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No. 04: Gender Concerns in South African Migration Policy

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Introductory Note:

This paper draws attention to the need for a gender analysis of the South African government's proposed new policy on international migration, by identifying a number of areas of implicit gender discrimination. Such "discrimination by default" is of more than academic relevance, having important implications for national and regional development. Research undertaken by the Southern African Migration Project indicates a growing "feminization" of migration to South Africa from the Southern African region, as well as gender-specific motives and patterns of migration. If migration is to be effectively managed, such realities must be taken into account. The paper concludes by advocating a development-centred, household strategies approach, both in understanding international migration to South Africa and in the further development and implementation of legislation. The paper was written by Dr Belinda Dodson, a research associate of SAMP. The opinions expressed are the author's alone and do not necessarily reflect those of SAMP, its staff or its funders.

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1.0 Introduction

1.1 Relative to other areas of post-apartheid legislative reform, the development of a new national policy on international migration has been unusually protracted. It has now been over six years since the election of the first post-apartheid government, and yet international migration policy continues to be implemented through the tellingly-named Aliens Control Act. Passed in 1991 and amended in 1995, this Act is a direct legacy of the apartheid era and is both ideologically and practically ill-suited to present-day realities. Indeed certain of its provisions even contravene the South African constitution, which explicitly forbids discrimination on the basis of either gender or sexual orientation.

1.2 Reasons for the delay are many, but certainly includes the very real dilemma of formulating democratic, rights-based migration legislation in a highly xenophobic society. The first stage in the development of new migration policy and legislation was the publication of a *Green Paper on International Migration* in 1997. This was then subjected to critical review, including extensive public input. Out of this process emerged a *White Paper on International Migration*, published in the *Government Gazette* of 1 April 1999.[1] This too has been subjected to review, including public consultation, and is currently under consideration by the Parliamentary Portfolio Committee on Home Affairs. The next stage will be the (re)drafting of a bill and its passage through Parliament for eventual enactment.

1.3 While this progress is to be welcomed, there are a number of gender-related concerns about both the content and the process of migration policy reform. Despite having significant gender implications, both the Green and White Papers are remarkably silent on questions of gender. Far from representing gender neutrality, this rather suggests blindness to the close relationship between gender and migration, and hence to the ways in which migration policy will have different outcomes for men and women. Gender concerns also raise broader questions about international migration, both in South Africa and more generally. How, for example, does gender mediate the relationship between migration and development, in both source and recipient societies? Thus while the focus here is on gender, the lessons drawn have broader relevance and application.

1.4 In this paper, the Green and White Papers are both subjected to a gender-conscious reading, revealing a number of areas of implicit gender discrimination. Drawing on international literature on gender and migration, the paper recommends the incorporation of a development-centred, "household strategies" approach in migration policy and legislation. Only through such an approach, it is argued, can the tension between the economic development and human rights bases of migration policy be resolved.

2.0 The Aliens Control Act

2.1 Any country's international migration policy has to encompass a range of factors, including economic goals, political considerations, security issues, human rights concerns, and definitions of citizenship and nationality. Dramatic socio-political change commonly brings about changes to migration policy and legislation. In the context of South Africa's transition to a non-racial democracy, a move to a more open, non-discriminatory immigration policy than that which had pertained under apartheid might have been expected. Yet the 1991 Aliens Control Act still remains in force, amended in 1995 without any radical transformation of policy.

2.2 Crush (1999) has critiqued both the language and the ideology of the Act as amended, with its emphasis on regulation and policing and its perpetuation of a discourse of irregularity and "othering" of immigrants. On gender grounds too the Act has a number of weaknesses and omissions. Superficially, the amendments might appear to have removed gender discrimination. For example "he" was replaced by "he or she", "him" with "him or her". Yet even this was done inconsistently and incompletely, and without any realistic appreciation of the gender breakdown of the various categories and definitions being legislated. Certain forms of racial and religious discrimination were removed by the recognition of "customary unions" as valid marriages, but traditional partnerships such as same-sex couples were not given any recognition, despite the country's new constitution forbidding discrimination on grounds of sexual orientation.

