



Legal and institutional framework for the protection of persons living with HIV and AIDS in Nigeria: Issues

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Abstract

HIV infection and AIDS in Nigeria remain a major public health crisis and are one of the most common causes of death in Nigeria with about 250,000 infections occurring annually. In an environment that is filled with stigma and discriminatory attitudes and practices against persons living with HIV and AIDS, such persons will likely have difficulty accessing information, counselling, and support services that would prolong their lives. They may also be reluctant to disclose their status to seek assistance for fear of repercussions. The need to protect and promote the rights of persons living with HIV/AIDS is therefore imperative. This work examined the legal and institutional framework for the protection of persons living with HIV and AIDS in Nigeria with a focus on the 1999 Constitution of the Federal Republic of Nigeria (as amended), The HIV/AIDS Anti-Discrimination ACT 2014 and the Rules of Professional Conduct for Medical and Dental Practitioners 2008. The work also highlighted the role of governmental and non-governmental institutions like the Federal Ministry of Health, the National Human Rights Commission and the National Agency for the Control of AIDS (NACA) in ensuring the protection of Persons living with HIV and AIDS. The work concluded with some recommendations which the researcher believes will enhance the disposition or attitude of members of society towards persons living with HIV and AIDS in Nigeria.

Keywords: HIV/AIDS, protection, persons, Nigeria, framework

Introduction

HIV infection and AIDS in Nigeria remain a major public health crisis and one of the most common causes of death in Nigeria ^[1]. The HIV and AIDS problem is one of the greatest threats to the right to life at present and it ought to be addressed by government and non-governmental institutions at all levels having claimed an estimated 42.3 million lives to date ^[2]. This is expedient because it poses a serious challenge to global health and public safety and what is more is that the nature of the disease coupled with the special care and treatment required for patients pose daunting challenges. The fact is that HIV and AIDS have been accompanied by prejudice, stigmatization and discrimination partly due to misinformation and lack of knowledge about its mode of transmission. The situation is worrisome because some even believe that the disease is contagious and they try to avoid or isolate the patient. This research on the legal and institutional framework for the protection of persons living with HIV and AIDS in Nigeria is a response to the prejudices and stereotypes surrounding the subject matter and the need to evaluate the legal and institutional safeguards in place for the protection of persons living with HIV and AIDS in Nigeria.

Legal Framework for the Protection of Persons Living With HIV and AIDS In Nigeria

The legal framework for the protection of persons is both institutional and statutory. They include but are not limited to the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Fundamental Rights Enforcement (Procedure) Rules 2009, HIV and AIDS Anti-Discrimination Act 2014, and Rules of Professional Conduct for Medical and Dental Practitioners 2008.

1. Constitution of the Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria, 1999 is the ground norm from which every other law derives its validity. Chapter IV of the Nigerian Constitution provides for the protection of the fundamental rights of its citizens as enshrined under the said law. The right to life, dignity of the human person, right to private and family life and right to freedom from discrimination as enshrined under Sections 33, 34, 37 and 42 directly relate to confidentiality which this research focuses on.

i. Right to Life

The right to life is a first-generation right and is arguably the most important of all rights known to mankind. The right to life is an inalienable right and individuals cannot forfeit it. The right to life is provided for in Section 33 of the Nigerian Constitution. It states that "every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence at which he has been found guilty in Nigeria. Thus, every person is entitled to respect for their life and safety. This right however is not absolute but qualified as held in the case of *Kalu v. State* ^[3]. In jurisdictions like India, the right to life is given a more holistic interpretation which includes the right to health and the right to food. This position adopted by the Indian Courts is understandable because one cannot have a right to life without access to basic health care and a decent livelihood. In the Indian case of *Frannus v Union Territory of Delhi* ^[4], the court held that there is a close nexus between life and means of livelihood. The right to life must be interpreted broadly to ensure the protection of the right to live in a humane and dignified manner. The right to health implies the right to the best form of physical and mental well-being. It also means that access to medical treatment is made available to all regardless of

one's health status^[5]. Even though this right is not provided for under Chapter IV of the Constitution, it is provided for under Chapter II i.e. Fundamental Objectives and Directive Principles of State Policy. Though it may be argued that the items under Chapter II are non-justiciable, it can be argued that what makes life meaningful must be deemed an integral part of the right to life. To ensure the protection of the right to life of persons living with HIV and AIDS the Nigerian courts need to adopt a more purposive approach by expanding the interpretation of the right to life to include the right to health as is the case in other jurisdictions.

