

# Better late than never: Lessons from *S v Jordan* in strengthening women's participation in litigation

## Abstract

In 2002 the South African Constitutional Court rejected the decriminalisation of sex work and for many years the judgment has constricted further debate on the topic. In 2013 organisations such as the Commission for Gender Equality have again publicly committed themselves toward lobbying for the decriminalisation of sex work. The renewed debate has necessitated a reconsideration of the Court's decision in *S v Jordan* and this article focuses on the organisations that participated as *amicus curiae* in the matter. The discussion highlights the importance of organisational participation in litigation and how this participation could provide the context in which to consider future debates on the topic.

## 1 Introduction

It has been an ongoing debate within scholarly and legal frameworks whether to decriminalise sex work as most countries, including South Africa, criminalise the selling of sex. Recently, questions have again surfaced whether legal protection could empower women and decrease the vulnerability associated with this work, since it is accepted that women engaged in sex work are vulnerable to abuse, exploitation and stigmatisation by clients, police, pimps and society in general.<sup>1</sup>

In 2002 the South African Constitutional Court heard the case of *S v Jordan*, and found that decriminalisation was not constitutionally required despite the Court's seemingly progressive equality jurisprudence.<sup>2</sup> The judgment suggested

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<sup>1</sup>Albertyn *et al* 'Women's freedom and security of the person' in Bonthuys and Albertyn (eds) *Gender, law and justice* (2007) 295 at 355; for the Commission on Gender Equality's stance on the decriminalisation of sex work see Commission for Gender Equality: Position on sex work (2013), available at: [http://www.cge.org.za/index.php?option=com\\_docman&task=doc\\_download&gid=223&Itemid=](http://www.cge.org.za/index.php?option=com_docman&task=doc_download&gid=223&Itemid=) (accessed 2013-08-28).

<sup>2</sup>*Jordan v S* 2002 6 SA 642 (CC) (hereafter *Jordan*).

that litigation was limited in effecting meaningful change for women, but highlighted the importance of strategically litigating to ensure that women's lived realities were adequately represented in the judicial system.

This article revisits the Constitutional Court's decision in *Jordan* and the women's organisations that participated to represent the voices of sex workers. An analysis of this participation is crucial in understanding the Court's decision and provides the necessary context from which to approach renewed debates concerning decriminalisation.

## 2 Feminist interpretations of sex work

Feminists have held divergent views about the sex industry, specifically the decriminalisation of sex work. Liberal feminists have argued that sex work should be viewed as a legitimate form of work and that women have a right to choose to engage in sex work, as they do in any other work, which should afford them the same rights.<sup>3</sup> Generally, liberal feminists demand the decriminalisation of sex work and the protection provided by labour legislation and for them the focus is the acknowledgment of choice, the reduction of harm and the development of minimum working standards.<sup>4</sup>

Radical feminists argue that women are never free to make sexual choices and that 'prostitution ("sex work" as a term is rejected) is an extreme form of exploitation and subordination of women by men'.<sup>5</sup> Radical feminism rejects the claim that sex work is a valid employment opportunity as it devalues women and is the ultimate form of male domination over women. Generally radical feminism opposes legal rights that would grant women greater rights to do sex work, but rather favours rights entitlements to protect women and reduce their subordination.<sup>6</sup> For radical feminists:

Prostitution isn't like anything else. Rather everything else is like prostitution because it is the model for women's condition, for gender stratification and its logical extension sex discrimination. Prostitution is founded on enforced sexual abuse under a system of male supremacy that itself is built along a continuum of coercion-fear, force, racism and poverty. For every real difference between women, prostitution exists to erase our diversity, distinction, and accomplishment

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<sup>3</sup>South African Law Reform Commission (SALRC) *Sexual offences: Adult prostitution: Issue Paper 19* Project 107 (2002) 56.

<sup>4</sup>*Id* 58.

<sup>5</sup>Albertyn *et al* (n 1) 355. On the radical feminist approach to sex work see, eg, Mackinnon 'Prostitution and civil rights' (1993) 1 *Michigan Journal of Gender and Law* 13; Dworkin 'Prostitution and male supremacy' (1993) 1 *Michigan Journal of Gender and Law* 1.

