignity, and *second*, since the *Johar* judgment has recognised consensual sex as a fundamental right,⁴³ any provision which is an impediment in exercising the choice to indulge into transactional sex must be held unconstitutional. Now the two most revered aspects of *Johar* judgment are dignity and consent and these two vehemently support the case of transactional sex. Also, once it is shown that different existing provisions directly prohibit women from entering into consensual sexual relationships for commercial purposes, it is pertinent to move forward and examine the validity of those provisions in the light of *Navtej Johar* judgment. The paper in forthcoming sections establishes transactional sex as dignified labour within the ambit of a socio-economic right – a subset of right to dignity under article 21.

III. LIBERTARIAN PHILOSOPHICAL POSITION REGARDING CONSENSUAL (TRANSACTIONAL) SEX

The subscribers of the liberal legal philosophy have argued against any sort of regulation on the consensual sex between two adults and believe that disapprobation or political critique of such activities is uncalled for in a liberal setup.⁴⁴ The roots of such thinking can be traced to libertarian legal theory which articulates its points in terms of victimless crimes and undue state paternalism.⁴⁵ Within the ambit of this school of thought, if two or more parties consent to sex then the sex is victimless and any kind of regulation – criminal or civil – would be paternalistic and unwarranted.⁴⁶ As per J.S. Mill, an individual is a sovereign over himself, over his own body and mind.⁴⁷ Individual autonomy is central to the Millian lib-

⁴³ *Id.*

⁴⁴ Kate McGuinness, *Review: Gene Sharp's Theory of Power: A Feminist Critique of Consent*, 30 JOURNAL OF PEACE RESEARCH 101-115. (1993).

⁴⁵ *Id.*, ¶110.

⁴⁶ RICHARD POSNER, SEX AND REASON, 388 (1992).

⁴⁷ MILL, JOHN STUART, ON LIBERTY ¶53 (1869).

erals⁴⁸ and according to them the consensual sex is expression of individual autonomy,⁴⁹ identity, and any kind of state interference would be curtailment of this autonomy. This particular conception of autonomy stems from the Mill's Harm principle⁵⁰ and has continued to find validation in its favour often intertwined with accompanying commitments to equality and state neutrality as for example Dworkinian defense of person's right to moral independence.⁵¹ At the heart of criminal legislation governing sexual affairs lies the conception of consent. The existence of consent reflects an individual's ability to choose among the available alternatives. The ability to consent is an indication of exercise of one's agency. As per feminist theories, consent can be said to exist when a choice is made without being influenced by any kind of express or implicit extraneous force.⁵² Consent has been associated with autonomy of an individual over oneself. When discussed specifically in the context of sexual activities, it usually determines the 'rightness' or 'wrongness' of other's sexual advances to oneself. Therefore, consent can be understood as a line that an individual draws while exercising the right to sexual autonomy.⁵³ In libertarian viewpoint, transactional sex reflects the exercise of choice by an individual in a fully autonomous and dignified manner.⁵⁴ Economic rights derive their theoretical base from the conception human dignity which has been elaborated above.

IV. ECONOMIC RIGHTS AS AN EXTENSION OF HUMAN DIGNITY

Rights granted to a subject are constitutional mechanisms to ensure full expression of an individual. A constitution restricted only to civil and political rights depicts a truncated humanity as the exclusion of other rights, such as economic rights, symbolises autonomy without a choice to engage in necessities of life in a dignified manner.⁵⁵ Any impediment in the way of engagement for basic subsistence not only hampers the development of the whole range of human capabilities but also prevents meaningful contribution to the society by

⁴⁸ Nick Cowen, *Millian Liberalism and Extreme Pornography*, 60 AMERICAN JOURNAL OF POLITICAL SCIENCE (2016).

⁴⁹ *Id.*

⁵⁰ *Supra* note 46, "According to this principle the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others."

⁵¹ RONALD DWORKIN, A MATTER OF PRINCIPLE 353 (1986).

