

# GenderNews

Volume 4 No. 1 February 2000

- [The constitutional court and violence against women: a first breakthrough - Liesl Gerntholz](#)
- [The argument for affordable HIV/AIDS treatment - Anneke Meerkotter](#)
- [Shelter from the storm: an Atlantis success story - Gahsiena van der Schaff](#)
- [Gender Update - Heléne Combrinck and Ntombekhaya James](#)
- [New Acquisitions - Gill Kerchhoff](#)

## **The constitutional court and violence against women: a first breakthrough**

***On 3 December 1999, the Constitutional Court handed down judgement in its first case dealing with violence against women. Liesl Gerntholz, head of the Legal Department of the Commission on Gender Equality reports.***

In *S v Godfrey Baloyi 2000(1) BCLR 86 CC*, the Constitutional Court considered the validity of section 3(5) of the Prevention of Family Violence Act 133 of 1993. The Transvaal Provincial Division had earlier found that this section (which deals with the procedure to be followed when a person is accused of breaching the terms of a family violence interdict) placed a reverse onus "of proving absence of guilt" on the person charged with the breach of an interdict and had therefore ruled it to be unconstitutional.

The Constitutional Court (per Sachs J) declined to confirm the order of invalidity made by the TPD on the grounds that the section, properly interpreted, did in fact not create a reverse onus and therefore could not compromise the presumption of innocence of an accused person. The matter was referred back to the TPD to be dealt with in accordance with the judgement (at 104E).

The importance of this case does not however lie in its judgement about the constitutional validity of section 3(5) of the Prevention of Family Violence Act. (This Act was repealed twelve days after the judgement was handed down, and has been replaced by the Domestic Violence Act 116 of 1998). Its real value, in my view, lies in its explicit acknowledgement of the role that the state must play in protecting women from domestic violence.

The burden of dealing with domestic violence and all its implications for our society has traditionally fallen on NGOs, who are often under-resourced and lack the capacity to deal with vast numbers of complaints. Legal assistance for survivors of domestic violence, counselling and shelters have all been provided by civil society rather than the state.

In addition to the state's failure to make sufficient resources available to deal effectively with domestic violence, women's organisations are keenly aware of the barriers that women face when attempting to report domestic violence. From members of the South African Police Services who send women home because they are not bleeding "enough", to prosecutors who do not actively seek convictions when interdicts are breached, to magistrates who impose absurdly light sentences on perpetrators. In 1999, a research report into gender based violence noted that "victims survivors of gender based violence continue to suffer

# GenderNews

secondary victimization by the health and welfare sector as well as from the criminal justice system."<sup>1</sup>

The Baloyi judgment must serve as a powerful warning to the criminal justice system that the days when domestic violence could be viewed purely as a "private matter" between husband and wife are finally over.

Justice Sachs states that "section 12(1) [of the Bill of Rights] has to be understood as obliging the state directly to protect the rights of everyone to be free from private or domestic violence". He goes further to say that the state is "under a series of constitutional mandates that include the obligation to deal with domestic violence". These are critical and unambiguous concessions, made by the highest court in the land, to a society where women are struggling to advance their socio-economic rights and escape from cycles of poverty and abuse.

The United Nations Special Rapporteur on Violence Against Women has said in a speech to the Commission on Human Rights that it may well be possible for the State to be held accountable for violence committed against women by private individuals and that a "State that does not act against crimes of violence against women is as guilty as the perpetrators".<sup>2</sup> The Constitutional Court is commended for its clear recognition of this duty in the Baloyi case.

## Endnotes:

1. "Violence Against Women: An Exploratory Study of the Impact of the Justice System on Victims/Survivors of Domestic Violence and Rape" Masimanyane Women's Support Centre (1999).
2. Cited in Sharita Samuel "Gender-based violence: a barrier to women's enjoyment of economic and social rights" ESR Review (Vol 2 No 2) at 6.

