

Social Tract

Module on

HIV/AIDS as a human rights and legal issue

LEARNING OUTCOMES FOR ALL PARTICIPANTS

After completion of this module the learner should:

- Have an understanding of how and why HIV/AIDS is a human rights issue;
- Have been introduced to the South African Constitution and Bill of Rights;
- Have been introduced to some of the laws that impact on PLHAs;
- Be able to identify the common human rights violations faced by PLHAs;
- Have discussed ethical issues and informed consent.

Please note that module is an introduction only. Participants are strongly advised to refer to the relevant legislation or authorities in the case of any legal or ethical issues.

1. THE SOUTH AFRICAN CONSTITUTION

The adoption of the new Constitution marks a major step in the creation of South Africa's democracy. Before this, South Africa was governed under an Interim Constitution, which was written by negotiators during CODESA and Kempton Park multi-party negotiations on the transition.

Chapter 5 of the Interim Constitution laid out the process for writing the new, final Constitution. A Constitutional Assembly made up of all the members of the National Assembly and the Senate drafted the Constitution between May 1994 and May 1996. The Interim Constitution specified that the new final Constitution had to be consistent with 34 principles laid out in Schedule 4 of the Interim Constitution. These had been agreed upon after lengthy debate during the transition negotiations and constitute some of the fundamental principles of the transition.

The Constitutional Assembly wrote the new Constitution through a lengthy process that involved public consultation, expert input, political negotiation, ratification and legal certification. Responsibility for determining what the Constitution would say was divided among six committees, each responsible for particular issues. The committees covered: the character of the state; the structure of government; relationships among levels of government; fundamental rights; legal systems; and specialized structures of government.

During the two-year drafting process, the Constitutional Assembly made extensive efforts to consult with citizens and civil society about what the constitution should contain. It solicited written submissions, ran a telephone hotline to receive oral comments, held hundreds of meetings and hearings and maintained regular contact with hundreds of organizations. The Assembly reached out to the entire country, offering information in all 11 official languages and making special efforts to reach historically disadvantaged and rural communities. As a result two million people participated in drafting the new Constitution.

As soon as the new Constitution was drafted, it was submitted to the whole Constitutional Assembly for ratification. On 8 May 1996, the Constitutional Assembly ratified the new Constitution, easily achieving the 2/3 majority required by the Interim Constitution.

The Constitutional Court then received the new Constitution in order to review its compatibility with the 34 principles in the Interim Constitution. On 6 September 1996, the Court found that the new Constitution complied with the principles in most respects, but that its provisions were inadequate in the areas of local government and the division of powers between national and provincial governments. The Court gave the Constitutional Assembly three months to revise the Constitution, re-ratify it and resubmit it to the Court. The Constitutional Assembly followed this procedure, ratifying a revised draft on 11 October 1996 and submitting it immediately to the Court. On 4 December 1996, the Constitutional Court certified that the new Constitution complied with the constitutional principles.

On 10 December 1996, President Nelson Mandela signed the new Constitution on the site of the 1960 Sharpeville Massacre in a festive ceremony. On 4 February 1997, the new Constitution took effect, inaugurating a new era of democracy and inclusion in South Africa.

2 THE BILL OF RIGHTS

Simplified Version of Chapter 2: Bill of Rights

1. You have the right to equality and freedom from discrimination

The law must treat, protect and benefit everyone equally. No person shall be discriminated against because of his or her race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. Measures designed to protect or advance people in order to achieve equality (such as affirmative action programmes) may be necessary to guarantee this right.

2. Your human dignity will be respected and protected

You have the right to be treated with respect and dignity at all times. No one can insult you because of your race, colour or appearance.

3. You have the right to life

Nobody has the right to deprive you of your life. In South Africa the death penalty has been ruled unacceptable in terms of this right. In some countries this is given a wide meaning and can include the right to basic life necessities such as food, shelter, work and health care.

4. You have the right to freedom of the person and control over your body

You have the right to be free. Your freedom cannot be taken away from you unless the law allows this, for example, if you are arrested on suspicion or sentenced for committing a crime. You cannot be detained without trial, tortured or treated inhumanely. You have the right to make your own decisions concerning reproduction.

