

GenderNews

Volume 3 No. 1 May 1999

- [Equality and violence against women - Heléne Combrinck](#)
- [After the Fact: HIV Post-Exposure Prophylaxis following rape - Bronwyn Pithey](#)
- [Strangers in a strange land - Lee Anne de la Hunt](#)
- [Gender Update - Melanie Ambrose](#)
- [New Acquisitions - Gill Kerchhoff](#)

Equality and violence against women

Does a refusal by members of the SAPS to respond to calls for assistance from victims of domestic violence constitute unfair discrimination? Heléne Combrinck, senior researcher at the Gender Project of the Community Law Centre asks whether the forthcoming equality legislation will be useful in addressing shortcomings in state responses to violence against women.

Section 9(4) of the Constitution provides that national legislation must be enacted to prevent or prohibit unfair discrimination. This legislation must be enacted by 4 February 2000. An Equality Drafting Unit, established as a joint initiative between the Department of Justice and the Human Rights Commission, recently completed a draft version of the equality legislation. It is anticipated that the draft Bill will be introduced in Parliament later this year, and that public hearings will be conducted by the Justice Portfolio Committee on the provision of the Bill.

This draft legislation addresses unfair discrimination by defining direct and indirect discrimination as well as by providing for defences to claims of unfair discrimination. It sets out what would constitute unfair discrimination in various sectors, including education, health care, land, housing and accommodation, welfare and the provision of goods, services and facilities. The draft Bill also details enforcement mechanisms and remedies.

Although 'violence against women' is not addressed as a distinct sector in the draft legislation, we believe that there are a number of provisions that may impact on the state response to violence against women, and specifically, state services provided to victims of such violence.

Clause 29(a) of the draft Bill, for example, provides that no one who provides services may unfairly discriminate against another person by refusing or failing to supply those services. According to the definition section, the term 'services' includes services provided by the State or organs of state.

The potential impact of the legislation becomes clear if one looks at a scenario of a possible refusal on the part of the South African Police Service (SAPS) to respond to a call for assistance from a victim of domestic violence. Given the fact that members of the SAPS readily provide assistance to other victims of personal violence, it could be argued that a decision not to assist in a domestic violence complaint may amount to unfair discrimination in the provision of services (thus leading to a claim by the victim against the SAPS in terms of the equality legislation).

GenderNews

The question of whether this refusal on the part of the SAPS members will be seen as unfair discrimination will firstly, revolve around whether 'attendance to complaints of violence' qualifies as the provision of a service in terms of the legislation. If this is answered in the positive, the second question is whether the state would be able to rely on the defence that this refusal is reasonable and justifiable in terms of the criteria contained in the legislation.

There are also a number of other provisions in the legislation that may similarly be applicable to women subjected to violence, for example, the provision of health care services. It is essential for organisations working in the field of violence against women to examine the legislation closely and to suggest alternatives where the draft Bill falls short in protecting the interests of victims of violence. To facilitate this process, members of the Western Cape Network on Violence Against Women have been invited to join the Equality Alliance, an alliance of NGO's working together with a view to positively influence the forthcoming legislation. The key functions of the Alliance include research, education, advocacy and lobbying as well as mobilising other groups to respond to the proposed legislation.

In spite of clear commitments on the part of the South African government to address violence against women, the implementation of this commitment in practice is unfortunately still inadequate. We believe that the equality legislation will provide an additional mechanism for addressing the difficulties experienced by women subjected to violence who attempt to enlist the aid of the state.

After The Fact: HIV Post-Exposure Prophylaxis Following Rape

The provision of preventive prenatal treatment to HIV-positive pregnant women (at state expense) has been a thorny issue in South Africa for some period of time. Recently, new controversy was unleashed by the exposure of the difficulties experienced by a rape survivor trying to obtain post-exposure preventive HIV treatment. Bronwyn Pithey, head of the Advocacy Department at Rape Crisis, Cape Town, examines the current Health Ministry policy not to provide this treatment at state expense to rape survivors.

What is HIV Post-Exposure Prophylaxis?

Post-Exposure Prophylaxis (PEP) is a type of antiviral therapy for HIV that is designed to reduce the possibility of infection after a known exposure to the virus. PEP treatment consists of the drugs AZT (Zidovudine), 3TC (Lamivudine) and Crixivan (also known as Indinavir). The approach in treatment varies according to the level of risk of infection. This level of risk is related to the type of exposure to the virus, for example exposure through vaginal or anal intercourse or a needle stick injury. Medical experts are divided on whether all the drugs are necessary in the case of rape, some arguing that due to the nature of rape, physical trauma will have occurred. This places rape into a high risk category, which necessitates treatment with all three drugs. Others argue that AZT alone is sufficient to actively reduce the risk of HIV infection. In order for the treatment to be effective, it must be taken within 72 hours of exposure for a period of 28 days.