⁵² Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 4 THE UNIVERSITY OF CHICAGO PRESS JOURNALS 650 (1983)

⁵³ VANESSA MUNRO & CARL STYCHIN, SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 51 (2007).

⁵⁴ David Dyzenhaus, *Liberalism, Autonomy, and Neutrality*, 42 UNIVERSITY OF TORONTO LAW JOURNAL 3, 354-75 (1992).

⁵⁵ C. Scott & P. Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution* 141 UNIV. OF PENNSYLVANIA LR 1, 29 (1992).

members.⁵⁶ The concept of human dignity has played a central role in evolution of human rights discourse across the globe and has provided a concrete theoretical framework for analysis of rights and duties.⁵⁷ The conception of economic rights encompasses this peculiar interrelation which is crucial in development of economic rights jurisprudence as a response to socio-economic deprivation.⁵⁸

Thus socio-economic rights are crucial for an individual for the development of his emotional, physical, creative and associational capabilities along with civil and political rights. The bare social minimum that ought to be secured in accordance with political and constitutional principles includes uninterrupted pursuance and choice of means which are central to human life. Following the same logic, O' Regan J. in *Makwanyane* expresses that the right to life was enshrined in constitution not just to incorporate the right to mere existence but a dignified existence.⁵⁹ The constitution doesn't cherish the aspect of life as mere organic matter or a biological phenomenon, but instead bestows the right to human life. This includes the right to live as a human being, to be part of a broader community and to share in the experience of humanity.⁶⁰ When a constitution recognises the right to human dignity, it is an acknowledgement of the inherent worth of the human being which implies that human being must be treated with respect and concern. This also amounts to accepting the notion of human beings as agents capable of making moral choices to shape their identity.⁶¹ It encompasses the acknowledgement of associational freedoms, respect for diverse identity along with the genuine concern about the material conditions that help the individuals shaping their life choices. The case of poverty in this case is stark example of how we have failed as a society to value and respect human dignity. Hence, human dignity has an enriching impact on socio-economic rights jurisprudence because respect for a person's dignity requires an approach that is considerate of the impact of the deprivation on the genuine needs and necessities under given circumstances of the individuals and groups concerned.⁶² When state frames a pol-

⁵⁶ M.C. Nussbaum, *CAPABILITIES, HUMAN RIGHTS AND THE UNIVERSAL DECLARATION* 25-64 (B.H. Weston & S.P. Marks, 1999). In her seminal work 'Women and Human Development—The Capabilities Approach' Martha Nussbaum has provided strong philosophical arguments in favour of constitutional principles aimed at ensuring the conditions for optimum development and exercise of human capabilities. The center of her approach is human capabilities, that is, 'what people are actually able to do and to be' in an articulate manner informed by an intuitive idea of a life that ensures dignity of human being. Women and Human Development 96-101 and Nussbaum 'Capabilities, Human Rights and the Universal Declaration' in B.H. Weston & S.P. Marks (eds.) *The Future of International Human Rights* (1999) 25-64. I

⁵⁷ K. Dicke, 'The Founding Function of Human Dignity' in Kretzmer D. and Kleyn E., *The Concept of Human Dignity in Human Rights Discourse*, 111-120, (2002).

⁵⁸ H. CHEADLE AND DENNIS DAVIS, *SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS* 51, 60 (2002).

⁵⁹ *S. v. T. Makwanyane*, 1995 SCC OnLine ZACC 2 : (1995) 3 SA 391, ¶ 325.

⁶⁰ *Id.*, ¶ 328.