5. Servitude and forced labour cannot be inflicted on you

Slavery is forbidden by the Bill of Rights. You cannot be forced to work for anyone against your will or to work without pay.

6. You have the right to privacy

Your home and person are private. No one can search your home or person or interfere with your post and telephone, unless a crime is being investigated and the law governing searches is respected.

7. You have the right to freedom of religion, belief and opinion

You have the right to practise whatever religion you wish without interference. You can belong to any political party of your choice and hold any opinion you wish. You cannot be forced to do something against your conscience or beliefs. This right also provides that traditional law may be recognised in certain areas, provided that it does not conflict with any other fundamental rights.

8. You have the right to freedom of expression

You have the right to say what you like, whether this means speaking out against the government or putting forward a view that is not popular. This also includes freedom for the media, artists and researchers. However, this right does not permit war propaganda or the promotion of hatred or imminent violence.

9. You have the right to freedom of assembly, demonstration and petition

All people are free to attend meetings, demonstrate and present petitions, as long as they do so peacefully and without carrying weapons. A peaceful demonstration cannot be banned.

10. You have the right to freedom of association

You have the right to join any organisation of your choice. Any group of people with a common interest has the right to meet together and constitute themselves as an association or organisation in accordance with the law.

11. You have political rights

You have the right to make your own political choices. You have the right to join the political party of your choice and to participate in its activities, or to form your own party, recruit members and campaign. All citizens have the right to regular, free and fair elections. All adult South Africans have the right to vote in secret and to stand for election.

12. South Africans have citizen's rights

South African citizens cannot have their citizenship taken away from them without proper reason. Citizens have the right to enter, remain in and leave the country. You have the right to a passport.

13. You have the right to freedom of movement and residence

Everyone has the right to travel freely anywhere in South Africa and to leave the country. All South African citizens can live in any province, town and residential area they choose. However, the authorities do have the right to regulate the informal residential occupation of land.

14. You have the right to freedom of trade, occupation and profession

You have the right to try to make a living anywhere in South Africa and to practise the trade or profession of your choice, although the government can regulate how you practise. (For example, it may require doctors to have certain qualifications.)

15. You have the right to fair labour practices

You have the right to fair labour practices in the workplace. You cannot be unfairly dismissed, paid below the minimum wage in your industry or deprived of leave or sick pay. Workers have the right to join and participate in the activities of a trade union. They also have the right to collective bargaining and to strike. Employers have the right to form employers' organisations.

16. You have the right to a clean environment

You have the right to an environment that is not harmful to your health or well being. The state must ensure that pollution is prevented and that rubbish is properly disposed. Cleanups and conservation must be promoted.

17. You have property rights

You have the right to hold property that belongs to you. The state may only take away your property if it is in the public interest to do so, for example for the building of a road or school. Land may also be redistributed to redress injustices arising from past racial discrimination. When property is taken away by the state, the owners must receive just compensation.

18. You have the right to housing

All people have the right to adequate housing. The state must take all reasonable steps to guarantee this right. This right also means that no one can evict people from their homes or demolish dwellings without full respect for the law.

19. You have the right to health care, food, water and social security

All people have the right to sufficient food and water. People who are unable to support themselves have the right to social security. All people have the right to health care, including reproductive health care. Nobody can be refused emergency medical treatment.

20. Children are specially protected by the Bill of Rights

Children under the age of 18 have the right to proper care and security, basic nutrition, shelter, basic health care and social services. They cannot be exploited in the workplace or be allowed to do dangerous or unhealthy work. They have the right to be protected from neglect, abuse and degradation.

21. You have the right to education

Everyone has the right to a basic education. This right includes basic literacy for adults. You have the right to be educated in the official language of your choice, where this can reasonably be done. People also have the right to establish private schools, provided that they do not discriminate on the basis of race and maintain acceptable standards.

22. You have language and cultural rights

You have the right to use the language of your choice. You can participate freely in cultural life by practicing whatever customs and traditions you like, provided that you do not violate others' rights.

23. Cultural, religious and linguistic communities have rights

All people and communities are entitled to enjoy their culture, practise their religion and use their language. They also can organise associations based on their culture, religion or language, provided this does not infringe upon other fundamental rights. Cultural Councils have the right to be established and recognised.

