CHAPTER 4

The Constitution and Bill of Rights
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The Bill of Rights

Our Constitution has a Bill of Rights. This is a list of fundamental rights – the basic rights that all people in South Africa have as human beings.

The Bill of Rights is the foundation of our democracy. This is because all people have these rights and they must be respected by Parliament, different levels of government, the courts, private organisations (such as companies) and individuals.

Under the apartheid Government, millions of South Africans were excluded from political life and denied civil rights. One of the goals of the Constitution is to ensure that this never happens again. The Bill of Rights, therefore, grants all South Africans equal political rights (like the right to vote) and civil rights (like the right to equality).

There are, however, still millions of South Africans who do not have access to basic needs such as water, housing and health care. It is hard for people who have no food, clothing or shelter to be able to enjoy the rights to human dignity, freedom and equality. Our Constitution recognises that civil and political rights are related to social and economic rights, like the right of access to land, food and health care services. The Bill of Rights thus includes some social and economic rights.

THE IMPORTANCE OF SOCIO-ECONOMIC RIGHTS

A mother living with HIV has the right to vote for a political party that has promised to care for children orphaned by AIDS. But this right is no use to her if she is too ill to go to the voting station because there is no medical treatment available for her.

Any person or organisation has the right to go to court to claim or defend these rights, either for themselves or for other people.

The Constitution also says that limitations (restrictions) on these rights will only be allowed in very exceptional circumstances.

The Bill of Rights protects us from human rights abuses.
One of the most important rights in the Bill of Rights is the right to equality. This part of the Bill of Rights is often called 'the Equality Clause'.

Under the Constitution, equality means that everybody shares the fundamental rights and freedoms that are listed in the Bill of Rights.

But the Constitution does not assume that there is already equality in South Africa. It recognises that we are coming out of a time in our history where there has been a lot of inequality.

The Constitution therefore instructs the State to introduce new laws that will enforce equality - in other words, make equality real in people’s everyday lives. One new law that will help to enforce equality is the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (called ‘the Equality Act’ for short).

The 17 grounds for non-discrimination mentioned in the Equality Clause are sometimes called 'listed grounds'. The Equality Clause and the Equality Act also say that you cannot discriminate against someone using other grounds that are not listed here. The idea is to prohibit discrimination based on 'other' grounds that may not be specifically listed, but that are used to unfairly discriminate - such as HIV infection.

FAIR AND UNFAIR DISCRIMINATION

Peter applies for a job as a teacher in Germany, but he cannot speak German. Another applicant, Mark, can speak German and he is given the job. This is unfair discrimination, because a German-speaker is better qualified for a job as a teacher in Germany.

Mandy also applies. She too can speak German. She has even better qualifications than Mark. She does not get the job because she is a woman. This is unfair discrimination as Mandy is being treated unequally because of her sex.
Are people with HIV or AIDS specially protected?

The Equality Clause and the Equality Act can protect people living with HIV or AIDS in a number of ways:

- HIV/AIDS may be interpreted as a disability.
- HIV/AIDS may be added to new laws as a separate listed ground for non-discrimination.
- HIV/AIDS may be treated as an 'other ground'.

4.3.1 HIV/AIDS AS A DISABILITY

The Equality Clause does not specifically list HIV or AIDS as a ground for non-discrimination. But it does say disability may not be a justification for unfair discrimination.

Over the last few years, disability rights activists have defined 'disability' in a new way. Disability is not the same as incapacity, which means that a person is unable to function.

Disability rights activists look at the way society stops people with disabilities from participating as equals. They are campaigning to remove barriers that society puts in the way of people with disabilities.

BARRIERS FOR PEOPLE WITH DISABILITIES

Sandi is unable to walk and uses a wheelchair. She reads and writes as well as anyone else, and has qualified as a computer operator.

But Sandi can't find a job because most offices have steps, and she can't get up the steps. Sandi's disability does not prevent her from doing the job. It is the way offices are built that handicaps her and makes it more difficult for her to do the job.

