Study guide

Legal Problems of HIV and AIDS (RHV 410)

Module Coordinator: Prof A G Nienaber
LEGAL PROBLEMS OF HIV AND AIDS  
(RHV 410)

I  GENERAL INFORMATION

1. Department of Public Law

The module Legal Problems of HIV and AIDS 410 (RHV 410) is presented by the Department of Public Law.

The module co-ordinator for RHV 410 is:

Prof Annelize Nienaber
Law Building Room 4-45
Tel (012) 420 5778

Consulting hours:  Tuesdays  09:30 – 12:20
                    Thursdays  09:30 – 12:20

The lecturers in the module are Prof Annelize Nienaber, Prof Frans Viljoen and Prof Anton Stoltz.

Departmental administrator:
Ms JM Larkin
Law Building 4-61
Tel: (012) 420 2415

General information can be obtained from the departmental administrator and messages for lecturers may be left with her.

Academic associate:
Ms Tracy Muwanga
Office: Law Building 4-46
Tel: (012) 420 3848
Email: tracy.muwanga@up.ac.za
Her consultation hours will be announced in class and on ClickUp.

2. Lectures in the module

2.1 There are two compulsory lectures per week:

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<thead>
<tr>
<th>Group</th>
<th>Day</th>
<th>Times</th>
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</thead>
<tbody>
<tr>
<td>English/Afrikaans</td>
<td>Fridays</td>
<td>11:30 – 13:20</td>
<td>Law 2-9</td>
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</table>

2.2 Five lectures are presented by the lecturer and guest lecturers. After these lectures, students choose and prepare topics to present to their fellow students during seminars. Please consult the dates indicated in this study guide for each
seminar – students need to thoroughly prepare responses to the prescribed reading for each seminar.

2.3 A **time-table** containing dates and topics for students to choose from will be placed on **ClickUp**. Each student must choose **two** topics to present to the class. Where students work on the same topic they are advised to consult one another so that no overlapping takes place.

The lecturer fulfils the role of facilitator during these seminars, and will sum up and add information at the end of each seminar. It is therefore essential that students prepare for seminars so that they may be actively involved.

**Seminars** progress in three phases: the lecturer introduces the topic; the student makes a presentation and other students participate by asking questions and by making comments; the lecturer concludes by placing the topic under discussion in a broader context and by concluding the discussion.

3. **Evaluation**

The semester mark is made up of the following:

| Assignment 1 | 40% |
| Assignment 2 | 40% |
| Class participation | 20% |

**Assignments:**
Students prepare essays or opinions on **two** of the lecture themes and present them orally (**between 2500 and 3000 words, all text included, please indicate word count**). A mark will be awarded for each of these essays, which will then each count 40% towards the semester mark (10% for the oral presentation; 30% for the written assignment).

**Class participation:**
20% of the semester mark is composed of class participation (sharing of views, intelligent interaction with prescribed work and fellow students, etc.) and class attendance is therefore compulsory.

4. **Examination**

A date for an open-book take-home (24/48-hour) exam will be arranged with students (most likely the 3rd week of October 2016 – around 21 October 2016). Receipt of papers and submission of answers takes place at Law 4-61 (Mrs Larkin’s office, 4th Floor, Law Building).

5. **Work programme**

<table>
<thead>
<tr>
<th>Date</th>
<th>Topic</th>
<th>Lecturer</th>
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<tr>
<td><strong>Lectures</strong></td>
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<tr>
<td>22 July</td>
<td>Module introduction &amp; overview</td>
<td>Prof Annelize Nienaber</td>
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<tr>
<td>29 July</td>
<td>No class</td>
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<tr>
<td>5 August</td>
<td>The origin, demographics and spread of HIV and AIDS</td>
<td>Prof Annelize Nienaber</td>
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<td>12 August</td>
<td>The politics of HIV and AIDS</td>
<td>Prof Annelize Nienaber</td>
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<tr>
<td>Date</td>
<td>Seminar Details</td>
<td>Speaker/s</td>
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<tr>
<td>19 August</td>
<td>The scientific context of HIV en AIDS</td>
<td>Prof Anton Stoltz: Head: Infectious diseases unit, Steve Biko Academic Hospital</td>
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<tr>
<td>26 August</td>
<td>HIV, AIDS and key populations</td>
<td>Prof Frans Viljoen</td>
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**Seminars**