## The argument for affordable HIV/AIDS treatment

***Throughout the world, poor working class women bear the brunt of the HIV/AIDS epidemic. Not only are women more at risk of HIV infection, but they also have to carry the responsibilities of caring for and supporting those living with HIV/AIDS. Anneke Meerkotter, a volunteer for the Treatment Action Campaign, briefly explores the role that the provision of treatment can play in alleviating this burden.***

## The Impact of HIV/AIDS on Women

### THE RIGHTS

#### South African Constitution (1996) Section 27

1. Everyone has the right to have access to
  - a) Health care services, including reproductive health care
  - b) Sufficient food and water

# GenderNews

- c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance
- 2. The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.
- 3. No one may be refused emergency medical treatment

## **Section 28**

- 1. Every child has the right -
  - c) to basic nutrition, shelter, basic health care services and social services

## **International Covenant on Economic, Social and Cultural rights - section 12**

- 1. The State parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- 2. The steps taken by the States parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - c)The prevention, treatment and control of epidemic, endemic, occupational and other diseases
  - d)The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

## **Universal Declaration of Human Rights - section 25**

- 1. Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including...medical care...

## **Convention on the Elimination of all Forms of Discrimination Against Women**

# GenderNews

HIV/AIDS has an enormous impact on already poor communities. A large part of the family income is spent on health care for the infected and eventually funeral costs as a result of HIV/AIDS. This impact should be seen in the context of vast unemployment, where each breadwinner have to support many dependents. Sometimes family members, mostly women, must give up paid employment to look after the sick. Children facing such dire circumstances are affected in their health, mortality, education and overall quality of life. Discrimination against people living with HIV/AIDS and their families often makes an already unbearable situation worse. In rural areas a lack of access to even meagre health services compounds the problem.

## - section 12

1. State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure...access to health care services, including those related to family planning.
2. State parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary...

Women are more at risk of HIV infections. There seems to be a link between the incidence of HIV and issues like the lack of access to information and treatment of sexually transmitted infections, the unequal power relations between men and women, the development of the genital tract, and the higher risk of injury in the vagina.

Campaigns for treatment are often led by women who through their experiences of bearing the responsibility of health care, either formally as nurses and social workers, or informally as care givers, mothers, sisters, grandmothers and partners within the family and broader community, have a better understanding of the limitations of present reforms and the challenges that lie ahead. Unfortunately this vision has grown out of necessity, with women being forced to carry the tasks of providing home-based care where public health services are inadequate.

## **Providing Primary Health Care**

The South African government has committed itself to providing Primary Health Care. Primary Health Care however includes adequate nutrition, safe water, basic sanitation, maternal and child care, immunisation, prevention and control of endemic diseases, education concerning health problems, appropriate treatment for common diseases and injuries and the provision of essential drugs.

Essential drugs are those that are defined as satisfying the health care needs of the majority of the population and which should therefore be available at all times in adequate amounts and in appropriate dosage forms. Throughout the world people are dying for no other reason than that treatment costs are too high. It therefore becomes necessary that governments develop a policy to address, at the very least, the access of poor communities to essential drugs and adequate health care. There is a misconception that exists in government structures throughout the world, that it is justifiable to reduce health budgets and cut down on treatment in an effort to balance the national budget. Such fallacies must be addressed openly since it affects us all.

# GenderNews

## Challenging the Drug Companies

### THE FACTS

In Sub Saharan Africa 23.3 million adults and children are estimated to be living with HIV/AIDS (end 1999). 3.8 million people were newly infected in 1999. (Source: UNAIDS/WHO January 2000)

In South Africa HIV infection rates of women attending antenatal clinics is 22,8%. In KZN this figure is 32,5%, and in Mpumalanga 30%. The HIV prevalence in teenage girls between 15-19 years is 21%, between 20-24 years is 26% and between 25-29 years is 27%. (Source: SA Survey 1999/2000)

TB is the leading cause of death among people who are HIV+. There is no cure affordable to developing countries for some multidrug-resistant TB strains. In South Africa the proportion of clinics with TB drugs in stock is 59% whilst in some provinces like the Eastern Cape, this figure is as low as 44%. (Source SA Survey 1999/2000)  
Percentage of households with access to basic infrastructural services in 1996:

	<b>Eastern Cape</b>	<b>National</b>
<b>Water</b>	24.7	44.7
<b>Sanitation</b>	24.7	50.3
<b>Refuse</b>	34.4	52.2

*[Source: HRC Social and Economic Rights, 1999]*

In the Eastern Cape only 48 % of clinics have an uninterrupted electricity supply, 51% have an uninterrupted water supply, and 50% have a functioning two-way radio or telephone. (Source: HRC Social and Economic Rights, 1999)