⁶¹ *Id.*

⁶² Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. Afr. J. on Hum. Rts. 1, 9 (2005).

icy which inflicts deprivation of subsistence needs to a group of people then it is apparently a failure to acknowledge human dignity.⁶³ It is a denial of the intrinsic worth of an individual as these groups have been denied the opportunity to survive and develop their capabilities to the fullest potential.⁶⁴ The Dworkinian conception of human dignity⁶⁵ is congruent to what has been discussed in paper. The Dworkinian conception constitutes self-respect and authenticity of human action which results into respect and recognition a person's action.⁶⁶ Robert Nozick articulates⁶⁷ the socio-economic rights in contextual framework of associational freedom as right over particular things and particular rights to strike a bargain with society. No rights exist in conflict with this substructure of particular rights.⁶⁸ Rawls too takes into account the structural framework where the socio-economic rights will not be in conflict with the structure of which the right is part of.⁶⁹

Now grounding the issue in Indian context sex between consenting adults is expression of dignity and privacy and is protected under the Indian constitution.⁷⁰ The jurisprudence of right to life under Article 21 encompasses the protection of the choice of a person regarding private affairs and as an inherent aspect of human dignity.⁷¹ In the Johar case the court articulated this point very cogently holding that right to dignity includes the right to conduct certain acts or

⁶³ H. Botha, *Human Dignity in Comparative Perspective*, STAN L REV 171–220 (2009).

⁶⁴ *Supra* note 26.

⁶⁵ Kenneth W. Simons, *Dworkin's two principles of dignity: An unsatisfactory nonconsequentialist account of interpersonal moral Duties*, 90 BOSTON UNIVERSITY LAW REVIEW 715 (2010), ¶101. Dworkinian conception of human dignity consists of two aspects of human life. First is self-respect which stands for taking the objective importance of one's life seriously and second one is authenticity which stands for creation of one's life through a coherent narrative which one chooses for his life and accepting a special, personal responsibility for identifying what counts as success. In this manner the Dworkinian principle of dignity provide a guidance of living well as per choice of an individual. see also Matthew Clayton and Zofia Stemplowska, *Dignified Morality*, CSSJ Working Papers Series, SJo26 August 2014 Centre for the Study of Social Justice Department of Politics and International Relations University of Oxford Manor Road, Oxford OX1 3UQ <http://social-justice.politics.ox.ac.uk>.

⁶⁶ R. Dworkin, *Taking Rights Seriously*, (2nd edn., 1978).

⁶⁷ ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 238 (1974).

⁶⁸ *Id.*

⁶⁹ Rawls, *supra* note 5, 34. The reference to original positions and 'veil of ignorance' are in fact in congruence with Nozick's line of thought in this context. The commonly agreed rights in Nozick's conception will be achieved when individuals situated in 'original position' will collectively negotiate for certain rights which is equally desired agreed upon by all. Now the structural framework of rights under Rawlsian Paradigm will contain various sub-structures which is derivable from the existing structural framework. It means that if individual dignity is recognized right within a particular framework then socio-economic right as a subset of dignity must necessarily conform to the former and must be viewed as an extension of the former.

⁷⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁷¹ *Common Cause v. Union of India*, (2018) 5 SCC 1. In this case Chandruchud J. observed that, "The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another's choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not denied."

to carry out certain functions which would constitute the meaningful expression of self.⁷² Human Dignity has been duly recognised inherent aspect of the right to life under Article 21.⁷³ In *Air India Statutory Corpn. v. United Labour Union*,⁷⁴ the Supreme Court observed that the social justice envisioned by Article 38 and the preamble of the Constitution stress on ensuring that one's life is meaningful and liveable with human dignity. *Navtej Johar* extensively deals with the concept of Human dignity and emphasises the importance of dignity in connection with liberty and privacy. The Court has also observed that the fundamental idea of dignity is regarded as an inseparable facet of human personality.⁷⁵ The organisation of intimate relations is a matter of personal choice and more so, between consenting adults. "*It is a vital personal right falling within the private sphere of one's life and the realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.*"⁷⁶ An individual retains his/her dignity as a free person when he/she is free to enter into a relationship of choice within the confines of his/her homes and respective private lives.⁷⁷

V. TRANSACTIONAL SEX AS A FORM OF LABOUR

Now to understand transactional sex as a form of labour which demands its protection under umbrella of socio-economic right it must understood how sexual intercourse qualifies as form of labour. Transactional sex, when stemming from choice, as form of work resulting from economic motivations cannot be termed as exploitative labour.⁷⁸ When Nussbaum talks about socio-economic rights she measures the 'good of a society' and its laws in terms of the capabilities that a person has, and the substantive freedoms available to lead the kind of life he or she has reason to value.⁷⁹ She compares transactional sex with works of professors,

⁷² *Supra* note 69.