<sup>6</sup>SALRC (n 3) 60.

while reducing us to meat to be bought, sold, traded, used, discarded, degraded, ridiculed, humiliated, maimed, tortured, and all too often murdered for sex.<sup>7</sup>

Radical feminists reject the liberal idea of choice arguing that women are directly or indirectly coerced into prostitution.<sup>8</sup> Socialist and critical feminists have also questioned the liberal reliance on choice, as for them it 'disregards the social contexts and relationships which influence and structure individual behaviour'.<sup>9</sup> However, socialist and critical feminists also criticise the radical approach:

Although 'abolitionist' and 'pro-sex worker' feminists clearly hold divergent moral and political understandings of prostitution, it seems to me that the view of power implicit in both lines of analysis is equally unidimensional. The former offers a zero-sum view of power as 'commodity' possessed by the client (and/or third party controller of prostitution) and exercised over prostitutes, the latter treats the legal apparatuses of the state as the central source of a repressive power that subjugates prostitutes. However, the power relations involved in prostitution are far more complicated than either of these positions suggest.<sup>10</sup>

For socialist and critical feminists 'prostitution as a social practice is embedded in a particular set of social relations which produce a series of variable and interlocking constraints upon action'.<sup>11</sup> Both locate prostitution within this particular set of socio-economic conditions which questions the reliance on individual choice and calls for an understanding of choice within the socio-economic circumstances in which women find themselves.<sup>12</sup>

The South African approach to sex work has mostly been influenced by the socialist and critical approaches, and sex work has been linked to our high levels of poverty and inequality.<sup>13</sup> However, a liberal approach is also supported as decriminalisation has been seen as an option to address the vulnerability of sex workers by providing a 'safer' work environment.

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<sup>7</sup>Wynter 'Whisper: Women hurt in systems of prostitution engaged in revolt' in Delacoste and Alexander (eds) *Sex work: Writings by women in the sex industry* (1987) as cited by Bingham 'Nevada sex trade: A gamble for the workers' (1998) 10 *Yale Journal of Law and Feminism* 69 at 81.

<sup>8</sup>Albertyn *et al* (n 1) 356.

<sup>9</sup>Van Marle and Bonthuys 'Feminist theories and concepts' in Bonthuys and Albertyn (eds) *Gender, law and justice* (2007) 15 at 32.

<sup>10</sup>O'Connell Davidson 'Prostitution, power and freedom' in Weeks, Holland and Waites (eds) *Sexualities and society* (2003) 204 at 205.

<sup>11</sup>*Id* 206.

<sup>12</sup>Albertyn *et al* (n 1) 356.

<sup>13</sup>*Id* 358.

In the late nineties, the South African government realised that their approach to the criminalisation of sex work needed to change.<sup>14</sup> In the provincial sphere (to use the language of chapter 3 of the Constitution), in 1996, the Gauteng Ministry of Safety and Security drafted a policy document that provided the provincial cabinet with statistics on how resources were utilised in policing sex work.<sup>15</sup> The argument was that resources could be better spent in other areas and that policing sex work should not be a priority. In the national sphere (once again using the language of chapter 3 of the Constitution), the Department of Justice and Constitutional Development's 1999 Gender Policy Statement mentioned the decriminalisation of sex work as an international obligation in terms of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>16</sup> At the same time, the South African Law Reform Commission (SALRC) investigated sexual offences by and against children which expanded into a project concerning adult prostitution.<sup>17</sup> The civil society organisation, the Sex Workers Education and Advocacy Task Force (hereafter SWEAT), strongly in favour of the decriminalisation of sex work, actively lobbied the SALRC.<sup>18</sup> These initiatives, combined with the SALRC process, created a positive framework for legislative change concerning the decriminalisation of sex work.

When the *Jordan* case was brought forward in early 2002, it came as a surprise to those working in the area, as they were satisfied that their engagement with the executive would lead to decriminalisation and there were no plans to litigate on the issue.<sup>19</sup> According to Albertyn, organisations working in the area did not believe that this was the ideal case and set of facts to decide the issue of decriminalisation, as Jordan's circumstances were not representative of the sex work trade in general, specifically the circumstances of poor outdoor sex workers.<sup>20</sup> However, as the case was already before the Constitutional Court, there was no choice for women's and sex workers' organisations to participate as *amicus curiae* to attempt to provide the Court with the contextual evidence, clearly lacking in Jordan's arguments, and to ensure that all relevant voices were placed before the Court.<sup>21</sup>

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<sup>14</sup>SALRC (n 3) 36.

