AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: C O'Connell 'Reconceptualising the first African Women's Protocol case to work for all women' (2019) 19 *African Human Rights Law Journal* 510-533
http://dx.doi.org/10.17159/1996-2096/2019/v19n1a24

Recent developments

Reconceptualising the first African Women's Protocol case to work for *all* women

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Summary

The ECOWAS Court of Justice is the first human rights body to find a violation of the African region's women's rights treaty, the African Women's Protocol. Nearly 15 years after the adoption of this Protocol, the ECOWAS Court determined in Dorothy Njemanze & 3 Others v Nigeria *that the Nigerian state violated the rights of women because state agents assumed they were sex workers and, therefore, discriminated against them and treated them violently. Significantly, the Court determined that the state violated the women's rights to dignity, as well as their right not to be arbitrarily detained and arrested. However, a feminist analysis of this case reveals that the ECOWAS Court's judgment protected women who are not sex workers at the expense of sex workers' rights. This article critically examines how the ECOWAS Court developed its jurisdiction in this case, with a particular focus on how the Court's strategic avoidance of the topic of sex work resulted in a judgment that is harmful to sex workers. The article reconceptualises the Court's reasoning to provide alternative approaches for interpreting women's rights, especially sex workers' rights. By providing the ECOWAS Court judgment with an alternative approach,*

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which includes an analysis of the right to work and the right to dignity, through the application of the African Women's Protocol and other human rights instruments, the article provides a feminist and inclusive perspective on how women's rights could be approached in future judgments and litigation efforts.

Key words: *women's rights; sex work; Economic Community of West African States; African Women's Protocol*

1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) entered into force in November 2005.[1] However, it was not until more than a decade later that the provisions enshrined in the Protocol would be examined by a regional human rights body. In October 2017 the Economic Community of West African States (ECOWAS) Court of Justice[2] issued judgment in *Dorothy & 3 Others v Nigeria*,[3] and in so doing held the Nigerian state responsible for violating rights enshrined in the African Charter on Human and Peoples' Rights (African Charter);[4] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[5] the International Covenant on Civil and Political Rights (ICCPR);[6] the Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[7] the Universal Declaration of Human Rights (Universal Declaration);[8] and, for the first time, the African Women's Protocol.[9]

1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) adopted 11 July 2003, entered into force 25 November 2005.

2 Economic Community of West African States (ECOWAS) Court of Justice (2001).

3 *Dorothy Njemanze & 3 Others v Nigeria* ECOWAS Court of Justice (12 October 2017) ECW/CCJ/JUD/08/17. The case was initially filed on 17 September 2014, and was a joint action between the Institute for Human Rights and Development in Africa (IHRDA), Alliances for Africa, the Nigerian Women Trust Fund and the law firm of SPA Ajibade, with support from the Open Society Initiative for West Africa (OSIWA).

4 Arts 1, 2, 3, 5 & 18(3) African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

5 Arts 2, 3, 5(a) & 15(1) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) GA Res 54/180 UN GAOR 34th session Supp 46 UN Doc A/34/46 1980.

6 Arts 2(1) & (3), 4, 7 & 26 International Covenant on Civil and Political Rights (ICCPR) adopted 16 December 1966, GA Res 2200A (XXI), UN Doc A/6316 (1966) 993 UNTS 3, entered into force on 23 March 1976.

7 Arts 10, 11, 12, 13 & 16(1) Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) adopted 10 December 1984, GA Res 39/46, entered into force 26 June 1987.

8 Arts 1, 2, 5, 7 & 8 Universal Declaration of Human Rights (Universal Declaration) adopted 10 December 1948, UNGA 217 A (III).

9 Arts 2, 3, 4(1) & (2), 5, 8 & 25 African Women's Protocol (n 1).

While this case is heralded as an advancement in women's rights in Africa,[10] it raises concerns as to how and to what extent the African Women's Protocol was applied. The article contends that *Njemanze* is both cause for celebration and grounds for reflection. While the case recognises rights violations of one particular group of women, namely, women who are not sex workers, it simultaneously upholds discrimination impacting another group of women, namely, those women working in sex work (sex workers or 'prostitutes').[11] The ECOWAS Court being the first international treaty body to determine a violation of the African Women's Protocol, it is useful to draw lessons from the case of *Njemanze* for future application before regional and sub-regional human rights bodies in Africa.

In the spirit of feminist efforts to reconceptualise how international human rights law applies to women, the article offers alternative strategies and approaches as to how the ECOWAS Court could have developed its judgment in *Njemanze*. Admittedly, the proposed alternative approaches push the boundaries of what is considered feasible in how we currently *do* human rights law. However, the foundational premise supporting the arguments developed in the article is that in order to make human rights law work for women and marginalised groups in general it is imperative that the accepted 'boundaries' of human rights law and advocacy be manipulated, distorted and, in some cases, eradicated.[12] In terms of structure the article first explores the context in which sex work exists and is regulated in Africa generally. Second, the article introduces the *Njemanze* case by setting out the facts of the plaintiffs' and state's cases and the ECOWAS Court's analysis. Third, it introduces

10 See B Chakya 'Africa (Nigeria): ECOWAS Court challenges vagrancy laws that target women' ReproHealthLaw Blog 30 November 2017, https://reprohealthlaw.wordpress.com/2017/11/30/africa-nigeria-ecowas-court-challenges-vagrancy-laws-that-target-women/ (accessed 10 April 2018); Institute for African Women in Law 'A first for the Maputo Protocol' 24 November 2017, www.africanwomeninlaw.com/single-post-ajg27/2017/11/24/A-First-for-the-Maputo-Protocol (accessed 12 April 2018); B Ajibade, B Gabari & A Adeniyi 'SPA Ajibade & Co wins landmark decision on gender discrimination and infringement on human rights' Chambers and Partners 20 November 2017, www.chambersandpartners.com/article/2829/spa-ajibade--co-wins-landmark-decision-on-gender-discrimination-and-infringement-of-human-rights (accessed 12 April 2018).

11 The author uses the term 'prostitutes' when directly referencing the ECOWAS Court judgment as that is the terminology used by the Court. However, the author uses the terms 'sex work' and 'sex worker' rather than 'prostitute' because 'the primary meaning of the word [prostitute] has a sexual connotation, historically describing women who offer sexual services on an indiscriminate basis, whether or not for money and, more recently, the offer of sex for money ... Further, the term 'prostitute' conflates work and identity. Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera.' See SA Law 'Commercial sex: Beyond decriminalisation' (2000) 73 *Southern California Law Review* 525. The terms 'sex work'/'sex worker' and 'prostitution'/'prostitute' refer to the exchange of sexual acts for money, as opposed to the 'sex work industry' which refers to a broad range of sexual services including pornography, phone and internet sex. D Auguston & A George 'Prostitution and sex work' (2015) 16 *Georgetown Journal of Gender and Law* 229.

