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Unravelling equality - women textile workers and the impact of globalisation

Deirdre Hamilton and Anneke Meerkotter describe the tension between increasing global competitiveness and the achievement of substantive equality for women workers in South Africa, and examine the role of the proposed equality legislation in addressing this issue.

On 8 September 1999, 100 000 textile, clothing and leather workers throughout South Africa marched upon the government in an effort to save their jobs. In 1998 alone, more than 20 000 workers in these sectors (predominantly mostly women) lost their jobs. The plight of the textile and clothing workers is a vivid example of the negative impact of policies aimed at increasing South Africa's participation in the global economy.

The South African clothing and textile industry is very labour intensive and involves traditionally "female" work (such as sewing) that is regarded as unskilled work. Most workers in these sections are the only breadwinners and earn less than R1000 a month.

Over the past few years, the South African government has adopted economic policies aimed at global competitiveness. Measures adopted as a result of these policies included the lowering of import tariffs and the creation of a more "flexible" labour force. Local manufacturers agree that it is becoming more difficult to produce products that equal the quality of imports at competitive prices. Factories are therefore forced to close because local businesses cannot compete with cheaper imports and illegally imported goods. (Textiles can be produced more cheaply overseas, particularly in Asia where the cost of labour is much lower and fewer labour regulations exist.)

While the majority of persons who are retrenched remain unemployed, those workers who retain their jobs become "flexible" workers (casual workers, part-time workers, contract workers or permanent workers who must perform multiple tasks). This often means little or no job security, benefits, leave or promotion opportunities, and also imply health problems. Another method for companies to compete is to increase the use of short-time or home-based work. As a rule, women are most affected by these measures.

More than half of full-time women clothing workers have been put on short-time. As more and more women are shifted to these "informal" job sectors where labour regulations either don't apply or can't be enforced, it is mostly men that remain in the smaller formal sector where the labour legislation does apply.

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The South African government has undertaken a number of legislative initiatives, including the Labour Relations Act, Basic Conditions of Employment Act and the Employment Equity Act that are designed to address systemic disadvantage and promote gender equality in the workplace. However, the recent experiences of textile and clothing workers are an indication of how the potential impact of these new laws is effectively undermined by attempts at globalisation of the South African economy.

Clause 11 of the proposed Promotion of Equality and Prevention of Unfair Discrimination Bill prohibits acts that have "the effect of sustaining forms of domination and disadvantage which perpetuate and re-enforce unequal gender relations and prevent women from being able to develop their full human potential and participate fully in society". It may be argued that maintaining and supporting an economic system which subordinates women effectively amounts to such an act. The potential use of this legislation to address harmful economic policies should therefore be explored. It is interesting to note that the Australian Sex Discrimination Unit, which forms part of the Australian Human Rights and Equal Opportunity Commission, has raised the possibility of invoking anti-discrimination legislation where a "significant number of women work involuntarily on a part-time or casual basis and if the work is generally inferior in terms of wages and conditions".

An economic system which disproportionately disadvantages women is counterproductive to the laws promising employment and economic equity. The South African government's acceptance of globalisation and concomitant policies should therefore be reexamined and challenged if substantive equality is to become a reality for women.

The mandatory minimum sentences waltz: one step forward, five steps back

When legislation providing for mandatory minimum sentences for serious offences was introduced in 1998, women's organisations expressed concern about the potential misinterpretation of this legislation in rape cases. Nicolette Naylor, candidate attorney and associate researcher at the Gender Project, examines a number of recent sentencing judgments to see how our courts have dealt with these provisions.

The introduction of a mandatory minimum sentencing scheme (by means of the Criminal Law Amendment Act 105 of 1997) meant that where an accused was convicted of a "listed" offence, the court would be bound to impose a certain minimum sentence. This legislation was interpreted as a commitment by the government to reduce crime and show society that there would be no tolerance when it came to serious offences, and the inclusion of rape as a listed offence was seen as an important step for the protection of women's interests.

