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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

[9] See, for example, the work of Deborah Quenet, from the Women's Legal Centre, in Capte Town. In a paper entitled, "Sexual Harassment: What is the Appropriate Test to be Applied when determining what is unwanted conduct of a sexual nature?" (presented at public seminar on sexual harassment organized by Women's Legal Centre, May, 2001, Quenet states, "I suggest that sexual harassment claims…constitute unfair "gender" (as opposed to sex) discrimination and that framing a sexual harassment claim as such assists in developing an approach which is consistent with substantive equality". The proposed policy against sexual harassment at the University of Stellenbosch states explicity that "sexual harassment is a form of gender discrimination."

[10] An ongoing problem (common to research on gender-based violence) with "evidence" of sexual harassment lies with the fact that the Code of Good Practice on Sexual Harassment recommends workplace policies which allow for resolution of a case within the parameters of the organization's grievance policies. Only where the outcome of such a case is not satisfactory (to anyone involved) can it be referred to the CCMA, and thus become available to public record. Most cases with which I have been personally involved as a consultant have been "settled" without referral to the CCMA, and thus remain documented by the organization's own human resources records only. It is thus extremely difficult to count the number of cases on-going, or resolved, in a particular year, and as difficult to find case material on public record rich enough to sustain in-depth analysis.

full time staff), successful, and well-known. The management structure involves a Director and a small team of managers, each of whom in turn manages a staff of 7-8. The "equity profile" of the organization shows strong traces of pre-1994 demographics (the director is a white man, 4 of the 5 managers is a man, the clerical staff are all women, and the cleaning staff are all Black "african" women), as well as some evidence of shifts (3 of the managers are Black men (two "coloured", and one, "african"; the clerical staff are racially diverse, white, Black "coloured" and Black "african"). In 1997, the only woman manager (who is white) complained to the Director (with whom she has a close relationship) that a fellow-manager was sexually harassing her, by touching her bottom frequently, making sexual comments about her in meetings, and sending her "romantic" e-mails. The Director was alarmed, took it upon himself to speak with the manager in question, and decided to adopt the proposed Code of Good Practice as company policy on sexual harassment. The e-mails, comments, and touches stopped, announcements were made in staff meetings about the new policy, a training workshop was held for managers on how and why to identify and challenge sexually harassing behaviour, and the woman manager who had complained was formally given the responsibility of being the company's "sexual harassment complaints officer" (someone who could supposedly listen sympathetically to another employee's concerns and then liaise, as appropriate, with the Human Resources manager).

Fantasy Vacations runs an internship programme, where young people could be employed (usually for the first time) as "shadows" to staff working on updating and maintaining the company data-base of places to go, and "things to do" in the Western Cape. In 1999, three new interns were taken aboard for the year, two Black women, and one white woman. The white woman (Emily), three months after her arrival, went to the "Sexual Harassment Officer" and told her that the manager of the Interns Programme had taken her to a hotel (to "show her the facilities"), locked her into one of the bedrooms – to which the hotel staff had given him the key – and tried to sexually assault her. Her father accompanied her to the disciplinary hearing that was set up, where the manager admitted he had done it, but claimed Emily's compliance. In telling his version of the story, he spoke about one of the other interns, saying that she too had accompanied him willingly on occasion to that particular hotel bedroom, that he knew it was an abuse of job privilege, but that the interns themselves knew what was happening, and had encouraged one another to accompany him because they valued his access to places of entertainment within the city. The Sexual Harassment Officer and the Human Resources Officer decided to suspend the hearing after his testimony, and to request the second intern, Noziswe, to come and speak with them. When she came, she was asked whether she had had any kind of sexual liaison with the manager. She refused to answer, saying that she did not want to talk about the manager, and that she did not want to do anything that would jeopardize her internship. The SHO explained that there had been a complaint against the manager, that he had named two of the interns as willing to have sexual relations with him in hotels, and that if she (the intern the SRO was now speaking to) had done this, she too would be liable for punishment unless she claimed sexual harassment. The intern began to cry, and said that the manager ***had*** *threatened her and said he would not support her chance of being properly employed at the company if she did not have sex with him at the hotel. She had agreed to accompany him, she said. The SHO shouted at her, asking why she had not reported this, why she had been "so stupid". Noziswe replied that she just wanted to keep the job, and that she had not wanted to cause any trouble – it was the first chance of employment she had gotten, 2 years after passing her Matric. In addition, the manager had agreed to try and get her brother a position in one of the hotels, whose staff he knew. The SHO asked her whether she would now lay a charge of sexual harassment against him; Noziswe refused again, and the meeting between them ended with the SHO banging her fist on the table, and Noziswe crying. Seven months later (the manager was dismissed, but for abusing his job privilege to gain access to the hotel bedroom more than for sexual harassment of Emily or Noziswe), Emily was offered permanent employment at the company. Noziswe wasn't.*