2.3 Where direct discrimination on grounds of gender was removed from the 1991 Act, this was usually to the lowest common denominator. For example, under the old Act, the foreign wife of a male South African citizen qualified for immigration, while no such rights attached to the foreign husband of a female South African citizen. Under the amended Act, neither a male nor a female spouse qualifies automatically for permanent residence in South Africa upon marriage to a South African citizen, their immigration status instead being determined by the Immigrants Selection Board. A number of highly publicized cases suggest that many of these decisions have been made arbitrarily and in a way that perpetuates the gender discrimination of the past. Certainly a number of spousal applicants have been refused immigration permits.

2.4 In its general spirit of policing and regulation, as well as in its specific provisions, the legislation is far more concerned with exposing "fake" marriages entered into with the purpose of gaining entry to the Republic than with any positive rights attaching to the foreign spouses of South African nationals. With some exemptions, applications for either temporary or permanent residence have to be made from outside South Africa, in the applicant's country of normal domicile, with the almost inevitable consequence of separation of South African citizens from their foreign spouses while such applications are pending. There is no special spousal or family category in the designation of

eligibility for temporary residence, which is limited to visitor, work, work seeker, medical, and business permits. Any rights attaching to the spouse or children of "aliens" granted temporary resident status are left vague: "When a temporary residence permit is issued to an alien, an appropriate permit in terms of this section *may* also be issued to the spouse and to the dependent child of that alien" (Section 26(5), my italics). Similarly, under the category of permanent residence, "a regional committee *may*, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit" (Section 25(6), my italics).

2.5 While it would be wrong to restrict the considerations of female immigration to their marital or family status, it remains true of countries around the world that more women than men immigrate under the spousal or family category. Limiting the residence rights of spouses and family members is thus likely in practice to discriminate unfairly against women. From a gender perspective, the 1995 amendments to the 1991 Act consisted of "just adding women", merely changing language rather than substantively and systematically addressing discrimination. It could even be argued that women were better off under the original 1991 Aliens Control Act, which was at least more overt in its gender discrimination. As it stands, implicit gender discrimination persists in South Africa's immigration policy, masked by the superficially gender-neutral language in which the legislation is cast.

3.0 The Green Paper on International Migration

3.1 The 1997 Green Paper, it was hoped, would provide the blueprint for just, non-discriminatory international migration policy. But a gender-aware reading of the Green Paper reveals a number of problem areas. The very title of the document is significant, deliberately referring to "international migration" rather than immigration *per se* so as to move away from the implication of permanence in the latter phrase. The reasons for this distinction lie in part in the history of male-dominated labor migration to South Africa from neighboring Southern African countries. This has created a particular form of long-term but impermanent international migration – in essence a version of transnationalism – which remains important to the South African economy (Crush, Jeeves, and Yudelman 1991; Crush and James 1995). It was also an attempt to avoid the prevalent association of immigration with the preface "illegal", and thus to move away from the idea of a problem to be controlled towards a discourse of rational management.

3.2 The broad philosophy of the proposed policy was that migration control should be governed by two sets of criteria: economic criteria of labor demand; and democratic criteria of human rights (Republic of South Africa 1997). However, neither labor demand nor human rights can be regarded as gender-neutral, particularly in the Southern African context, from where most migrants are drawn. Discrimination against women is

deeply culturally ingrained and women are systematically denied rights and opportunities granted to men.

3.3 The Green Paper goes on to identify three streams of cross-border migration: immigrants, migrants, and refugees. Aside from an acknowledgement of the persistence of the historical male bias into the present, the Green Paper stated that for both temporary migration and permanent immigration there should be "rules of entry driven by labour-market need", admitting "individuals who have desirable skills, expertise, resources and entrepreneurial will" (Republic of South Africa 1997:19). As Southern African women are routinely denied the opportunity to acquire such skills and resources, they are automatically disadvantaged by the application of such criteria for (im)migration eligibility.

3.4 Quite how "labor-market need" would be determined was not made clear. Certainly persistence of the traditional dominance of the mining sector in employing migrant labor would imply a continued male bias. Nor did the Green Paper make clear whether Southern African labor migrants would be allowed to bring spouses, partners and families with them to South Africa, beyond an endorsement of "border passes to eligible persons to ease the flow of legally-sanctioned temporary visitation of *bona fide* family members across our borders" (Republic of South Africa 1997:26). At the other end of the skills spectrum, such as in the high-tech sector, a similar gender bias would inevitably arise; yet nowhere is this given explicit recognition.