Some people argue that HIV must be protected on the grounds of disability under the Equality Clause and Equality Act because:

- People with HIV have a medical condition that may affect their day-to-day activities even when they do not look or feel ill.
- People with HIV or people who are thought to have HIV, often face discrimination that makes it more difficult for them to live and work together with other people. They face barriers put up by society because of fear and prejudice about their condition.

Foreign law in a number of other countries has supported the idea that asymptomatic HIV and AIDS should be protected as a disability.
4.3.2 HIV/AIDS AS A GROUND FOR NON-DISCRIMINATION IN THE EQUALITY ACT

The new Equality Act does not list HIV status separately from disability as a ground for non-discrimination. But the Act does recognise that "HIV/AIDS status" – whether real or perceived – leads to discrimination.

THE EQUALITY ACT

The Equality Act says that the Minister of Justice must consider adding HIV/AIDS to the list of prohibited grounds.

At the moment, the Equality Act allows the courts to decide in each case whether HIV/AIDS should be interpreted:

- As a disability, or
- On its own as a separate ground.

Law-makers must still decide whether or not to add HIV status to the list of 17 grounds in the Equality Act.

There are strong reasons for HIV to be treated as a separate listed ground for non-discrimination under the Equality Act:

- HIV/AIDS is a national epidemic that affects an increasingly large number of people in South Africa.
- People living with or affected by HIV or AIDS face a wide range of unfair discrimination and stigmatisation in all aspects of life, and the Equality Act should recognise this to ensure non-discrimination on the basis of HIV/AIDS.
- By making HIV status a separate prohibited ground, it is easier for a person living with HIV or AIDS to show in a court of law that they were unfairly discriminated against. They would just need to prove that there was discrimination, and the person accused of discrimination would need to prove that it was not unfair discrimination.
- A person living with HIV or AIDS can then claim that they were unfairly discriminated against on:
  - The ground of HIV status, or
  - On the ground of disability.
4.3.3 HIV/AIDS AS AN ‘OTHER GROUND’

Discrimination against a person on the basis of his/her HIV status could be prohibited because the Equality Clause and Equality Act also prohibit unfair discrimination on any ‘other’ ground – by this we mean a ground that is not specifically listed.

GUIDELINES ON ‘OTHER GROUNDS’

In Harksen v Lane and others (1997), the Constitutional Court developed a good test for deciding whether a person had been unfairly discriminated against on any ground, including a ground that was not specifically named in the Equality Clause.

The Court said:

The right to equality is violated whenever a person is treated differently in a way that is unfair discrimination.

TEST FOR UNFAIR DISCRIMINATION

The Harksen case said that we can see if someone has been unfairly discriminated against by using this test:

1. The person discriminated against must show that they were treated in a way that was different from others.

2. If you show that you were treated differently on a listed ground for non-discrimination (e.g., race), then it is immediately believed that there was discrimination and that the discrimination was unfair. The person discriminating against you must then prove that the discrimination was fair.

3. If the different treatment was not on one of the listed grounds (e.g., HIV status is not a listed ground in the Equality Clause), then you must show that the basis for treating you differently might seriously harm your sense of dignity or otherwise affect you in a serious way.

4. You must then prove that the discrimination is unfair because of the way that it affects you (or other people like you).
Whether or not HIV status is listed separately or treated as a disability, there is little doubt that people living with HIV or AIDS are disabled by a condition or illness which makes them face the same kind of barriers or discrimination which other people with disabilities experience.

**BARRIERS OR DISCRIMINATION FACED BY PEOPLE WITH HIV OR AIDS**

Many people living with HIV or AIDS live in poverty and are prevented from enjoying equal rights due to various forms of discrimination and stigmatisation such as:

- Workplace policies that unfairly discriminate against people living with HIV or AIDS
- Medical aid schemes that deny effective treatment and care to people living with HIV or AIDS
- Insurance companies who refuse to offer life insurance to people living with HIV or AIDS
- Communities who stigmatise and isolate people living with HIV or AIDS.

