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A Discussion on Policies on Sexual Harassment in South Africa

Jane Bennett

UNRISD
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UNRISD, Palais des Nations
1211 Geneva 10, Switzerland

Tel: (41 22) 9173020
Fax: (41 22) 9170650
E-mail: info@unrisd.org
Web: http://www.unrisd.org

The Racism of 'Gender Equity'?
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In early August, 2001, South African National Police Commissioner Jackie Selebi made headlines by suggesting that the implementation of the celebrated national Domestic Violence Act was impossible. Likening the Act to laws preventing smoking or the use of cell-phones while driving, Selebi is quoted as saying,

"These laws are certainly good in their intentions and they might work somewhere like Sweden, but they cannot be policed here"[1].

Several responses from NGOs whose work involves the prevention of gender-based violence, especially violence against women in their homes, agreed in part with Selebi's despair, arguing that while the policy offered protection from domestic abuse to anyone, its dependence on the police for the provision of healthcare, safe housing, and counselling or legal services eviscerated its real potential as a transformatory tool. The Western Cape Network on Violence Against Women was quoted as saying,

"This is just another example of the gap all South Africans are facing between policy and implementation. What is the use of passing bills which seem to give hope to people if there are no resources, and no sense that all society is responsible for finding new resources? It almost seems malevolent – to be able to ***articulate*** *the policies we need and then not to bother about bedding them down into the practicalities of on-the-ground delivery"*[2]

The cry that a "gap" exists between policy design and the implementation of new policies in post-1994 South Africa is not confined to advocates against gender-based violence. At all sectoral levels of discussion, it is possible to find analyses of the "slow delivery" of poverty alleviation which attribute responsibility for on-going hunger, lack of healthcare, unemployment, homelessness, or violence to the "gap" between the opportunity to redesign policies in the wake of 1994 democratic elections and the difficulty of actualizing change in a country whose economies are deeply rooted in the legacies of racism, and class-construction, orchestrated through apartheid legislation and culture[3]. Theorizations about the structure and shape of this "gap" include discussion of information-flow, bureaucratization, resources allocation, lack of capacity to understand the complexities caused by on-

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[1] From *The Star,* August 14th, 2001

[2] Quoted on *Cape Talk,* Monday, 20th August, by Lisa Vetten, Gender Researcher for the Centre for the Study of Violence and Reconciliation.

[3] See, for example, *Development Update, Vol 3, #4, 2001: A Review of Government and Voluntary Sector Development Delivery from 1994* or *Agenda, #37, 1998, Special Monograph on Policy and Practice for Gender Justice*

going poverty "on the ground", and the tensions of trying to build a globally-responsive economy while simultaneously eradicating deeply-entrenched discriminations. In this paper, I want to approach the meaning of the "gap", not by refining some of the aforementioned issues, but by exploring the concepts of humanity underlying some of South Africa's recent legislation most deliberately targeted at apartheid's legacies. I am thinking in particular of legislation which seeks to expand on the Constitutional Bill of Rights' declaration that discrimination against South Africans on the basis of *race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth* is prohibited.

Policy approaches to identity have historically segregated "gender" from "race". The reasons for this can, in part, be located in the complexities of particular contextual moments through which issues of discrimination and injustice have catalysed political attention. While this paper recognizes the importance of careful historicization, I would argue that the separation of "race" from "gender" (or sometimes, "sex") within policy development targeted at changing discrimination against people gendered as "women" largely fails to change the life circumstances of those suffering discrimination, and in so doing effects an inevitable racism. While it is possible – and sometimes useful - to trace the effects of racialization and gender as those these were separable forces within South Africans' lives, most people's heterosexual, reproductive, lives have yoked the operation of their gender into intimate identification with apartheid's categories of racialization (or into understandings of ancestry and community consciously resistant to, and therefore cogniscent of, these categories). Where a South African woman, therefore, is offered new opportunity through policies which seek to prevent discrimination against her **because** she is gendered as a woman, it is very likely that her situation will be as full of challenges rooted in a legacy of racialization. A "gap" therefore opens between the notion of a new access (**because** she is "a woman") and her capacity to make strong use of the opportunity (because racialization has located her within poverty, poor education, the experience of a lethally-intentioned state, and so on). If racism can, in part, be defined as the systemmatic obliteration of some people's access to all resources because their lives are circumscribed through racialization, then policy formation which addresses gendered realities as possible sources of discrimination **without** locating the process of becoming gendered within South African race/class history can only be described as contributing to the on-going systemic racism in the country.