3.5 One of the Green Paper's recommendations which might positively favor female migration was that cross-border trading, including small-scale and informal-sector trading, be facilitated. As research by the Southern African Migration Project has shown (Dodson 1998), such trading is one of the key motives for visits to South Africa by women from neighboring countries. The final category of temporary migrant considered was that of students, where again, especially for students from other African countries, there is likely to be a bias in favor of males.

3.6 The economic discourse in the "migrant" stream is in stark contrast to the human rights-based language contained in the section on refugees, the "third stream" of international migrants and the only category in which gender is given explicit, if still partial, treatment. In the section summarizing the current situation, one reads: "The majority of people who are asylum-seekers are *young men* in their twenties who have fled African countries such as Angola, Somalia, Zaire, Liberia, Rwanda and Ethiopia" (Republic of South Africa 1997: 32, my italics). No explanation was offered for this gender bias. In many countries, both in Africa and elsewhere, women, children, and the elderly are particularly at risk and especially vulnerable to the effects of the famines, wars, and natural disasters that commonly initiate major flows of refugees. Why, then, are most of the refugees who find their way to South Africa male rather than female, young rather than old, adults

rather than children? Do these men leave behind female partners, parents, and children in their country of origin?

3.7 Of course, there is a danger in emphasizing women's vulnerability that they might become ghettoised into the "refugee" category, regarded as temporary sojourners in South Africa awaiting ultimate repatriation, while men can more readily be admitted as mainstream immigrants. As recommended by the Green Paper, the refugee category of international migrant became the subject of its own distinct Act and was thus separated from the "mainstream" migration covered by the subsequent White Paper on International Migration. The Refugee Act itself is written in carefully gender-neutral language, but the gender composition of refugee flows certainly warrants monitoring and, if necessary, measures for gender redress.

3.8 The category of permanent immigration to South Africa was dealt with in similarly gender-blind terms to those applied to temporary migration. Here too the application of skill- and wealth-based admission criteria would in effect serve to discriminate in favor of men, as has proved the case even in the supposedly non-discriminatory immigration policies of countries such as Australia (Fincher 1997). The very word entrepreneur, which recurs throughout the document, still to most people evokes an image of a male. Clearly, immigration eligibility criteria do not have to be explicitly sexist to discriminate against women in effect (Fincher 1997). Thus while the Green Paper represented a considerable improvement on the Aliens Control Act, it could by no means be described as gender-neutral.

4.0 The 1999 White Paper: Progress or Regress?

4.1 Almost two years elapsed between the Green and White Papers, the latter coming out officially only in April 1999. The process by which the White Paper came into being was, to say the least, opaque, and its subsequent evolution has been characterised by increasing confusion and controversy. The composition of the Task Team responsible for drafting the White Paper was far from representative, with Winnie Madikezela-Mandela being the only woman member. Public input appears to have been extremely limited in the drafting stages, with little attempt to draw groups representing women's interests into the process. The timing of the release of the White Paper was also unfortunate, coming in the build-up to the 1999 elections when there was little chance of it being acted upon or indeed of attracting the public attention and debate that it deserved. Certainly there is very little in the document to suggest that the gender lacunae of the Green Paper were systematically addressed. Nevertheless, the White Paper remains for all intents and purposes the basis for policy reform, even while there is disagreement as to its precise procedural status.[2] It therefore forms the primary focus of my critique here.

4.2 The White Paper explicitly asserts its independence from the Green Paper and it is clear that it departs from the Green Paper in several respects - despite the Green Paper having drawn a largely positive response from a wide variety of stakeholders including labor, business, human rights organizations, other government departments, and members of the public. Overall, the White Paper is far more anti-immigration in tone and specific about mechanisms and strategies for immigration "control" than its predecessor. One of the more perturbing statements in the White Paper is the following, contained in the section summarizing the existing policy framework: "Furthermore, whilst one acknowledges that the transformation of South Africa from apartheid to democracy is the event with the greatest significance on any process of policy formulation conducted in the past five years, the Task Team could not determine the import or impact of this event on the shaping of new migration policies. In abstract, *the migration policies of the old South Africa could work for the new one* once the existing legislation fully complies with the Constitution and the administrative practices developed under it do not unfairly discriminate against certain aliens on the basis of origin, ethnicity or religion" (Republic of South Africa 1999: 11, my italics).