12 H Charlesworth & C Chinkin *Boundaries of international law* (2000).

alternative approaches the ECOWAS Court could have adopted to allow for an analysis of rights that operate to protect *all* women. Finally, based on arguments made throughout the article to re-frame the ECOWAS Court's decision in *Njemanze*, the article reconceptualises aspects of the case to consider the discriminatory impact of Nigeria's Penal Code and the need to repeal its *de facto* criminalisation of sex work. While the consensus among human rights lawyers may be to go for the 'low-hanging fruit' in litigation, the article critically examines *Njemanze* with the intention of showing how such an approach may be counterproductive as it enforces the rejection of the rights of marginalised groups such as sex workers.

2 Contextualising sex work in Africa

The vast majority of African countries maintain laws that criminalise the activities of sex workers.[13] These laws are in large part remnants of a colonial legacy across African nations, where the influence of Abrahamic religions (Christianity and Islam) on traditional African religions altered traditional perceptions about women's bodies and sexualities. While African traditional religions celebrate women's bodies as 'reproductive or sexual icons', Abrahamic religions portray women's bodies as sites of 'sin, moral corruption and a source of distraction from godly thoughts'.[14] In response to this colonial articulation of women's bodies as 'sinful', colonial powers developed laws to control African women's sexuality. For example, the Ugandan Penal Code, largely based on English criminal law, criminalised sex work (prostitution) in 1930, despite the fact that sex work generally was acceptable in the pre-colonial era.[15]

The criminalisation of sex work in colonial-era Africa was very much entrenched in constructions of black women as 'sexually degenerate', a conception that Ngwena argues continues to outlive European imperialism and colonisation.[16] The 1969 legalisation of sex work in Senegal offers support for Ngwena's conclusion – legalisation, which was and is heavily regulated, is not the result of a liberal government agenda but rather an attempt 'to protect French colonial administrators from contracting sexually-transmitted diseases (STDs)

13 African Sex Worker Alliance '"I expect to be abused and I have fear": Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries' Research Report in S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 164-165. See also Global Network of Sex Work Project 'Sex work is legalised in Senegal', https://www.nswp.org/timeline/event/sex-work-legalised-senegal (accessed 12 April 2018).

14 Tamale (n 13) 153.

15 CA Mgbako *To live freely in this world* (2016) 50; S Tamale 'Sex work and sexuality in Uganda' in S Tamale (ed) *African sexualities: A reader* (2011) 155.

16 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 192.

from native women'.[17] The regulation of African women's bodies in the colonial era was both racist and patriarchal by design.

Laws regulating sex work determine when and where women may engage in sexual activity – in the home, when married to a person of the opposite sex, for purposes of procreation – and simultaneously reinforce the subordination of women. Women who reject this formulation of how women should engage in sexual activity were (and are) pushed to the margins of society, where they not only are denied state protection but are actively targeted by the state.[18]

While many African countries outrightly criminalise sex work, others adopt wide-berth laws on vagrancy, loitering and public disorder.[19] The intention of these expansive laws is to allow law enforcers large discretionary powers to determine who is breaking the law.[20] For instance, in the Kenyan case of *Lucy Nyambura & Another v Town Clerk* the petitioners challenged the interpretation and application of a set of by-laws prohibiting 'loitering in a public place for immoral purposes'.[21] The petitioners were arrested under the remit of these by-laws and because of the vague nature of these laws the Court determined that there was no violation of the petitioners' rights to dignity. Laws such as this one allow law enforcement officers indiscriminately to arrest and detain women simply because of what they are wearing or what time of day it is.

No matter the design of laws criminalising sex work or sex work-related activities, the objective remains the same. These laws are designed to 'strengthen and affirm our aversion to and fear of (sex workers) and confirm that we must control women engaged in unsanctioned sexual activity'.[22]

3 Case overview: Establishing the facts

The *Njemanze* case is concerned with the treatment of four women who were arrested and subjected to violence by state agents as it was assumed that the women were sex workers. The plaintiffs (the four women) and the state presented two different contexts in which to examine the case. While the plaintiffs focused on the state's obligation

17 K Ngalamulume 'Le péril vénérien: L'État colonial français et la sexualité à Saint-Louis-du-Sénégal, 1850-1920' ('The venereal peril: The French colonial state and sexuality in Saint-Louis, Senegal, 1850-1920') in J-P Bado (ed) *Conquêtes médicales: Histoire de la médecine moderne et des maladies en Afrique* (*Medical conquests: The history of modern medicine and diseases in Africa*) (2006), quoted in Tamale (n 13) 164.

18 Tamale (n 13) 158.

19 Eg, Botswana, Nigeria, Kenya, Zimbabwe and Namibia.

20 Centre for Reproductive Rights *Legal grounds III: Reproductive and sexual rights in sub-Saharan African courts* (2017) 125-132.

21 *Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others* (2011) Petition 286 of 2009.

22 Mgbako (n 15) 63.

to prevent and investigate the discrimination and violence they experienced, the state argued that because the plaintiffs in fact were sex workers there existed no grounds on which to determine state responsibility for the alleged violations. The overview of the plaintiff and state arguments provided below builds the foundation for the critique of this case which asserts that the ECOWAS Court's decision in *Njemanze* pits women against each other, rather than supports an inclusive approach to protecting the rights of *all* women.

3.1 The facts: Plaintiffs

The plaintiffs alleged a set of facts that outlined how they were targeted, assaulted and detained by officers of a state authority, the Abuja Environmental Protection Board (AEPB). AEPB worked in cooperation with members of the Society against Prostitution and Child Labour (SAPCLN), an Abuja-based non-governmental organisation (NGO), to patrol the streets in search of sex workers.[23] The plaintiffs alleged that they were targeted and deemed 'prostitutes'/*ashawo* simply because they were outside at night. The facts specific to each of the four plaintiffs varied to some degree, but the basis for their allegations shared a string of commonalities, including that

(i) they were walking outside at night and as a result were verbally abused and degraded by state officers who called them 'prostitutes';[24]

(ii) they were each assaulted and/or sexually assaulted by armed uniformed officers – two of the plaintiffs identified AEPB officers and vehicles;

(iii) they either were abducted or an attempt was made to abduct them; and

(iv) three of the plaintiffs reported the incident to a state authority but received no remedy.