According to the legislation, the High Court has to impose a minimum sentence of life imprisonment where -

- the victim is raped more than once;
- the victim is raped by more than one person acting with a common purpose;
- the victim is under the age of 16 years; or

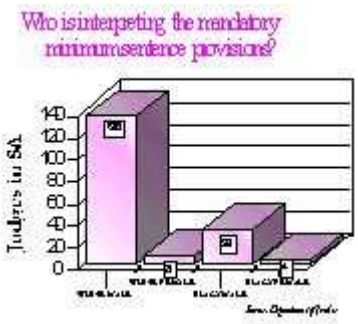
- the rape involves the infliction of grievous bodily harm.

There is however an exception to this rule: where the court is satisfied that there are "substantial and compelling circumstances" justifying a less severe sentence, the court is empowered to impose such a lesser sentence.

The interpretation of "substantial and compelling circumstances" has been left to the courts, since Parliament did not elaborate on the meaning of this phrase. In this article, we look at four recent judgments where the legislation was applied. In each case, the accused had been convicted of rape committed under circumstances that would require the imposition of a sentence of life imprisonment, unless the court was satisfied that "substantial and compelling circumstances" were present.

CASE 1: S v Zitha 1999 JDR 0410 (W) [dated 10 June 1999]

In this case, a six year old girl was raped in her home by three men who had entered the house (armed with a panga) for purposes of robbery. Despite the girl's pleas that they take whatever they want but just leave her alone, the three men raped her in turn on her own bed, one of them raping her twice. All three men were convicted of rape.



During sentence proceedings, it was argued on behalf of the accused that the youth of the three men (they were 20, 19 and 18 at the time of the commission of the offence) constituted a "substantial and compelling circumstance", along with the fact that none had any previous convictions and all three had come from unfortunate backgrounds. More astonishingly, it was advanced on behalf of the accused that the little girl had not suffered any serious injury apart from the rape and that the rape had not been premeditated since the men had gone into the house in order to commit a robbery.

Goldstein J held that even if the rape had not been planned in advance, it was no simple act - it "constituted a series of horrific invasions of the sanctity of the complainant's body". He also rejected the argument that the accused's youth and clean record could be seen as a substantial and compelling circumstance, and held that it was the duty of the court to impose a sentence of life imprisonment for the offence of rape.

CASE 2: S v Segole 1999 JDR 0336 (W) [dated 6 May 1999]

On 19 May 1998 a 24 year old woman was abducted at gunpoint by two men. She was driven to a deserted farm, robbed of her jewellery and valuables and then ordered into the deserted ruin of a house, where both men raped her. Afterwards, she was tied up and left there. She managed to escape from the house, and reached safety by stumbling through mud and swamps to a factory nearby.

It was advanced on behalf of the accused that the complainant had not suffered any serious physical injury nor had she to be treated in hospital. It was even

argued that she exaggerated the severity of the injuries and that the psychological trauma was not severe. It was further argued that both accused were from a deprived background.

Jordaan AJ quite correctly took the evidence of the psychological trauma experienced by the survivor into consideration and stated that he could not "disregard these factors". He also stated that no weight could be attached to the fact that the accused were from disadvantaged backgrounds as they had not gained anything by raping the woman. They could simply have robbed her and taken her vehicle - yet they chose to humiliate and degrade her. In conclusion it was stated that "the circumstances of this case do not create compelling circumstances envisaged by Parliament."

CASE 3: S v Shongwe 1999 JDR 0473 (O) [dated 11 August 1999]

The complainant, a nine year old girl, was raped in her home by the father of her mother's boyfriend. He was interrupted when someone entered the house. The district surgeon who examined the girl stated that her injuries were slight in that there were two slight (apparently superficial) vaginal tears.

Cillie J felt that any person with practical experience in criminal cases and sentencing would regard a sentence of life imprisonment on the accused in this case as "shocking". He interpreted the section of the Act to mean that wherever a judicial officer is of the view that the sentence which would have been imposed prior to the Act and the one required in terms of the new Act are so different that it leads to an injustice, then a departure from the Act would be justified. The court held that the non-serious nature of the offence and the lack of real harm to the child were sufficient grounds for departing from the mandatory sentence requirement.

This decision should be compared with the decision in S v Mofokeng 1999 (1) SACR 502 (W), where the court comes to exactly the opposite conclusion. We submit that the Shongwe judgment is patently wrong, since it in no way takes into account the purpose of the legislation or the ordinary grammatical meaning of the words "substantial and compelling circumstances". The result can only be described as an erodation of the new legislation.