4.3 Remarkably, especially given the criticism of the Green Paper on gender grounds, the White Paper was almost completely silent on matters of gender. Any affirmative action policy suggested in the White Paper is expressed in terms of regional and continental preferences (and thus implicitly by race) rather than by gender. The document states: "Our obligations are to serve our people first; the people of the region and the member states of the Southern African Development Community (SADC) second; the people of Africa third; and the rest of the world last" (Republic of South Africa 1999:9). How this might be achieved, or whether serving the interests of other African countries should involve encouraging emigration of their citizens, is not made clear.

4.4 As in the Green Paper, the international migration system envisaged in the White Paper is one driven primarily by narrowly-defined economic criteria: "The people who can *add value* to our growth and development are those who *invest*, are *entrepreneurs* and promote *trade*, those who bring new *knowledge* and *experience* to our society, and those who have the *skills* and *expertise* to do the things we cannot properly do at this stage" (Republic of South Africa 1999: 9, my italics). Given these explicit wealth and skills criteria for admission, the potential immigrant, whether temporary or permanent, is far more likely to be male than female. This is especially true if combined with the proposed geographically-based hierarchy discussed in the paragraph above, with a marked male bias in access to income, property, resources, and education in most African countries.

4.5 Thus the very criteria proposed as the basis for selecting immigrants and admitting migrant labor mean *de facto* gender discrimination, no matter how gender-neutral the language in which policy is written. Proposals to modify the labor quota system to a system of corporate work permits, where companies would be able to apply for

permission to employ foreign labor, would also discriminate in favor of men, as many women work in sectors where employment is individualised and less amenable to large-scale, organised recruitment. Opening up sectors of the labor market other than mining and agriculture to foreign labor might serve to remove some of the existing gender bias, but without deliberate policy interventions the gender composition of foreign labor is likely to remain predominantly male. In failing to acknowledge the gender composition of different sectors of the labor market, whether mine labor or software engineering, the White Paper implies that a continued male bias in the composition of international migrants is not a matter for concern.

4.6 There are also gender implications in whom the White Paper would like to keep out, for example in the proposal to reduce the overall number of foreign migrants working in the South African economy. Reducing opportunities for labor migration in sectors dominated by males, for example on the mines, will affect the livelihoods of the households of retrenched, and thus repatriated, workers. This risks forcing female household members into possibly unauthorized migration and related exploitation by unscrupulous employers. Evidence from Lesotho suggests that this is already occurring. Many of the contract workers on eastern Free State farms, for example, are now women, including a large proportion of unauthorized migrants enduring grossly inadequate working and living conditions and without any recourse to union protection (Crush *et al*. 2000). As this study demonstrates, the feminization of certain sectors of the labor market in particular locales does not necessarily represent improvement in women's lives, and there is certainly more to gender equity in migration policy than the mere matching of numbers. Migration, even when undertaken by individuals, is practised as a household strategy rather than atomistic, individual behaviour. Migration policy, therefore, should likewise be formulated and applied in household strategy terms, with due attention to social, economic, and biological relationships, rather than in terms of unattached, genderless "persons", "labor units", or "entrepreneurs".

4.7 In addition to ignoring the impact (whether positive or negative) of international migration on the larger household units from which migrants are drawn, the White Paper also fails to recognise the impact of migration to South Africa in fostering regional development. Instead it states bluntly: "Persistent economic disparity, poverty and political and social turmoil are likely to continue to force or induce people to migrate from the rest of the continent towards South Africa… [U]nder present circumstances it is not possible for South Africa to deal with the 'push' factors acting in the rest of the continent, nor to build a migration system predicated on the improvements of these factors" (Republic of South Africa 1999:17).

