

GenderNews

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Research on bail in sexual assault cases

Raygaanah Barday and Heléne Combrinck

In August 1998, new legislation aimed at addressing public concerns regarding the South African bail system came into operation. This legislation, which amended key provisions of the Criminal Procedure Act 51 of 1977, was drafted in the wake of a number of cases where it appeared that persons accused of serious offences had committed the acts concerned while already out on bail on similar charges. The most notorious case was the well-publicised murder of seven-year old Mamokgethi Malebana, who was killed by a neighbour who had earlier been charged with raping her. The perpetrator had been released on bail in the rape case in the face of two other charges of having raped young children, threats of retaliation against Mamokgethi and her mother for reporting the rape and police objections against bail.

The Gender Project, in association with the Institute of Criminology (University of Cape Town) and Rape Crisis, Cape Town, has established the Consortium on Violence Against Women in order to engage in collaborative research aimed at monitoring the implementation of the Domestic Violence Act and at investigating the changes brought about regarding bail in sexual assault cases by the new legislation.

The first phase of the bail research, which commenced in April 2000, looks at current practices in the granting of bail in sexual assault cases. Are alleged rapists now finding it more difficult to obtain bail than before the implementation of the legislative changes? Where bail is granted in sexual assault cases, are appropriate conditions to prohibit contact with the victim attached? Are victims informed of the outcome of bail applications? These are some of the questions that the research attempts to answer.

The bail project is focused on the magistrate's districts of Cape Town, Mitchell's Plain and George. Research work in Cape Town and Mitchell's Plain is nearing completion, and George will be visited during April and May 2001. Interviews are being conducted with police officials, prosecutors and magistrates and police and court records are analysed. A comprehensive research report, including findings from the above field work, will be published.

A new domestic violence law for Namibia

By Heléne Combrinck

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On 21 September 2000, the Gender Project participated in a workshop held in Windhoek, Namibia, to discuss proposals for Namibian legislation on domestic violence. The workshop, hosted by the Legal Assistance Centre, a Windhoek-based human rights organization, was attended by Namibian parliamentarians, police officials, magistrates and members of non-governmental organisations.

The current position in Namibia is similar to that prevailing in South African law prior to the enactment of the Prevention of Family Violence Act 133 of 1993: there are no specific protective legal remedies available to victims of domestic violence, and victims have to rely on remedies that may be completely inappropriate in the light of their need for protection, such as laying criminal charges against the perpetrator.

In a joint presentation with Lilly Artz from the Institute of Criminology at the University of Cape Town, the Gender Project outlined the background to the current Domestic Violence Act, and explained some of the lessons learnt in the process of drafting this legislation.

This presentation also drew on some of the preliminary findings emerging from the joint research project monitoring the implementation of the Domestic Violence Act 116 of 1998. One of the major points for discussion here was how to ensure that adequate planning and resource allocation form part of deliberations on new legislation (even prior to debate on parliamentary level). Another concern was how to ensure that women in remote rural areas, with limited access to police, courts and health care services, derive the maximum benefit from protective legislation.

Subsequent to this workshop, the Namibian Law Reform and Development Commission released its report on domestic violence, incorporating a draft Bill.

The recognition of Islamic marriages: empowering women or entrenching discrimination?

By Farahnaaz Safodien

The integration of Islamic marriages into the civil law of South Africa has recently been the subject of widespread discussion following the publication of the South African Law Commission (SALC) Issue Paper 15 on this topic. On the one hand, there is a concern that legislation aimed at 'legalising' Islamic marriages within the framework of secular South African law may conflict with the tenets of Shariah law. On the other hand, the need to address aspects of Islamic law that may amount to gender discrimination as understood in terms of the Constitution has also been recognized.

The Gender Project, working with the gender Unit at the UWC Legal Aid Clinic, therefore attempted to take a balanced approach incorporating both sides of this picture in preparing comments on the above Issue Paper for submission to the SALC. The submission stressed the need to adhere to the principles of both formal and substantive equality through gender-sensitive provisions that could address and redress the historical disadvantages faced by Muslim women. The submission focused on five key areas: choice of marital system and matrimonial

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property regime for new marriages; registration of existing marriages; formalities for valid marriages; polygyny and divorce.

In the submission, we address difficult questions such as these -

- Should Muslim women be allowed to marry non-Muslim men?
- Should Muslim women be required to observe the compulsory waiting period (iddah) after divorce?
- Should legislation allow for the contracting of new polygynous marriages?
- Should women be allowed to officiate as marriage officers at Muslim marriages?