⁷³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶127.

⁷⁴ *Air India Statutory Corpn. v. United Labour Union*, (1997) 9 SCC 377 : AIR 1997 SC 645.

⁷⁵ *Supra* note 7, 127.

⁷⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶240.

⁷⁷ *Lawrence v. Texas*, 2003 SCC OnLine US SC 73 : 156 L Ed 2d 508 : 539 US 558 (2003) ¶6.

⁷⁸ KAMALA KEMPADOO & JO DOEZEMA, FORCED TO CHOOSE: BEYOND THE VOLUNTARY V. FORCED PROSTITUTION DICHOTOMY (1998) ¶98. As mentioned in Yenwen Peng, "Of course they claim they were coerced": On voluntary prostitution, contingent consent, and the modified whore stigma, *Journal of International Women's Studies*, 2005 <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1432&context=jwsi> GLOBAL SEX WORKERS, at 34, 42. As some scholars have compared transactional sex with exploitative labour, it is pertinent to understand the distinction between the two. The term 'exploitative labour' has attracted a profound debate in academic arena however in the cases of prostitution the trafficking of human being for the sake of it and voluntary prostitution has always been misunderstood with each other. The basic foundation of my argument for transactional sex as an economic right only concerns with voluntary transactional sex. In no way we must confuse the concept of happy slave with consent and dignity of a worker.

⁷⁹ MARTHA C. NUSSBAUM & JONATHAN GLOVER, WOMEN, CULTURE AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES (1995).

teachers, factory labours, lawyers where a person employ there body parts and receive wages.⁸⁰ She has offered examples illustrating how in different eras of time certain professions such as giving lectures in philosophy had been looked upon with contempt. Certain artistic works like dancing, acting etc. are looked with contempt especially for females. In India it is still stigmatising for a family when a girl form that family dances.⁸¹ She compares a number of classified works which involve body part of women with prostitution in order to establish that transactional sex too like any other labour is simply a work.⁸² The only major difference between these forms of labour and prostitution is the stigma attached to it which is based on a shaky foundation of conventional morality.⁸³ This idea derives its inspiration from Aristotelian moral thought⁸⁴ which proposes that the agency of a human being must encompass free choice and independent decision making.⁸⁵ In order to recognise consensual transactional sex as an important economic right, we must abandon the traditional moral framework which looks at women engaged in sex work as deviant and guilty of choosing wrong path. It is not to deny that in a number of cases women enter do not prostitution as a result of violence, coercion, and deceit but instead voluntarily. This must remain immune to any interferences based on perceptions built on the abovementioned schemes.⁸⁶ As the preamble of Constitution of ILO suggests, the objective it seeks to achieve is social justice based on an understanding that race, creed or sex should not hinder a person's right to pursue his material wellbeing and spiritual development.⁸⁷ The same should be pursued with freedom and in dignified manner with economic security and equal opportunity.⁸⁸ At the very outset, the preamble of the ILO convention it is quite clear that the human relationship to labour has evolved in such a way that the ideology of a free contract cannot adequately explain it, neither can the workings of free market solely regulate it. Hence, the dichotomy drawn in the existing debate between right to work and right pertaining to slavery as a structure of legal and political analysis must always be understood in agreement with the point that a person has a right to free choice of employment.⁸⁹

⁸⁰ Martha C. Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, 27 *THE JOURNAL OF LEGAL STUDIES* 693 (1998).

⁸¹ *Id.*, 699.

⁸² *Id.*, 701. The Factory Worker, domestic servant, nightclub singer, professor of philosophy, skilled masseuse, employed by a health club, 'colonoscopy artist'.