24. You have the right to access to information

You have the right to all information held by any state department that you may need to exercise and protect your rights. However, certain information may be withheld on the grounds of state security. Different countries give their citizens different amounts of access to government information. The exact meaning of this right may be specified further by Parliament if it passes an Open Democracy bill.

25. You have the right to administrative justice

You have the right to be treated fairly and lawfully by any government official. You are also entitled to be given reasons for administrative decisions. If you believe that an administrative decision was wrong or unreasonable, it can be reviewed by a court of law.

26. You have the right to access to the courts

It is your right to have disputes settled by an independent and impartial court. The courts must serve all South Africans equally and fairly. Courts hear both criminal and civil cases.

27. Detained, arrested and accused persons have rights

No one can be arrested or detained without good reason and proper legal procedures must be followed. Detainees have the right to be informed in a language they understand of the reason for their arrest. Prisoners have the right to be kept in humane conditions and to have access to a lawyer, doctor, religious counsellor and spouse or partner. People arrested must be told of their right to remain silent. Anyone charged with a crime has the right to a fair trial by an impartial court, without "unreasonable delay." Anyone accused of a crime is considered innocent until they are proven guilty in a court.

NOTE: The Bill of Rights provides that rights can be limited under certain circumstances

It is important to note that rights are not absolute. The Bill of Rights provides that they can be limited as long as the limitation is "reasonable and justifiable in an open and democratic society," taking into account several factors, including the nature of the right, the nature and extent of the limitation, the purpose of the limitation and whether there are less restrictive means that could accomplish the same purpose.

3. HIV/AIDS AND THE LAW

The following are some examples of relevant areas of law impacting on HIV/AIDS: It is highly recommended that participants refer to the primary source or legal assistance on any of these matters.

Equality and non-discrimination:

Section 9 of the Constitution, the Equality Clause, lists 17 grounds for non-discrimination: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Promotion of Equality and Prevention of Unfair Discrimination Act (referred to as the Equality Act) lists similar grounds and:

"...Any other ground where discrimination on that other ground –

- i) Causes or perpetuates systemic disadvantage;
- ii) Undermines human dignity; or
- iii) Adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground listed in paragraph (a)."

HIV/AIDS must be considered for inclusion in the Act in the future (see subsections 34(1) and (2) of the Act).

Note that discrimination can be fair as is in the case of "affirmative action" programmes.

The Equality Clause and Equality Act can protect PLHAs in two ways:

- 1) By the treatment of HIV/AIDS as a disability, which is an enumerated ground. The treatment of HIV/AIDS as a disability has been quite controversial because in the past, disability was often associated with incapacity. This is not the case anymore, and some countries do recognize HIV/AIDS as a disability (for example, the courts have found HIV/AIDS as a disability in the US, Canada and Australia).

- 2) By “reading in” of HIV/AIDS. This is related to the “spirit” of the Act/clause. The courts can read in HIV if they believe that it complies with the intention and purpose of the Act/clause, which is to prevent discrimination against people that are vulnerable.

Right of access to health care

Section 27(1)(a) of Constitution states that everyone has the right of access to health care services, including reproductive health care. This does not mean that individuals have a right to health care; rather Government must create a conducive environment for people to be able to access health services. In addition, this right is not unlimited or immediate. It is subject to available resources and progressive realization.

The National Patient’s Rights Charter lists the rights and duties of all people that use government health services. It is not binding law, but provides guidelines that health care workers and patients are supposed to follow. The Charter says that all health care workers must treat patients with respect, dignity, courtesy, patience and tolerance.

The HIV/AIDS Policy Guidelines issued by the Department of Health in October 2000, are being used in government hospitals to treat people with HIV/AIDS. It is not acceptable for a health care worker to treat a patient differently, or refuse to treat a patient, due to his/her HIV/AIDS status.