How Effective is Post-Exposure Prophylaxis following Rape?

GenderNews

Although there is no research to show that AZT works specifically in rape cases, there is ample research showing AZT treatment effectiveness after occupational exposure, for example, in the case of needle stick injuries incurred by health care workers. Administration of AZT following occupational exposure reduces the chance of HIV infection by between 79% and 81%. Many health care experts, both locally and internationally, maintain that successful preventive treatment with AZT following sexual exposure is biologically plausible, given the efficacy of treatment after needle stick injuries and the similarities between immune responses to transcutaneous and transmucosal exposures. ("Transcutaneous exposure" takes place via the skin, as in the case of needle stick injuries, and "transmucosal" via a mucus membrane, for example, the mucus membrane of the vagina). It is therefore accepted by medical experts throughout the world that AZT treatment is effective after sexual exposure.

Local experts have stated that the risk of HIV infection from a single sexual encounter is about the same as that from a needle stick injury. If the same rationale is to be used - that of prevention of infection before it takes place - then women who have been potentially exposed to HIV by being raped should receive the same medical treatment as those exposed to HIV due to occupational injuries.

Policies on Post-Exposure Prophylaxis in Other Countries

The Centres for Disease Control in the United States has produced guidelines for PEP treatment following sexual exposure, which obviously includes rape. Following this many health care facilities in the United States provide PEP treatment to rape survivors at the expense of the state. In France the state provides PEP treatment for both rape and consensual sexual exposure.

How Likely is HIV infection following Rape?

It is accepted that the risk of HIV infection from one unprotected heterosexual (penile penetration of the vagina) encounter is about 0.1%. In the case of rape, the possibility of HIV infection is increased due to a number of factors:

- The number of times a woman is raped (either by multiple perpetrators or by one perpetrator raping her repeatedly);
- The woman's vagina may not lubricate making penetration likely to cause injury;
- Force may have been used in the rape which may cause injury.

Recently released figures indicate that 22.8% of South Africans are HIV positive. We can thus assume that a similar percentage of rapists are HIV positive. In addition, South Africa has very high rates of sexually transmitted diseases (STD's) in sexually active populations. STD's predispose to HIV infection and are therefore another risk factor for infection due to rape.

The Current South African Approach

At present the state provides, at its expense, AZT to health care workers in its employ if they are exposed to HIV in the course of their work. The present policy of the Health Ministry is not to provide AZT to women who have been raped. It is submitted that this policy is a violation of the right to equality (section 9(1) of the Constitution) of rape survivors in that the state is differentiating between two

GenderNews

groups of people who have been exposed to HIV through factors 'beyond their control', and that this differentiation can not rationally be linked to a legitimate government purpose. The state bears some level of responsibility to both groups. In the case of health care workers, this duty is clearly based on the state=s capacity as employer. The state=s responsibility towards rape survivors arises from its specific duties and commitments as contained in the Constitution and in international human rights law.

Health Care of Rape Survivors

The health care of rape survivors is generally problematic in South Africa. Besides the fact that AZT treatment is not provided to rape survivors, most women are not even informed about the risk of HIV infection when they do present themselves at health care facilities after being raped. They are not informed of the existence of AZT and its potential effectiveness, and even if they do know about AZT, they are not informed as to how and where to access the drugs.

Conclusion

We acknowledge that South Africa is a country of limited resources and that the provision of AZT to rape survivors will inevitably imply additional state expenditure. Although the costs may be high in the short term, it is internationally accepted that the provision of HIV post-exposure prophylaxis to rape survivors is cost effective in the long term. In addition, we believe that the state has (at least) a moral duty to ensure that the dark cloud of potential HIV infection is lifted from the already arduous road to recovery that rape survivors face.

Strangers in a strange land

Lee Anne de la Hunt, a member of the Task Team on Refugees, examines the question of obtaining asylum in South Africa on the basis of gender-related persecution.

"Persecution" - a Gendered Experience?

The UN Convention on the Status of Refugees defines a refugee as any individual who has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. The categories of persecution in themselves emphasise traditional and patriarchal conceptions of persecution - which is implicitly limited to experiences suffered at the hands of the state and various formal structures (for example, the courts or armed forces). The Convention fails not only to recognise experiences of persecution specific to women, but also to consider actions women may suffer at the hands of their community, society, or family - including female infanticide, genital mutilation, bride and widow burning, forced arranged marriages (often involving young girls), forced abortions, domestic violence, and compulsory sterilisation. As cited in the Canadian Guidelines, "[I]n all of these instances, women are targets of violence because of their sex. This is not random violence; the risk factor is being female."

GenderNews

With women and children representing the vast majority of the world's refugees, the refugee experience is overwhelmingly a female one. Yet the definitions, procedures, and policies that guide their asylum processes fail in many areas to reflect the specific situations of women refugees or to meet their particular needs, and have until recently remained predominantly male-centered.