For several years, discussions of U.S.-based jurisprudential approaches to equity have illuminated the dangers of theories which imagine a universal "female" as a starting point towards legal reform and policy-making. As early as 1989, Kimberle Crenshaw, for example, argued that legal thinking and policy initiatives have created, and sustained "single-axis" thought, segregating "gender" from "race," and in the process erasing the material realities of those most in need of recognition by policies seeking to redress historical disadvantage. Debates initiated through the Yale Journal of Law and Feminism in 1990 have come to constitute a body of work known as "critical race theory", which explores from multiple angles the fact that epistemological approaches to redress that imagine rights through single-lensed identity should probably be understood simply as the late twentieth century's discursive rehearsal of the "spirit-murder" (Patricia Williams, 1995) of black people, especially black women-people.

The story of South African engagement with Northern-minded legal approaches to equity is an extremely complex one. Simply put, on the one hand 1994 saw, within South Africa, an indigenously grounded, and indigenously developed, set of convictions about the need to completely transform State policies, so that "democracy would be brought home." On the other hand, the translation from convictions into language has systematically been influenced by liberal approaches to equity, promulgated by the North (the development of policies concerned with equity has also been marked by relative incoherence (Manicom, 1992), the need for rapid and visible change, and the implications of engagement with global economies which do not sit easily side-by-side with the country's developmental priorities). Suffice it to say that the sustained critique of U.S.-based critical race theorists of equity approaches that de-linked "race" from gender went un-noticed by South African initiatives. Despite the fact that the ANC's Reconstruction and Development Programme (published in 1994) made it explicit that those most drained and depleted by apartheid's deeply racialized and gendered policies (namely, poor black women) were to be the most immediate beneficiaries of development, all subsequent policy approaches have expressed intentions around "gender equity" as something separable from the need to erase racism.

To undertake the examination of South African policy commitment towards gender equity as part of an exploration into the ways in which racisms continue to encircle people's lives within the country necessitates the recognition that it took a gigantic, and complex, effort on the part of South African women in 1992 through 1994 to demand constitutional, public, attention to issues of gender discrimination against women-people. Many of those active within the work of current gender activism would attest to the exhausting difficulty of maintaining a national will towards gender justice, and within the past six years, the need to understand and transform oppressive gender relations has informed a wealth of projects and programmes. The courage of these efforts, and of the many people individually involved with the work, should not preclude discussion of which women's lives have been changed for the better by attention to "gender equity", and where a segregated articulation of gender relations comes to betray the hope of social transformation. In 1991, the Women's National Coalition, spearheaded by the ANC Women's League and consisting of diverse – and sometimes awkwardly-juxtaposed – constituencies of women came together for the single purpose of drawing up a charter which articulated a sense of this oppression. As Shamim Meer suggests, however, "The charter and the strategies of the WNC seem to reflect a middle ground in much the same way as the negotiations among the major parties did. It would seem fair to say that this was translated into a liberal feminism that did not challenge class or race privilege in any significant way."[4] Several South-African focused feminists have written about some of the implications of this liberalism: "A further difficulty is that…the language of gender – 'gender equality' (as in the Constitution), 'gender-sensitive policies and programmes' (as in the mission statement of the OSW[5], "mainstreaming gender", "integrating gender", "women's empowerment", "gender transformation" – is often not linguistically connected with other social equalities, notably those shaped by 'race" and class. The national gender machinery illustrates the point: does the OSW intend to address all women's interests in South Africa, or will it focus specifically on the interests of black (poor) women?…in other words, particular uses of gender language can mask the complicated ways in which gender relations intersect with social relations of class, 'race', age, geography, ethnicity, and sexuality. In the absence of a more inclusive

[4] Shamim Meer, "*Which Workers, Which Women, What Interests: Race, Class, and Gender in Post-Apartheid South Africa,"* paper delivered at Centre for African Studies/African Gender Institute Seminar, May, 2000.
[5] Office of the Status of Women

language, it is only in specific contexts that the political assumptions underlying particular terms are made clear"[6]

The case studies explored by the *Agenda/African Gender Institute Monograph on Translating Commitment into Policy and Practice* (1999) examine policy work in land reform, health care and energy. The review highlights the complexity of raising issues of gender equity *per se* in many contexts, but notes the conclusions of other analysts that even where the need to focus on what is happening for people gendered as women in a particular area is obvious, to do so as though they were "only women", is to doom the implementation of new policies to failure. Such failure inevitably deepens racism: it is – on the whole – black women (often poor) who experience the new policies as either inaccessible (and thus incapable of alleviating the legacies of race-based poverty) or, in fact, as added awkwardnesses and barriers in their lives.