The plaintiffs collaboratively alleged that the state of Nigeria had violated their human rights as enshrined in the African Charter;[25] the African Women's Protocol;[26] CEDAW;[27] ICCPR;[28] CAT;[29] and the Universal Declaration.[30] The alleged rights violations were based on the premise that the mistreatment suffered by the plaintiffs at the hand of state authorities constituted gender-based violence; unequal and gender-based discrimination; and a failure on the part of the state

23 *Njemanze* (n 3) 16.
24 *Njemanze* 36 37.
25 Arts 1, 2, 3, 5 & 18(3) African Charter.
26 Arts 2, 3, 4(1) & (2), 5, 8 & 25 African Women's Protocol.
27 Arts 2, 3, 5(a) & 15(1) CEDAW (n 5).
28 Arts 2(1) & (3), 3, 7 & 26 ICCPR (n 6).
29 Arts 10, 11, 12, 13 & 16(1) CAT (n 7).
30 Arts 1, 2, 5, 7 & 8 Universal Declaration (n 8).

to investigate the plaintiffs' allegations and subsequently to provide a remedy.[31]

To redress the alleged rights violations the plaintiffs requested the Court to order the state to implement awareness-raising campaigns aimed at eradicating beliefs, practices and stereotypes that legitimise and exacerbate violence against women, as well as to adopt legislation and employ social and economic resources to punish and eradicate violence against women. The requested remedies included monetary compensation for the plaintiffs. However, the plaintiffs did not request remedies intended to acknowledge stereotyping, discrimination and violence experienced by sex workers.

The plaintiffs' statement of facts drew a definitive line in the sand: There are two types of women, namely, those women who are humiliated by even the perception that they may be an *ashawo* ('prostitute'), and those women who in fact *are* sex workers. Rather than align themselves with the rights of *all* women, including sex workers who are women, the plaintiffs rebuffed the state's allegations that this case concerned sex work. They asserted that 'this case has nothing to do with the legality or illegality of prostitution and is not a campaign for the legalisation of prostitution'.[32] From the outset, the plaintiffs asserted that being called *ashawo* was degrading, seemingly with little regard for the perhaps unintended implication that women who engage in sex work should be degraded (discriminated against, exposed to violence, not worthy of protection, and so forth). While an argument certainly can be made that it was strategically necessary for the plaintiffs intentionally to distance themselves from commercial sex work and sex workers in order to *win* the case, such a stance played to rather than challenged gender-based discrimination and the stereotyping of women.

3.2 The facts: Nigerian state

Rather than engage in the particulars of the plaintiffs' alleged facts the state set out to challenge the ECOWAS Court's jurisdiction over the case. At the crux of the state's argument was the assertion that the plaintiffs were 'prostitutes' who 'dress naked or half naked by the road side soliciting for men'.[33] In its efforts to obstruct the Court's jurisdiction the state submitted the following arguments.

First, the Nigerian state contended that because the plaintiffs 'belong to the cadre of prostitutes popularly called 'Big Aunty'[34] they

31 *Njemanze* (n 3) 20-22.
32 *Njemanze* 17.
33 *Njemanze* 15. The state also raised an objection with regard to the admissibility of the second plaintiff's claim, alleging that it was statute-barred. The Court upheld this challenge and did not issue judgment with regard to the second plaintiff.
34 *Njemanze* 16.

were in violation of national law that criminalises sex work in public places in Nigeria.[35] The state claimed:[36]

> The government of the Federal Republic of Nigeria, the FCT (Federal Capital Territory) administration and indeed the international bodies in Africa are against commercial sex workers popularly called *ashawo* in Nigeria, as same constitutes nuisance and a violation of the moral values of our African society.

The state argued that the arrest of the plaintiffs was not a violation of the African Charter as the practice was warranted in national law.[37] Sex work is criminalised through Nigeria's Criminal Code, which mainly is applicable in the southern regions of Nigeria, and also its Penal Code, which mainly is applicable in the northern region. The grounds on which sex work is criminalised vary across the Criminal Code and the Penal Code.[38] The state referenced section 406(d) of the Penal Code to support its assertion that sex work in public is criminalised in Nigeria because sex workers are included in the definition of an idle person: '(a)ny common prostitute behaving in a disorderly or indecent manner in a particular public place or persistently importuning or soliciting persons for the purpose of prostitution'.[39] The state argued that because the plaintiffs were outside at night there were enough grounds to warrant their arrest.

The Nigerian state claimed that because sex work in public spaces is illegal in Nigeria there were no grounds for the ECOWAS Court to determine jurisdiction based on a violation of article 6 (the right not to be arbitrarily arrested or detained) of the African Charter. To substantiate its claim that the national law criminalising prostitution warranted the arrest and detainment of presumed sex workers the state argued that if the ECOWAS Court were to accept the plaintiffs' claims it would be equivalent to the Court granting the plaintiffs the 'freedom to sell sex in the street'.[40] The state ultimately argued that national law supplants the protections afforded by international human rights law or, put another way, that the arbitrary arrest and detainment of sex workers is not a violation of international law *because* Nigerian law allows such behaviour.

Second, based on the state's presumption that the plaintiffs were in fact sex workers, it argued that '[t]here exists no international convention, domestic law or culture in Nigeria that recognises prostitution as a legitimate business, it is actually a criminal offence to

35 Sec 406(d) Nigerian Penal Code LFN 2004 3.
36 *Njemanze* (n 3) 15.
37 *Njemanze* 22.
38 Ch 21 Nigerian Criminal Code; secs 220-225 Offences Against Morality; ch 24 Idle and Disorderly Persons; Rogues and Vagabonds; Bringing Contempt on Uniform 249.
39 Penal Code (n 35).
40 *Njemanze* (n 3) 23.

indulge in prostitution in public places'.[41] By challenging the legitimacy of sex work, the Nigerian state sought to marginalise sex workers from international human rights protections. However, this claim, that sex work is not protected in international law, is false. As is discussed in more detail below, sex workers' rights are explicitly recognised in CEDAW and are articulated through a myriad of human rights provisions, including the right to work.

Accompanying its dual-pronged approach to challenging the Court's jurisdiction, the state maintained that the AEPB, in collaboration with the Nigerian police, was mandated 'to arrest, detain and prosecute any woman soliciting/offering herself for sexual service at night at any public place'.[42] The state made no attempt to deny that it condones the arbitrary arrest of women by its agents, revealing that in practice its officers are free to make judgments about who is and who is not a prostitute based on profiling, stereotypes, and individual bias.