4.8 Rather than seeing migration from neighboring countries as a means towards reducing inequality in the region, for example through remittances, skills transfer, and "to-and-fro" migration, it is presented almost entirely as a threat to the social and economic well-being

of South African citizens. Here too there is an important gender dimension. The Southern African Migration Project's research (Dodson 1998) suggests that female oscillating migration from neighboring countries acts as a positive force for development in those countries; and that female migrants to South Africa are by and large law-abiding, responsible, entrepreneurial, and resourceful. There is also evidence to suggest that female migration to South Africa is less likely to be long-term or permanent than migration by males (Dodson 1998), again with particular implications for redistribution and development in the wider region.[3] Cross-border migration by women has the potential to reduce both spatial and gender inequality in Southern Africa, and any policy that facilitates existing female migration should therefore surely be encouraged.

4.9 Also paid insufficient attention in the White Paper are the many ways in which there may be *de facto* gender discrimination in the implementation and enforcement of migration policy. Such discrimination may be against either men or women. For example, men are probably more likely to be affected by workplace raids to round up suspected "illegal aliens", already a common occurrence in South African cities and given further institutional formalization in the White Paper. At the other end of the migration spectrum, skilled women wishing to immigrate may face difficulty convincing officials that they are a family's primary or only breadwinner. While it does not explicitly discriminate against women, the implicit assumption is that the primary migrant is likely to be a male "breadwinner", with certain rights attaching to his female and child dependants. This is one area where the White Paper acknowledges that there has been unfair discrimination by Home Affairs officials in the past. Such discrimination is seldom conscious, instead being based on deeply-embedded social stereotypes.

4.10 This raises another issue, and that is the question of gender-neutral language. Although the White Paper takes obvious pains to use gender-neutral language (e.g. "their", "his or her", "spouse" or "partner"), this is done in a way that is more suggestive of gender-blindness than gender-awareness. In a social context that is anything but gender-neutral, South African migration policy surely has to be conceptualised and articulated in a way that acknowledges both its own gender-based assumptions and its likely gender-differentiated outcomes. Policy and legislation, therefore, should be written in gender-neutral language only where this is valid, appropriate, and intended, and where terms such as "he or she" have a meaningful basis in reality. Where there has been a historical male bias, or where legislative provisions are likely to have different outcomes for men and women, this should be made explicit rather than left implicit, and strategies implemented to overcome any unfair gender discrimination. Such foregrounding of gender will of necessity require the use of gender-specific language. Useful precedents exist in other recent South African legislation, for example in the National Water Act (no.36 of 1998) and Environmental Management Act (no.107 of 1998), each of which makes legislative provision to overcome past discrimination against women.

4.11 Despite such misgivings, the White Paper does have some positive developments. It contains, for example, a number of recommendations which would facilitate various types of short-term migration to South Africa, including visits for the purpose of "tourism, business, trade, study or other activities not requiring work" (Republic of South Africa 1999:25). The easing of restrictions on short-term migration will be of particular benefit to women from the Southern African region, who commonly practise such migration for purposes of shopping, informal-sector trade and visiting family members (Dodson 1998). The White Paper reiterates the government's "commitment to sustain the informal sector" and notes that "the public hearings have provided the Task Team with an indication that foreign traders are beneficial to the informal sector" (Republic of South Africa 1999:24). Visits by (mostly female) family members to (mostly male) migrant workers in South Africa would also be facilitated by these short-term entry permits, thus helping to overcome some of the social costs of contract labor migration.

4.12 A further positive development for women and families is the White Paper's acknowledgement that: "Family reunification should become an important element of migration policy. It must be noted that artificial colonial boundary lines and forced migration have disrupted many family units" (Republic of South Africa 1999:34). Foreign spouses of South African citizens would finally and unambiguously be given rights of permanent residence. Family relations "would also become the ground for a temporary residence permit for relatives" (Republic of South Africa 1999:34), with temporary residence permits being made available to people within the third step of kinship of a South African citizen or the second step of kinship of a permanent resident. Somewhat worrying in gender terms is the condition that holders of such temporary residence permits would not be allowed to work. As it is likely that more females than males would enter the country under the "family" category, it would be females who suffered disproportionately from the resulting forced unemployment. There remain a number of other ambiguities, for example as to the immigration and employment status of family members of persons entering the country under the proposed temporary corporate work permits. Certainly there are a number of legal, administrative and practical questions which need further debate and clarification before the proposed policy becomes law.