**WHAT THE CONSTITUTIONAL COURT HAS SAID ABOUT EQUALITY AND NON-DISCRIMINATION**

- In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs (2000), the Constitutional Court said that discrimination can be on more than one ground. This means that our courts may decide that a person is unfairly discriminated against on the grounds of HIV status and disability.
- In Harksen v Lane and Others (1997), the Constitutional Court said that the right to equality is violated when someone is treated differently in a way that is unfair discrimination.
- In Prinsloo v Van Der Linde and Another (1996), the Constitutional Court said that not all cases of different treatment are unfair discrimination. The different treatment must also hurt a person’s sense of dignity.
- In Hoffman v South African Airways (2000), the Constitutional Court said that refusing employment to a person simply because he was living with HIV affected his dignity and was unfair discrimination.
International law is the body of laws and principles that all countries must follow in their relations with each other (e.g., Universal Declaration of Human Rights, 1948). Foreign law means judgments and statutes from other countries around the world (e.g., Americans with Disabilities Act of 1990).

Under the Constitution, a court interpreting the Bill of Rights must take note of international law, and may consider foreign law.

4.5.1 INTERNATIONAL LAW

International law seems to support all three views:

- HIV status as a disability
- HIV as a separate ground for non-discrimination
- HIV status as an 'other' ground for non-discrimination (when not listed specifically).

The UNAIDS/UN International Guidelines on HIV/AIDS and Human Rights advise governments:

> General anti-discrimination laws should be enacted or revised to cover people living with asymptomatic HIV infection, people living with AIDS and those merely suspected of HIV or AIDS. Such laws should also protect groups made more vulnerable to HIV/AIDS due to the discrimination they face. Disability laws should also be enacted or revised to include HIV/AIDS in the definition of disability.

The UN Standard Rules on the Equalisation of Opportunities for People with Disabilities say:

> The term disability summarises a great number of functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.
Two of the most important rights in international human rights agreements are:

- Equal protection for all people by the law, and
- Freedom from discrimination on any ground such as race, sex, religion, “or other status”.

The UN Commission on Human Rights has confirmed that “other status” should include health status, including HIV/AIDS.

4.5.2 FOREIGN LAW

- In Bragdon v Abbott (1998), the United States Supreme Court decided that people living with HIV are protected by the non-discrimination sections of the Americans with Disabilities Act.

- Canada also protects people from discrimination on the basis of disability with its Charter of Rights and Freedoms. In Canada v Thwaites (1994), the court said that discrimination on the basis of a person’s HIV status violates the Charter and the Canadian Human Rights Act.

- In Australia, the Disability Discrimination Act recognises HIV infection, or even the belief that a person has HIV infection, as a disability. In X v Commonwealth (1999), the High Court of Australia confirmed a decision of the Australian Human Rights and Equal Opportunity Commission, deciding that the dismissal of an employee on the basis of his HIV status is prohibited by the Disability Discrimination Act.

- Hong Kong, the Philippines and New Zealand have similar laws.
4.6.1 WHAT ARE SOCIO-ECONOMIC RIGHTS?

The fundamental rights in the Bill of Rights can be divided into:

- Civil rights, e.g. the right to equality.
- Political rights, e.g. the right to free, fair and regular elections.
- Social rights, e.g. the right to freedom of association.
- Economic rights, e.g. the right to have access to health care services.

Social and economic rights are often discussed together and are known as "socio-economic rights".

SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTION

- The right to a healthy environment (s24).
- The right of access to land and land restitution (ss25(5) – (9)).
- The right of access to adequate housing (s26).
- The right of access to health care services, food, water, and social security (s27).
- Children's rights to nutrition, shelter, basic health care services and social services (s28).
- The right to a basic education, including adult education (s29).
- Prisoners' rights to dignified prison conditions, including nutrition and medical treatment (s35).

Socio-economic rights are important rights which can help to improve the everyday living conditions for people with HIV or AIDS. Socio-economic rights deal with the access that people have to basic services and needs.