CASE 4: S v Mahamotsa (Unreported) [Case No 29/99, Free State Provincial Division, Judgment dated 28 July 1999]

On 7 July 1998 and 11 August 1998 two women under the age of 16 were raped by the accused, a 23 year old man. Both were raped more than once by the accused, who had apparently taken them to his house by means of a weapon or something resembling a weapon (the sentencing judgment is not very clear in this regard). The second rape was committed after the accused had been arrested for the first incident and released in the care of his guardian.

Kotze J firstly listed a number of mitigating factors, which included the fact that the complainants did not lose their virginity as a result of the incidents (they had already been sexually active prior to the incident). In addition, the complainants had not sustained any physical injuries or psychological harm.

The court then held that the following constituted a "substantial and compelling circumstance":

Although there was intercourse with each complainant more than once, this was the result of the virility of a young man still at school who had intercourse with other school pupils against their wishes, and, note, school pupils who had previously been sexually active... Where one is dealing with school pupils, and where, in addition, it appears that the two girls concerned had already had intercourse before, one really shouldn't lose perspective, especially not in relation to the first count, which dealt with a complainant who had in any event been naughty a few days earlier and had intercourse with someone else. The injustice which she suffered in this case does not demand an unusually severe sentence. [Our translation from Afrikaans original.]

This judgment has a chilling effect, both in terms of its general approach and its conclusion regarding "substantial and compelling circumstances". In his interpretation of the Act, Kotze J perpetuates the very myths surrounding rape that one would have hoped to see our courts discarding, i.e. that rape isn't traumatic for a woman unless there are physical scars and injury to show for it, that there are no psychological consequences where a woman has been sexually active prior to the rape and that so-called "rape" is often merely a matter of misunderstood male virility.

Conclusion:

One can scarcely believe that such disparate judgements were handed down in the space of five months. The lack of consensus among High Court judges indicates the pitfalls of a broad statutory provision without any guidelines as to its interpretation. While the back door of "substantial and compelling circumstances" created by the legislature (arguably) saves the provision from unconstitutionality, it also allows for judicial interpretation which is inconsistent with an understanding that all women (irrespective of their age or previous sexual history) are entitled to dignity, physical and psychological integrity and freedom from all forms of violence.

What does the imposition of a more severe sentence mean for rape survivors? It could be argued that the pain, fear and humiliation of the rape itself will not be lessened by the period of imprisonment imposed on the convicted rapist. However, a feeling of respect and the restoration of the rape survivor's dignity can be achieved when the courts choose to send a message to society and rapists which recognises the grave injustice done to rape survivors.

Forbidden or forgiven? The legal status of sex work in South Africa

The South African Law Commission recently announced that it will examine the legal status of adult sex work in a forthcoming discussion paper. Heléne Combrinck, from the Gender Project, Community Law Centre, looks at the different legal options for addressing commercial sex work.

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South African law currently regards the performance of commercial sex work as a criminal offence. Section 20(1)(aA) of the Sexual Offences Act 23 of 1957 provides that it is an offence to have sexual intercourse or perform an indecent act for reward. (A "reward" may include the payment of money or any other benefit.)

The Sexual Offences Act also criminalises acts that are seen as related to the performance of sex work, including the keeping of a brothel, soliciting and "public indecency".

It is interesting to note that when sex workers are arrested for the alleged commission of criminal offences, the charges are usually not framed in terms of the Sexual Offences Act, but rather in terms of contravention of municipal bylaws prohibiting "loitering", "causing a public disturbance" or related provisions. The reason for this is to be found in the fact that enforcement of the Sexual Offences Act requires more intensive investigation methods - for example, the usual method of enforcement of section 20(1)(aA) is the setting of a "trap", with concomitant personnel-intensive monitoring requirements. The enforcement of municipal by-laws normally requires little more than regular patrol activities.

The disadvantages arising from the criminalisation of sex work are numerous. Apart from the social stigma attached to sex work, criminalisation implies that workers operate in constant fear of apprehension. This often leads to work under dangerous conditions that limit the ability of sex workers to exercise control over safe sex practices and other working conditions. In addition, sex workers who are assaulted or raped are reluctant to report these offences to the police, fearing persecution and believing (with good reason) that their complaints will not be taken seriously by the authorities.