<sup>15</sup>Wojcicki 'The movement to decriminalize sex work in the Gauteng province, South Africa, 1994-2002' (2003) 46 *African Studies Review* 83 at 87.

<sup>16</sup>Department of Justice and Constitutional Development *Gender policy statement* (1999), available at: <http://www.justice.gov.za/policy/gender/genderPOL.htm> (accessed 2013-01-31).

<sup>17</sup>SALRC (n 3) 27- 28.

<sup>18</sup>Albertyn *et al* (n 1) 356.

<sup>19</sup>Interview Albertyn, (2013-01-09).

<sup>20</sup>The case was brought by a brothel owner and a prostitute that was working in the brothel. The same sentiments were shared by the Women's Legal Centre (WLC); see Cowan 'The Women's Legal Centre during its first five years' (2005) *Acta Juridica* 273 at 287.

<sup>21</sup>Albertyn (n 19). An *amicus curiae* is a non-litigating party that plays a vital role in ensuring that courts are aware of the social impact of their judgments. *Amicus curiae* participation is regulated by rule 10 of the Constitutional Court Rules promulgated under GN R1675 in GG 25726 of 2003-10-

In terms of the facts of the case, Ellen Jordan, a brothel owner, together with two of her employees, were arrested for contravening the Sexual Offences Act.<sup>22</sup> Jordan was charged with the keeping of a brothel; Brooderyk, the receptionist, for assisting in the management of a brothel and Jacobs, the sex worker, for committing an act of indecency for reward with a policeman (parties hereafter collectively referred to as Jordan). Jordan argued that the relevant sections of the Sexual Offences Act were unconstitutional and requested the decriminalisation of prostitution and brothel-keeping.

The High Court concluded that the section criminalising prostitution was unconstitutional but held that the sections in relation to brothel-keeping were not.<sup>23</sup> The declaration of invalidity against the sex work provision was sent to the Constitutional Court for confirmation and Jordan appealed the High Court's refusal to set aside the brothel provisions.<sup>24</sup>

### 3 The arguments

Jordan based her challenge on the constitutional rights to privacy, equality and freedom of trade.<sup>25</sup> The most important arguments were made in relation to the right to equality, as Jordan argued that all sex workers were unfairly discriminated against on the basis of gender, given that only the acts of the sex workers (mostly women) were criminalised as opposed to those of the clients (mostly men).<sup>26</sup> In terms of the right to equality before the law,<sup>27</sup> she asserted that sex workers were victimised since the stigma associated with sex work made it difficult for sex workers to lay charges of, for example, assault and rape.<sup>28</sup>

The state on the other hand emphasised the harm caused by prostitution. According to the state, the range of social ills inherent to prostitution meant that

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<sup>22</sup>The Sexual Offences Act 23 of 1957 s 20(1)(aA) states: 'Any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward, shall be guilty of an offence'. Section 2 of the Act states that any person who keeps a brothel shall be guilty of an offence and s 3 provides that certain persons would be deemed to keep a brothel including '(b) any person who manages or assists in the management of any brothel (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel'.

<sup>23</sup>The High Court decision is reported as *S v Jordan* 2002 1 SA 797 (T).

<sup>24</sup>*Jordan* (n 2) para 36.

<sup>25</sup>See ss 14, 9 and 22 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>26</sup>Written submissions of the applicant, *Jordan* (n 2) paras 29-32.

<sup>27</sup>Section 9(1) of the Constitution states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.

<sup>28</sup>Written submissions of the applicant, *Jordan* (n 2) para 45.

it was reasonable for it to combat these ills by prohibition rather than regulation.<sup>29</sup> For the state, the choice to criminalise prostitution was a constitutionally permissible choice, although it conceded that it might not have been the only or most perfect choice:

The first is that the combat of the social ills of prostitution, is a legitimate and important state objective. It is permissible for the state to employ its legislative power to that end. The second is that there is no perfect cure for the social ills of prostitution. They may be addressed in different ways but all of them are imperfect. The state is in other words limited to a range of imperfect policy options. It is accordingly not helpful merely to point to imperfections in the means that parliament has chosen to combat the ills of prostitution.<sup>30</sup>