4.13 Another progressive development, in keeping with constitutional requirements, is the White Paper's proposal to recognise permanent same-sex partnerships as having the same constitutional status as heterosexual marriages. "It is suggested that the statute contains a provision enabling but not requiring the Immigration Service to regard as spouses for the purpose of the granting of permanent residence permits, two people of the same sex who provide a certain type of commitment about their relationship in a form prescribed by regulations" (Republic of South Africa 1999:35). After a case in the Constitutional Court brought by the National Coalition for Gay and Lesbian Equality and others against the Minister of Home Affairs, this provision has already been given effect in advance of

specific migration legislation, and foreign same-sex life partners of South African citizens have been granted the same residence rights as foreign heterosexual spouses of South African citizens (Constitutional Court of South Africa 1999). Were the relevant section of the White Paper to become the basis of new migration legislation, this would grant permanent resident status to the heterosexual spouses or same-sex life partners of South African citizens.

4.14 The above criticisms notwithstanding, the White Paper represents a considerable advance on the existing situation, offering at least the possibility of removal of some of the gender bias that has characterised past policy and practice. Nevertheless, great care will have to be taken in the drafting and enforcement of legislation if gender discrimination by default is to be avoided.

5.0 From White Paper to Bill

5.1 Even less procedurally transparent than the White Paper process was the emergence in February 2000 of a Draft Immigration Bill (Republic of South Africa 2000). Soon after the Bill's appearance, the Parliamentary Portfolio Committee for Home Affairs, responsible for overseeing the Bill's passage through parliament, attached the process being followed in migration policy-making. Criticizing the process to date, it stated that the period for public consultation should be extended and limited to discussions on the earlier White Paper. The draft Bill would be shelved until such time as the White Paper process had been completed.

5.2 Public hearings on the White Paper were convened in May 2000 by the Parliamentary Portfolio Committee, drawing input from a small but important group of stakeholders. Regrettably, it seems that once again gender interests were under-represented. Fincher (1997) has pointed out for Australian immigrants, that groups such as trade unions have their own gender biases, usually operating in favor of men, who make up the majority of membership. In the submissions to the Portfolio Committee, women's interests were generally subsumed under the question of family protection, such as in the written submission from the Foreign Marriage and Family Protection Association (2000). This called for a reduction in the cost of applications for permanent residence by foreign spouses of South African citizens, as well as the dropping of any prohibition on the rights of such spouses to work and study in South Africa.[4]

5.3 While expressed in gender-neutral terms, and having benefits for both women and men, the changes proposed would be especially advantageous to women, more of whom are likely to enter the country under the spousal category. In its general recommendations, the Association also explicitly urged Members of Parliament to support the advancement of women's rights (Foreign Marriage and Family Protection Association 2000). While this organization's intervention is to be welcomed, expressing female migrants' rights

solely in family terms, while male migrants are perceived and evaluated in economic terms, risks categorizing women purely as dependants of male family members, rather than as desirable immigrants in their own right. Certainly any restriction on the activities of spousal-category immigrants has the potential to discriminate unfairly against women to a greater extent than men.

5.4 Further input came from a range of NGO's (Parliamentary Portfolio Committee on Home Affairs 2000). Gender issues received barely any attention, either in the written submissions or in the actual hearings. In its submission, the South African Human Rights Commission (2000) reminded the Portfolio Committee of South Africa's 1994 ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), noting that this has a bearing on the treatment of "aliens"; but the submission proceeded to focus on xenophobia and racism and general human rights violations rather than on gender discrimination. The Southern African Migration Project's representative noted in the hearings that "the Paper is silent on matters of gender" and that "there needs to be a distinction between male and female immigrants in some respects", without going into detail (Southern African Migration Project et al. 2000).[5]

5.5 Discussion at the hearings focused largely on debate over the economic impact of migration and the consequences for South African citizens (Parliamentary Portfolio Committee on Home Affairs 2000). Most submissions acknowledged the need for skilled immigrants, both temporary and permanent, and were critical of the White Paper's fixation on the control of unauthorized migration rather than the facilitation and management of orderly, legal migration. Not surprisingly, the Centre for Development and Enterprise and Business South Africa both emphasised the country's skills shortage and the need to attract immigrants accordingly; COSATU focused on labor issues and the rights of both foreign and South African workers. None of these groups paid explicit attention to the gender implications of their proposals, despite the likelihood of male-skewed populations in both skilled immigrant and migrant labor categories.