3.3 The Court's approach: Avoid 'prostitution'

In determining its jurisdiction over *Njemanze*, the ECOWAS Court cited article 9(4) of the Supplementary Protocol, which provides that 'the Court has jurisdiction to determine cases of violations of human rights that occur in any member state'.[43] However, to establish its jurisdiction under article 9(4) the Court determined that human rights violations had indeed occurred because the state confirmed the plaintiffs' version of the facts.[44] The Court found that the state had not provided sufficient evidence to substantiate its claim that the plaintiffs were sex workers.[45] Rather than engage in the complicated task of combating the state's jurisdiction claims, especially as they were premised on the legality or illegality of sex work, the ECOWAS Court determined that

> (t)he plaintiff alleged a violation of their human rights, [and] the defendant (state) maintain[ed] that the issue borders on legalisation of prostitution. However, it is trite that jurisdiction is inferred from the plaintiff's claim and not the defence (the state).[46]

41 *Njemanze* 17. Of note, the wording of the law criminalises acts in 'public places', implying that more private arrangements, such as soliciting through text messages, are not criminalised. This means that this provision should be considered more as a regulatory offence (such as operating a legitimate business in a residential building) rather than a criminal offence. Consequently, sex work as a criminal or immoral act is a misreading of the intent of the law.

42 *Njemanze* 16.

43 Supplementary Protocol A/SP1/01/05 amending the Preamble and arts 1, 2, 9, 22 & 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and art 4 para 1 of the English version of the said Protocol (Supplementary Protocol) (adopted in 2005 and provisionally entered into force upon signature in 2005).

44 *Njemanze* (n 3) 36.

45 *Njemanze* 38.

46 *Njemanze* 24.

Based on the plaintiffs' established facts the Court examined the relevant rights violations.

First, the Court determined that the use of the word 'prostitute' or *ashawo* by state agents is 'humiliating, derogatory and degrading' and, therefore, is a violation of the plaintiffs' rights under article 5 of the African Charter which protects the right to dignity and freedom from cruel, inhuman or degrading punishment or treatment.[47] While upholding the plaintiffs' right to dignity, the Court simultaneously reinforced negative social attitudes that perceive sex work to be 'humiliating, derogatory and degrading'.

Second, the Court examined the state's discriminatory application of the Penal Code and determined:[48]

> The hug of the operation was targeted against women. This systematic sting operation directed against only the female gender furnishes evidence of discrimination ... There is no law that suggests that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex.

In this brief statement, the Court provided its only analysis of the state's Penal Code in relation to sex work. It relied on CEDAW to determine the Nigerian state's responsibility to prevent gender-based discrimination, as well it determined that Nigeria's Penal Code is discriminatory because it assumes that only women out late at night are 'idle persons'. This aspect of the judgment is the ECOWAS Court's greatest effort to confront the criminalisation of sex work in Nigeria, yet the Court makes no mention of the impact of discriminatory law on sex workers.

Third, the Court found the Nigerian state responsible for violating the plaintiffs' rights to protection from arbitrary arrest and detention under article 6 of the African Charter and article 9(1) of ICCPR. The Court reached its conclusion that the plaintiffs were arbitrarily arrested and detained as the state did not provide sufficient evidence to prove the allegation that the women were engaged in sex work and that their arrest was as a result of the women committing a criminal offence. The Court made it clear that the Nigerian state had violated the plaintiffs' rights to be free from arbitrary arrest and detention. However, the way in which the Court framed its reasoning implies that it would be acceptable for Nigerian state agents to patrol the streets and arrest women as long as they could prove the women they arrested were sex workers. This is a dangerous inference that undermines the Court's previous assertion that a discriminatory law violates the human rights protections enshrined in CEDAW.

Finally, whereas the plaintiffs' requested remedies were intended to confront some of the underlying discrimination issues at play in this

47 Art 5 African Charter.
48 *Njemanze* (n 3) 38.

case, the ECOWAS Court limited its remedy order to monetary compensation.[49] This decision is disappointing because not only did the Court neglect to address the larger issue of sex work criminalisation in this case, but also it missed an opportunity to require the state to focus on eradicating beliefs, practices and stereotypes that legitimise and exacerbate violence and discrimination against women.

The following sections seek to reconceptualise aspects of *Njemanze* in order to extrapolate lessons for application in future women's rights cases.

4 Reconceptualising jurisdiction

Central to the ECOWAS Court's analysis in *Njemanze* is the premise on which it established jurisdiction. While the state offered distinct challenges to the Court's jurisdiction, the Court neglected to acknowledge the state's claims, instead opting to establish its jurisdiction based on the facts provided by the plaintiffs.[50] By forgoing a comprehensive rebuttal to the state's jurisdiction challenges, the Court subverted the complicated issues surrounding Nigeria's treatment of sex workers and the criminalisation of sex work. This approach makes strategic sense in the event that the ECOWAS Court's aim was to provide an individual remedy to the relevant plaintiffs. However, the ECOWAS Court's vision statement includes 'establishing and sustaining an enabling legal environment for the achievement of *community* aims and objectives'.[51] This activist community-based approach to interpreting the law creates space for the ECOWAS Court to push the boundaries of how law exists. However, the ECOWAS Court has explicitly stated 'that its role is not to examine community member states' laws *in abstracto*, but rather to ensure protection of people's rights when they are victims of violations of those rights and that it must do so by examining concrete cases brought before it'.[52] This principle notwithstanding the Nigerian state raised the issue of the criminalisation of sex work in *Njemanze*, thereby offering the ECOWAS Court an opportunity to fully interpret international human rights law as it applies to *all* women potentially impacted by the domestic law criminalising sex work.

This part provides a reconceptualisation of the ECOWAS Court's jurisdiction in the determination to develop alternative streams of

49 Three of the four plaintiffs were awarded N6 000 000; one of the plaintiffs was dismissed from the case due to time-barred jurisdiction issues.

50 *Njemanze* (n 3) 24.

51 ECOWAS Court of Justice Mission and Vision Statement (2012), www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=17&Itemid=20 (accessed 12 June 2018) (my emphasis).

52 *Hadijatou Mani Koraou v The Republic of Niger*, ECOWAS Court of Justice 27 October 2008 ECW/CCJ/JUD/06/08.

analysis that address underpinning issues relevant to this case. To effectively confront the Nigerian state's jurisdiction claims the ECOWAS Court needed to develop two coinciding arguments, namely, (i) a national law criminalising sex work cannot be used as grounds to violate international human rights law; and (ii) the rights of sex workers are indeed enshrined in and protected by international human rights law.

Had the ECOWAS Court developed these counter-claims effectively, it would have established grounds to examine how the national law criminalising sex work violates *all* women's rights. The following parts outline approaches the ECOWAS Court could have adopted to counter the state's jurisdiction claims.