- 2 September: Seminar 1
- 9 September: Seminar 2
- 16 September: Seminar 3
- 23 September: Seminar 4
- 30 September: Seminar 5
- 14 October: Seminar 6
- 21 October: Examination

**6. Basic texts**

- Fourie, P *The political management of HIV and AIDS in South Africa: One burden too many?* (2006)
LECTURE 1 MODULE INTRODUCTION & OVERVIEW
(PROF ANNELIZE NIENABER) (22/07)

Lecture themes:
1. Module introduction & overview
2. What is expected of students

PLEASE NOTE THAT THERE IS NO CLASS ON 29 JULY 2016.

LECTURE 2 THE ORIGIN, DEMOGRAPHICS AND SPREAD OF HIV AND AIDS
(PROF ANNELIZE NIENABER) (05/08)

Lecture themes:
1. The origin of HIV
2. The demographics and spread of HIV and AIDS
3. Reasons for prevalence patterns
4. Which age group in South Africa is affected most? What are the implications?
5. The debate regarding reliable statistics

Preparation and sources:


1. What do the most recent statistics show about the prevalence of HIV and AIDS
   a) globally
   b) in Africa
   c) in South Africa?
   Provide details.
2. Which factors lead to the high prevalence of HIV and AIDS in
   a) Sub-Saharan Africa, generally, and
   b) South Africa, specifically?

LECTURE 3 THE POLITICS OF HIV AND AIDS IN SOUTH AFRICA
(PROF ANNELIZE NIENABER) (12/08)

Lecture themes:
1. A discussion about aspects of the sociological context of HIV/AIDS (eg stigmatisation, the Nkosi Johnston saga)
2. What has the government’s response to HIV/AIDS been? Why?
3. Growing questioning of so-called ‘AIDS exceptionalism’. What are the arguments against ‘AIDS exceptionalism’? Why is HIV still treated differently?

Sources:
- Marais H To the edge (AIDS Review 2000), esp pp 30-41
- Fourie P (2006) The political management of HIV and AIDS in South Africa One burden too many?
LECTURE 4
THE SCIENTIFIC CONTEXT OF HIV AND AIDS
(PROF ANTON STOLTZ – HEAD: INFECTIOUS DISEASES UNIT, STEVE BIKO ACADEMIC HOSPITAL)  (19/08)

Lecture themes:
1. How is HIV transmitted? What is the likelihood of each mode of transmission, and what are the implications for the law?
2. What is the difference, medically speaking, between HIV and AIDS? How is each medically defined? What is the clinical image of each?
3. What is a CD4 count and a viral load and their relevance to HIV/AIDS?
4. What is the implication of the "window period" on criminal liability?
5. Show some of the implications of the targets of the HIV virus on employment policy and law.
6. What medical treatment is available? How does it work, and how costly is it?
7. What is a vaccine and what difference can it make?

Sources and preparations:
- Class notes
- Hoffmann v SAA 2000 (11) BCLR 1211 (CC), esp paras 11 to 15

LECTURE 5
HIV AND AIDS AND SO-CALLED KEY-GROUPS
(PROF FRANS VILJOEN)  (26/08)

Lecture themes, content & sources will be placed on ClickUp.

SEMINAR 1
HIV, AIDS AND NATIONAL AND INTERNATIONAL HUMAN RIGHTS LAW  (02/09)

Lecture themes:
South African law:
1. Bill of Rights: which rights are affected?
2. The principle of non-discrimination: Are HIV and AIDS included as a “disability” or otherwise in the list of prohibited grounds in section 9(3) of the Constitution, 1996? What are the implications of this?
3. Other legislation: Which Acts deal specifically with HIV/AIDS? What other legislation is of relevance? What are the implications of a supreme constitution for legislation which deals with HIV and AIDS?
4. What is the impact of African culture and customary law on the spread of HIV?
5. How effective is the law in curbing stigma and altering attitudes?