In terms of private health care, the Medical Schemes Act 1999 states that:

- A scheme is not to exclude PLHAs from its scheme.
- Every scheme must provide prescribed minimum benefits, even to those living with HIV/AIDS. In January 2000, the Minister of Health introduced minimum prescribed benefits for PLHAs including treatment for opportunistic infections and costs of hospitalization.
- There is generally no waiting period for benefits but if a member has HIV when he/she joins, he/she may have to wait 12 months to get access to HIV/AIDS benefits in the scheme.

Rights at work

The Constitution, Section 23, states that everyone has the right to fair labour practices.

The Labour Relations Act (LRA) provides for basic rights of employees. It protects employees from unfair labour practices, and unfair dismissal. It outlines a process for dismissal, and deems certain dismissals as automatically unfair. The Labour Relations Act does not cover the SANDF, employees of the Secret Services or the National Intelligence Agency (NIA).

The Employment Equity Act (EEA) also does not cover the SANDF, employees of the Secret Services and NIA. The Act says that no one may discriminate against an employee or job applicant based on any employment policy or practice (unless it is an “inherent requirement of the job – but it is questionable in what circumstances this would be applicable) on the basis of 20 grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, **HIV status**, conscience, belief, political opinion, culture,

language and birth. The Employment Equity Act was the first law to specifically state HIV status is a ground for non-discrimination. It means that a person cannot be denied promotions or be demoted, blocked from training and development or have unfair access to employee benefits. The Act also does not allow for HIV testing of job applicants, or existing employees, or before employees are offered a promotion or training. If the employer wants pre-employment testing or testing of employees, the employer must apply for an order from the labour court justifying why pre-employment testing is a requirement. Without the order, pre-employment testing is illegal.

The Code of Good Practice on HIV/AIDS and Employment has been added to both the LRA and EEA.

The Basic Conditions of Employment Act (BCEA) outlines the minimum standards for employees such as working hours, leave, sick leave, etc. It also allows for renegotiation of sick days if it is required.

A person is entitled to confidentiality about his/her status at work. This means that a health care worker cannot disclose to an employer without the employee's consent, and that human resources or any other department, if they are aware of the status of an employee, must keep the status confidential.

Women's rights

Women are susceptible to HIV for various reasons including: biology, traditional practices, and due to their status in society; vulnerability to rape, which increases the risk of HIV infection, etc.

Relevant legislation and policies that impact on women include:

- The Equality Clause makes discrimination against women illegal; and men and women are to be treated equally under the law.
- Choice on Termination of Pregnancy Act, which allows for a woman to terminate a pregnancy; the requirements become more stringent as time passes. An abortion can only be undertaken after informed consent is obtained from the woman. Forced abortion or sterilization is not allowed. Girls younger than 18 can give informed consent to have a termination without the knowledge or consent of their parents.
- The TAC case made it a requirement for government to provide women access to Nevirapine to pregnant women and their newborns to reduce the risk of mother-to-child transmission. However, a woman can refuse to be tested cannot be forced to take Nevirapine.
- Government policy makes PEP available to rape survivors. However, there have been problems with the implementation of this policy.
- The Domestic Violence Act defines domestic violence broadly and also makes marital rape a crime. There has, however, been a difficulty in the implementation and enforcement of the Act.
- The Recognition of Customary Marriages Act recognizes customary marriages and provides women in these unions with some legal protection.

Children's rights

Section 28 of the Constitution outlines the rights of children. There is no requirement for progressive realization of the rights of children.

Other important legislation includes: the Child Care Act, which provides children with protection from exploitation and abuse; and the Children's Bill, which is currently in Parliament; the South African Schools Act, which makes education compulsory for children under the age of 15; this would also include HIV positive children. However, there have been cases of children being denied access to crèches and schools due to their HIV status.

Children also have a right of access to health care. Government policy provides for free health care to children under the age of 6.

A child 14 or above can consent to an HIV test, without the knowledge of his/her parents. He/she is entitled to confidentiality when it comes to his/her status. This means that health care workers cannot disclose the child's status to anyone without consent, including parents and guardians.

Since children can consent to medical treatment if they are 14 or above, this will undoubtedly impact on their access to ARVs. Presumably, they would be able to give informed consent to the treatment without the knowledge or consent of their parents/guardians.