The next step towards the development of legislation aimed at the recognition of Islamic marriages (analogous to the Recognition of Customary Marriages Act 120 of 1998) will be the compilation by the SALC of comments received in response to the Issue Paper in the form of a discussion paper will also contain draft legislation. In the joint Gender Project and Legal Aid Clinic submission we emphasized the need for extensive further discussion and debate, especially within Muslim communities in South Africa, in anticipation of the discussion paper and possible parliamentary consideration of the draft legislation.

A copy of the submission is available from the Gender Project. The SALC Issue Paper can be accessed at <http://wwwserver.law.wits.ac.za/salc/issue/issue.html>

Gender Update

By Anneke Meerkotter

Violence Against Women

Some statistics and laws in Southern Africa:

BOTSWANA

Recent crime statistics estimate that almost 50 percent of women murdered are victims of either their husbands or intimate partners. Since 1997 the Penal Code has been amended: rape is defined in a gender neutral manner, suspects are denied bail and minimum sentences for rape have been increased to 10 years. The new law further provides that a convicted rapist who tests positive for HIV/AIDS without prior knowledge of his/her status, can be fined an additional 5 years, whilst a rapist who was aware of his/her HIV/AIDS status before committing the crime faces a minimum of 20 years and a maximum of life imprisonment.

MAURITIUS

Spouses are entitled to apply for domestic violence protection orders in terms of the Protection from Domestic Violence Act of 1997. Occupancy or tenancy orders can further be granted entitling the victim of domestic violence to occupy the family residence or rented accommodation. Unfortunately the Criminal Code still provides that femicide in the case where the spouse was found committing adultery is excusable and marital rape is similarly not an offence. Whilst the

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Criminal Code was amended in 1998 to include sexual harassment by an employer, co-workers and clients were excluded and no labour laws refer to sexual harassment at work.

NAMIBIA

One in 5 violent crime cases are domestic and the overall domestic violence cases which resulted in convictions is 21 percent. The majority of complainants withdraw cases of domestic violence. Shelters have been established in major towns to help abused women. A significant development is the Combatting of Rape Act which was promulgated last year.

ZAMBIA

The Zambian Police Service has been running a Victim Support Unit since 1996, which deals with cases of femicide, property grabbing, domestic violence and sexual assault. Perpetrators of domestic violence can be arrested without a warrant.

Source: Women's Net, extracts from Country Reports presented at the SADC Conference in December 2000 and published in "Our Right/Write", a conference publication: www2.womensnet.org.za/news/show.cfm?news_id606, posting organisation: Gender Links, 12 December 2000.

Case Law

Femicide

In *S v Roberts 2000 (2) SACR 522 SCA* the NDPP appealed against a sentence of 15 years imprisonment suspended for 5 years, where the accused murdered his ex-wife and concealed her death. The Appeal Court held that the sentence "failed utterly to reflect the gravity of the crime and take into account the prevalence of domestic violence in South Africa and ignored the need for courts to be seen to be ready to impose direct imprisonment for crimes of this kind".

Rape

A woman who had been raped by a man whilst on bail for similar offences, brought a delictual action for damages against the Ministers of Justice and Safety and Security after the accused was sentenced to 10 years imprisonment. She argued that the SAPS and public prosecutors in the area where the rape occurred owed her a legal duty to act in order to prevent the accused from causing her harm and that they had negligently failed to comply with such duty. The Court held on Appeal by the woman that "there must be some relationship between the person who owes the legal duty and the person to whom the duty is owed, the breach of which would expose the latter to a particular risk of harm in consequence of an omission, which risk is different in its incidence from the general risk to all members of the public". The Appeal was dismissed with costs.

Source: *Alix Jean Carmichele v Minister of Safety and Security and Minister of Justice, Case No 310/98 CPD, Van Heerden ACJ, Vivier JA, Howie JA, Schutz JA, Zulman JA, 2 October 2000.*

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Sex Work

Prostitution as work

A Czech woman has brought her case to the Dutch Court after the Netherlands government refused to grant her a permit to practice prostitution in the Netherlands. The Dutch Court has accordingly asked the European Court in Strasbourg for an opinion on whether prostitution can be seen as work in the definition of the Association Treaty between the European Union and the Czech Republic. If prostitution is seen as work, it would mean that the woman could work as a self employed sex worker in the Netherlands.