The state countered Jordan's equality arguments by arguing that the prohibition was gender-neutral and that the offence could be committed by any person (both female and male prostitutes).<sup>31</sup> The State supported a broad interpretation of the Act which would criminalise both the prostitute and her customer and argued that, even if the Court did not follow a broad interpretation, a client could still be held guilty as an accomplice and could incur the same penalty.<sup>32</sup>

In support of their contentions, the state relied on radical feminist arguments illustrating that prostitution degraded women and commodified their sexuality.<sup>33</sup> Although there is a link between viewing prostitution as a form of harm and radical feminism, the state misconstrued these arguments through including them merely as tactical persuasion to indicate that even feminists were against prostitution.<sup>34</sup>

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<sup>29</sup>Written submissions of the state, *Jordan* (n 2) paras 5-6; the social ills referred to include: the encouragement of violent physical abuse; encouragement of trafficking in women and children; spreading sexually transmitted diseases; the prevalence of drug abuse and the encouragement of other crimes such as bribery; corruption; drug trafficking; assault; public nuisance; robbery; and even murder.

<sup>30</sup>*Id* para 7.

<sup>31</sup>*Id* paras 46-49.

<sup>32</sup>*Ibid*.

<sup>33</sup>*Id* paras 8-12.

<sup>34</sup>Jordan refuted the state's reliance on radical feminist arguments responding in a supplementary affidavit that outlined the current feminist theories surrounding prostitution; see the applicant's supplementary affidavit, case number: CCT 31/01.

## 4 Representing sex workers' interests: Participation by the Commission for Gender Equality and the Sex Workers Education and Advocacy Task Force

As stated the Commission for Gender Equality (hereafter CGE) and SWEAT,<sup>35</sup> were concerned that Jordan did not adequately address the concerns of sex workers and felt it necessary to join the litigation as *amici curiae*. A strategic decision was taken that the CGE would deal with the equality arguments, whilst SWEAT would deal with the other rights arguments.<sup>36</sup>

The CGE proceeded to focus on the equality test set out by the Court in a previous decision.<sup>37</sup> They argued that the sex work provision drew a distinction between 'chaste' women that needed protection, and 'unchaste women' that needed to be punished, and argued that this enforcement of morality had no legitimate government purpose.<sup>38</sup> They further argued that the provision discriminated on the grounds of gender as it disproportionately affected women with the unfairness of the discrimination based on the stereotypical preconceptions advocated for by the state.<sup>39</sup> Throughout its arguments the CGE linked prostitution with the experience of being a woman:

What does, however, emerge as a thread common to almost all depictions of prostitution is the recognition (albeit sometimes tacit) that prostitution is inextricably linked to the experience of being a woman. This is because prostitution cannot be severed from the reality of women's experiences of inequality which experience is manifested in the most extreme cases in abuse and subordination and in less extreme cases in the limited options or choices available

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<sup>35</sup>The SWEAT brief was a collaborative brief between SWEAT, the Centre for Applied Legal Studies (CALs) and the Reproductive Health Research Unit (RHRU) (the SWEAT brief). Each organisation brought its own expertise to the table. SWEAT represented the voices of sex workers as an advocacy organisation, which works towards the empowerment of sex workers; CALs brought its legal expertise in furthering women's equality ideals and the RHRU, its expertise in sex workers' health concerns and their access to health care services.

<sup>36</sup>Albertyn (n 19).

<sup>37</sup>The test was established in the case of *Harksen v Lane* 1998 1 SA 300 and in relation to s 9(1) of the Constitution requires a court to ask the following questions: (a) Does the law or conduct differentiate between people or categories of people? (b) If so, it should be established whether there is a rational connection between the differentiation and a legitimate government purpose.

<sup>38</sup>Written submissions of the CGE, case number: CCT 31/01 para 69.2.