⁸³ The conventional morality which stigmatizes prostitution is rooted in the patriarchal conception that female sexuality should be controlled by societal considerations rather than her own agency. The prostitute, being seen as the uncontrolled and sexually free woman, is in this picture seen as particularly dangerous, both necessary to society and in need of constant subjugation.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Jane E. Larson, *Prostitution, Labour, and Human Rights*, 37 *U.C. Davis L. Rev.* 673 (2004).

⁸⁷ Constitution of the International Labour Organisation, Annex, Declaration concerning the aims and purposes of the International Labour Organization, available at <http://www.ilo.org/public/english/about/iloconst.htm> (Last visited October 17, 2003).

⁸⁸ *Id.*

⁸⁹ Universal Declaration of Human Rights specifically provides that everyone has the right to work, to free choice of employment. Further, it provides that everyone has the right to just and

The conceptualisation of sexual labour has largely been influenced by Marx's stigmatisation of labour⁹⁰ by using it as an example of derogatory nature of labour and further Arlie Russell Hochschild's analysis of emotional labour as integral to women's productive labour.⁹¹ But keeping the Marxist conception aside as it is not relevant to the topic one thing is clear that sex as form of work was basic premise for Marxists. Like every other labour, prostitution involves transaction of human self-expression and like any other professions such as teaching, dancing singing which too is expression of self-prostitution should not warrant any moral condemnation. The specific stigma attached to the prostitution derives its origin from an "aristocratic prejudice against earning wages" that is no longer existing in other forms of labour outside prostitution, and Christianity's "general anxiety about the body—especially the female body".⁹² Interestingly both of this perception don't have any reasonable basis moreover latter reflects a misogynistic, mindset. The prevalent understanding of transactional sex as a purely sexual phenomenon is the root cause of moral and legal stigmatisation. Fundamentally transactional sex is nothing more than a purely economic transaction which has been chosen by women out of number of available employment options.⁹³

As per Nusbaum, woman entering into the profession of prostitution out of economic distress as it seems better alternative than working in a chicken factory. She contends that although the autonomy of that woman is infringed in this case but this too in a different manner. She uses Joseph Raz's vivid example of "the hounded woman," situation woman on a desert island who is constantly pursued by a man-eating animal. To articulate the aspect of autonomy and choice in the given⁹⁴ at one hand, this woman is free to go anywhere on the island and do anything she likes. But yet on the other hand, of course, she is not free because if she wants to be live and not to be eaten by animals she will have to restrict her movements to avoid the dangerous beast. Raz's point is that many poor people's lives are non autonomous in just this way. They may fulfil internal conditions of autonomy, being capable of making bargains, reflecting about what to do, and so forth. But none of this counts for a great deal if in fact the struggle for survival gives them just one unpleasant option or a small set of (in various ways) unpleasant options.⁹⁵

favourable conditions of work and everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity.

⁹⁰ RUTH BENEDICT, *THE PATTERN OF CULTURE* (1946).

⁹¹ Arlie Russell Hochschild, *Emotion Work, Feeling Rules, and Social Structure*, 85 *AMERICAN JOURNAL OF SOCIOLOGY* 3 (1979).

⁹² *Id.*

⁹³ *Supra* note 77.

⁹⁴ *Id.*

⁹⁵ *Id.*

In order to find a solution in situations like above, it would be pertinent to consult the principle of justice which in this case would be maximin strategy as a rational choice.⁹⁶ According to this strategy

One would seek to maximise the minimum condition, so that if a person were born into the worst possible situation of life allowed by the adopted moral principles, he would still be better off than he would be in the worst situation allowed by other principles. The choice of which fundamental principles of justice to adopt requires consideration of the weight assigned to general goods by those in the original position. "General goods"⁹⁷ are those things or conditions that all people desire as the generalised means to fulfilment of their individual life plans.⁹⁸

One of the most glaring examples of one of such goods is liberty which is normally understood as absence of constraint in addition to other classifiable examples like power, opportunity and wealth.⁹⁹ Among these general goods, autonomy too has a significant position.¹⁰⁰ Autonomy, seen now in the light of contractarian theory, is the capability of a person to shape and direct his life in accordance with his dynamic aspirations and desires without any external hindrances. The competent exercise of such abilities in the pursuit of one's life plan forms the basis of self-respect,¹⁰¹ without which one is liable to suffer from despair, apathy, and cynicism. Following this line of thought transactional sex will offer a maximisation of availability of choice to every member of the society.