The Constitution says that constitutional obligations facing the government, including obligations to deliver on socio-economic rights, "must be performed diligently and without delay" (s237).
THE LINK BETWEEN SOCIO-ECONOMIC RIGHTS AND CIVIL AND POLITICAL RIGHTS

In the Government of the RSA and Others v Grootboom and Others (2000), the Constitutional Court said:

- Socio-economic rights are important because they make it possible for people to enjoy all the other rights listed in the Bill of Rights.
- Without food, clothing or shelter, people cannot enjoy rights such as the right to dignity, the right to freedom and the right to equality.

The Court said:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 (of the Constitution – the Bill of Rights). The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

4.6.2 WHAT IS THE STATE’S DUTY TO FULFIL SOCIO-ECONOMIC RIGHTS?

When we talk about the State’s “duty to fulfil”, we mean the State’s responsibility to carry out socio-economic rights.

The Constitution says the State must make new laws that will help to ensure that socio-economic rights are available to everyone. The problem with socio-economic rights, however, is that the State cannot immediately give everyone things like running water, housing and medical care. This is because the State does not have sufficient resources to do this.
DIFFERENT TYPES OF SOCIO-ECONOMIC RIGHTS

In protecting the State from demands that it is unable to fulfil (carry out), the Constitution divides socio-economic rights into:

- Unqualified rights that the State must carry out (eg children's rights to basic health care services)
- Qualified rights – the delivery of these rights depends on factors like the availability of money (eg the right of access to health care).

What are the steps the State must take to deliver socio-economic rights?

Section 27 of the Constitution says that the State does not have to fulfil most socio-economic rights immediately. The Constitution says the State must take:

reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.

IMPORTANT TERMS

Progressive realisation means that the State has to take reasonable steps, within its available resources, to give people these qualified socio-economic rights over a period of time.

Available resources include things like money, people, materials and technology.

A child's right to basic health care is one of the rights that the State must carry out.
PAYMENT OF SCHOOL FEES

- Xhotso has 4 children of school-going age. He cannot afford the school fees, and so he applies for exemption from paying school fees for his children.
- He is told that he does not qualify for exemption from school fees, because of the amount he earns. Exemption from paying school fees is based on a means test, and only people who earn less than a certain amount are excused from paying school fees.
- Here, Xhotso's right to have access to social assistance is being restricted, due to limited State resources.

**Does the State have to do anything immediate to deliver qualified socio-economic rights?**

The State still has a duty to take some steps to provide access to things like medical care, housing, water and social security. So, even though the State does not have to provide the benefits of each of these rights immediately, it must be able to show that it has a programme which will eventually provide the benefits of each of these rights to those who need them.

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CASE

THE RIGHT OF ACCESS TO ADEQUATE HOUSING

In *The Government of the RSA & Others v Grootboom & Others* (2000), the Constitutional Court had to decide on the meaning of "the right of access to adequate housing" (one of the qualified socio-economic rights in the Constitution).

**The Court decided:**

- The State does not have to immediately provide homeless people with a house (and the land and services that go with a house, eg water and rubbish removal.)
- But the State must have a reasonable programme which will eventually provide a house to those who need them over a period of time and within the resources available to the State.
- The Government's housing programme was unreasonable because it did not properly consider and assist families who had no home at all and were therefore living in crisis conditions.
- The Government must change its housing programme to give relief to families who had no access to land, no roof over their heads and who were living in unbearable conditions or crisis situations.
What does the State have to do about unqualified socio-economic rights?

Some socio-economic rights do not depend on "available resources" or are not qualified by "progressive realisation". These rights, which must be delivered immediately, include:

- Emergency medical treatment
- Education
- Children's rights
- Prisoners' rights
- A healthy environment
- Protection from arbitrary evictions and demolitions.

**EMERGENCY MEDICAL TREATMENT**

Lindi is seriously injured in a bus accident and needs emergency medical treatment. She is rushed to the nearest hospital, but is refused treatment because the hospital has few nurses and limited supplies.

But the Constitution says that "no one may be refused emergency medical treatment". This means that the hospital must provide treatment for Lindi with the resources that it has available, no matter how limited.