In 1991, the UN High Commissioner on Refugees for the first time urged states who have acceded to the Convention to recognise and accept gender-related persecution as valid grounds for refugee status. States were encouraged to include women as constituting a "particular social group". The first country to comply with this request was Canada, who subsequently in 1993 issued a comprehensive and ground-breaking set of guidelines. These guidelines set out a policy for adjudicating claims for refugee status as well as recommending the introduction of specific gender-sensitive processes into investigations of claims. Since 1993 other countries in the developed world have followed suit with their own gender guidelines.

Asylum in South Africa

The numbers of women and children claiming asylum in South Africa deviate from the international picture in that they form a minority. This anomaly itself requires further investigation, particularly within the regional context. Nevertheless those responsible for drawing up refugee policy in South Africa have recognised the special needs of refugee women. While the Green Paper on International Migration, published in 1997, merely makes passing reference to refugee women and children, it was significant that the Commission on Gender Equality was included in the Task Team on Refugees which presented a White Paper and Draft Refugee Bill to Cabinet in July 1998. The White Paper emphasised the importance of appropriate training for officials in the Department of Home Affairs responsible for interviewing women asylum seekers and adjudicating their claims. The Refugees Act, which was promulgated at the end of 1998, states in the definition section that "'social group' includes among others, a group of persons of particular gender, sexual orientation, disability, class or caste."

South Africa has therefore entrenched the rights of women in refugee legislation by defining gender as a particular social group for the purposes of seeking asylum. What now remains is to develop a comprehensive and well-thought-out set of policy guidelines on how claims for asylum will be processed, investigated, and adjudicated. Some of the issues that need to be addressed include:

- Special processes for gender-related asylum claims;
- A reassessment of both the internal flight alternative and its applicability to gender cases;
- A gender-friendly procedure for assessing the repatriation of refugees to countries where the previous threat no longer exists; and
- Alternative methods of investigation and presentation of evidence for women who apply under the category of gender-related persecution.

Aside from the refugee determination process, women refugees face particular difficulties in South Africa. The 1998 Annual Report of the Cape Town Refugee Forum identifies the lack of representation within the leadership structures of the refugee community in Cape Town as a problem, and points out that if women and children's special needs are ignored, they can be all too easily excluded from

GenderNews

organised assistance programmes, and may be made even more vulnerable. The vulnerable position of women and children in refugee camps has been well documented. Moreover, simply because refugee women and children do not stay in refugee camps (at least not yet), it does not follow that they are less vulnerable. The fact that they have to find accommodation and the means to support themselves and frequently their children brings different stresses. The responsibility of children limits the freedom of movement that refugee women have in South Africa.

Refugee women have to contend with high levels of xenophobia in South Africa, and ignorance on the part of civil servants with regard to refugee rights. Last year, a woman refugee in Cape Town took her critically ill baby to a nearby police station to beg for assistance in getting to hospital, as she could not afford a taxi. The police refused to assist her because she was not South African, and her baby died before she was able to reach a hospital.

Policy Guidelines

It is crucial that any guidelines established in South Africa reflect the uniqueness of this country's immigration patterns and the particular composition of those groups who seek asylum here. For example, Somalis constitute a significant proportion of those who seek refugee status in this country. However, Somalia also produces among the highest figures for female infibulation (a form of genital mutilation) practised each year in the world. Processes should be put in place to encourage women to speak of their experiences in addition to the more politically centered claims generally filed.

The creation of gender asylum guidelines in South Africa will add much-needed definition and specificity to the already progressive legislation in place. It will give officials and applicants alike a broader understanding of the applicability of the gender category, and will create processes that do not further victimize women fleeing an already desperate situation. In the international context, South Africa will be making a valuable contribution by adding its name to the list of those countries willing to recognise the brutality and validity of the persecution many women experience every day. But perhaps even more significant, such steps will continue to shift the masculinist definitions of our communities, our courts and our laws towards a broader, more inclusive, and more humane vision of our society.

Lee Anne de la Hunt and Nahla Valji are working on a project to draft such gender asylum guidelines, and would welcome contributions, ideas, resources and other material. If you would like to participate, please contact us at lolly@law.uct.ac.za.

Gender Update

Compiled by Melanie Ambrose

Reproductive Rights

The Supreme Court of Appeal has given strong recognition to a woman's rights of "control over her own body" in its judgment in *Mukheiber v Raath* (dated 28 May 1999). The court departed from its 1990 ruling that a couple could sue a doctor

GenderNews

for failed sterilisation only if the operation had been requested on the grounds that the couple could not afford any more children. This approach also implied that a woman could successfully sue only if she were married and had her husband's consent. Olivier JA found in the present case that where a medical practitioner was sued for a failed sterilisation operation, it was not appropriate for the doctor to claim as a defence that the couple's reason for not wanting any more children was not legitimate.