Over one 3rd of world's population lack access to essential drugs. (Source: Panos Briefing No 36. 9/1999)

The global pharmaceutical market is worth

# GenderNews

A major problem with the provision of essential drugs lies with the prices charged by drug companies who produce these drugs. One such essential and life-saving drug is Fluconazole. Fluconazole tablets (used in treatment of common fungal infections often associated with HIV/AIDS, like Cryptococcus Meningitis and systemic thrush) was available in less than one third of hospitals surveyed by the South African Survey

1999/2000. People living with HIV who have Cryptococcus Meningitis can die within a month if they are not treated. Fluconazole is currently produced in South Africa by Pfizer, and is under patent protection. Pfizer sells it at R57,00 per 200mg capsule. It is not financially accessible in the public sector and private sector patients can only spend a limited amount on drugs. In Thailand and India, generic drug companies sell Fluconazole at R2,98 to R7,50 per 150mg capsule.

US\$300 billion per year. (Source: Panos Briefing No 36, 9/1999). In comparison, the total GNP of the 21 Comesa countries (Common Market for Eastern and Southern Africa) amounts to a mere \$170 billion. (Source: Cape Times, 2/3/2000)

In KwaZulu Natal, the province with the most people living with HIV/AIDS, 52 percent of clinics don't offer HIV testing. (Source: SA Survey 1999/2000)

## The Legal Position

Like many developing countries, the South African government is hesitant to import Fluconazole at this cheaper price (parallel importing) or to make their own cheaper generic version of the drug (compulsory licensing), even though international law allows for this. When the previous minister of health, Dr Nkosazana Zuma, provided for parallel importing and compulsory licensing in South African legislation, the Pharmaceutical Manufacturers Association challenged this on the basis of the protection of their patent rights. The US government intervened on behalf of the drug companies and threatened the South African government with sanctions if they continued interfering with patent rights. The government is currently in the process of redrafting this legislation.

What is necessary is for the government to join community campaigns arguing for a reduction in the excessive profits drug companies make on HIV/AIDS and other drugs. The government could, in addition also apply for a voluntary license from the company, allowing it to tender to generic drug companies to produce essential HIV/AIDS drugs, paying a reasonable royalty to the patent holder. The South African Patents Act of 1978 also allows for the granting of compulsory licences provided (1) that a voluntary license has first been applied for, and been refused, and (2) an abuse of patent rights is clearly established. With 4 million people living with HIV/AIDS in South Africa and an exorbitantly high price for Fluconazole, the abuse would not be difficult to establish. Such measures would not only save millions of lives and money, but it would greatly reduce the impact HIV/AIDS has on the lives of women.

## Conclusion

HIV/AIDS can be treated. People with HIV/AIDS can live long and productive lives if they have access to treatment, clean water and food. Countries like Thailand have lead the way in decreasing the rate of HIV infections and providing affordable treatment to those living with HIV/AIDS. They have been able to

# GenderNews

achieve this after continuous campaigning by communities. It is up to community organisations, trade unions, religious bodies and non-governmental organisations to learn from other countries' struggles and face the challenge of making the fight against HIV/AIDS an essential part of their daily struggles against injustice.

## **Shelter from the storm: an Atlantis success story**

***The recent introduction of the Domestic Violence Act, with its requirement that members of the SAPS should assist victims of domestic violence in locating a safe shelter, has again highlighted the lack of available shelters for victims of domestic violence. Gahsiena van der Schaff, a volunteer for the United Sanctuary Against Abuse situated in Atlantis, reports on progress made in this area***

Atlantis is situated on the West Coast in the Western Cape, approximately 50 km from Cape Town. In the past, employers with factories were given incentives by the former apartheid government to create places of employment for people who had been forcibly removed to Atlantis in terms of the Group Areas Act. With the institution of the new democratic government, these subsidies were withdrawn. Many of these factories closed down and numerous families were left destitute because of unemployment.

This resulted in an escalation of social problems such as drug and alcohol abuse, high divorce rate, violence, particularly domestic violence which in turn led to an increase of children taking to the streets and engaging in criminal activities at a very early age. Statistics show that six out of ten families are affected by domestic violence and the magistrate's court grants at least ten protection orders to abused women weekly. Because of unemployment and poverty in Atlantis, victims of domestic violence who are in need of safety and support do not have the means to travel to established centres in Cape Town, with the result that women remain trapped in constant fear in their homes. Where women do have regular jobs, leaving for counselling or to reach safety creates absenteeism and leads to job loss. Against this background, the work of the United Sanctuary Against Abuse (previously the United Sanctuary for Battered Women) is of crucial importance.

