

ETHICAL AND HUMAN RIGHTS IMPLICATIONS OF THE HIV/AIDS PANDEMIC IN NIGERIA*

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INTRODUCTION

The HIV/AIDS pandemic is more than a war at present. The death rate from this disease from available informed data is far higher than that of the holocaust of any of the World wars with the attendant deleterious effects on families and communities the world over. No country or continent of the world is spared of this scourge. A study of existing literature on the subject betrays the frightening revelation of the poverty, failure and helplessness of medical science in combating this small virus, the HIV, which has become a veritable threat to human existence.¹

However, our task in this contribution is to address the many ethical and legal issues which may arise in the attempt to prevent, "treat" or control further spread of the HIV/AIDS. These would include, in some cases, the clash of medical ethics with the traditional or societal beliefs and values and, the fundamental human rights or other legal rights of the HIV/AIDS patient with societal beliefs or values. The ethical or legal obligations of the municipal government to victims of HIV/AIDS on the one hand and those of the international community to the government and people of underdeveloped countries on the other hand, will also enjoy our focus.

I. HIV/AIDS AS A HUMAN RIGHTS PROBLEM:

Simply explained, human rights are inalienable, natural and inherent rights essential to the human nature or personality which are enjoyed by an individual by virtue of the fact that he is a human being. These rights are so supremely sacred that no person may be deprived of any of them without a great affront to justice. They constitute claims by individuals and groups against the community or the State and, in some cases, claims against individuals. These rights are recognized by law both municipal and international. Since the cessation of hostilities of the Second World War, the international community has been greatly involved in the struggle to guarantee to human beings these fundamental and inalienable rights which may be conveniently classified into **first generation rights** – Civil and Political Rights - and the **second generation rights**- Economic, social and cultural rights.² The first generation rights include the right to life, liberty, and security of person; freedom from slavery and torture; equality before the law; protection against arbitrary arrest, detention or exile; the right to fair trial; the right to own property; political participation; the right to marriage; the fundamental freedoms of thought, conscience and religion, opinion and expression, freedom of peaceful assembly and association and the right to take part in the government of one's country.³ The second generation rights,⁴ amongst others,

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¹ See generally, AIDS in Africa, edited by Max Essex, Souleymane Mboup, Phyllis J. Kanki, and Mbowa R. Kalengayi, Raven Press Ltd., New York, 1994.

² See Professor A. A. Adeyemi's Speech as the Dean of Law and Co-ordinator of the Human Rights Centre, University of Lagos to the Workshop on Human Rights Training in the Twenty-first Century: The Role of Law Faculties, at the University of Lagos on 29th August, 2001; Ladan, M.T. Introduction to International Human Rights and Humanitarian Laws, Ahmadu Bello University Press, 1999 p.45.

³ These are generally contained in Articles 1 – 21 of the Declaration. See also the International Covenant on Civil and Political Rights 1966 otherwise known as the Political Covenant.

⁴ These are contained in Articles 22 – 29 of the Declaration. See also the International Covenant on Economic, Social and Cultural Rights 1966 otherwise known as the Economic Covenant.

include the right to work, equal pay for equal work; the right to join trade unions, the right to adequate standard of living and the right to education.⁵

Various international instruments contain guarantees of these rights. Indeed, it is in recognition of the importance of these rights that the United Nations Charter (1945) begins with the following declaration in its preamble:

“We the peoples of the UN determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human persons, in the equal right of men and women and nations large and small...”

This was followed by the Universal Declaration of Human Rights⁶ by the General Assembly of the United Nations in 1948. Other international instruments containing these rights include The African Charter on Human and People’s Rights⁷ 1981, the European Convention on Human Rights 1950,⁸ The European Social Charter⁹ 1961 and the American Convention on Human Rights¹⁰ 1969.

The Constitution of the Federal Republic of Nigeria 1999 has entrenched most of these Civil and Political rights in its Fundamental Human Rights provisions¹¹ thus rendering them enforceable against the State. Most of the social, economic and cultural rights are also contained in the Fundamental Objectives and Directive Principles of State Policy contained in the same Constitution.¹² Although not justiciable, it is submitted that these Principles have however acquired the status of standards which any reasonable government should respect and by which the citizens may judge its performance.

It is submitted that the HIV/AIDS pandemic is a threat to the realization of these rights in any society at present and it must be seen in its true perspective as a great human rights problem.