A system of criminalisation also implies that the employment contracts of sex workers employed in brothels are illegal and therefore unenforceable. Such workers, who are often exploited through enforced overtime and other unacceptable labour practices, are also excluded from the protection of labour legislation.

What are the alternatives to criminalisation? Two options that are frequently debated are decriminalisation or legalisation. A system of decriminalisation entails that all provisions which impose criminal sanctions for the performance of sex work are "scrapped", and that no regulatory measures are enacted. General legal provisions are employed to address potentially undesirable aspects of sex work, such as the commercial sexual exploitation of children.

Legalisation, on the other hand, allows for the legal performance of sex work under certain conditions. These conditions typically include zoning regulations, registration of sex workers, mandatory health checks and licensing of brothels or escort agencies. Any sex work performed outside these conditions is treated as a criminal offence.

The two options of decriminalisation and legalisation are often confused. It should be noted that very few instances of "true" decriminalisation currently exist internationally, and that the majority of so-called decriminalised systems actually entail some form of regulation coupled with criminal sanction where regulatory measures are not complied with.

It is essential for the merits and demerits of both these options to be carefully considered in the South African context. A starting point for the debate should be the commercial sex industry itself. Different sectors of this industry may well have divergent interests. Street sex workers, who are regularly subjected to police harassment and violation of basic rights, may regard outright decriminalisation as the most desirable option, while sex workers operating in the "indoor" industry (which includes brothels, escort agencies and massage parlours) may possibly regard legalisation as more feasible. The implications of each option for taxation and the enforcement of labour regulations should also be considered

The most important aspect, however, is that the debate on the legal status of sex work should not be derailed by issues of popular morality, but should be informed by the ethos of the Bill of Rights. This will ensure consideration of the interests of those "whose choices upset the majority".

The Gender Project is currently preparing an information pamphlet on the legal status of sex work and the implications of different legal strategies. This pamphlet is being produced in association with SWEAT (Sex Worker Education and Advocacy Taskforce), an organisation based in Cape Town which aims to empower sex workers and works towards decriminalisation; equal access to police, legal, health and social welfare conditions; fair and safe working conditions and the promotion of safer sex work.

Contact us for more information at (021) 959-3602.

Gender Update

Compiled by Deirdre Hamilton and Anneke Meerkotter

Muslim Marriages

Amod v Multilateral Motor Vehicle Accidents Fund

The Supreme Court of Appeal held that the Motor Vehicle Accidents Fund must compensate a widow married under Muslim law. Mahomed CJ held that the issue was not whether the marriage was recognized by the state, but whether the deceased had a duty to support the claimant. He reasoned that the common-law duty of compensating the dependents of a deceased breadwinner is based on the breadwinner's duty of support. He found that in a Muslim marriage the husband is obligated to support his wife and that this duty of support deserves recognition and protection for the purposes of this action.

As for the fact that Muslim marriages are not recognized by the state, he stated that it is contrary to "the values of the new South Africa for one group to impose its values on another and that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large... and not only by one section of it."

Mahomed CJ repeatedly referred to the fact that the marriage in this case was a de facto monogamous marriage. He explicitly left open the issue as to whether a dependent's action would succeed had it been a polygamous marriage.

(Case No. 444/98, judgment dated 29 September 1999). The judgment can be accessed at www.uovs.ac.za/law/appeals/44498.htm.

Challenge to the Prevention of Family Violence Act

On 9 November 1999, the Constitutional Court heard argument in the case of S v Baloyi (CCT 29/99). This matter entails a challenge to the constitutionality of section 3(5) of the Prevention of Family Violence Act 133 of 1993. The section requires provides that a court may convict an accused for contravention of an interdict issued in terms of the Act unless the accused satisfies the court that his failure was not due to fault on his part.

The accused in this matter argued that the section imposes a 'reverse onus' on accused persons and thus violates the constitutional presumption of innocence (section 35(3)(h) of the Constitution). Judgment has been reserved.