<sup>39</sup>*Id* para 94; s 9(3) of the Constitution states: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

to women. Ultimately, however it is told, the story of prostitution is fundamentally a story about women and their position in society.<sup>40</sup>

On the other hand, SWEAT wanted to outline the nature of the indoor and outdoor sex industry and the impact that the criminalisation of sex work had on adult commercial sex workers.<sup>41</sup> At the core of their brief, SWEAT wanted to illustrate that prostitutes were entitled to certain constitutional rights and that the Act curtailed these rights. SWEAT primarily relied on the right to freedom and security of the person and stated that the right encompassed autonomy from interference in determining for oneself what to do with one's own body.<sup>42</sup> In addition, SWEAT contended that the Act violated sex workers' right to dignity, their right to free economic activity, their right to privacy and supported the CGE's submissions that the section discriminated unfairly.<sup>43</sup>

SWEAT further focused on several categories of vulnerability entrenched by the criminal sanction including: vulnerability to violence, unsafe, unfair and poor working conditions, the stigmatisation of sex workers, their access to health, social, police, legal and financial services, the prohibition's adverse impact on safe sex practices and the ability to find other employment.<sup>44</sup> SWEAT advocated that prohibition was not the only viable option and that even without any legislation regulating the industry there existed a strong legal framework, including labour laws, business laws, liquor laws, solicitation laws and nuisance laws that could assist in regulating the industry and addressing the State's fears.<sup>45</sup>

## 5 The Constitutional Court's response to and interpretation of the participating group's arguments

The Court was strongly divided in its decision and from the structure of the judgment one can infer that the minority judgment was intended to be the majority decision and that final consensus revolved around the acceptance of the participating group's arguments. In analysing the judgment, I found it necessary to first analyse the minorities' interpretation of the *amici's* arguments followed by the majority's interpretation which in my opinion leads to a better understanding of the judgment.

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<sup>40</sup>Written submissions of the CGE (n 38) para 5.4.

<sup>41</sup>Notice of Motion to be admitted as *amici curiae*, SWEAT brief, case number: CCT 31/01 para 18.

<sup>42</sup>See s 12 of the Constitution and s 11 of the Interim Constitution of the Republic of South Africa, 1993 (hereafter the Interim Constitution).

<sup>43</sup>Sections 10, 26, 13 and 8 of the Interim Constitution respectively; see the written submissions of SWEAT, case number: CCT 31/01.

<sup>44</sup>Written submissions of SWEAT (n 43) paras 6.57-6.85.

<sup>45</sup>*Id* para 14.7.1.



### 5.1 The CGE's equality arguments

The minority judgment, by O'Regan J and Sachs J (with Langa DCJ, Ackerman J and Goldstone J concurring), gives the impression of being the planned majority judgment, with the CGE's equality arguments the common ground around which consensus revolved.<sup>46</sup>

The minority first considered the section 9(1) arguments, and found that it was not irrational for the legislature to punish the conduct of only one group but not the other.<sup>47</sup> However, it accepted Jordan's and the CGE's arguments that the Act discriminated as it disproportionately affected prostitutes (mostly women) as opposed to their clients (mostly men).<sup>48</sup> Here the minority based their argument, as the CGE did, within the general framework of gender stereotypes and did not focus on the sex workers as a distinct vulnerable group:

In the present case, the stigma is prejudicial to women and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.<sup>49</sup>

In determining the unfairness of the discrimination, the minority did shift their focus to the sex workers, but this was however not to acknowledge their vulnerability as a distinct group:

There can be no doubt that they are a marginalised group to whom significant social stigma is attached. Their status as social outcasts cannot be blamed on the

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<sup>46</sup>This can be inferred from the Court's statement *Jordan* (n 2) para 70: 'In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court, of course, is not bound by the Commission's views but it should acknowledge its special constitutional role and expertise. In the circumstances, its evidence and argument that s 20(1)(aA) is unfairly discriminatory on grounds of gender reinforces our conclusion' (footnotes omitted).

<sup>47</sup>*Jordan* (n 2) para 57.

<sup>48</sup>*Id* paras 57-63.

<sup>49</sup>*Id* para 65.

law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.<sup>50</sup>

Ultimately it found, based on the distinction between the application of the criminal sanction between the sex worker and client that the provision discriminated unfairly.