If the hospital does not do this, it is a violation of Lindi's constitutionally guaranteed right to emergency medical treatment.

**A CHILD'S RIGHT TO SHELTER**

In Grootboom v Oostenberg Municipality and Others (2000), the Cape High Court had to decide what is meant by "a child's right to shelter". This right is not qualified by "progressive realisation" and "available resources".

The Court decided:

- As this right is not qualified, the State must immediately provide the children and their parents with shelter.
- The shelter should include, at the very least: tents, pit latrines and water.
The right of access to health care: a qualified socio-economic right

Our Constitution gives every person the right of access to health care, including reproductive health care. The right of access to health care services is an important right for people living with HIV or AIDS. Most people with HIV or AIDS cannot afford to pay for medical insurance, private clinics or the expensive drugs that are necessary to keep them healthy. This means that they are dependent on government hospitals and clinics for health care.

4.7.1 WHAT ARE THE BARRIERS TO ACCESS TO HEALTH CARE FOR POOR PEOPLE?

Until August 2000, there were no national treatment guidelines for health care workers on the treatment of patients with HIV or AIDS.

Patients have received different standards of care at each hospital or clinic:

- Some hospitals no longer treat opportunistic infections which need expensive medication.
- Many rural clinics do not have staff sufficiently trained and equipped to diagnose opportunistic infections.
- There are not enough ambulances to transport people to hospital – patients needing emergency care often die before they get to hospital.

The Department of Health's National Guidelines on Prevention and Treatment of Opportunistic and HIV-related Diseases in Adults do not provide for:

- Expensive medical treatments such as Highly Active Anti-retroviral Treatment (HAART) at government hospitals.
- Treatment to prevent mother-to-child transmission of HIV.

For more on the Opportunistic Infection Guidelines, see References and resource materials on page 91.

For more on recent developments in MTCT, see Introducing this manual on page 111.
4.7.2 WHAT IS THE STATE’S DUTY TO PROVIDE ACCESS TO HEALTH CARE?

NO TREATMENT BECAUSE OF LIMITED RESOURCES

In 

Soobramoney v Minister of Health, KwaZulu-Natal (1997), the Constitutional Court looked at the State’s duty to provide access to health care services.

Mr Soobramoney suffered from a fatal kidney disease which required regular treatment. He could not afford a private hospital and the government hospital could only admit a limited number of patients to its treatment programme because of scarce resources. He did not meet the conditions set by the hospital for admission to its programme.

Mr Soobramoney asked the Constitutional Court for an order forcing the State to treat him. He based this on his right to emergency medical treatment and the right to life. The Court said that ongoing dialysis treatment could not be defined as “emergency treatment”, and that the case should be decided on the basis of the right of access to health care services.

The Court decided:

- The State does not have to provide free health care to everyone. If a hospital or clinic has a limited budget, it is allowed to make decisions about the type of treatment it will give, and who will receive that treatment – as long as the decision of the hospital or clinic is reasonable.
- It could not interfere with the budgetary and policy decisions made by the State in this case.

The Government has a duty to take steps and put a programme in place to try to improve the right of access to health care services. There is a special duty towards vulnerable groups like people living with HIV or AIDS.

The HIV/AIDS and STD Strategic Plan for South Africa 2000-2005 was developed to set out a programme of action for respecting, protecting, promoting and fulfilling the rights in the Constitution. The Plan highlights people living with and affected by HIV or AIDS as a vulnerable group.
WHAT THE GOVERNMENT SHOULD BE DOING

- Make sure that people living with HIV or AIDS are not discriminated against in getting access to available health care services.

- Monitor and implement the Opportunistic Infection Guidelines for people living with HIV or AIDS, so that patients get standard treatment at all government hospitals.

- Investigate ways to fund medical treatment for people living with HIV or AIDS, like negotiating with drug companies for lower drug prices, and looking at compulsory licensing and parallel importing of anti-retroviral drugs (including more affordable generic drugs).

- Research and pilot new medical treatments for HIV/AIDS.

- Research the cost-effectiveness of new medical treatments.