II. THE RIGHT TO HEALTH AS A HUMAN RIGHT

Although the right to health is not specifically referred to as a human right in the Universal Declaration of Human Rights, Article 25 of the declaration recognizes the rights of every person to a standard of living adequate for the health and well-being of himself and his family, including medical care. Other international instruments have declared the enjoyment of the highest attainable standard of health as one of the fundamental rights of every human being without discrimination. The World Health Organization’s Constitution rightly contains this declaration. Article 12 of the UN International Covenant on Economic, Social and Cultural Rights 1966 and, indeed, the African Charter on Human and Peoples’ Rights¹³ 1981 also affirm the right of an individual to enjoy the highest attainable standard of physical and mental health. These include the prevention, treatment, and control of epidemic, endemic, occupational and other diseases. The declaration of Alma-Ata¹⁴ (1978), the

⁵ The third and fourth generation rights are gradually evolving though this has already given rise to some debate as to their exact nature, content and application. See Chy Ben-Ezenekwe Esq, “Teaching of Human Rights Education in a Multi-cultural Society”, being paper presented at the Workshop on Human Rights Training in the Twenty-first Century: The Role of Law Faculties, at the University of Lagos on 29th August, 2001.

⁶ See General Assembly Resolution 217A (III), G.A.O.R. Third Session Part I, Resolutions P.71.

⁷ This came into force in 1986. It was adopted by Nigeria in 1983 by virtue of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria, 1990. As for the status of this Charter vis-à-vis the municipal laws, see General Sani Abacha and ors. V. Chief Gani Fawehinmi (2000) 6 N.W.L.R. (Pt.. 660) p. 228

⁸ This came into force in 1953

⁹ This came into force in 1965

¹⁰ This came into force in 1978

¹¹ See Chapter 4, Section 33 - 46

¹² See Chapter 2, Section 13 - 24

¹³ See Article 16 thereof

¹⁴ This was the product of the International Conference on Primary Health Care held on 12th September 1978

Convention on the Rights of the Child¹⁵ 1989 and the OAU Charter on the Rights and Welfare of the Child¹⁶ (1990) also contain similar declarations on health as a fundamental human right.

It is submitted that when Article 3 of the Universal Declaration of Human Rights, Article 6 of the Political Covenant and Section 33 of the Constitution of the Federal Republic of Nigeria 1999 on the right to life are read together with the above Covenants and declarations, the effect would be clearly to elevate the Right to Health as a Fundamental Human Right deserving of respect and protection by any responsible government. It is suggested that Nigeria should take a cue from the good example of India which has found a way to enforce these rights through the invocation of such civil and political rights as the right to life and to the dignity of the human person contained in the Constitution. This would clearly be in consonance with the U.N. General Assembly resolution adopted in 1950 to the effect that “the enjoyment of civil and political rights and economic, social and cultural rights are interconnected.....”

It is submitted that the HIV/AIDS problem is the greatest threat to the right to life at present which ought to be addressed by municipal governments and the international community. Life cannot be sustained through the provision of food, shelter and clothing alone. The provision of adequate medical and health facilities for all persons as contained in the Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution should be seen as an integral part of the right to life. This is because the right to life will be meaningless without a corresponding provision for medical and health facilities for prevention, treatment and control of diseases like the HIV/AIDS. Whether the responsibility is described as ethical or legal, each government must rise to the occasion in the present circumstance, since HIV/AIDS is a great monster which cannot be left for an individual to contend with. Like an invading army HIV/AIDS must be fought to submission by a responsible government if the citizens are to have any measure of confidence in it. Failure to discharge this responsibility amounts to abdication of its mandate and the right to govern.

III. HIV/AIDS AND THE RIGHT TO PRIVACY AND CONFIDENTIALITY

The individual has the right of confidentiality and privacy in personal matters such as his health status and sexual relationship. It is hinged on the right to the dignity of the human person and to privacy as human rights¹⁷. However, this is not only a legal issue but also part of the moral values of the society as well as medical ethics. Without this right, it would be difficult for a patient to discuss his health problems with his doctor, hence the integration of confidentiality in medical ethics even aside from the human right perspective, is a welcome development.

However, privacy and confidentiality have to be considered with reference to our traditional and cultural values. Under our culture, illness is not always regarded as a private or individual matter. Because the basic unit of the society is not the individual but the family,¹⁸ the family members have a moral or ethical right to know about the state of health of the individual especially in respect of such serious illness as HIV/AIDS. After all, they also have a moral obligation to assist in the treatment of the patient/member of the family with the HIV/AIDS. It is submitted that members of the family, such as the wife or wives, or husband as the case may be, and those who will be taking care of the patient – all those who are put on risk – have a corresponding right to information as to the health status of the HIV/AIDS patient despite his right to

¹⁵ See Article 24 thereof

¹⁶ See Article 14 thereof

¹⁷ See Sections 34 and 37 of the Nigerian Constitution of 1999.