In this case study, it could be argued that there is little evidence of Noziswe's being the deliberate target of personalized racism: the SHO may have behaved just as aggressively had it been Emily who had been refusing to lay a complaint, the perpetrator shows no sign of having treated Emily very differently from Noziswe (he tried to coerce them both into having sex with him, and had Noziswe been the one laying the complaint may well have fingered Emily), and Noziswe's failure to get her internship translated into permanent employment could be argued as evidence of inability to "play by the company's policies" rather than an index of a racist choice between herself and Emily. However, even the simplest reading of current South African realities would reveal that, unlike Emily, Noziswe's life is enmeshed with the legacies of apartheid where racialization embeds her into a set of material conditions about employment, kinship responsibilities, and – quite possibly – a lack of faith in formal systems of justice to respond to her needs. At a level blind to the history of racism in South Africa, it would be possible to argue that Emily and Noziswe were demonstrably equally "gendered" in a way that made them targets of the manager's coercive heterosexuality, that one of them freely chose to avail herself of the company's policy-based support while the other (as freely) chose not to, and that – to a certain extent – the company encouraged both people to make a complaint against a sexual bully. It is in the intimate texture of each woman's day-to-day life that a tale of racial difference is visible (Noziswe has been unemployed for two years, despite having a Matric; her brother is also unemployed, and she is willing to negotiate for his livelihood – a common survival strategy among those battered by destitution; she has prioritzied her employment over her own safety; and, far from experiencing the approach of the SHO as supportive, she finds it harassing, in and of itself. Less is known of Emily's circumstances – what is visible is that she has been willing to voice the assault against her, despite the fact that this will "mark" her in the company's public eye, and that she has at least some family support for this act of independence.

Her courage is in her willingness to make use of the policy; Noziswe's courage may well be in her refusal to jeopardize her job, and her brother's hope of employment). It is along the lines of this difference that Emily's story and Noziswe's as "women" part company, wrapping the latter into a narrative explicable only via her race/class position which drags her back, in the end, to unemployment. The company policy against sexual harassment *has* (with her own strength) offered Emily recourse to support; it has offered Noziswe nothing she felt she could draw upon, and worked to complicate her life in the organization horribly.

Some might argue that a policy on sexual harassment (like any other policy) cannot afford to take the full complexity of every possible complainant's life into consideration, and that the language of policy in fact finds its strength in generalizations which can find their contextualization through careful application.

Futhermore (so could the argument continue), if the circumstances caused through historical discrimination prevent some people from access to policy, those circumstances should be the source of concern, rather than the "limitations" of the policy itself. There is something to be said for these arguments – the material circumstances caused by centuries of formal and cultural racial discrimination *should* be a primary source of concern, and policy-formulation does require analysis through application rather than through an engagement with semantics. As the case study suggests, however, it is precisely through "application" that the failure to apprehend the full reality of the intersection of race and gender emerges, with devastating effect for the woman who is Black. The design and promotion of policy which cannot offer a woman safety from sexual abuse *because* of the circumstances in which her racialization has put her becomes an act of racism in itself: in a context in

which racialization and racism have caused incalculable damage, any policy-making which does not take the realities of those at the coalface of this legacy as a priority has to be interpreted as – at best – liberal, and – at worst – interested in perpetuating racial disrimination at a deeply systemic level.