5.6 In the meantime, events are rapidly overtaking the slow and cumbersome policy-making and legislating process. In June 2000, the Constitutional Court heard the case of Dawood and another, Shalabi and another, and Thomas and another versus the Minister of Home Affairs (Constitutional Court of South Africa 2000). The applicants in the case were all South African citizens and their spouses, the latter being neither citizens nor permanent residents of South Africa. The Court noted that, under the Aliens Control Act, there is no automatic entitlement even to temporary residence permits for foreign spouses of South African citizens.[6] The Court ruled that Section 25(9) of the Aliens Control Act was in contravention of the constitution on the grounds of constitutional protection of the right to family life and of the right to "enter into and sustain permanent and intimate relationships [as] part of the right to dignity" (Constitutional Court of South Africa

2000:1). Under this ruling, officials have been instructed to take people's constitutional rights into account when dealing with applications for the granting of temporary residence permits to the spouses of South African citizens or permanent residents.

5.7 While the Constitutional Court's ruling did not have an explicit gender dimension, it could have particular benefits for women. As acknowledged in the White Paper, South African women wishing to have their foreign husbands reside in South Africa have been unfairly discriminated against in the past. It is not insignificant that two of the three principal applicants in the Dawood, Shalabi, and Thomas case were women. The case thus represents significant progress towards greater gender equity in migration policy and practice. Together with the case brought by the National Coalition for Gay and Lesbian Equality, which would secure the same rights for same-sex life partners, the Constitutional Court's findings provide grounds for optimism that even within a restrictive policy and legislative framework, the country's constitution provides a means by which such legislation can be challenged on gender and other grounds. This should not, however, be regarded as a substitute for equitable, rights-based migration law and policy. Any new legislation should conform, in every manner, to the foundational principles of the new South Africa Constitution and Bill of Rights.

5.8 Actual migration to the country is also, of course, ongoing, within and outside existing law. Indeed one of the problems confronting policy-makers is the lack of reliable data on the number of migrants, especially undocumented migrants, already within the country's borders. Popular perception holds that South Africa is home to millions of such migrants and is threatened by a further "flood" of migrants from countries to the north, despite evidence that the existing and potential numbers have been grossly exaggerated (see e.g. Crush 1999). Confused and contradictory messages from within the official administrative and policy-making process do little to dispel these misperceptions. Whatever the actual numbers, South Africa, if it follows recent international experience, is likely to witness a feminization of international migration over the next few years (Campani 1996). This makes the neglect of gender concerns in policy-making a serious omission. The neglect of gender in policy deliberations also signals a broader failure to locate the whole question of migration in appropriate context, either in intellectual terms or in terms of comparative international experience.

6.0 Putting Gender into Migration Policy

6.1 In the development of its legislation on international migration, South Africa has thus far missed the opportunity to draw from a range of international experience, both practical and academic. While it is not inevitable that South Africa will follow suit, there is evidence of three trends in international migration worldwide: (a) growing feminization; (b) increasing levels of temporary as opposed to permanent migration; and (c) establishment of various forms of transnationalism, including various household forms

"stretched" across international borders (Campani 1996; Fincher 1997; Silvey and Lawson 1999). Not just the first but also the second and third have gender implications. Some are generalizable while others are specific to particular places. Nothing in the White Paper suggests that the applicability of these trends to the South African context was even taken into account, still less incorporated into the formulation of policy. While temporary migration and transnationalism are long-established features of migration in the region, and are likely to persist, the feminization of migration is a very real possibility, with a number of policy implications.

6.2 As discussed above, the relationship between gender and migration is barely addressed at all in the White Paper, despite the availability of an extensive international literature on which to draw (e.g. Buijs 1993; Campani 1996; Chant 1992, 1998; Fincher 1993, 1997; Lawson 1998, 2000; Silvey and Lawson 1999). Simply put, one cannot understand contemporary international migration anywhere in the world without understanding its gender dimensions. Certainly no international migration policy can be assumed to be gender-neutral, with the criteria for who should be admitted, for how long, and with what restrictions on their activities, having gender implications specific to the particular social, economic, and geographical context (see e.g. Fincher 1997 on Australia).