ii. Right to Dignity of Human Person

The right to human dignity includes the prohibition of inhuman treatment. This right is contained in Section 34 of the Nigerian Constitution. The Section states that "every individual is entitled to respect for the dignity of his person and accordingly no person shall be subjected to torture or inhuman and degrading treatment^[6]." This right is violated when a person living with HIV and AIDS is mistreated by a fellow human being simply because of his HIV and AIDS status. Thus where a health worker refuses to treat a patient or where an employer denies him employment or his movement is restricted, his right to human dignity is violated^[7]. In the South African case of *Hoffman v South African Airways (SAA)*^[8], the appellant was subjected to a pre-employment medical examination which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and suitable for employment, however, the blood test showed that he was HIV positive and the medical report was altered to read that the appellant was HIV positive and therefore unsuitable and was subsequently denied employment. The appellant challenged the decision and succeeded. The court stated that the treatment of people who are HIV positive must be based on reasoned and medically sound judgment, and they must be protected against prejudice and stereotyping. This decision by the court is quite commendable as it preserves the essence of human dignity.

iii. Right to Private and Family Life

According to section 37 of the 1999, CFRN, the privacy of persons is guaranteed and protected. Thus an individual has the right of confidentiality and privacy in personal matters which includes his health status. This right is not only legal in nature but also forms part of the moral values of society and the ethics of the medical profession. It will be difficult, if not impossible for a patient to discuss his/her health problems with the medical personnel concerned when the patient is not convinced that his information will be kept confidential. The right to private and family life also encompasses the obligation to respect physical privacy, including the obligation to seek informed consent to HIV testing and privacy of information, including the need to respect the confidentiality of all information relating to a person's HIV status.

The right to privacy is important to people living with HIV and AIDS because they are usually stigmatized and subject to cruel, inhuman and degrading treatment. This right is also recognized by Article 17 of the International Covenant on Civil and Political Rights. A failure to guarantee this right has contributed to the spread of the pandemic. The right to privacy is violated when an HIV test is conducted without informing the patient or seeking his or her consent or when

an employee is compelled to undergo a compulsory HIV test by his employer. There is also a concern with the position of many religious organizations and leaders who ensure mandatory premarital HIV testing policies. While premarital HIV testing has a benefit and helps intending couples make informed decisions, it is suggested that this testing should be made voluntary and decisions taken by them respected^[9].

iv. Right to Freedom from Discrimination

The Nigerian Constitution provides under section 42 that every person is equal before the law and no one should be discriminated against based on grounds of birth, social status, gender or religious background. Discrimination is a serious psychological problem that affects the totality of a being. One of the greatest problems people living with HIV/AIDS encounter in Nigeria is stigma and discrimination which is experienced in many facets of human endeavour, such as in the hospital, workplace and at home^[10]. In Nigeria, workplace discrimination based on HIV/AIDS status is shrouded in secrecy, primarily because people living with HIV/AIDS are constrained to suffer in silence, when their employment is terminated for no other reason than their health status, rather than seek legal redress and risk stigmatization and ostracization^[11]. In the case of *Georgina Ahamefule V. Imperial Medical Centre & Dr. Alex Molokwu*^[12], Mrs Georgina Ahamefule, was an auxiliary nurse in the employment of Imperial Medical Centre, Lagos, until the year 2000 when her employment was terminated on the ground of her HIV-positive status. The termination letter indicated that the hospital management could not compromise the facility of its patients by exposing them to the risks associated with her health status. She suffered additional injuries as a result of the treatment meted out to her and even had a miscarriage. She challenged this decision in court and The Lagos State High Court ruled that the purported termination of her employment is illegal, unlawful and actuated by malice and extreme bad faith.