For more on compulsory licensing, see 5.5.1 on page 110.

For more on parallel importing, see 5.5.2 on page 111.

For more on generic drugs, see 5.4.3 on page 107.
A child's right to basic health care services: an unqualified right


EXAMPLES FROM THE CRC

- States recognise that every child has a basic right to life.
- States must ensure to the maximum extent possible, the survival and development of the child.
- States recognise the right of the child to the highest possible standard of health.
- States must take steps to:
  - Lower infant and child mortality.
  - Ensure that all children receive necessary medical assistance and health care, with the emphasis on primary health care (basic health care).
  - Ensure suitable pre-natal and post-natal health care for mothers.

The South African Government has a duty to ensure that the child's right to basic health care services is fulfilled. The right of children to basic health care services should not be limited by resources.

In 1995, the Government decided that all pregnant women and all children under the age of 6 would have a right to free medical care at State hospitals and clinics.

THE NEED FOR PREVENTION OF MTCT

- The Government spends a lot of money on treating and hospitalising sick children with HIV.
- But most pregnant women with HIV still do not receive anti-retroviral therapy to reduce mother-to-child transmission (MTCT) of HIV.
- This policy was challenged because it is not reasonable or cost-effective.
4.9 What do fundamental rights mean for people with HIV or AIDS?

The Bill of Rights has a list of the fundamental rights of all people living in South Africa. In addition to the right of equality under the Equality Clause (s9 of the Bill of Rights), these rights are also extremely important for people living with HIV or AIDS.

This table explains some of these rights and what they mean for people with HIV or AIDS:

