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Author(s): Ronald Louw
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The Constitutional Court upholds the criminalisation of sex work

RONALD LOUW examines the minority judgment in the State v Jordan case

On August 20, 1996 a policeman entered a brothel on Jorissen Street in Pretoria, South Africa. He neither revealed that he was a policeman, nor that he had a search warrant. He pretended instead to be a client. He paid the receptionist R250 and then obtained a pelvic massage by one of the brothel's sex workers. Thereafter he revealed his identity and arrested the owner of the brothel, the receptionist and the sex worker on grounds that they had breached provisions in the Sexual Offences Act. When their case eventually went to the Constitutional Court as State v Jordan, the accused argued that the provisions criminalising sex work and brothel keeping were unconstitutional on the grounds of the right to equality, the right to privacy, the right to dignity, the right to freedom of the person and the right to economic activity. The Court disagreed with them on all grounds. It failed to take the opportunity to bring the law into line with the reality of sex work. It failed to build on its own progressive jurisprudence in respect of equality, privacy and dignity and it failed to protect a marginalised minority. Indeed it produced I argue, probably its poorest judgment on constitutional rights, and left thousands of women vulnerable to abuse, exploitation and violence.

The Sexual Offences Act

The Sexual Offences Act dates back to 1957 when it was first termed the Immorality Act – its original name suggesting that it had more to do with the enforcement of morality than with preventing socially damaging criminal activity. The current Act contained provisions against interracial sexual relations, homosexual acts and sex work, but initially did not criminalise sex for reward. The latter was introduced in an amendment in 1988. The general tenor of the laws that criminalised various sexual practices was moralistic and overtly privileged monogamous, heterosexual, marriage relationships. Most other relationships outside marriage were considered deviant and criminalised.

The provisions of the Act dealing with interracial sex and homosexuality are no longer in force, but the Act continues to prohibit sex work. Firstly, for the purposes of this briefing, the Act criminalises the keeping of a brothel (section 2), defined as a house or place used for the purpose of prostitution. Secondly, it deems any person who assists in the management of a brothel to be a brothel keeper (section 3(b)) and thirdly, it criminalises sex (either 'carnal intercourse' or an 'act of indecency') for reward (section 20(1)(aA)). All three of these provisions were challenged in Jordan.

Structure of the judgment

The judgment of the Constitutional Court can be divided into three parts. First, Judge Ngcobo (with Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skeyiya AJ concurring) delivered the majority judgment in which he found that the criminalisation of sex work was not unconstitutional on any of the grounds of challenge. Second, Judges O'Regan and Sachs (with Langa DCJ, Ackermann J and Goldstone J concurring) delivered a minority judgment and were of the opinion that the sex work provisions violated sex workers' rights to equality and privacy, although the state was justified in limiting the right to privacy in respect of sex work, but that the provisions did not violate the other grounds of challenge. Thirdly, Judges O'Regan and Sachs delivered the unanimous decision of the court that the criminalisation of brothel keeping was not unconstitutional. In summary, the laws criminalising both sex work and brothel keeping were upheld. The most contentious of the challenges were the ones based on equality, privacy and dignity.
The judgment gives rise to many legal and sociological issues. This briefing, however, while providing an overview, will focus on the minority judgment especially, in respect of the right to privacy and the minority’s engagement with feminist legal theory. Although the majority is indeed a setback for the development of gender issues, it is lacking in both content and analysis to the extent that it is unlikely to be an enduring precedent. The minority judgment is instead more carefully argued and will certainly attract the attention of future courts. For this reason, it is deserving of more careful analysis.

The majority judgment

The majority found that the criminalisation of sex work does not discriminate against women, as the provision in the Act is gender neutral, penalising ‘any person’ who engages in sex for reward. They also found that the section does not discriminate between sex workers and their clients. They reasoned that in terms of the common law the client could be prosecuted as a partner in crime, or in terms of the Riotous Assemblies Act, which criminalises those who conspire to commit a crime. The fact that clients are never prosecuted was of no legal consequence to the majority. They were of the opinion that what happens in practice may be a flaw in the application of the law, but held that it did not establish the unconstitutionality of the law.