The majority judgment by Ngcobo J (with Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ, and Skweyiya AJ concurring), simply countered the minority's arguments alluding to the conclusion that the majority judgment was initially intended to be the minority judgment. The majority, in establishing discrimination, simplistically adopted the State's arguments that perceived the section to be gender-neutral, as it penalised both male and female prostitutes.<sup>51</sup> It argued that the criminality of the conduct was equal as both parties incurred liability, the prostitute in terms of the Sexual Offences Act, and the client at common law and in terms of the Riotous Assemblies Act.<sup>52</sup> In relation to the unfairness of the discrimination the majority stated:

And if there is any discrimination, such discrimination can hardly be said to be unfair. The Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex. The only significant difference in the proscribed behaviour is that the prostitute sells sex and the patron buys it. Gender is not a differentiating factor. Indeed, one of the effective ways of curbing prostitution is to strike at its supply.<sup>53</sup>

For the majority, the stigma attached to prostitution was not a legal issue and could be attributed to the prostitute through her own conduct and not her gender.<sup>54</sup> The majority did not pay any attention to the CGE's equality arguments except insofar as it refuted the minority's analysis that relied on them.

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<sup>50</sup> *Id* para 66.

<sup>51</sup> *Id* paras 9-10; written submissions of the state (n 29) paras 46-49.

<sup>52</sup> *Jordan* (n 2) para 14. Section 18 of the Riotous Assemblies Act 17 of 1956 reads as follows: '(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable. (2) Any person who – (a) conspires with any other person to aid or procure the commission of or to commit; or (b) incites, instigates, commands, or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable'.

<sup>53</sup> *Jordan* (n 2) para 15 (footnotes omitted).

<sup>54</sup> *Id* para 16.

## 5.2 SWEAT's rights arguments

The minority did not engage SWEAT's arguments and built on its earlier statement that prostitutes were, to an extent, to blame for their own vulnerability. With reference to the right to dignity, the minority stated:

To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work.<sup>55</sup>

Although it found that the sex work provision infringed the right to privacy, it did so in a constrained manner:

By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. Although counsel for the appellants was undoubtedly correct in pointing out that this does not strip her right to be treated with dignity as a human being and to have respect shown for her as a person, it does place her far away from the inner sanctum of protected privacy rights. We accordingly conclude that her expectations of privacy are relatively attenuated. Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree.<sup>56</sup>

The majority also did not take account of any of SWEAT's arguments. Its reasoning in terms of the rights claims were formalistic and focused on the unlawful nature of the conduct with no reference to the lived realities of sex workers. It chose to implement traditional legal method, that relies on relevant and persuasive evidence, to determine facts (which for the majority was the state's arguments); a reliance on legal precedent (in this case the common law and Riotous Assemblies Act) to provide a framework for analysis that lead them to the decision that the restriction was constitutionally permissible.<sup>57</sup>

The majority merely considered the constitutionality of the legislation which it argued passed constitutional scrutiny.<sup>58</sup> It proceeded to reject the confirmation of invalidity and was deferential in stating that the legislature had to consider whether the interests of society would be better served by decriminalising prostitution.<sup>59</sup>

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<sup>55</sup>*Id* para 74.

<sup>56</sup>*Id* para 83.

<sup>57</sup>Mossman 'Feminism and legal method: The difference it makes' (1987) 3 *Wisconsin Women's LJ* 147 at 153.

<sup>58</sup>Mossman 'Feminism and the law: Challenges and choices' (1998) 10 *CJWL* 1 at 5.

<sup>59</sup>*Jordan* (n 2) paras 30 and 33.

## 6 The importance and relevance of women's participation in litigation

The *Jordan* case necessitated participation by interested groups to ensure that the Court took account of the lived realities of sex workers and to ensure that their interests were fully represented. The importance of the CGE's and SWEAT's participation is reflected in the judgment as their arguments, especially those from the CGE, elicited a great degree of debate and consideration from the Court.

However, despite attaching great value to the CGE's brief, it is interesting how both the majority and minority judgments did not attach any value to SWEAT's submissions. An analysis of the different briefs showed that the SWEAT brief focused on the sex workers themselves and their experience, as opposed to the CGE's brief, that focused on the gendered discrimination underlying sex work that affected all women. It is clear that the Court attempted to neutralise difficult rights assertions made by a distinct group by framing the case as a general women's issue.