4.1 National law and international human rights protections

To counter the state's claim that the ECOWAS Court's acceptance of jurisdiction in this case would be equivalent to it condoning a violation of national law, the ECOWAS Court needed to determine that the state's Penal Code criminalising sex work may not be employed as grounds to violate the plaintiffs' rights under the African Charter. In the *Njemanze* judgment, the Court developed a preliminary argument about the Nigerian Penal Code that is foundational to confronting the state's first jurisdiction challenge. The ECOWAS Court determined that the AEPB's 'sting operation' specifically targeted women, not men, and therefore inherently was discriminatory. It established that the criminalisation of sex work is not, and should not be, interpreted to be a law that 'suggests when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes'.[53] By addressing the discriminatory application of the Penal Code as regards sex work, the Court established grounds to argue not only that the Penal Code explicitly is discriminatory but also that the Penal Code cannot override article 6 of the African Charter, which enshrines the right to personal liberty and protection from arbitrary arrest.[54]

The claw-back clause in article 6, 'except for reasons and conditions previously laid down by law', is mitigated by the international law principle enshrined in the Vienna Convention on the Law of Treaties, which mandates that a 'state party may not invoke the provisions of (an) internal law as justification for its failure to perform a treaty'.[55] By illustrating how the Nigerian Penal Code undermines human rights principles protected in the African Charter, the ECOWAS Court could have effectively confronted the state's first jurisdiction challenge: The Nigerian state cannot use the provisions of a national law (the criminalisation of sex work) to discriminate against and to arbitrarily arrest and detain any woman. Instead, the Court signalled to other

53 *Njemanze* (n 3) 38.
54 Art 6 African Charter.
55 Art 27 Vienna Convention on the Law of Treaties UNTS Vol 1155 23 May 1969.

African countries that a state's ratification of human rights treaties does not necessarily require the protection of rights enshrined in international human rights law.

4.2 Sex work as 'legitimate' work in international human rights law

To challenge the Nigerian state's assertion that sex work is not a 'legitimate business', the ECOWAS Court needed to establish that sex work indeed is considered 'legitimate' under international human rights law and, accordingly, that women who work in sex work are protected by international human rights law. While the state referenced only the African Charter in its jurisdiction challenge, the African Charter itself prescribes a guide for the broad interpretation of its articles, which includes inspiration from international law.[56]

International human rights treaty-monitoring bodies have not yet developed a direct and comprehensive framework specific to the enforcement of sex workers' rights. Despite this lack there are numerous grounds on which to articulate sex workers' rights through the standards set out in international human rights treaties. For instance, Amnesty International draws on the ESCR Committee's General Comment 2 to argue that 'states must specifically ensure that sex workers have access to the full range of sexual and reproductive health care services'.[57] Additionally, Amnesty International referred to CEDAW General Recommendation 33 to note that '[w]here sex workers face the threat of criminalisation, penalisation or loss of livelihood when or if they report crimes against themselves to police, their access to justice and equal protection under the law is significantly compromised'.[58] The South African organisation Sex Workers Education and Task Force (SWEAT) links the right to work to sex work through the International Covenant on Economic, Social and Cultural Rights (ICESCR).[59] Further, the Kenyan Sex Worker Alliance in its 2017 Shadow Report submission to the CEDAW Committee determined that the criminalisation of sex work in Kenya violated sex workers' rights to equality and non-discrimination; to engagement in political and public life; to fair employment and labour practices; to access healthcare services; and to be free from exploitation.[60]

56 Art 60 African Charter.

57 Amnesty International 'Policy on state obligations to respect, protect and fulfil the human rights of sex workers" POL 30/4062/2016 26 May 2016 10, https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF (accessed 12 June 2018).

58 As above.

59 Sex Workers Education and Task Force (SWEAT) 'Sex work and human rights' (2015), http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-work-and-human-rights-Asijiki-1.pdf (accessed 12 June 2018).

60 Kenya Sex Worker Alliance '"Aren't we also women?" Kenya sex workers' shadow report submission to the United Nations Committee on the Elimination of

Perhaps the strongest legal grounds to assert the rights of sex workers is through CEDAW,[61] which has been ratified by Nigeria[62] and which is the only international treaty to make explicit mention of the rights of sex workers. CEDAW explicitly acknowledges the rights of sex workers by requiring states to prevent the exploitation of sex work. The most direct articulation of sex workers' rights in CEDAW is through article 6, which calls on states to 'take all appropriate measures … to suppress all forms of traffic in women and exploitation of prostitution of women'.[63] Importantly, this provision focuses on the suppression of the exploitation of sex work, not on the suppression of sex work itself. This is because, as Mgbako and Smith explain, during the CEDAW drafting process a group of states expressly rejected language to suppress *all* prostitution.[64] CEDAW's specific mention of the need to suppress the '*exploitation* of prostitution' is indicative of a shift from an emphasis on eradicating sex work to 'view[ing] sex workers as individuals who hold fundamental rights'.[65] While CEDAW does not explain the causes and means of exploitation it references, implied in the language of article 6 is the idea that women may elect to engage in voluntary sex work, that is, states have a duty to create an environment in which sex workers are not exploited.[66] Significantly, article 6 does not imply that sex work should be suppressed or criminalised.

Implicit in CEDAW's requirement that state parties 'take all appropriate measures' to protect sex workers from exploitation is the requirement for states to undertake positive action to ensure the fulfilment of article 6. Such action may include measures to eradicate

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Discrimination against Women 68th session' October 2017, https://aswaalliance.org/wp-content/uploads/2019/03/AREN%E2%80%99T-WE-ALSO-WOMEN.pdf (accessed 12 June 2018).

61 J Sagade & C Forster 'Recognising the human rights of female sex workers in India: Moving from prohibition to decriminalisation and a pro-work model' (2018) 25 *Indian Journal of Gender Studies* 26.

62 CEDAW and African Women's Protocol, ratified by Nigeria on 22 November 2004 and 16 December 2004 respectively.

63 Art 6 CEDAW.

64 C Mgbako & LA Smith 'Sex work and human rights in Africa' (2011) 33 *Fordham International Law Journal* 1201.

65 As above (my emphasis).

66 Debates in feminist circles both challenge and accept the voluntary nature of sex work. Anti-prostitution feminists argue that sex work is a form of violence and sexual slavery, which cannot be removed from its exploitative patriarchal roots. Anti-prostitution feminists use human rights as a liberation tool to 'free' sex workers. See K Barry *The prostitution of sexuality* (1995); J Bindel *The pimping of prostitution: Abolishing the sex work myth* (2017). Pro-sex work feminists, on the other hand, argue that sex work is a legitimate occupation, and that sex workers who voluntarily elect to work in sex work must be protected by the same human rights protections afforded to all workers. See P Alexander 'Feminism, sex workers, and human rights' in J Nagel (ed) *Whores and other feminists* 1997) 83; K Kempadoo & J Doezema *Global sex workers: Rights, resistance, and redefinition* (1998). However, it is important to note that sex workers from marginalised communities, such as transgender individuals, may be 'forced' into sex work because they face disproportionate employment discrimination.

discrimination, harmful gender stereotypes and violence against women;[67] to establish socio-economic programmes to assist women who work in sex work;[68] to ensure access to healthcare services;[69] and to promote safe and healthy working conditions.[70] Alongside article 6 of CEDAW, the CEDAW Committee has issued recommendations that, although non-binding on states, provide great clarity and substance in interpreting the CEDAW provisions. For instance, General Recommendation 19 on Violence Against Women asserts that gender-based violence impairs women's enjoyment of their rights and freedoms, which includes the right to just and favourable work conditions.[71] This Recommendation makes no distinction as to the type of work or worker, formal or informal, thereby providing a standard to protect sex workers' rights under the right to just and favourable work conditions in international human rights law.