There are two problems with the majority judgment. While it is technically true that the law does not draw a distinction between male and female sex workers and between sex workers and their clients, the law barely reflects the reality of most sex workers. Although any of these classes of persons may be prosecuted, it is in fact almost exclusively women sex workers who are prosecuted. Secondly, the majority did not rely on the Court’s 1998 judgment of City Council of Pretoria v Walker. In that case the Council had differentially charged municipal levies in different geographical areas. Although on the face of it the differentiation was neutral, the Court held that as the residents of one area where overwhelmingly white and the residents of the other area overwhelmingly black, the Council had indirectly discriminated on the ground of race. The Court held that it had to look at the consequences of the conduct and not merely the form of the conduct to ascertain indirect discrimination, as ‘conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination’ (para 31). This point is made forcefully by the minority in respect of indirect gender discrimination and is discussed below.

The majority judgment offers little in the way of explanation of the right to privacy, but merely accepts that the State has a legitimate interest in proscribing commercial sex. It accordingly held that privacy does not protect those who commit a criminal act in private. This misses the point, which was that the act of sex for reward should not constitute a crime because it occurs in private.

The Court considered the privacy of the sex worker further attenuated by the fact that the sex worker ‘invites the public generally to come in and engage in unlawful conduct in private’ (para 28).

In what might be an oblique reference to the right to dignity, although they dealt with it under the right to equality, the majority held that the stigma attached to sex workers is a result of social attitudes and not the law, and as they knowingly attract this stigma, they cannot seek constitutional protection from it. They bolstered this argument by acknowledging that the decision to enter sex work is taken in a context of constrained choices. But as there is some choice, they held that the stigmatisation is their own problem and not the law’s.

The minority judgment

Equality

Judges O’Regan and Sachs, for the minority, developed a more subtle understanding of gender inequality. They accepted that sex workers are overwhelmingly female and that the prosecution of sex workers results in women, rather than their clients, being primary offenders. These consequences of the law, even though the law on the face of it might have been gender neutral, reinforced patterns of sexual stereotyping (para 60). The minority held that the differential impact of the law on
sex workers was directly linked to a pattern of gender disadvantage (para 60) which the Constitution was committed to eradicating. Furthermore the sex worker is stigmatised to a degree that the (male) client is not. This, ‘difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women’ (para 64). The minority thus concluded that the criminalisation of sex work constituted indirect discrimination on the grounds of sex and gender.

The minority expressly disagreed with the majority view that the stigma attaching to sex work arises from social attitudes and not from the law. They held:

'It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values, when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution (para 72).

However, as the majority had relied on a more technical and legalistic understanding of equality and failed to analyse the right to equality in the context of sex work, the Court placed the constitutional right to equality beyond the reach of sex workers. No other ground of challenge succeeded, even in the judgment of the minority.

**Dignity and privacy**

The concept of dignity is foundational to the South African Constitution which opens with the undertaking that the country is based on the values of human dignity, equality and the achievement of human rights (section 1(a)). Furthermore it is a right specifically protected in section 10 of the Bill of Rights: ‘Everyone has inherent dignity and the right to have their dignity respected and protected’. This has led the Court, in previous judgments, to hold that dignity is both a foundational value and an enforceable right.

The right to privacy is closely connected to the right to dignity. The Court has held that the right to privacy is underpinned by the right to dignity. Thus where the dignity is not violated, the less likely it is that privacy will be violated. Secondly, privacy protects not only places, but also persons. This is more subtly expressed by the Court in its conceptualisation of the right as a diminishing one, strongest at the inner core of one’s self, moving into the home, but fading in strength as it moves into the more public realm. This has been called the continuum of privacy rights. In Mistry v Interim National Medical and Dental Council of South Africa the Court expressed (para 20) its conception of the right as:

*a whole continuum of privacy rights which may be regulated as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated.*

In respect of the right to dignity, the minority held that the dignity of the body, a component of the constitutional value of dignity, does not survive commodification. As the Constitution requires us to respect our bodies, it will not protect us when commodifying them. As the sex worker chooses to commodify her body through sex work, she thus eliminates her right to dignity herself. Although the minority held that the sex worker must still be treated with dignity by law enforcement officers, it held that the act of commercial sex itself is devoid of any claim to dignity.