The sole founder of this organisation, Barbara Rass, was herself battered for many years and many a night found herself on the run with her children, struggling to find shelter. She experienced tremendous pain and suffering since there was never anyone who would listen when she desperately needed support. In 1993, Barbara decided to start a project which would provide support, counselling, food and shelter for women in similar situations. The United Sanctuary Against Abuse provides the following:

- shelter for women and children who are in physical danger of domestic abuse;
- counselling and support to battered women and their children;
- legal advice to victims of domestic violence;
- educational programmes regarding human rights and issues pertaining to domestic violence to victims of abuse and the broader community it serves;
- skills training to empower victims to become economically active and independent;

# GenderNews

- information and programmes to raise the consciousness and involvement of members of the community regarding the detrimental effects of domestic violence with the aim of minimising domestic violence.

The Sanctuary serves victims of domestic violence in the broader communities of Atlantis, Mamre, Pella and surrounds. In 1999, the South African Clothing and Textile Workers' Union generously funded the purchase of a shelter - a three-bed roomed house with an outbuilding. The Sanctuary proudly took ownership of it on 10 December 1999. As a non-profit organisation, the project has no access to regular funding, and is currently scouting around for funding to start projects that would generate funds to sustain and maintain the shelter and employ additional staff members.

*Par 125(a) of the Beijing Declaration and Platform for Action requires governments to "provide well-funded shelters and relief support for girls and women subjected to violence, as well as medical, psychological and other counselling services and free or low-cost legal aid, where it is needed, as well as appropriate assistance to enable them to find a means of subsistence"*

*Section 2 of the Domestic Violence Act 116 of 1998 states that members of the SAPS should assist victims of domestic violence in finding a "suitable shelter". This is not limited to shelters for battered women, but may include any place that will provide safety, such as the home of a family member or friend.*

## **Gender Update**

***Compiled by Heléne Combrinck and Ntombekhaya James***

### **Firearms Control Bill**

The Western Cape Network on Violence Against Women recently presented a written submission on the Firearms Control Bill to the parliamentary Portfolio Committee on Safety and Security. The submission highlights the relationship between firearms and the high levels of violence against South African women. The draft bill was published for comment in Government Gazette No 20688 dated 3 December 1999, and public hearings are scheduled to be held in Parliament in March.

- Copies of the WC Network submission may be obtained from the Gender Project.
- The Bill may be accessed at <http://www.pmg.org.za/FirearmsControl/FirearmsControlBilldraft.htm>

### **Promotion of Equality and Prevention of Unfair Discrimination Act**

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was passed by Parliament on 28 January and signed by the President on 2 February 2000.

- The Act may be accessed at <http://www.polity.org.za/govdocs/legisl/2000/act4.pdf>.



# GenderNews

- The Gender Project presented a submission focusing on reproductive rights and employment to the Joint Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill. Copies of the submission may be obtained from the Project.

## **Did they really say that?**

"We've been standing here for 26 seconds and nobody has been raped." Steve Tshwete and Penuell Maduna (Ministers of Safety and Security and of Justice and Constitutional Development respectively), commenting on South African rape statistics during a CBS broadcast on rape in South Africa.

- Source: Mail & Guardian, 11 February 2000.

"The law existing as of now does not know marital rape. Husbands should not be worried for now."

Mayanja Nkangi, Uganda's Minister of Justice and Constitutional Affairs, commenting on the issue of marital rape.