¹⁸ See Article 16 (3) of the Universal Declaration of Human Rights 1948 and Article 23 of the Political Covenant.

privacy and confidentiality. In essence, the right to privacy and confidentiality should only be extended to protect personal decisions that are implicit in the concept of ordered liberty or those that are deeply rooted in our history, culture or tradition. The information however, need not be made available to all the members of the family. Apart from those who are put on risks, it is suggested that the HIV/AIDS patient should be allowed the choice of the members of the family who may be informed about his health status in furtherance of his right.

Accordingly, there should be a reasonable balance between the HIV/AIDS patient's right to privacy and confidentiality and respect for the rights of others on the one hand and the traditional/cultural practices and values of our society. This is because of one very important observation which is necessary for appreciation in this discussion - **that even fundamental human rights are not absolute**. The rights of one person end where those of another or other persons begin. The Nigerian Constitution contains express limitations on the human rights guaranteed under it – right to life, privacy, peaceful assembly, freedom of movement etc. Indeed, derogations from these rights may also be by implication in some areas such as this. Accordingly, the rights of the HIV/AIDS patient must be interpreted with due consideration and regard for the rights of other persons and the overall survival of the society.

IV. HIV/AIDS AND CONSENT TO TREATMENT OR MEDICAL TEST

The doctrine of informed consent protects the individuals right to bodily integrity, personal dignity, autonomy and self-determination and this includes the right to take decisions for himself. This confers on the individual, for instance, the right to refuse a medical test or treatment, advice or counsel even if his doctor or family considers this as necessary for his health. This may not involve much problem in respect of sicknesses that do not pose a threat to the patient's life. In Gillick v. West Norfolk and Wisbech Area Health Authority and Another,¹⁹ the Department of Health and Social Security issued a circular containing guidance to doctors on the provision of contraceptive advice and treatment to young girls. Mrs. Gillick took the Department to court seeking declarations that the circular was unlawful and that her local health authority should guarantee that her daughters below 16 years of age would not be given contraceptive advice and treatment without her consent. She failed - her consent was not considered absolutely necessary, provided her daughters were mature enough and well - informed to appreciate the implication of the request and utilize the advice or treatment to be rendered. The impeccable reasons for this decision by the House of Lords (England) are so instructive and educative to be reproduced here. The Law Lords held:

- (1) Having regard to the reality that a child became increasingly independent as it grew older and that parental authority dwindled correspondingly, the law did not recognize any rule of absolute parental authority until a fixed age. Instead, parental rights were recognized by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind. Accordingly, a girl under 16 years of age, did not, merely by reason of her age, lack legal capacity to consent to contraceptive advice and treatment by a doctor.
- (2) It followed that a doctor had a discretion to give contraceptive advice and treatment to a girl under 16 years of age without her parents' knowledge or consent provided the girl had reached an age where she had a sufficient

¹⁹ (1984)1 All E.R. 365, (1985)1 All E.R. 533; (1985)3 All E.R. 407 (House of Lords).

understanding and intelligence to enable her to understand fully what was proposed, that being a question of fact in each case.

In the Nigerian case of Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo²⁰ the Supreme Court of Nigeria upheld the personal decision of a Jehovah's Witness to refuse consent to blood transfusion in exercise of this right.

However, when considering a serious illness like the HIV/AIDS and in the context of our culture/tradition where the family is superior to the individual, the family's consent may have to be considered without necessarily dispensing with that of the individual HIV/AIDS patient. Where, for instance, a patient is resisting treatment or management for no just cause when the family is willing to sponsor it, it is suggested that the decision of the family should prevail in the interest of the patient in such a situation.

V. THE HIV/AIDS AND FREEDOM FROM DISCRIMINATION AND STIGMATISATION

Like some other dreaded diseases such as epilepsy, leprosy, tuberculosis and mental illness, AIDS has been accompanied by prejudice, stigmatization and discrimination. The stigma associated with AIDS is partly due to misinformation and lack of knowledge about its mode of transmission. Some think that the disease is contagious and therefore try to avoid or isolate the patient. The same attitude of discrimination and isolation is seen in others because the illness is mainly associated with socially unfavoured behaviour or unsanctioned activities such as sexual intercourse with multiple partners or indeed, prostitution. Yet others fear that the illness is genetic and may be passed from generation to generation and any marriage with a member of such family may lead to transmission of the disease. These fears inevitably result in discrimination and prejudice against the HIV/AIDS patients in workplaces, educational institutions and other places.

The Nigerian Constitution 1999 entrenches freedom from discrimination as a fundamental human right.²¹ The Fundamental Objectives and Directive Principles of State Policy in the same Constitution provide for equality of rights, obligations and opportunities before the law.²² Various international instruments, also contain similar declarations of equality in dignity, rights and opportunity for all persons. Such instruments include the Universal Declaration of Human Rights²³ 1948, the UN Declaration of the Rights of Disabled Persons 1975, World Health Assembly Resolution WHA 41.24,²⁴ the latter of which specifically calls for non-discrimination against HIV/AIDS patients, the African Regional Conference on AIDS and Human Rights,²⁵ 1990. These may furnish the ethical and legal foundation for non-discrimination against HIV/AIDS patients.