My own experience with the processes of policy and implementation is more directly based in the prevention of gender-based violence than with other arenas of concern. In the past seven years, legal reform efforts have focused on a number of "vectors" of such violence: domestic abuse, State harassment of sex workers, legal definitions of sexual assault and rape, and sexual harassment. Of these, sexual harassment is probably the least well understood as an area for policy concern, and the area in which there is the most formal complexity. A precedent setting case in the Industrial Court in 1991, *J v M Ltd*[7], found that sexual harassment violated bodily rights to integrity, and defined sexual harassment as:

"sexual harassment would mean to trouble another continually in the sexual sphere…conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints of fondling without consent or by force in its worst form, namely rape. It is in my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment."

No legislation at the time could frame the charge of sexual harassment[8], but subsequently amendments to the LRA, post 1994, specifically identified sexual harassment as a potential form of harassment against workers. The National Economic Development and Labour Council (NEDLAC), formally constituted as a body representing the interests of government, organized labour, and organized business in 1995, a "Code of Good Practice on the Handling of Sexual Harassment" which attached a defintion of sexual harassment and suggested procedure for processing complaints to Section 203 of the LRA. This Code does not in and of itself constitute policy; it functions as a set of guidelines for employers, and leaves organizations the flexibility to design their own policies and procedures. In 1998, section 6 (1) of the Employment Equity Act prohibited unfair discrimination: *"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."* Given that discrimination on the grounds of gender frequently takes the form of sexual harassment for women, the EEA offers another route of policy protection to those suffering though sexualized bullying in the workplace. In addition, the Criminal Codes include a category, *crimen injuria*, which criminalizes assaults to

[6] Michelle Friedman, "Effecting equality: translating commitment into policy and practice," *Agenda, in collaboration with the African Gender Institute Monograph,* 1999
[7] (1991) IRLR 513 AT 518
[8] The complainant drew upon section 1 (a)(i) of the 1956 Labour Relations Act

"dignity", the Basic Conditions of Employment Act protects workers from discrimination on grounds which include gender, and the Constitution itself contains similar protections. Within business, many organizations include – in deference to the EEA – formal proscription against sexual harassment as part of their internal grievance procedures, and finally, institutions whose members are organized through relations other than those defined as "labour" (such as churches, universities, technikons, and schools) have also designed policies against sexual harassment within their boundaries.

The current profile, then, of policy available to anyone experiencing sexualized bullying is one of disjointed options, whose individual routes begin in different places and can follow different trajectories. A university, for example, may have its own policy against sexual harassment which applies to students' realities, be accountable to the Employment Equity Act in terms of labour conditions for staff (including academic staff, who may also be subject to internal policies about faculty conduct), and face situations in which staff on campus are employed, through "outsourcing", by other organizations. The complexity of this plethora of formal relations to policy alone can be a barrier to implementing any action to deal with an actual complaint of sexual harassment.

Although the language of most sexual harassment policy is inexplicit about the identities of either complainant or alleged perpetrator, feminist legal advocacy in South Africa has been clear that issues of gender underlie the area[9]. Debates around gender identity within cultural practices of heterosexuality are dominant within discussions of policies' design and implementation, and in most public fora likely victims are assumed to be "women" rather than "men". Sexual harassment policy is thus an arena in which the possibility of homogenizing people through a singe identity (that created through their gender) is key to design and implementation.

The following case study illustrates the effects of policy-making which has failed to think through the way in which gendered identities are inextricably caught up into the South African implications of racialization and class. Because the case study draws on information about particular companies, received during the process of my work as a consultant, identifying details are omitted[10].

Fantasy Vacations is a company in the Western Cape, which promotes international tourism in the area and facilitates various aspects of holiday-making for visitors. The company is not large (57