<table>
<thead>
<tr>
<th>SECTION IN THE BILL OF RIGHTS</th>
<th>RIGHT</th>
<th>WHAT THIS MEANS FOR PEOPLE WITH HIV OR AIDS</th>
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<tbody>
<tr>
<td>10</td>
<td>HUMAN DIGNITY</td>
<td>Everyone has the right to have their dignity respected and protected. A person or institution (eg a hospital or company) may not insult or damage any person's self-respect, by their words or actions.</td>
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</tbody>
</table>
| 12               | FREEDOM AND SECURITY OF THE PERSON | Includes the right to:  
  - Make decisions on reproduction  
  - Security and control over their body  
  - Not to be subjected to medical or scientific experiments without informed consent.  
A person has the right to take their own decisions about medical treatment and pregnancy, eg you cannot be forced to test for HIV.  
You cannot be treated in a cruel or degrading way by any person or institution. |
| 14               | PRIVACY | Everyone has the right to privacy.  
If you have HIV or AIDS, you have the right to keep that information to yourself.  
An employer or hospital cannot force you to tell them, or force you to have a blood test to find out this private information. |
| 16               | FREEDOM OF EXPRESSION | Everyone has the right to freedom of expression, which includes freedom to receive or give out information or ideas.  
This right is important, particularly as a way to ensure that proper information about how to prevent HIV is available in schools or prisons. |
| 18               | FREEDOM OF ASSOCIATION | Everyone has the right to freedom of association.  
You can join any organisation you choose.  
You cannot be forcefully separated from other people. |
<table>
<thead>
<tr>
<th>SECTION</th>
<th>RIGHT</th>
<th>WHAT THIS MEANS FOR PEOPLE LIVING WITH HIV/AIDS</th>
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<tr>
<td>21</td>
<td><strong>FREEDOM OF MOVEMENT AND RESIDENCE</strong>&lt;br&gt;Everyone has a right to freedom of movement, and to leave the country. All citizens have the right to enter, to remain in and to live anywhere in the country.</td>
<td>If you have HIV or AIDS, you are free to move around the country. You cannot be forced to live in a separate place, away from the rest of society.</td>
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<td>22</td>
<td><strong>FREEDOM OF TRADE, OCCUPATION AND PROFESSION</strong>&lt;br&gt;Every citizen has the right to choose their trade, occupation or profession freely.</td>
<td>People with HIV or AIDS can choose what kind of work they want to do, eg you may not be told that you cannot be a doctor, a teacher or a health care worker.</td>
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<td>23</td>
<td><strong>LABOUR RELATIONS</strong>&lt;br&gt;Everyone has the right to fair labour practices.</td>
<td>No person may be unfairly discriminated against at work (see Chapter 7 on page 153).</td>
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<td>24</td>
<td><strong>ENVIRONMENT</strong>&lt;br&gt;Everyone has the right to an environment that is not harmful to their health or well-being.</td>
<td>This right is important for people with HIV who are living in state institutions such as prisons or psychiatric hospitals.</td>
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<tr>
<td>26</td>
<td><strong>HOUSING</strong>&lt;br&gt;Everyone has the right to have access to adequate housing.&lt;br&gt;No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.</td>
<td>People living with HIV or AIDS may not be refused a subsidy or loan to buy a house. Evicting a person from a house or flat because of their health is also unlawful.</td>
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<tr>
<td>SECTION</td>
<td>RIGHT</td>
<td>WHAT THIS MEANS FOR PEOPLE WITH HIV OR AIDS</td>
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</table>
| 27      | HEALTH CARE, FOOD, WATER AND SOCIAL SECURITY | Everyone has the right to have access to:  
- Health care services, including reproductive care.  
- Social security, including, if they are unable to support themselves and their dependants, suitable social assistance.  
No person may be refused emergency medical treatment.  
Hospitals or doctors cannot refuse to treat a person with HIV or AIDS (see Chapter 6 on page 115).  
People with HIV or AIDS have the right to disability grants if they are too ill to support themselves or their families (see Chapter 12 on page 271). |
| 29      | EDUCATION | Everyone has the right to a basic education, including adult basic education.  
If you have HIV or AIDS, you have the same right as all people to education.  
A school cannot refuse to educate you or your child because you have HIV or AIDS. |
| 32      | ACCESS TO INFORMATION | Everyone has the right to have access to any information that is held by another person and that is needed to carry out or protect your rights.  
If you feel you are being discriminated against because of a policy, you can demand to see that policy and then challenge it in a court.  
You have the same right with private institutions (eg companies), and information that may be kept about you (eg your medical records).  
This right may also include the right of people who are held in state institutions, such as prisons, to have access to education and life-skills training on issues such as HIV/AIDS. |
| 33      | JUST ADMINISTRATIVE ACTION | Everyone whose rights have been negatively affected by administrative actions, has the right to be given written reasons.  
If you feel that you are being refused a social service (eg a house or education) for unjust administrative reasons, then you can demand these reasons in writing. |
| 35      | ARRESTED, DETAINED AND ACCUSED PERSONS | Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that protect their dignity.  
Prisoners cannot be treated in a discriminatory or undignified way just because of their HIV status (see Chapter 15 on page 343). |
Anyone can enforce their rights by bringing a case to court. The Constitution says that every court must promote the spirit and aims of the Bill of Rights whenever it makes a decision.

The Constitutional Court is the highest court in South Africa that hears cases about the Constitution. It was specially created to:

- Interpret the Constitution.
- Decide if a law or an action by someone violates the Constitution.
- Hear only cases involving constitutional rights.

Most of the cases heard by the Constitutional Court usually begin in a High Court. Once the High Court has made its decision, the Constitutional Court may be asked to decide if the decisions of the High Court are correct.

Going to court to enforce your rights is unfortunately very expensive and not everyone can afford it. There are, however, other ways for you to enforce your rights. The Constitution has established different statutory bodies with the task of protecting and promoting human rights.

**BODIES PROTECTING HUMAN RIGHTS**

- The Public Protector
- The South African Human Rights Commission
- The Commission for Gender Equality

Members of the public can make complaints to these bodies. They will then investigate the complaint and decide whether to take the case to court on behalf of the person complaining.
Are there limitations on your rights?

The Constitution recognises that some human rights may be "limited". It says that limitations must be:

- Set out in laws that treat everyone equally.
- "Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (s36).