- Source: New Vision, 12 January 2000 cited on WomensNet at <http://www.womensnet.org.za/news>

## **New legislation and policy**

- Chapter III, certain sections of Chapter II and Schedules 1 and 4 of the Employment Equity Act came into operation on 1 December 1999.
- The Maintenance Act 99 of 1998 came into operation on 26 November 1999, with the exception of sections 5, 7(1)(d) and (2). These sections deal with the appointment and duties of maintenance investigators.
- On 30 December the government issued National Instruction 7/1999 to provide clear direction for SAPS members on how to respond to a complaint of domestic violence (Government Gazette No 20778).
- On 10 December 1999 the Minister of Health introduced the National Policy on testing for HIV as part of the National Policy for Health Act of 1990. This policy prescribes the circumstances under which HIV testing may be conducted, including details on pre-test and post-test counseling procedures. (Government Gazette No 20710 Vol 414)

## **Labour Law**

The Department of Labour has published the draft Unemployment Insurance Bill for comments (the closing date is 31 March 2000) as General Notice 943 of 2000 in Government Gazette No 20952 dated 2 March 2000. The sections on maternity benefits (Part D, sections 16-18) are of particular importance.

- The draft Bill may be accessed at <http://www.labour.gov.za/docs/legislation/uia/not0943.html>

The Minister of Labour has issued under section 87(1)(b) of the Basic Conditions of Employment Act, 1997, a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child with the objective of

# GenderNews

providing guidelines for employers and employees concerning the protection of the health of women against potential hazards in their work environment during pregnancy, after the birth of a child and while breast-feeding. The Code sets out the legal requirements relevant to the protection of the health and safety of pregnant and breast-feeding employees; the method for assessing and controlling the risks and the list of principal, ergonomic, chemical and biological hazards to such health and safety.

- Copies of the document can be obtained from the Gender Project

## **New Acquisitions**

***Gill Kerchhoff***

### **War crimes against women: prosecution in international war crimes tribunals**

*Kelly Dawn Askin*

*The Hague: Martinus Nijhoff, 1997, ISBN 9041104860*

Crimes against women in war have been perpetrated for many centuries. This book presents a historical perspective on the development of international humanitarian law and the treatment of crimes against women. The author argues that all forms of gender specific crimes must be prosecuted and punished and she analyses the Nuremberg and Tokyo War Crimes Tribunals from a gender perspective. In the final section, there is a detailed review of the Yugoslav conflict and argument for how various gender specific crimes (including rape, forced prostitution, genocidal rape etc) should be prosecuted under Article 2-5 of the Yugoslav Statute.

### **Women in law**

*Edited by Shimon Shetreet*

*London: Kluwer Law International, 1998, ISBN 904110710X*

This book contains papers from the George A. Katz legal conference on Women in Law. The focus is on the major social challenge of attaining equality for women in the legal profession, academia and the judiciary. A number of different issues are dealt with in this volume: the double career for women of family and work; an analysis of the role of women jurists; the role of women in legislation and jurisprudence to promote the equality of women; the relationship between religion, law and women, and legislation concerning violence against women, including rape and domestic violence. Presenters of the papers from Israel and the United States provide comparative insights into these aspects of women in law.

### **Violence against women in South Africa: a resource for journalists**

*Soul City, Johannesburg 1999*

This booklet is a practical resource looking at understanding violence against women (VaW) including rape, domestic violence, femicide and sexual harassment, particularly in South Africa. Other sections deal with the media and VaW, providing guidelines to reporting and a brief summary of legislation relating

# GenderNews

to coverage of VaW. Lastly, it includes a list of resources and contacts in South Africa.

## **Participation of women in the legislative process**

*Debbie Budlender et al*

*Cape Town: European Union Parliamentary Support Programme, 1999, ISBN 06202246286.*

The European Union Parliamentary Support Programme, which commissioned this study, sees gender equality as one of the core issues in building democracy. The aims of the study were to assess the organisational structure and culture of the legislative institutions and to identify mechanisms within institutions which would facilitate the participation of women in the legislative process. The report includes a literature review about women in parliament; a synthesis report of the interviews with MPs; a list of participants who attended a workshop about how to increase women's participation in Parliament. Amongst other things, the report looks at the life of a parliamentarian and effect of parliamentary work on domestic and family life; support structures for women parliamentarians; training; and language difficulties.

## **Advancing the human rights of women: using international human rights standards in domestic litigation**

*Edited by Andrew Byrnes, Jane Connors and Lum Bik*

*London: Commonwealth Secretariat, 1997, ISBN 0850925150*

The revised versions of papers presented at the Asia/ South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights are contained in this publication. The presentations are from judges, scholars, representatives of international and commonwealth organisations, and cover the application of international standards to the task of promoting human rights of women and the girl child. In particular, they look at how international human rights norms can be used in domestic litigation to achieve wider recognition and application of human rights norms.