Source: Jan Visser, MR Graaf Institute, Netherlands

Decriminalisation proposal

In September 2000 the *Prostitution Reform Bill* was introduced in the New Zealand parliament as part of the campaign to decriminalize prostitution. The Bill aims to decriminalize prostitution by repealing provisions that make it a criminal activity, whilst also safeguarding the human, welfare and occupational rights of sex workers. The Bill affords sex workers the right to refuse sex. The Bill makes it an offence to coerce any person into providing commercial sexual services and brothel owners/managers are given the responsibility of protecting sex workers from the potential risk of violent clients and to provide condoms and information on safe sex, STIs and HIV/AIDS. The Bill is currently being debated at committee level.

Source: Prostitution Law Reform Campaign, vic.tripod.com/reform.htm

International women's rights

Whilst South Africa has ratified the Convention on Discrimination Against Women (CEDAW), it has not ratified the Optional Protocol which was assigned to by State Parties to CEDAW in the beginning of 2000. The Optional Protocol provides for complaints against states by individuals, groups or countries. States who adhere to the Optional Protocol can thus be brought to task for not complying with CEDAW. South Africa has similarly failed to ratify the International Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights.

Constitutional Cases

In March the case between the Pharmaceutical Manufacturers Association (PMA) and the government will be heard in the High Court (*Case 4183/98 TPD*). The PMA is arguing that the *Medicines and other Substances Control Amendment Act 90 of 1998* is unconstitutional. The Act makes provision for substitution by pharmacists of off patent drugs with similar generic drugs where this is a cheaper option. The Act also provides for a pricing committee to be set up to monitor the prices of medicines and control unfair profiteering. Provision is also made for international tendering and parallel importing of medicines where the same medicines are available cheaper in other countries. The case has been delayed since 1998 thus preventing the Act from being implemented. Various organizations, especially HIV/AIDS organisations have come out in support of the

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government in this case since the Act provides the necessary legal framework to enable greater access to treatment, thus complying with the state's constitutional duty to provide access to health care.

In the case of *S v Banana 2000 (2) SACR 1* in the Supreme Court of Zimbabwe, the majority held that "according to customary law homosexuality was considered extremely wicked" and "from the point of view of law reform it could not be said that public opinion had so changed and developed in Zimbabwe that the courts had to yield to that new perception and to declare the old law obsolete" whilst "from the point of view of constitutional interpretation the court had to be guided by Zimbabwe's conservatism in sexual matters". The minority judgment however held that the common law offence of sodomy, committed in private between consenting adult males, discriminated against such persons on the basis of gender and was not reasonably justifiable in a democratic society.

The Labour Appeal Court in Cape Town recently upheld the appeal against the finding of the Labour Court in the case of *Whitehead v Woolworths (Pty) Ltd*. The majority held that Woolworths was not acting arbitrarily when they took into account Whitehead's pregnancy when deciding whether or not to offer her a contract of permanent employment and that it had taken into account "perfectly rational and commercially understandable considerations". An application for leave to appeal to the Constitutional Court was filed but the matter was since settled confidentially between parties. *Woolworths (Pty) Ltd v Whitehead 2000 (12) BCLR 1340 (LAC)*

In the case of *Hoffman v South African Airways 2000 (11) BCLR 1235 (CC)*, the Constitutional Court found that the airline's policy of not employing people living with HIV as cabin attendants amounted to unfair discrimination.

In the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)* the Constitutional Court held that certain provisions of the Aliens Control Act 96 of 1991 which only granted spouses (and not same sex life partners) of South African citizens a right to an immigration permit, constituted unfair discrimination on the grounds of sexual orientation and marital status.

New Legislation

On 1 September 2000 sections 1-6, 29(1), 32-34(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* came into operation. These sections unfortunately do not deal with the substance of the Act. Government Gazette No 21517, 1 September 2000

The *Recognition of Customary Marriages Act 120 of 1998* came into operation on 15 November 2000 (Proc R66 GG 21700/1-11-2000). The Act recognizes marriages valid at customary law and existing before 15 November 2000. Customary marriages entered into after 15 November 2000 must comply with the requirements set out in the Act, including that the spouses must be over 18 years or consent was obtained from the Minister if not, and consent was properly obtained in accordance with customary law. The Act further provides for the registration of customary marriages and attribute full status and capacity to wives. Customary marriages entered into after 15 November 2000 are in community of property and of profit and loss unless this is specifically excluded

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by spouses in an antenuptial contract. Dissolution of customary marriages may only be dissolved by the high, family or divorce court, as a result of irretrievable breakdown of the marriage. The Regulations were promulgated on 1 November (GN R1101 in GG 21700) and sets out the procedures and forms that must be complied with in terms of the Act.

Source: De Rebus, No 396, January 2001, ISSN 0250-0329