VI. ARTICLE 19(1) G AND TRANSACTIONAL SEX

Now as it has been established that transactional sex as form of labour comes under the umbrella of socio-economic rights, it is pertinent to ground the same under right to freedom of trade and profession under Article 19 of the Constitution. The citizens of India are entitled to practice any profession, trade or business under Article 19(1)(g),¹⁰² subject to restrictions made in public interest, under Article 19(6)¹⁰³ of the Constitution. However, the restrictions cannot be arbitrary and unreasonable. The word "reasonable restriction" in Article 19 implies intelligent care and deliberation that is the choice of a course which reason dictates.¹⁰⁴ Legislation which arbitrarily or excessively invades the right cannot be

⁹⁶ *Supra* note 4, ¶92.

⁹⁷ *Id.*, Rawls describes these general goods as "things which it is supposed a rational man wants whatever else he wants". The notion of rationality considered here is developed in the general view of the good is discussed in D.A.J. Richards, *A Theory of Reasons for Action* at 286-91.

⁹⁸ C. FRIED, *AN ANATOMY OF VALUES* 97-101 (1970).

⁹⁹ RAWLS, *supra* note 5, 92.

¹⁰⁰ *Id.*

¹⁰¹ R. WHITE, *EGO AND REALITY IN PSYCHOANALYTIC THEORY* 168 (1963).

¹⁰² *Id.*

¹⁰³ The Constitution of India, 1950, Art. 19(6).

¹⁰⁴ *Chintaman Rao v. State of M.P.*, AIR 1951 SC 118.

said to contain the quality of reasonableness.¹⁰⁵ In *Narendra Kumar v. Union of India*,¹⁰⁶ the Supreme Court held that while applying the test of reasonableness, courts must look into the nature of the evil sought to be remedied by the law and whether the restraint caused by law is more than necessary. If the provisions of ITPA are looked at in this context it is quite clear that the effect of law is antithetical to the purpose sought to be achieved. The stringency of provisions is unnecessary in the light of remedy sought by legislation. The ironical yet disturbing aspect related to this is that Johar judgment which gives constitutional status to consensual sex between adults is ineffective so far when it comes to giving protection to transactional sex under constitutional framework of Article 19. Such a situation appears to be in contradiction with the jurisprudence of the Johar case, because, if the sexual conduct of consenting individuals of the same sex does not violate the Constitutional spirit, then how can the consensual transactional-sex relations continue to be unprotected by the constitution?

The economic rights of a dance bar worker or a sex worker warrant constitutional protection following the jurisprudence evolved in Johar case. The legislations¹⁰⁷ regulating the sex work and similar activities reflect the anomaly inherent in legal system. If a particular act is protected under the constitutional framework then there is no justification for regulating it by way of criminal sanctions. This in return begs a constitutional question- Why is this arbitrariness being resorted to in protecting the economic rights of a dance bar worker or a sex worker? This kind of anomaly is not sustainable under the Constitutional scheme. The question here is whether a 'reasonable restriction' can be imposed to curtail other fundamental right guaranteed under the Constitution. Since reasonable restrictions are imposed in order to preserve the public order and the interest of the state, the same cannot be applied in case of consensual transactional sex because the very jurisprudence evolved in *Navtej Johar* gives precedence to an individual over the state or society. Discarding the theory of parliamentary supremacy of British jurisprudence, the framers of our Constitution deliberately adopted the American view that the subjects should be protected against the tyranny of legislative majorities and for achieving that purpose they guaranteed certain rights set out in Part III and forbade legislation in derogation to those rights.¹⁰⁸ If transactional sex is brought under the umbrella of reasonable restrictions, this would result in a precedence of majoritarian notion over individuality which in turn would be detrimental to impact of the Johar Case. If a reasonable restriction is imposed on transactional sex it will give rise to a doctrinal conflict within constitutional principles.