It is doubtful however, whether these laws and instruments alone can affect the minds and hearts of the people to change their attitude towards the HIV/AIDS patients given the above background. It is suggested that these laws and instruments should be combined with other strategies such as public education, counseling and enlightened health policies to serve as effective check on discrimination and stigmatization, at least on the long run.

VI. MISCELLANY OF ETHICAL IMPLICATIONS

²⁰ Unreported, Suit No SC. 213/1999 delivered on 2nd March, 2001.

²¹ See Section 42.

²² See Section 17.

²³ See Articles 1, 2, 7 and 10.

²⁴ This was adopted by the 45th World Health Assembly in 1988.

²⁵ The Conference was held in Brazzaville, Congo.

The problem of HIV/AIDS raises some other ethical considerations in respect of Drug and Vaccine distribution. The disparity between the developed and underdeveloped countries in wealth and resources would appear to impose some ethical obligations on the former to assist the latter in the procurement of drugs and vaccines in the interest of humanity. Researches also need to be sponsored to enable the underdeveloped countries discover more effective ways of controlling the rapid spread of the disease. Without this, the resolutions and declarations sponsored by the developed countries in respect of the control and treatment of HIV/AIDS will only amount to lip service which would be untenable.

In the same way, a national government owes its citizens ethical obligations in this regard rather than leave this all important health problem of AIDS to the individual patient. In tertiary institutions for example, government may have to sponsor regulations whereby medical tests for HIV/AIDS have to be undertaken as a condition for matriculation. Also, in the case of employment in the public sector of the economy such tests have to be a condition. The question may be asked as to the utility of such test. Such test would reveal the HIV/AIDS patient, not necessarily for public information but to enable the institution make adequate arrangements for the treatment or management of the patient. This will also enable the patient to know about his health status and therefore cooperate with the institution concerned. Accordingly, the patient need not be denied matriculation or employment by reason only that he is an AIDS patient. One important consequence of this suggestion is that it would appear to lay on the government or institution concerned the burden or responsibility to establish the necessary health care facilities for the treatment or management of the disease before undertaking such tests, otherwise they will be meaningless.

HIV/AIDS tests will also be necessary as a condition for marriage and religious institutions have to be so directed. This suggestion must be taken very seriously especially as it has been proved that ninety-nine percent of HIV/AIDS transmission is through sexual intercourse. The issue of confidentiality does not arise here. The intending couple must submit to the test the result of which will be revealed only to them and the marriage minister. However, where they insist that they would marry despite the fact that one of them is HIV/AIDS positive, it seems that they would be allowed to marry with this sentence of death!²⁶

The above suggestion of medical tests may be contested by some people who may regard it as invasion of their privacy. However, as has already been submitted, such action of government can be justified as a necessary derogation or limitation on individuals rights in the interest of the survival of the nation.

In addition, attempt should be made to prohibit deliberate spreading of HIV/AIDS by patients although this may be difficult to enforce especially as the incubation period of the disease is long and a carrier may not know until too late. Also, since AIDS is already a sentence of death, what will be the appropriate punishment/penalty to be imposed to serve as deterrent to the patient as well as others? Notwithstanding this however, a legislation in this regard is overdue and absolutely necessary in view of the present wicked practice of some HIV/AIDS patients in deliberately spreading the disease with the indefensible logic that they are entitled to do so since they contracted the disease through someone else.

VII. SUMMARY/ CONCLUSION

From the foregoing discussion, the following facts emerge:

- (1) Ethical considerations would be necessarily involved in the prevention, treatment or management and control of HIV/AIDS in Nigeria. This is true of

²⁶ There is already a precedent in Nigeria where a man married an HIV/AIDS victim against the wishes of his parents and the church. After all, they can marry outside the Church.

medical ethics, the obligations of the municipal government, the developed countries and the international community.

- (2) Our cultural and traditional beliefs and values also affect to some extent, the attempt to prevent, treat, manage or control the spread of HIV/AIDS in Nigeria.
- (3) The treatment, management and control of HIV/AIDS also involve some legal implications on the part of the doctor, patient, the caregivers and the municipal government.
- (4) However, neither medical ethics, nor cultural/traditional beliefs and values nor legal instruments alone have the solution to the HIV/AIDS problem.
- (5) The solution to the problem of HIV/AIDS pandemic would therefore rest not in the isolated or independent efforts but the recognition, combination, co-operation and “marriage” of the contributions from these indispensable partners – ethical, traditional/cultural values and legal principles/instruments.