According to Sheehy, judges often validate the more conservative or simplified arguments to reach consensus and to conform to traditional legal paradigms and established hierarchies.<sup>60</sup> This interpretation by the Court establishes the importance of women's and organisational participation in challenging formalist reasoning even though it might not have the desired impact:

The power of law to define boundaries so as to exclude 'irrelevant' facts about women's lives represents a formidable challenge. Yet, the power of feminism to critique a construction of law that has safely situated itself outside social life is also a choice, albeit, not an easy one. Both of these challenges – the challenge to acknowledge complexity in assessing the impact of cases and the challenge to recognize relationships between law and social arrangements – represent feminism's challenges to law. They demonstrate both the law's power and the power of feminism to resist it. However, the effort to take up these challenges and to resist the power of traditional legal method, depends on a third choice, which is whether or not to persist in seeking justice within law.<sup>61</sup>

Although the CGE and SWEAT were not successful in persuading the majority to adopt its arguments, the indirect impact of their participation ensured that these arguments were before the Court. The importance of participation in influencing the writing of a minority judgment should not be underestimated. Minority judgments have been described as 'democratic conversations' where a

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<sup>60</sup>Sheehy 'Feminist argumentation before the Supreme Court in *R v Seaboyer*; *R v Gayme*: The sound of one hand clapping' (1991) 18 *Melbourne University LR* 450 at 462.

<sup>61</sup>Mossman (n 58) 14.

judge engages in a form of 'institutional disobedience' by not agreeing with the majority.<sup>62</sup> Therefore, a judge is able to point out flaws in the majority's reasoning, whilst presenting his/her own interpretation of the correct application of legal principles.<sup>63</sup> By participating as *amici curiae* the CGE and SWEAT assisted in this democratic conversation, as their arguments created a framework for the minority opinions to develop, which promoted democratic dialogue, indicating that the majority's decision was not supported by everyone.<sup>64</sup>

The subsequent decision of the Labour Appeal Court (LAC) in *Kylie v CCMA*, is a good illustration of a minority judgment influencing a later decision.<sup>65</sup> In this case, a sex worker felt that she was unfairly dismissed from the massage parlour where she worked and approached the court for redress. The LAC found that although it could not sanction sex work, the fact that prostitution was illegal did not derogate the prostitute's constitutional rights and in this specific instance her right to fair labour practices.<sup>66</sup> The judgment softened the decision of *Jordan* to an extent and the arguments presented would not have been possible without the dicta in *Jordan's* minority judgment and SWEAT's arguments that specifically advocated for constitutional rights entitlements.

However, the *Jordan* judgment has still dealt a blow to the positive framework that was established by organisations with the executive in reforming the sex industry. There is still no final report from the SALRC on decriminalisation and, apparently, as a result of the *Jordan* judgment, the Sexual Offences Act has been amended to criminalise the clients of sex workers.<sup>67</sup>

The CGE has only relatively recently again publicly announced its support to decriminalise sex work and for future decriminalisation debates it is important to consider the arguments of the participating organisations and how it was received by the Court to plot a strategy going forward.

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<sup>62</sup>Collins *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 144-146.

<sup>63</sup>*Id* 144.

<sup>64</sup>*Id* 146.

<sup>65</sup>*Kylie v CCMA* 2010 4 SA 383 (LAC).

<sup>66</sup>*Id* para 54; s 23(1) of the Constitution states: 'Everyone has the right to fair labour practices'.

<sup>67</sup>See the SALRC (n 3). A report should have been filed by the end of February in 2011, but to date no report has been filed. For information pertaining to the status of the Issue Paper see [http://www.justice.gov.za/salrc/media/2010\\_wwmp\\_adultpros.html](http://www.justice.gov.za/salrc/media/2010_wwmp_adultpros.html) (accessed 2013-01-17). The Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 amended s 11 of the Criminal Law (Sexual Offences) Act 32 of 2007 which now states: 'A person ("A") who unlawfully and intentionally engages the services of a person 18 years or older ("B"), for financial or other reward, favour or compensation to B or to a third person ("C") – (a) For the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or (b) By committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older'. The imposition of penalties in respect of this section is left to the discretion of the courts.

In conclusion, although the Court's judgment in *Jordan* could be described as being conservative, it provided an opportunity for women's organisations to confront the Court with evidence concerning women's lived realities, and although those realities were not acknowledged by the Court, it created an important platform for these arguments to be debated. By participating as *amicus curiae* women's organisations were able to further the feminist project in law:

In order to make law conscious of, and responsive to, gender oppression in all its manifestations, it is necessary to challenge the signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms.<sup>68</sup>

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<sup>68</sup>Pellatt 'Equality rights litigation and social transformation: A consideration of the women's legal education and action fund's intervention in *Vriend v R*' (2000) 12 *CJWL* 117 at 120.  
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