¹⁰⁵ *Id.*

¹⁰⁶ *Narendra Kumar v. Union of India*, AIR 1960 SC 430.

¹⁰⁷ As discussed earlier in paper legislations like Immoral Traffic (Prevention) Act, 1956, Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018.

¹⁰⁸ *S. Ananthakrishnan v. State of Madras*, 1951 SCC OnLine Mad 294 : AIR 1952 Mad 395.

The Indian constitutionalism encompasses the values of equal concern and respect for personal autonomy as a foundational aspect and those values that dominant moral theories, following Kant,¹⁰⁹ has identified and endorsed as fundamental to the point of view of morality. In the *Navtej Johar* case while adopting the same principle the court laid emphasis on the critical importance of protection of liberty and dignity of an individual in matters related to their private space including sexual relationship. Section 377 was one such example where an individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age old social perception. Hence in this manner the legislation is violating the human dignity by tainting the individualism of person with criminality.¹¹⁰ The right to privacy central to the human dignity is core value of autonomy and is intrinsically attached to liberty. The right to life under article 21 has incorporated these values as an integral part. The meaningfulness of life lies in the ability to decide the course of living and leading a life of freedom and self-respect.¹¹¹ Privacy is considered the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. There is an inextricable link between individual dignity and privacy in a pattern woven out of a thread of diversity into the fabric of a plural culture.¹¹²

Thus in the light of *Navtej Johar* judgment the transactional sex has secured two fold constitutional protection. First the decision to indulge in sexual activity with person of one's choice is matter of one's personal autonomy and second as transactional sex is a dignified form of labour and it is protected under article 19(1)(g) of the constitution. Hence the said provisions of ITPA are in contradiction with the ruling of *Navtej Johar* as well as violative of article 19(1)(g).

VII. WAY FORWARD

Consensual sex between adults has also been recognised as an aspect of the right to privacy. In *K.S. Puttaswamy v. Union of India* judgment the Supreme Court expressed that the right to privacy and the insurance of sexual orientation are at the core of the basic rights ensured by Articles 14, 15 and 21 of the Constitution.¹¹³ The court observed that sexual preference of an individual is fundamental aspect of one's privacy any inequality against a person whose preference doesn't match to majority is detrimental one's nobility and self-esteem.¹¹⁴ In this regard if there is differential treatment to transactional sex then it would violate the right to equality of women indulging in consensual sex for money. Further

¹⁰⁹ *Supra* note 4, ¶19.

¹¹⁰ *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶135.

¹¹¹ *Id.*, ¶ 54 (Per Chandrachud J.).

¹¹² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹¹³ *Id.*

¹¹⁴ *Id.*

the Supreme Court laid down threefold test to check whether curtailment of right to privacy by state is justified. The first being existence of law, second being need in terms of legitimate state interest which ensures that law is reasonable as mandated by article 14 and third the means adopted by law must be proportional to its object.¹¹⁵ Since the provisions of ITPA violate the right equality and also run antithetical to the object sought to be achieved by legislation, they fail to pass the threefold test enunciated in Puttaswamy. The judgment not only recognises the right to have sexual preference as fundamental right but also created an obligation on government to make such infrastructural arrangement so that individual can effectively exercise their right to privacy without any kind of hindrance.¹¹⁶ Now the issue is what mechanism should be adopted by the government to regulate the sex work without infringing constitutional right of sex workers and which also promotes their interests. Looking from the international perspective, decriminalisation of sex work (including the activities related to it) has been considered as a liberal approach and this has also been the central demand of sex workers movements.¹¹⁷ Criminal laws perpetuate stigma and discrimination which violates basic human rights of sex workers and also found to be ineffective so far.¹¹⁸ The government must focus on enacting a legal framework where some regulatory measures are put on industry of sex work like minimum age bar, penalisation in case of forceful transactional sex and public health policies for sex workers.