6.3 One of the most significant contributions of feminist work on migration has been the "household strategies" approach, placing the household at the centre of analysis and policy while simultaneously deconstructing the household to expose the gendered power relations that influence migration behaviour and experience (Chant 1992, 1998; Lawson 1998, 2000). Migration policy must similarly be conceptualised in household terms, paying attention to the gender of individual migrants as well as to their household position and family status. Migrants are not only "labor units" and "entrepreneurs" but husbands, wives, and partners; parents, sons, and daughters. All migration, even when it is primarily economically motivated, takes place within a social context, with gender and family relations among the key factors influencing migration behaviour.

6.4 The "household strategies" approach brings gender considerations squarely into the relationship between migration and development. The White Paper's understanding of this relationship is essentially one of migration as a component of modernization. Policy is expressed in individualized, genderless terms, with migrants being seen either as the bearers of skills, labor or capital which they can bring to South Africa to foster "development" (and hence desirable as immigrants), or as the unskilled victims of poverty and underdevelopment (and hence undesirable as immigrants). Feminists have challenged the simplistic "push-pull" theory of migration suggested by the modernization paradigm, which discriminates not just against women but also against places characterised as "backward" or "underdeveloped" (Silvey and Lawson 1999). "Gender analysis has made a crucial contribution to understanding the institutions that structure migration processes… There is now more emphasis on differential migration responses

by men and women (themselves context dependent), gender discrimination in returns to migrant labour, and the gendered nature of motives for remitting" (De Haan 2000:10).

6.5 In such a framework, migration is seen as part of a household's livelihood strategy, and thus as an important means of poverty reduction. Certainly further policy development in South Africa needs to be based on a much more sophisticated understanding of the development-migration-gender triangle. Even from a strictly economic standpoint, to ignore gender is to risk misinterpreting the way in which migration can contribute to development in both source and recipient areas. Gender-blind policy thus risks missing opportunities not merely for greater gender equality, but for maximising beneficial development outcomes.

7.0 Conclusion

7.1 Gender concerns have been markedly lacking in the development of a new national policy on international migration to South Africa, both in the policy-making process and in the content of the Green and White Papers. Given the lessons of international experience, as well as recent advances in the understanding of the relationship between gender, migration and development, this represents a major oversight. In the further development of policy, as well as in the drafting and implementation of subsequent legislation, gender considerations must be systematically included, and great care must be taken to avoid *de facto* gender discrimination. This is important not merely as an issue of women's rights, but as the only meaningful basis for a socially just, economically effective, and administratively workable policy framework in South Africa.

Dr Belinda Dodson

ENDNOTES

[1] This White Paper remains the current basis for proposed legislative reform, despite some confusion regarding its precise official status. A draft bill is in existence, but is not officially recognized by the Parliamentary Portfolio Committee on Home Affairs (see note 2 below).

[2] The Department of Home Affairs invited public input on the White Paper, with a deadline of 30 November 1999. The Department then went on to produce a draft bill. In a separate process, public hearings on the White Paper were convened by the Parliamentary Portfolio Committee on Home Affairs in May 2000, with input from a number of stakeholders. There remains disagreement between the Department of Home Affairs and the Parliamentary Portfolio Committee as to the status of the White Paper and the process now to be followed, with the Department wishing to proceed immediately with legislation while the Portfolio Committee wishes first to subject the White Paper to further review and amendment and formal approval by parliament and cabinet before drafting another bill.

[3] Indeed one of the problems of the White Paper is its ambiguity and confusion about the distinction between temporary and permanent migration. The two are often conflated and there is insufficient attention to the complexity of temporal patterns of migration (seasonal, short-term, oscillating, circular, relay etc.).

[4] In 1999 this was set at R10020 (Foreign Marriage and Family Protection Association 2000).

[5] There was a more substantial section on gender in SAMP's 1999 written submission to the Department of Home Affairs in response to its invitation for input on the White Paper (see http://www.queensu.ca/samp/comments/analysis.htm).

[6] Such temporary residence permits are required if such a spouse is to be permitted to submit an application for permanent residence status from within South Africa (i.e. without requiring geographical separation from their South African spouse pending the outcome of the immigration application process, itself not guaranteed of success).

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