International law:
1. International Guidelines on HIV/AIDS and human rights: what is its status?
2. What place does international (human rights) law have in the South African legal system?
3. What are the international obligations arising from: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights;
Convention on the Rights of the Child; Convention on the Elimination of All Forms of Discrimination against Women?


Sources and preparation:
- HIV/AIDS and the Law (ch 3)
- Any compilation of international law instruments or <www.unhchr.ch>; for African regional instruments see www.up.ac.za/chr/ahrdb
- Pieterse M “Beyond the reach of law: HIV, culture and customary law” (2000) TSAR 428
- Eba P Stigma[ta] (AIDS Reveiw 2007)

SEMINAR 2 HIV, AIDS AND THE LIMITS OF PRIVACY (09/09)

Lecture themes:
1. Should AIDS be made a notifiable disease? What about HIV?
2. Should there be a legal duty on medical personnel to disclose the status of HIV-positive person to immediate family/sexual partners/spouse?
3. Should there be a legal duty on medical personnel to disclose his or her HIV positive status to patients?
4. Should there be a legal duty on HIV positive persons to disclose their status to sexual partners? Can the uninformed partners sue for damages (compensation)? What about those who have been informed?
5. What is routine testing, and what are the implications? Is routine testing constitutional, and should it be encouraged?

Sources and preparation:
- Amendment to Regulations as proposed by the Minister of Health (SK/GG 23 April 2000)
- Venter v Nel 1997 (4) SA 1014 (D&C)
- Ethical Guidelines: Health Professions Council of South Africa (HPCSA)
- NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)
• Slabbert MN “Parental access to minors’ health records in the South African health care context: Concerns and recommendations” (2004) 2 PER 165
• Nienaber AG and Van der Nest D “An exploration of the impact of a claimant’s HIV/AIDS status on a personal injury claim” (2002) 2 TSAR
• Blackbeard M “HIV/AIDS: The right to privacy vs the right to life” (2002) 65 THRHR 232
• Van Wyk C “Pregnancy and HIV in South Africa: Women’s right to be informed” (2007) THRHR 584

SEMINAR 3 HIV, AIDS AND ACCESS TO MEDICAL CARE (16/09)

Lecture themes:
1. Does a HIV positive person, in general, have an enforceable right to anti-retroviral treatment at state expense? What is the present policy of the Department of Health?
2. Do HIV positive mothers and their children have a right to Nevirapine at state expense?
3. Do HIV positive mothers have a right to continuous treatment after the birth of their children, at state expense?
4. Do mothers have the right to refuse such treatment for themselves/their children?
5. Do rape victims have the right to anti-retroviral treatment at state expense?
6. May medical aid schemes take into account HIV/AIDS in their policies?
7. Does greater access to medication justify “routine testing”? Why would it / could it?
8. Has human rights undermined an effective public health response?
9. Does the intellectual property regime contribute to the lack of access to affordable medicines?

Sources and preparation:
• Berwick D “We all have AIDS’: Case for reducing the cost of HIV drugs to zero” (2002) British Medical Journal 214
• Cameron E “AIDS denial and Holocaust denial: AIDS, justice and the courts in South Africa” (2003) SALJ 525
• Heyns A “Risk of transmitting HIV and other diseases with a blood transfusion in SA” (1999) CME: Transfusion Medicine 854
• Ngwena C “Access to health care as a fundamental right: The scope and limits of Section 27 of the Constitution” (2000) Journal for Juridical Science 1
• Ngwena C “AIDS in Africa: Access to health care as a human right” (2000) SA Public Law 1
• Soobramoney v Minister of Health KwaZulu/Natal 1998 1 SA 765 (CC)
• Van Biljon v Minister of Correctional Services 1997 4 SA 441 (C)
• Medical Schemes Act 131 of 1998
• Minister of Health v Treatment Action Campaign (1) 2002 (10) BCLR 1033 (CC) (see also www.tac.org.za)
• Applicant v Administrator Transvaal 1993 4 SA 733 (W)
- Roundtable on scaling up HIV testing (2005) 8 Health and Human Rights 1

SEMINAR 4 HIV, AIDS AND CRIMINAL LAW (23/09)

Lecture themes:
1. Is the common law adequate in regulating criminal liability relating to the sexual conduct of people with HIV/AIDS?
2. May (and should) a convicted rapist be compelled to undergo an HIV test? Even as a suspect? What about those suspected and convicted of other crimes?
3. Should the law recognise an “AIDS panic” defence (eg to a charge of murder)?
4. Does the law have a role in addressing HIV-based stigma?