The first step in enacting a legal framework would be recognising sex work as a form of labour which would ensure uniform labour laws apply to them and employers could not get chance to exploit them. In this framework they will also have access to compensation for work-related injuries, illness or death, and cannot be forced to work in physically unsafe and unhealthy work environments.¹¹⁹ In these contexts, sex work may be recognised in areas such as tax law, industrial rights, insurance and local planning, and sex workers have the same associated rights, obligations and entitlements as other groups of workers. The next step is removal of all forms of criminalisation and other legal oppression against sex work. The self-organisation and self-determination of sex workers must be respected.¹²⁰ They must have right to have agency over their own lives without any extraneous interference either by law or by society. And finally a proper rights enforcement mechanism where the grievances of sex workers could be redressed.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Sandhya Rau and Cath Sluggett, *Who stole the tarts? Sex work and human rights*, 2009, available at https://www.sangram.org/upload/resources/who_stole_the_tarts.pdf (Last visited on December 7, 2019).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Human Rights Watch, *Off the Streets: Arbitrary Detention and other Abuses against Sex Workers in Cambodia* 2010, available at <http://www.hrw.org/reports/2010/07/20/streets> (Last visited on December 7, 2019).

Adopting these methods the government would be able to create a safe and dignified space for sex workers and their prospects.

VIII. CONCLUSION

To summarise, in relation to the transactional sex the moral condemnation has been existing from ancient times and in the articles we have discussed how it is based on mistaken beliefs and perceptions. In reality it doesn't violate constitutional ideal. The principle of sexual autonomy is not applicable to people presumably lacking capacity to rationalise, for example young children, nor does it is the validation of the infliction of serious bodily harm. In addition, the liberty of sexual expression comports with the liberty of others to choose to be sexual partners. It follows, therefore, that there should be no moral objection on grounds of sexual autonomy to the reasonable regulation of consensual sex among adults sex as regards time, manner, and place. For example, there is no objection to the reasonable regulation of the obtrusive solicitation of sexual relations. But the moral principles qualifying the principle of sexual autonomy do not justify any absolute prohibition of sexual autonomy of the kind that the criminalisation of prostitution involves.

Not protecting the dignity of labour and human capital is also a kind of arbitrariness leading to the marginalisation of millions of workers. In the post-Johar world, I believe this kind of economic marginalisation is no longer consistent with the Supreme Court's jurisprudence. The criminal prohibitions in this context flatly violate the individual rights. These rights may also now not be abridged through indistinct appeals to public distaste that, if given the authority of law, would dilute their ethical force and substantially change them from a powerful vindication of autonomy into the empty and insipid conception that human beings must be allowed to do that which gives no space for fierce objection.¹²¹ The attitudes of Majority by themselves are not supported by defensible moral reasoning,¹²² and at any rate deprivation of liberty cannot be justified. This majoritarian morality is merely an instance of intractable prejudice that must not be elevated into law.¹²³

Under Indian constitution which stresses upon right of adults to consent and to pursue life with dignity and privacy includes matters related to sexual expression too. As social morality is not guiding force for any progressive constitution the sanction on sex work which derives its legitimacy fundamentally from social morality is untenable. As Johar jurisprudence has given more weightage to individual rights than preservation of social mores now the sex work deserves

¹²¹ W. Friedmann, *Law, Liberty, and Morality*, 9 THE AMERICAN JOURNAL OF JURISPRUDENCE 151-154 (1963).

¹²² *Supra* note 65, ¶18.

¹²³ *Supra* note 46, ¶19.

constitutional protection from arbitrary penalisation sex work has found sound articulation within constitutional framework. It is not just that the sex work must be protected under right to life and right to freedom of trade but it is also an obligation of state to facilitate the effective exercise of such rights. The government is duty-bound to introduce a novel legal framework where sex work is recognised as labour and all the criminalising attempts of state must be dispensed with. Under new framework every sex worker must have a right to live with dignity and autonomy with an enforcement mechanism to deal with cases when the enjoyment of such rights is attempted to curtailed by anyone.