The right to work, as enshrined in numerous international human rights treaties, provides a robust framework through which to protect women sex workers from exploitation. Article 23(1) of the Universal Declaration protects the right to work and to free choice of employment, as well as the right to just and favourable conditions of work.[72] ICESCR, which was ratified by Nigeria in 1993, enshrines the right to work in articles 6, 7 and 8, and includes the right to just and favourable work conditions and the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'.[73] This distinction, that a worker has the right to freely choose the type of work they do, is directly applicable to sex work and is bolstered by the ESCR Committee's further elaboration of the right to work in General Comment 18 and General Comment 23.[74] General Comment 18 establishes that state parties have a responsibility to reduce the number of workers operating in the informal economy as these workers receive no state protection.[75] Sex workers who operate in contexts where sex work is criminalised are included in this classification of informal workers. General Comment 23 elaborates on General Comment 18 to determine that 'the right to

67 Arts 5 & 10 CEDAW.

68 Report of the Committee on the Elimination of Discrimination against Women 18th and 19th sessions 1998 GA Official Records 53rd session Supplement 38 (A/53/38/Rev.1) 'Zimbabwe' para 158.

69 Art 12 CEDAW.

70 Art 11 CEDAW.

71 CEDAW Committee General Recommendation 19: Violence against women (1992) para 7(h).

72 Art 23(1) Universal Declaration.

73 International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966, GA Res 2200A (XXI), entered into force 3 January 1976.

74 Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 18: The Right to Work, art 6 of the Covenant (E/C12/GC/18) 6 February 2006; ESCR Committee General Comment 23: Right to Just and Favourable Conditions of Work (E/C12/GC/23) 27 April 2016.

75 General Comment 18 (n 74) para 10.

just and favourable conditions of work is a right of everyone, without distinction of any kind'.[76] Furthermore, it contends that workers in the informal economy often are excluded from legal protection, support and safeguards, which exacerbates their vulnerability.[77] General Comment 23 does not argue that informal work be criminalised, but rather calls on states to formalise informal work as a means to improve access to legal and social services for informal workers, which includes sex workers.

The African Charter mandates that every individual shall have the right to work under equitable and satisfactory conditions.[78] The African Commission on Human and Peoples' Rights (African Commission) elaborated in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights the African Charter's right to work provision[79] by noting that state parties have an obligation to take 'appropriate steps to realise the right of everyone to gain their living by work which they freely choose and accept' and to 'establish a system of social protection ... for workers in both formal and informal sector, including ... members of vulnerable and disadvantaged groups'.[80] Sex workers' human rights fall within these protections as sex workers operate in the informal sector and are vulnerable workers, particularly in contexts where sex work is criminalised by the state.

Lastly, article 13 of the African Women's Protocol enshrines the right to work, and calls upon state parties to 'create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector'.[81] While the Women's Protocol makes no explicit mention of sex work or 'prostitution', women who work in sex work are protected by the Protocol in its entirety both because they are women and because they work in the informal work sector.

A commonality across each of the provisions outlined above is that there is no mention of the existence of 'illegitimate' work. Rather, the emphasis in international human rights law, as far as work is concerned, is on states' obligations to protect *all* those persons who work in the informal work sector, which includes protection of the rights of sex workers.

The ECOWAS Court should have relied on CEDAW and the expansive international legal framework on the right to work to address the Nigerian state's challenge to the Court's jurisdiction based on the premise that sex work is not legitimate work and that sex

76 General Comment 23 (n 80) para II(1).
77 General Comment 23 (n 80) para 47(d).
78 Art 15 African Charter.
79 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010).
80 Paras 58, 59(d) & 59(o) Principles and Guidelines (n 79).
81 Art 13(e) African Women's Protocol.

workers are not protected under international human rights law. The Nigerian state is required to fulfil its obligations under CEDAW's article 6. However, by claiming that sex work is not 'legitimate', the Nigerian state aggressively denies a section of its population the right to freely choose their form of work and the right to work in just and favourable work conditions. If the ECOWAS Court interpreted CEDAW and developed the legal framework on the right to work as outlined above, it could have substantiated the legitimacy of sex work, as well as determined that the right to just and favourable work conditions cannot be fulfilled for sex workers in a context where the state criminalises sex work. Indeed, this would be a form of unprecedented judicial activism. However, because the state introduced the argument around the legitimacy of sex work as work the ECOWAS Court had a unique opportunity to push the boundaries of human rights interpretation and application as regards sex work.

5 Rethinking *Njemanze*

In the event that the ECOWAS Court had taken up the state's jurisdiction challenge, that this case was indeed about the legality of sex work, it would have created an opportunity to examine the causes and effects of criminalising sex work in Nigeria. There are several reasons why the Court may have elected to forgo such an analysis, including a historical disinclination by courts to delve into the private realm of sex and sexuality. However, this alternative approach would have opened new streams of analysis, two of which are outlined here.

First, the ECOWAS Court would have had the opportunity thoroughly to examine and apply the African Women's Protocol. Second, based on its analysis of the Women's Protocol the Court could have examined the criminalisation of sex work as it is an affront to the human rights protections of women who work in sex work. This final part provides an alternative analytical framework for examining *Njemanze*.

5.1 Really applying the African Women's Protocol

While *Njemanze* is heralded as the first African Women's Protocol case, the ECOWAS Court made no effort to analyse human rights violations in this case through the framework of the Women's Protocol. The plaintiffs requested the Court to find a violation of each of the following Women's Protocol provisions: the right to dignity (article 3); the rights to life, integrity and security of the person (articles 4(1) and (2)); the right to access justice and equal protection before the law (article 8); the right to a remedy (article 25); and the obligation on the state to eliminate harmful practices (article 5) and discrimination

against women (article 2).[82] Significantly, the ECOWAS Court did find violations of each of the alleged African Women's Protocol rights. However, it provided no thorough analysis of the respective rights provisions as they applied in this case. Such an analysis would have assisted the Court in articulating the impact of gender stereotyping and discrimination as they relate to the right to dignity in this case and perhaps would have assisted the Court in avoiding an articulation of rights violations that forces women into hierarchical groups. This part provides an analysis of the right to dignity as an umbrella analytical framework that the Court could have employed to unpack how gender stereotypes contributed to the mistreatment of the plaintiffs at the hands of state agents, and to illustrate how *all* women, regardless of their profession, are to be protected against discrimination and violence.