Source: Sunday Times, 30 May 1999. The judgment can be accessed at <http://www.wits.ac.za/law.sca/scadate.html>.

Unfair Discrimination based on...

...Pregnancy

In a recent judgment, the Labour Court enforced the prohibition of unfair discrimination based on pregnancy by awarding R200 000 compensation to plaintiff Beverley Whitehead, who had been refused permanent employment by Woolworths because she was pregnant. Acting Justice Bashier Wagley held that Whitehead was unfairly discriminated against as a job applicant. The Commission on Gender Equality has applauded this judgment.

Source: Business Report (31 May 1999); see also Commission on Gender Equality Press Release dated 7 June 1999.]

...Sexual Orientation

The Cape Provincial Division of the High Court recently dealt with the question whether section 25(5) of the Aliens Control Act (which permitted the issue of an immigrant permit only to a "spouse" or dependent child of a permanent and lawful South African resident) constituted unfair discrimination. The Court held that this provision unfairly discriminated against same-sex life partners. The Ministry of Home Affairs has appealed to the Constitutional Court, and the matter is set down for hearing on 17 August 1999.

The CPD judgment is reported as National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 1999 3 BCLR 280 (C).

Family Courts

In our January edition, we reported on the establishment of a divorce court at Cape Town Magistrate's Court as part of the Family Court project. The Court is now fully operational and has finalised 436 matters between January and May 1999. A similar court in Mitchell's Plain is in the final planning stages.

For further information, Mr Wayne Deck, Registrar of the Divorce Court, may be contacted at (021) 4011570.

New Acquisitions

Gill Kerchhoff

GenderNews

Bringing Equality Home: Implementing The Convention On The Elimination Of All Forms Of Discrimination Against Women

Edited by Ilana Landsberg-Lewis

New York: United Nations Development Fund for Women, 1998. ISBN 0912917512

The booklet contains case studies from a number of different countries where the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been used to advance women's rights. It does not attempt to provide a comprehensive discussion of how CEDAW has been used to date, but it is intended as a resource for persons involved in the implementation of human rights for women. The authors stress that the only way that CEDAW can be used to effect any change in court decisions, constitutions, or legislation, will be through the work of women's NGOs and that the Convention provides the power of an internationally recognised instrument to assist in this process.

Pursuing Grounded Theory In Law: South-north Experiences In Developing Women's Law

Edited by Anne Hellum (Norway) and Julie Stewart (Zimbabwe)

Oslo : Tane-Aschehoug; Harare: Mond Books, 1998. ISBN 8251836824 (Tane-Aschehoug) 1779060262 (Mond Books)

This book evolved as a handbook for women researchers through joint initiatives between the universities of Oslo and Zimbabwe, as well as DANIDA and Women and Law in Southern Africa Research Trust. The aim is to provide a framework, within grounded theory, through which empirical data can engage with theory to produce a base for research. It is intended that the researcher will develop appropriate theories on the legal position of women in a particular situation from this base.

Feminist Perspectives On Law: Law's Engagement With The Female Body

Jo Bridgeman and Susan Millns

London : Sweet & Maxwell, 1998, ISBN 042159750X

Feminist Perspectives on Law looks closely at the interaction between law and women's lives, particularly legal regulation of the female body. The three main themes which are addressed are firstly, reproductive bodies; secondly, sexual bodies; and thirdly, offensive bodies. The latter section studies the legal response to women's criminality and women's conduct that is regarded as 'offensive' because it is behaviour other than that expected of them as women. Throughout the book, extracts from the works of feminist legal scholars provide a variety of feminist perspectives of the law. The authors explore these perspectives, as well as case law and legislation, while presenting their own ongoing commentary.

Women And Family Law: Connecting The Public And The Private

Patricia McGee Crotty

New York : Peter Lang, 1997

ISBN 0820438049

The relationship between women's rights under family law (which regulates marriage, divorce, inheritance and reproduction) and the overall status of women is the subject covered in this book. It examines changes in family law that occurred between 1980 and 1995 in 64 different countries. The book also shows

GenderNews

how public policy that relates to everyday life affects women. This book is ideal for teaching purposes and includes pertinent questions for discussion at the end of each chapter.

SADC Research Report

Compiled by Nomtuse Mbere

Athlone (Cape Town) : Gender Education and Training Network (GETNET), 1998

This report resulted from a seminar on "Gender Equality Strategies for Effective Intervention" which was held in Cape Town in December 1998. Research was undertaken in the SADC countries to examine the status of implementation of CEDAW and of the Beijing Platform of Action. The comparative study is summarised in matrix format and the questionnaire that was sent is provided as an appendix. The report is intended for advocacy purposes in the different countries.