The above, I argue, is too narrow and artificial a conception of dignity. To draw a distinction between the law and the inevitable consequences of the law, direct or indirect, is artificial. Surely sex workers’ dignity is denied by social ridicule, humiliation and police harassment. As legal outcasts they are subject to extortion, theft and violence at the hands of both the police and the public. Daily they are mocked in police stations as they pay admission of guilt fines or paraded in courts for the public to jeer at. Many support families with their income, families whom must suffer directly and indirectly by police harassment and judicial process. The impact this has on family life also diminishes notions of self-worth and dignity. An extended notion of the right to dignity is compatible with constitutional values, and interpretation and should be extended to sex workers in the context of sex work.
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With regard to the right to privacy, the first question the minority dealt with was whether commercial sex falls within the scope of privacy. The applicants argued that even though the sexual act was commercial, it was still intimate and hidden from the public gaze, and thus ought to be protected by the right to privacy. The State argued that it was the commercial nature of the act that deprived it of its right to privacy as the sex worker makes her services available to 'all and sundry' (para 78).

The minority realised the dilemma of the dual nature of the act: that it was both intimate and commercial, and thus had difficulty in placing the act on the continuum of privacy rights. They concluded that the commercial nature of the act significantly displaces the intimacy of the act, and thus places the act at the periphery of the right to privacy.

Central to the minority's position, was that privacy protects 'intimate, meaningful and intensely personal relationships' (para 80). Sex work lacks these characteristics because it is 'indiscriminate and loveless' (para 83). It does not involve 'deep attachment and commitment' (para 83) and is not connected with 'nurturing relationships or taking life-affirming decisions about birth, marriage or family' (para 83). As privacy protects the place where we 'nurture human relationships' (para 80), the sex worker instead makes her services available 'for hire to strangers in the market place' (para 83) and thus 'empties the act of much of its private and intimate character' (para 83).

As the sex worker's right to privacy 'does not reach into the core of privacy, but only touches its penumbra' (para 86) it is a right that is more easily limited. Limitation of rights occurs in terms of section 36 of the Bill of Rights, which states that a right, even though violated, may be limited. Such limitation will be permissible where limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. The minority acknowledged that there were competing interests in the question of the legalisation of sex work, but felt that they were not in a position to resolve the dispute. This was instead the task of the legislature. Furthermore, as most countries criminalise or severely restrict sex work, the State was entitled to do so.

Accordingly, the right to privacy in this instance was justifiably limited.

Critique of the minority judgment on privacy

In order to properly understand the minority position of privacy, it is necessary to provide a broader critique of the Court's jurisprudence on the right to privacy. Underlying the Court's conception of privacy is the model of the continuum. The right not only diminishes along the continuum but it is strongest in the home and weakest in the market place.

The first problem with this model is that it privileges the home over other places. In protecting the home from the public gaze, it simultaneously re-enforces the subjugation of women in the home and creates an artificial divide between the private and the public. The separation of the private from the public has long been the subject of critique by feminists (MacKinnon 1991). The subjugation of women in the home should be a matter of public interest. The minority's dilemma of where to place sex work on the continuum hints at the artificiality of the private/public divide.

The second problem with the model, is that it has a particular ideological conception of the home. Certainly it is more than a place merely hidden from public gaze, otherwise a brothel would be no different. Instead it is a place traditionally marked by marriage and religion: the term 'sanctum of the home' (Mistry: para 20) betrays a religious bias.

Thirdly, the model is compromised by exceptions. At least in terms of the law, if not in practice, violence in the home is impermissible. Whereas the more commercial relationships between, for example, a doctor and patient are protected by privacy, as are certain commercial practices such as protection of patents.

It is within the context of the Court's jurisprudence on privacy that we can then understand the reluctance of
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the minority to accord the sex worker privacy protection. However, it is the minority's engagement with a certain position within feminist legal theory that more fully develops its conception of privacy. This is evidenced in its requirement that a relationship be 'nurturing' before it can make a privacy claim.

Within an essentialist feminist framework, some feminists have developed a legal theory based on the premise that women are actually or materially connected to human life (West, 1988; Gilligan, 1982). Men are not so connected; and the connectedness or unconnectedness of our material reality has existential consequences for us. It is in the context of these existential consequences that feminist legal theory divides into two broad camps: cultural feminists and radical feminists (West, 1988). While radical feminists see their material connectedness to life as the source of women's powerlessness and subjugation, cultural feminists see this connectedness as something to be celebrated (West, 1988).