Criminal law

Criminal law is important for HIV/AIDS for various reasons including:

- Some crimes can make a person more vulnerable to HIV/AIDS (crimes such as rape).
- Questions are often raised about whether a person can be charged for harmful HIV-related behaviour such as having unprotected sex while knowing his/her HIV status.
- People living with HIV/AIDS are sometimes subjected to physical violence and abuse because of their status.

While all people are protected by the Bill of Rights, including accused persons, there are certain situations that make it more difficult for HIV positive accused persons to get bail (i.e. if he is accused of rape. Please note that "he" is being used on purpose as most accused for sexual offences are men). In addition, the HIV status of a person may affect their sentencing, after they have been found guilty. It will be considered an aggravating factor, especially in cases of rape and other sexual offences. The Criminal Law Amendment Act 1997 states that if a rapist knew he/she was HIV positive at the time of committing the rape, he will be sentenced to life imprisonment.

Private law/contracts

- Funeral policies – People enter into a contract with a private company to cover their funeral expenses. Many big funeral policies do not cover funeral expenses if

the person died of AIDS. This is usually contained in an exclusion clause found in the policy. Even if a person is infected after having the policy, if there is an exclusion clause in the policy, the company will not pay out. It is important to read the fine print carefully, and ask questions about the policy. (For more information, refer to ALP pamphlet Funeral Policies and HIV/AIDS: Read Carefully and Think Twice!)

- Insurance law – The Life Office's Association has adopted an agreement on HIV testing in association with the life insurance companies. An applicant is asked to undergo a HIV test when applying for insurance; the applicant can refuse to be tested (but will most likely be refused insurance or have very high insurance premiums); pre- and post-test counseling is required, and confidentiality means that the applicant can decide to whom the test results will be made available. If the applicant tests positive, his/her results will be placed on the LOA's Life Register to indicate that he/she was denied insurance. It will be "coded" to prevent most people from understanding the reason for being turned down. The insurance policy may also include an exclusion clause that limits the payout or liability of the life insurance company if the person dies of AIDS related illnesses.

4. SELECTED REFERENCES

Legislation

- Basic Conditions of Employment Act, No. 137 of 1993
- Child Care Act, No. 74 of 1983
- Choice on Termination of Pregnancy Act, No. 92 of 1996
- Constitution of the Republic of South Africa, No. 108 of 1996
- Criminal Law Amendment Act, No. 107 of 1997
- Domestic Violence Act, No. 116 of 1998
- Employment Equity Act, No. 55 of 1998
- Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000
- Labour Relations Act, No. 66 of 1995
- Medical Schemes Act, No. 131 of 1998
- Recognition of Customary Marriages Act, No.120 of 1998
- Sexual Offences Act, No. 23 of 1957
- Social Assistance Act, No. 59 of 1992
- South African Schools Act, No. 64 of 1996

Selected Policy Documents

- Charter of Rights on AIDS and HIV (South Africa), AIDS Consortium, 1992
- Department of Health: HIV/AIDS & STD Strategic Plan for South Africa 2000-2005, May 2000.
- Department of Health: The Patients' Rights Charter, 1999.
- Department of Labour: Code of Good Practice on Key Aspects of HIV/AIDS and Employment.
- Department of Labour: Code of Good Practice: Dismissal
- HPCSA Guidelines: The Management of Patients with HIV Infection or AIDS, 2001
- Life Offices' Association (LOA), Protocol on HIV/AIDS, October 2000.

- MASA: HIV/AIDS Guidelines (revised), 1995.
- SADC Code on HIV/AIDS and Employment, 1997.

Some Useful Websites for further information:

- AIDS Consortium: www.aidsconsortium.org.za
- AIDS Law Project: www.alp.org.za
- AIDS Legal Network: www.redribbon.co.za/legal
- CCMA: www.ccma.org.za
- Council for Medical Schemes: www.medicalschemes.com
- Department of Health Resources: www.aidsinfo.co.za
- Health Professions Council of South Africa: www.hpcsa.co.za
- Medical Research Council: www.mrc.org.za
- South African Human Rights Commission: www.sahrc.org.za
- Treatment Action Campaign: www.tac.org.za
- UNAIDS: www.unaids.org
- World Health Organization: www.who.org