The right to dignity, as enshrined in article 3 of the African Women's Protocol, imparts to *every* woman the right to dignity, the right to respect as a person and the right to free development of her personality.[83] To enact these rights the Protocol requires state parties to adopt and implement 'appropriate measures to prohibit any exploitation or degradation of women' and to 'ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence'.[84] The right to dignity provision in the African Women's Protocol provides a deeper reflection of the ways in which women experience violations of this right as compared to the African Charter's article 5 protection. Not only does the Women's Protocol impart to states a positive duty to enact measures to prohibit the exploitation and degradation of women, but also it requires that the state take measures to *prevent* violence against women.

Inherent in the fulfilment of the right to dignity is the state's obligation to prevent violence against women. To this end, the rights to be free from discrimination (article 2) and the rights to life, integrity and security of person (article 4) provide states with the minimum standard with which they must comply. Article 2 requires state parties to 'commit themselves to modify social and cultural patterns of conduct of women and men … with a view to achieving the elimination of … practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotypes roles for women and men'.[85]

82 Arts 2, 3, 4(1) & (2), 5, 8 & 25 African Women's Protocol; *Njemanze* (n 3) 10-12 41-42.

83 Art 3 African Women's Protocol.

84 As above.

85 Art 2 African Charter.

Along the same lines article 4 calls upon states to eradicate beliefs, practices and stereotypes that legitimise and exacerbate violence against women.[86] Because the right to dignity requires states to protect women from all forms of violence it cannot be read as a right in a vacuum. To fulfil this right states must also realise, at a minimum, the rights enshrined in articles 2 and 4 of the African Women's Protocol.

Recently the African Commission shed further light on the meaning of the right to dignity as enshrined in the African Women's Protocol and relating to sex work. For example, the General Comments on articles 14(1)(d) and (e) of the Women's Protocol, which examine the intersection between women's human rights and HIV, draw particular attention to the rights of sex workers to be informed of their health status.[87] In the same General Comment the African Commission noted an intrinsic link between the right to dignity and the right to self-protection, which includes the rights to access information, education and sexual and reproductive health services.

Also in the context of HIV prevention, the Special Rapporteur on the Rights of Women released an Intersession Activity Report calling for

> policy makers to put in place effective strategies to fight against discrimination in health facilities and thus create favourable conditions enabling people affected by HIV including young girls, sex workers and MSMs to come forward and access HIV-related services.[88]

In this General Comment and Session Report the African Commission made distinctive efforts to encompass the rights of sex workers within the purview of the African Women's Protocol.[89]

Had the ECOWAS Court thoroughly examined the Women's Protocol in line with the African Commission's comments and resolutions, whether alongside or in place of its analysis of article 5 of the African Charter, it subsequently would have found it necessary to uncover the 'social and cultural patterns' that cause and perpetuate

86 Art 4 African Charter.

87 African Commission on Human and Peoples' Rights, General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012), http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comments_art_14_rights_women_2012_eng.pdf para 15 (accessed 18 June 2018).

88 Inter-session report of the Special Rapporteur on the Rights of Women in Africa, Maître Soyata Maiga, 46th session of the African Commission on Human and Peoples' Rights (2009), http://www.achpr.org/files/sessions/46th/inter-act-reps/132/achpr46_specmec_women_actrep_2009_eng.pdf (accessed 10 May 2019).

89 In addition, Resolution 163 of the African Commission on Human and Peoples' Rights establishes the Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, which has a mandate 'to integrate a gender perspective and give special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners', http://www.achpr.org/sessions/47th/resolutions/163/ (accessed 10 May 2019).

gender stereotypes and violence against women. Upon examining gender discrimination and stereotypes that dictate norms for how and when women engage in sexual activity, the Court would have created for itself an avenue to address how these stereotypes discriminate against *all* women, not only those that are wrongly perceived to be *ashawo* or 'prostitutes' because they are out late at night.

5.2 Sex workers' human rights and the criminalisation of sex work

In the event that the ECOWAS Court determined its jurisdiction by challenging the state's claim that sex work is not legitimate work and subsequently analysed the *Njemanze* case using the African Women's Protocol as its guide to examine gender stereotypes and discrimination, it would have established the foundation on which to challenge the criminalisation of sex work in Nigeria. The Court had at its disposal a myriad of rights through which it could have elected to confront Nigeria's Penal Code provision on 'idle persons' or 'prostitutes'. However, the right to dignity and the right to work particularly are attractive as they afford the ECOWAS Court the opportunity to respond to the facts alleged by the plaintiffs and the state. This final part provides alternative arguments the ECOWAS Court could have employed as a means to protect the rights of *all* Nigerian women, including Nigerian women who work in sex work.

5.2.1 Sex workers have the right to work

When the law criminalises sex work it fashions sex workers as criminals deserving of punishment, not as labourers deserving of rights.[90] The international legal framework on the right to work, provided in part 4.2 above, has as a common thread the notion that workers who are restricted from choosing their type of work and who are denied formal work protections, particularly are vulnerable to violations of their human rights. This vulnerability, as applied to women who work in sex work, is compounded in circumstances where the law and its enforcement bodies actively discriminate against women who work in sex work. The criminalisation of sex work imposes a position of vulnerability on sex workers by forcing them to operate 'underground'. Working on the fringes of society makes it very difficult for sex workers to report sexual assault or rape, to receive medical treatment and to access social services such as housing and education.[91] Sex workers' forced status as existing or operating beyond the protection of legal structures and systems creates an environment where state agents, such as police officers, face little to

90 Mgbako (n 15) 62.

91 Amnesty International 'Sex workers at risk: A research summary on human rights abuses against sex workers' (2016), www.amnesty.org/download/Documents/POL4040612016ENGLISH.PDF (accessed 24 April 2018).

no punishment for arbitrarily arresting, detaining and abusing sex workers.[92]

By criminalising sex work in its Penal Code, Nigeria is in violation of the right to work as enshrined in article 13 of the African Charter and article 13(e) of the African Women's Protocol. The criminalisation of sex work violates the right to work under equitable and satisfactory conditions as it denies sex workers the right to determine the conditions in which they work. Nigeria's Penal Code deems sex work in public places to be a crime, which forces sex workers to operate behind closed doors to escape arrest or police violence. Sex workers who are forced to hide from the state, rather than be protected by the state often have to work for pimps and in brothels in order to be 'protected'.[93] Additionally, the criminalisation of sex work runs counter to the international right to work provisions that require states to take active measures to reduce the number of workers operating in the informal economy as they receive no state protection.[94]

5.2.2 Sex workers have the right to dignity

The right to dignity is indivisible from human rights in themselves, and is at the root of all human rights conventions, norms and standards. However, when applied to sex workers the right to dignity seemingly loses weight. The South African case of *Jordan*, summarised here, exemplifies the challenge sex workers face when attempting to enjoy their rights to dignity, as well as offers the ECOWAS Court an opportunity to rectify harmful precedent.