For cultural feminists, the collective is important and women are more nurturing, caring, loving and responsible to others than men (Rhode, 1991). Intimacy is not simply a description of what women do, but it is something human beings generally ought to do (West, 1988). Cultural feminism thus offers a new vision of human nature, reality and sociopolitical arrangement. Bohler-Muller (2002:615) calls for 'the recognition of the values of care and compassion'. The cultural feminist position contrasts with liberal and critical legal theory, which describes humans as equal and autonomous. Women, who are distinctly unequal because of their connectedness to material reality, respond to their inequality not with calls for equality and independence, but rather with an ethic of care and responsibility (West, 1988). It is partly this understanding of feminism, even though expressly essentialist and somewhat dated, that informed the minority's determination of the scope of privacy: our relationships with others are private, provided that they are nurturing, caring and loving.

The problem with the minority's reliance on cultural feminism, at least as expressed by themselves, is that the theory fails to provide a thorough critique of patriarchy (Johnson et al, 2001). The focus on nurturing does not challenge male hegemony. Furthermore, the theory as applied by the minority is exclusivist. It prescribes acceptable attributes for relationships and excludes those who do not abide. It has no room for the non-nurturing individual. Thus women, in this instance sex workers, who participate in the world of sexist patriarchy, who collude with non-nurturing men, betray women and so should be excluded from constitutional protection.

Both the Court's jurisprudence generally and the minority's development of the conception of privacy in particular, is based on too narrow an ideological and theoretical foundation rather than a more tolerant one. It has developed an exclusivist approach to privacy. In the National Coalition for Gay and Lesbian Equality v Minister of Justice judgment, the Court also referred to privacy as the right to autonomy. This might be a sounder basis for developing a more tolerant and inclusive interpretation of privacy. Such an interpretation would permit us to do with ourselves as we choose, and make a significant break from formerly narrow definitions of sexual morality.

In order to realise a more inclusive notion of privacy, rather than relying on a continuum, privacy should be determined by considering a broad range of factors proportionately balanced in the context of the impugned act. Such factors would include considerations of place, person, autonomy, commerce and harm. Where the act is a victimless one, causing no harm to others, taking place away from the public gaze, and constituting an expression of the individual autonomy of the person, no matter how much one likes or dislikes that expression, then the act should be protected by the right to privacy. Applied to sex work we would conclude that sex workers may do with their bodies as they wish, the act of sexual intercourse then, occurring in a room in a brothel, is no less private than sexual intercourse between spouses. No harm is done to others. The mere fact of the commercial nature of the sex work should not rob the act of its privacy, especially where there is no harm to others. Sex work should thus be fully protected by the right to privacy.


**Brothel keeping**

In delivering the Court’s unanimous judgment on brothel keeping, Judges O’Regan and Sachs relied on two premises. Firstly, that statutes previously enacted to impose narrow conceptions of morality are not necessarily unconstitutional and secondly, that our constitutional framework requires the State to enact laws which foster morality. This should not be a narrow conception of morality, but one founded on constitutional values. The Court accepted that an attempt by the State to promote only sexual intercourse between married heterosexual couples would unconstitutional, but held that the prohibition on brothel keeping was saved by the fact that the State has a legitimate interest in prohibiting brothels. (This interest is apparently justified by the holding of the majority that, ‘Prostitution is associated with violence, drug abuse and child trafficking’, although no evidence was lead in this regard). Furthermore brothels are outlawed in most democratic states and complex issues of policy are involved in their legalisation:

The issues of controlling and regulating sexual activity are complex. Attitudes vary over time and from country to country. Competing policy considerations have to be attended to and the problems of law enforcement in this are particularly acute. Attention has to be paid to the interest of neighbours. Many voices need to be heard. This is very much an area for legislative choice in which proposals made by the Law Commission could be particularly useful (para 119).