**LIMITATIONS RESPECTING YOUR RIGHT TO DIGNITY AND EQUALITY**

- The rights of pharmaceutical companies to exclusive enjoyment of their intellectual property (through patents) may be limited because of the need to make essential medicines more affordable for poor people.
- The rights of people with HIV to privacy may not be limited on the grounds that employers want to know who has HIV.

If South Africa goes to war, faces a national emergency or if there is a massive breakdown of law and order, then some rights can be limited or withdrawn.

Some rights can be limited or withdrawn in special circumstances — for example, if the country goes to war.
RIGHTS THAT CAN BE LIMITED OR WITHDRAWN

- The right to freedom of movement
- The right to demonstrate
- The right to form a political party

But the Government will have to prove to the courts that these limitations are "strictly required by the emergency", and that there are no less restrictive ways of dealing with the situation.

RIGHTS THAT CANNOT BE LIMITED OR WITHDRAWN

Some of the rights in the Bill of Rights can never be taken away, even in a state of emergency, for example:

- The right to equality on the grounds of race and sex
- The right to dignity
- The right to life.
The Bill of Rights includes important rights that can be used to:
- End discrimination against people living with HIV or AIDS, and
- Improve their social and economic living conditions.

But the full achievement of these rights needs responsible action by everyone – and not just government or large employers.

Every individual, association, organisation, company and government body has a duty to respect the rights of others. This means that you are responsible for checking your own actions to make sure that they are not violating someone else’s rights.

**YOUR DUTY WITH MEDICAL RECORDS**

If you work in a place where you have access to someone’s medical records, it may be unlawful for you to talk about that person’s HIV status – unless you have written permission from the person to do this.

**DUTIES OF ALL PEOPLE**

Some rights in the Bill of Rights place a responsibility on all people and not just government, for example:
- Everyone has the right to privacy – this means we must all respect the right to privacy of other people.
- With the aim of developing a society based on human dignity, equality and freedom, we all have a responsibility to learn about, to enforce, to respect and to promote the rights of other people.

For more on enforcing rights, see 17.2 on page 399.
Talking points

1. Do you think HIV status should be treated as a disability in the equality laws? Or rather as a separate ground for non-discrimination?

2. What do you think national and provincial government should be doing to deliver socio-economic rights (like the right of access to health care and social security) to all our people? How do we answer their argument that they do not have enough 'available resources' to service all communities?

3. Mother-to-child transmission of HIV –
   - What can be done to prevent this?
   - What should Government's responsibility be?
   - What do our courts say?
LAWs

Americans with Disabilities Act, No 42 of 1990.


Disability Discrimination Act, 1992 (Commonwealth).


Rehabilitation Act, No 29 of 1973 (USA).

Policy Documents


Universal Declaration of Human Rights, UN, 1948.

Cases

Bragdon v Abbott 524 US 624.

Canada (Attorney-General) v Thwaites 1994 3FC 38.

Government of the RSA and others v Grootboom and others, 2000 (1) SA 46 (CC).
Grootboom v Oostenberg Municipality and Others, Cape of Good Hope Provincial Division, 2000 (3) BCLR, 277 (1).
Harksen v Lane No and Others, 1998 (1) SA 300 (CC).
Hoffman v South African Airways, 2001 (1) SA 1 (CC).
S v Jordan and Others, 2001 (10) BCLR 1055 (T).
Jordan and Others v S and Others, 2002 (11) BCLR 1117 (CC)
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and others, 2000 (2) SA 1 (CC).
Prinsloo v Van der Linde and Another, 1997 (3) SA 415 (O).
Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 430 (D).
Soobramoney v Minister of Health, 1998 (1) SA 765 (CC).
TAC and Others v Minister of Health and Others, 2002 (5) SA 721 (CC)
TAC and Others v Minister of Health and Others, 2002 (4) BCLR 396 (T)

REPORTS, MANUALS AND OTHER USEFUL MATERIALS


WEBSITES

AIDS Law Project: www.alp.org.za
AIDS Legal Network: www.redribbon.co.za/legal
Department of Health resources: www.aidsinfo.co.za
UNAIDS: www.unaids.org