Sources and preparation:
- De Jager "VIGS: Moontlike gronndslae vir strafregtelike aanspreeklikheid van HIV-draers" (1991) TSAR 547
- De Jager "VIGS": Die rol van die strafreg" (1991) TSAR 212
- Partazis A "Against the criminalisation of HIV-related sexual behaviour" (1996) 62 THRHR 439
- Van Wyk C "The need for a new statutory offence aimed at harmful HIV related behaviour: The general public interest perspective" (2000) 41 Codicillus 2
- R v Cuerrier (1999) 127 CCC (3d) 1 (SCC)
- S v Moses 1996 (1) SACR 701 (C)
- Viljoen F (ed) Righting Stigma
- Phiri v S [2013] ZAGPPHC 279 (8 August 2013)

SEMINAR 5 HIV STATUS AND HIV TESTING (30/09)

Lecture themes:
1. Is it an offence for mothers with HIV/AIDS to breast-feed their babies? If not, should this conduct be criminalised?
2. Should HIV status play a role in adoption, child custody and access to fertility treatment?
3. Does the law deal appropriately with the situation of orphans?
4. May an employee ever be compelled to undergo an HIV test?
5. Can a prospective employee be compelled to undergo an HIV test? (The legal position in respect of HIV/AIDS in the workplace)
6. May insurance companies require HIV tests? May insurance companies exclude benefits on the basis of HIV status or AIDS death?
7. How should the results of such a test be treated?
9. May an HIV positive student be excluded from bursary and loans schemes at universities?

Sources and preparation:
- Bragdon v Abott 118 SCt 2196 (1998)
- Doe v University of Maryland Medical System Corporation 50 F3d 1261 (4th Cir 1995)
- Joy Mining Machinery, a Division of Harnischfeger (SA) (Pty) Ltd v NIMSA & Others (2002) 23 ILJ 391 (LC)
- PFG Building Glass (Pty) Ltd v CEPPAWU & Others (2003) 24 ILJ 974 (LC)
- Department of Education National Policy on HIV/AIDS for Learners and Educators, issued in terms of section 3(4) of the National Education Policy Act 27 of 1996
- C v Minister of Correctional Services 1996 4 SA 292 (T)
- Jansen van Vuuren v Kruger 1993 4 SA 842 (A)
- Watt B & Hamilton C "The High Court's failure to intervene to prevent an HIV positive mother breast feeding her baby" (December 1999) Child Right 16
- African Charter on the Rights and Welfare of the Child
- Lyerly AD & Anderson J “HIV and assisted reproduction, reconsidering evidence, reframing ethics” (2001) 75 Fertility and Sterility 843 -858 (on file)
- Committee on the Rights of the Child General Comment no 3 (32003)
- Hoffmann v SAA 2000 (11) BCLR 1211 (CC)
- The Employment Equity Act
- AIDS Law Project The case of “A” v South African Airways
- Department of Health National Policy on Testing for HIV
- Smit N “Some observations regarding the occurrence and management of HIV/AIDS in South African workplaces” 2005 TSAR 358

SEMINAR 6 HIV, AIDS AND MEDICAL EXPERIMENTATION (14/10)

Lecture themes:
1. Which human rights and ethical problems arise when HIV/AIDS medication or vaccines are tested on humans?
2. Have the rights of subjects in developing countries been violated through HIV research?
3. Is there an obligation on pharmaceutical companies who conduct trials involving experimental medication on subjects to provide these subjects with the successfully developed medication free of charge?

Sources and preparation:
- Van Oosten F “The law and ethics of information and consent in medical research” (2000) 63 THRHR 5
- Van Wyk C “Guidelines on medical research ethics, medial “experimentation” and the Constitution” (2001) 64 THRHR 3
- Nienaber AG “The researcher’s liability for HIV-related clinical research without the participant’s informed consent: South Africa’s common law, case law and legislation” THRHR (2008) 346