The Court held that it was not its function to pronounce on government policy in this regard and accordingly upheld the criminal prohibition of brothel keeping. With respect, this is a simplistic approach avoiding the constitutional imperative in the Bill of Rights that when interpreting legislation the courts must promote the spirit, purport and objects of the Bill of Rights (section 39(2)). Government policy and legislative choices are not beyond the scope of constitutional scrutiny. There are in fact considerable indirect policy implications in the judgment. First, for the minority Judges O’Regan and Sachs held that the criminalisation of sex work was unconstitutional, but for the Court they held that brothel keeping is constitutionally criminalised. This would leave sex workers even more vulnerable to abuse and the violation of their rights to privacy, dignity and equality if they were permitted to engage in sex work but only on the street. Secondly, the Court must have known that its judgment in favour of criminalisation was not going to have a positive effect on the upholding of the law. Sex work will continue largely unabated. This cannot do the public’s respect for the law any good. The Court’s judgment indirectly devalues respect for the law. In summary, the Constitutional Court does a disservice to itself and the country when it avoids difficult and unpopular issues by relying on vague generalisations and opting out of its role of promoting and enforcing constitutional values and rights.

**Conclusion**

This discussion of Jordan has by definition been confined to the judgment. Public debate and response around the judgment and sex-work in general fall outside of a case analysis. However, court judgments are not separate from these debates or the lives of real people. The analysis lacks reference to those other voices largely because the judgment itself is silent on the voices of sex-workers and, considering that their voices were heard in court, silences them. While there are probably many reasons for this judgment, I believe that in one respect it is in part a reflection of the weakness of the women’s movement in South Africa. Law is not made, whether by the legislature or the judiciary, in isolation from social factors. In some instances the making of good law requires vigilant activism on the part of civil society. The Constitution provides a tool to reorganise society. We should not leave that tool in the hands of 11 judges. Their decisions will be constrained by their own social positions and values. In respect of gender issues, vigilant activism is even more important when the majority of the judges (nine out of 11) are men. Women have exceptional resources at their disposal: first, a markedly progressive Constitution (whose Equality Clause alone prohibits discrimination on the grounds of sex, gender, pregnancy, marital status and sexual orientation), a Commission on Gender Equality with constitutionally protected independence, and a long history of political activism and progressive feminism. Despite this,
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the women's movement, if there is even such a movement in South Africa, has failed to utilise the legal process to bring about gender equality. If nothing else, the judgment is a warning to social activists used to progressive and inclusive judgments from the Constitutional Court, that without more strategic activism we may be a long way from the realisation of gender equality in South Africa.

References


Cases

Mistry v Interim National Medical and Dental Council of South Africa 1998 (7) BCLR 880 (CC).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC).

S v Jordan 2002 (2) SACR 499 (CC).

S v Makwanyane 1995 (6) BCLR 665 (CC).

City Council of Pretoria v Walker 1998 (2) SA 363 (CC).

Notes

1. The full citation of the judgment is S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (2) SACR 499 (CC), and referred to hereafter as Jordan, the text of which may be obtained via www.law.wits.ac.za

2. Both the Sexual Offences Act and the Constitutional Court as well as the South African Law Commission refer to prostitution rather than sex work. It is widely accepted that the former is pejorative and that the latter is preferable and will be the terminology used in this briefing. However, for the purpose of legal analysis it is necessary to distinguish between sex for reward and the keeping of a brothel. Unless the context indicates otherwise, the term sex work shall be used to refer to sex for reward and the term less favourable term brothel keeping shall be retained for distinguishing it as a separate component of the sex work industry as a whole.

3. For a contrary view, see Harris, 1991.

4. See para 37 of the judgment:

In addition, a number of amici curiae were admitted and permitted to make written and oral submissions in support of confirmation of the order of invalidity and upholding the appeal. They were the Sex Worker Education and Advocacy Taskforce (SWEAT); 4 the Centre for Applied Legal Studies (CALS) 5 and the Reproductive Health Research Unit (RHRU), 6 who made joint submissions; the Commission for Gender Equality 7 (the Gender Commission); brothel-owners Pieter Crous and Menelaos Gemeliaris (who made a joint submission) and Andrew Lionel Phillips (also a brothel owner) who made submissions only with regard to whether the interim or final Constitution was applicable. SWEAT and Crous and Gemeliaris submitted evidence on affidavit which was challenged by further affidavits from the state. Although the affidavits were replete with denials and counter-denials, the differences in position adopted by the experts and other deponents related not so much to empirical facts as to how to characterise the activities concerned and what conclusions should be drawn from them. Little of the argument accordingly turned on disputed questions of fact.

Ronald Louw is an Associate Professor of Law at the University of Natal, Durban

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