Source: www.law.wits.ac.za/casesched.html

South African Law Commission Discussion Papers

The Commission's papers on Compulsory HIV testing of persons arrested for sexual offenses (Discussion Paper No 84) and Sexual Offences: Substantive Law (Discussion Paper No 85) has recently been released for comments. The former paper concludes that there is a need for statutory intervention to require HIV testing in sexual offences cases. Such intervention is necessary in light of women's vulnerability, widespread sexual violence and the prevalence of HIV. There are compelling arguments for curtailing the right to privacy and bodily integrity to the extent necessary to let the victim know if the arrested person has HIV. The latter paper, the first in a series of three papers on sexual offences, focuses on the provisions of substantive criminal law relating to sexual offences. The proposals of the Law Commission include a radically revised definition of rape, as well as incisive amendments to the dated Sexual Offences Act 23 of 1957.

New legislation comes into operation

Domestic Violence Act 116 of 1998

The date for the commencement of the Domestic Violence Act has been set as 15 December 1999. The Regulations supporting the Act were promulgated on the 5th of November 1999 and will also come into operation on the same date.

Maintenance Act 99 of 1998

The Maintenance Act is due to come into operation on 26 November 1999.

The final versions of these Act can be found at www.parliament.gov.za/acts/1998/index.htm.

Mbeki fuels AZT controversy

President Thabo Mbeki has come out against the drug called AZT which is used to fight HIV/AIDS, claiming that it is "toxic" and has side-effects. AZT is used to prevent mother-to-child transmission of HIV/AIDS, to prevent HIV/AIDS in rape survivors and in combination with other drugs to treat HIV/AIDS. The President's statement comes after increased public pressure on the state to provide AZT free of charge to pregnant mothers who live with HIV and rape survivors. There has been a huge outcry against President Mbeki's claims by community organisations who has challenged him to come up with evidence to support his claims, claiming that Mbeki's response seems to be for financial rather than medical reasons.

Source: Sunday Independent 31 October 1999

New Acquisitions

By Gill Kerchhoff

Common Grounds: Violence Against Women in War and Armed Conflict Situations
Edited by Indai Lourdes Sajor
Quezon City, Philippines: Asian Center for Women's Human Rights, 1998. ISBN 9719199105

This book is a collection of papers presented at the International Conference on Violence Against Women in War and Armed Conflict Situations held in Tokyo in 1997. The main objectives of the conference were to identify the various manifestations of violence against women in war and armed conflict; to broaden the definition of wartime rape; to gather statistics and case studies of women in armed conflict situations; to examine the role of women's human rights groups in advocating for the issues in armed conflict situations; to explore legal strategies in national and international courts for women victims of armed conflict and to submit resolutions and recommendations to the United Nations Special Rapporteur on Violence Against Women.

Women in Parliament: Beyond Numbers
Stockholm: International Institute for Democracy and Electoral Assistance, 1998. ISBN 9189098196

The book (with a foreword by Frene Ginwala) was designed as a reference book for politicians and is also valuable as a training manual and textbook. It examines the problems of women's representation in parliament and how women can be more effective and make a difference in parliament. A number of leading researchers, parliamentarians, and activists have contributed to the handbook, which studies topics such as gender and democracy, quota and electoral systems. It also includes case studies highlighting the range of issues women face around the world.

Negotiating Reproductive Rights: Women's Perspectives Across Countries and Cultures
Edited by Rosalind P. Petchesky and Karen Judd
London: Zed, 1998. ISBN 1856495361

This collection of analyses (developed across seven different countries and over four years) is based on detailed individual interviews with hundreds of women in different situations. The questions look at whether women have a sense of entitlement in decisions on work, marriage, childbearing, fertility control and sexual relations; what strategies women use in negotiating with partners, parents, health care providers over reproductive and sexual matters; and what roles religion, tradition and economic constraints play in forming their decisions. The book provides an international picture that shows how much women have in common in their experience of the power relations involved in reproduction, despite cultural and regional differences.

The State of Women in the World Atlas
Joni Seager
London: Penguin, 1997. ISBN 0140513744

This is the second (revised) edition of the World Atlas, and the editor discusses the many changes that have taken place since its first publication in 1986. The intention of mapping such changes is to show both the generality of globalization, as well as the specific differences by region. Some of the changes have been good, for instance in literacy and education, women at work and feminist organising. The many inequalities that still exist are also clearly demonstrated.