In *Jordan & Others v The State*, a case concerned with the legality of the criminalisation of sex work, the South African Constitutional Court determined that 'the commercial exploitation of sex … involves neither an infringement of dignity nor unfair discrimination'.[95] Further to this, the minority opinion held the view that 'to the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself'.[96] The Court's line of reasoning in relation to the dignity of sex workers was based on the premise (i) that because sex workers invite the public to engage in illegal activity in the private realm they cannot claim protection of the right to privacy;[97] and (ii) that

92 D Evans & R Walker 'The policing of sex work in South Africa: A research report on the human rights challenges across two South African provinces' (Sonke Gender Justice and SWEAT 2017).

93 M Wijers 'Women, labour and migration: The position of trafficked women and strategies for support' in K Kempadoo & J Doezema (eds) *Global sex workers* (1998) 73.

94 General Comment 18 (n 74).

95 *Jordan & Others v The State* 13 BHRC 203; [*2002*] (11) BCLR 1117 (CC) para 28.

96 *Jordan* (n 95) para 74.

97 *Jordan* para 28.

> by making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.[98]

The minority opinion accepted the petitioners' argument that the right to dignity is not entirely stripped away from women who engage in sex work, but that such activity 'does place her far away from the inner sanctum of protected privacy rights'.[99] Such a determination, that sex workers have a lowered standard of the right to dignity, runs directly contrary to the South African Constitution, which mandates that '[e]very person shall have the right to respect for and protection of his or her dignity'.[100] As interpreted in *Jordan* this constitutional provision appears not to apply to 'every person' after all.

In *Jordan* sex workers were deprived of their human rights because their work blurs the lines between public and private sexuality. Going further than that, women sex workers experienced limitations on their right to dignity because the Court assumed that sex workers' efforts to make money limited their ability to mother, marry and raise a family. Such thinking is based on gender stereotypes and inherently is undignified in itself.

The ECOWAS Court had an opportunity in *Njemanze* to reflect on and rectify the dangerous precedent established by the South African Constitutional Court in the *Jordan* case. Such a reflection could have drawn on research and scholarship that highlight, for instance, how sex workers who work in a criminalised context may fear accessing healthcare treatment because of a risk that they may be discriminated against, or might even be detained.[101] This false choice that sex workers are forced to make – between accessing their right to health or their right to not be discriminated against or to be arbitrarily arrested – is an undeniable affront to the right to dignity. Perhaps the Court could have determined that by stigmatising sex work the state relays a message to society at large that the level of dignity afforded to a woman sex worker is not equal to that of a worker in a different area of employment.[102]

Further, the ECOWAS Court had the opportunity to link the criminalisation of sex work in Nigeria to the right to dignity as enshrined in article 3 of the African Women's Protocol. Not only does criminalisation strip sex workers of their rights to freely develop their

98 *Jordan* para 74.

99 As above.

100 Art 10 South African Constitution.

101 World Health Organization 'Implementing comprehensive HIV/STI programmes with sex workers: Practical approaches from collaborative interventions' October 2013.

102 Commission for Gender Equality South Africa 'Position paper on sex work' 16 January 2013 12, http://www.nswp.org/sites/nswp.org/files/Policy%20Brief%20Position%20Paper%20on%20Sex.pdf (accessed 19 June 2018).

personality and to respect as a person, but also it directly contradicts the state obligation to 'adopt and implement appropriate measures to prohibit any exploitation or degradation of women'. The Nigerian state's criminalisation of sex work violates the rights of women who work in sex work and perpetuates the exploitation of sex workers by casting them as less deserving of rights protection.

Alongside the right to dignity and the right to work the ECOWAS Court could have analysed, among others, the right to freedom of association,[103] the right to health,[104] the right to equality before the law[105] and the right to be free from violence.[106] However, in developing an analysis of the right to dignity and the right to work, the Court would have had the opportunity directly to respond to the plaintiffs' allegations that their dignity had been violated by being called *ashawo* or 'prostitutes'. In addition, the Court would have had an opportunity to respond to the state's claim that sex work is not legitimate and, therefore, that sex workers are not protected under international human rights law. By unpacking these rights as they apply to sex workers the Court would have been able to circumvent the juxtaposition it perpetuates in the *Njemanze* judgment, that only certain women – women who operate within the realm of acceptable sexuality – have the right to dignity and the right to work.

6 Conclusion

The first African Women's Protocol case provides a necessary reflection point for African human rights treaty-monitoring bodies to think about how to handle women's rights litigation and develop women's rights jurisprudence. While *Njemanze* is to be celebrated for breaking down a long-standing imposition on the application of the African Women's Protocol, the judgment develops a hierarchy of women based on stereotypes about the activities women should and should not do. By avoiding the complex arguments around the criminalisation of sex work and also neglecting to incorporate an analysis of the Women's Protocol in its judgment, the ECOWAS Court, perhaps inadvertently, perpetuated stereotypes that stigmatise and harm sex workers. As a result the *Njemanze* judgment impedes rather than supports efforts to challenge the criminalisation of sex work across Africa.

In reconceptualising the ways in which the Court could have determined jurisdiction, and subsequently providing alternative approaches to examine relevant rights violations, the analysis provided in this article argues for a comprehensive and inclusive

103 Art 10 African Charter.
104 Art 16 African Charter; art 14 African Women's Protocol.
105 Art 3 African Charter; art 8 African Women's Protocol.
106 Arts 2 & 4 African Women's Protocol.

interpretation of women's rights protection. Courts and litigators alike have a responsibility to push the limits of what the African Women's Protocol offers in terms of women's rights. This effort requires good faith interpretations of the Protocol that serve to uplift and protect the rights of all women, not only particular types of women. The ECOWAS Court judgment analysed in the article illustrates the ease with which it is possible to develop a 'women's rights case' while simultaneously harming a group of women. As future Women's Protocol cases emerge from the African region's treaty-monitoring bodies it will be essential that actors involved in litigation reflect upon and learn lessons from the first African Women's Protocol case.