The above case is an example of the many cases bordering on discrimination against persons living with HIV/AIDS. The research views the decision as commendable even though the matter suffered from intractable delays as it took about twelve years for the case to be concluded. To avoid such delays, there is a need to strengthen judicial institutions and for the courts to engage in judicial activism by focusing on substantial justice rather than recourse to technicalities.

2. HIV and AIDS Anti-Discrimination Act 2014

The HIV and AIDS Anti-Discrimination Act 2014, (referred to as the Anti-Discrimination Act) was signed into law on February 3, 2015. The Act made provisions for the prevention of HIV-related discrimination and provides access to healthcare and other services. The Anti-Discrimination Act also provides for the protection of the rights and dignity of people living with and those affected by AIDS in Nigeria. The Act includes eliminating all forms of discrimination based on HIV Status, and creating a supportive environment so that people living with HIV and AIDS can continue working under favourable conditions for as long as they are medically fit to do so^[13]. It also seeks to create a balance between the rights and responsibilities of all persons in the society and giving effect to human rights guaranteed in Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and obligations under international and regional human rights and other instruments^[14].

The Act provides that people living with or affected by HIV or AIDS have a right to freedom from discrimination based on their real or perceived HIV status concerning access to and continued employment ^[15, 16].

The Act underscores the need for the protection of the rights of people living with HIV and provides that all people in all settings shall take steps to protect the human rights of people living with or affected by HIV or AIDS. The Act provides for the right to take affirmative action that no individual, community, institution, or employer shall discriminate, directly or indirectly, against any person in the society based on the person's HIV status and HIV-related illness ^[17]. The Act defines affirmative action to include measures designed to ensure that people living with or affected by HIV or AIDS enjoy equality of opportunities and treatment about employment and occupation, to identify and eliminate barriers which adversely affect people living with and affected by HIV and AIDS and to further diversity (including gender diversity) in the society based on equal dignity and respect for all people ^[18].

The Act prescribes it is an offence to discriminate against any person based on their real or perceived HIV status and also prohibits the refusal to accept and offer treatment by qualified medical personnel, except in such cases when the special care or facilities specifically required for treatment of HIV or AIDS does not exist in that health facility ^[19]. It is also an offence to refuse to admit into school or not to allow such persons to continue in an educational institution, or deny access to religious or worship areas and services, communal places, residential spaces and other social facilities. The Act provides that persons should not be deprived of the right to an elected or appointed public or private office or admission to a public or private function. The Act makes it an offence to prohibit such persons from marrying anyone of their choice provided the latter's informed consent is obtained in the right frame of mind and he or she is informed about his or her partner's HIV status ^[20]. More relevant sections include sections 9, 13 and 24 which deal with issues about HIV counselling and testing, confidentiality and legal enforcement respectively.

There is now a need to shift attention to implementation and to achieve this, awareness of the law needs to be created, as knowledge of law helps promote better compliance. It is hoped that the law will ensure a gradual reduction and ultimately bring an end to acts of discrimination against people living with the disease and dedication to stopping all forms of discrimination targeted at people living with HIV. The onus now lies on the relevant agencies and organizations to ensure that full implementation of the law commences.

3. Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria 2008

The Rules of Professional Conduct for Medical and Dental Practitioners known as the Code of Medical Ethics was designed to ensure that every medical and dental practitioner practices the profession with conscience and dignity, within the limits of the provision of the code thus bringing the incidence of ethical violations to the barest minimum ^[21]. Parts A, B, C and D are directly relevant to this work as they touch on the subject matter under consideration in this research work ^[22]. The code also provides that all medical and dental practitioners owe a duty of care to their patients in every professional relationship. It

provides that the particular skill which training and eventual recognition and registration bestow on a practitioner is to be exercised in a manner expected of any practitioner, or any other member of the professions of his experience and status ^[23].

On confidentiality, it states that the profession takes very seriously the ethic of professional secrecy. It provides that any information about the patient which comes to the knowledge of the practitioner in the course of the patient-doctor relationship is privileged information and should in no way be divulged by such practitioner to a third party ^[24]. This duty outlasts the doctor's employment and extends to his employees. Disclosure without the patient's knowledge and consent amounts to a breach of confidentiality. This duty to maintain a patient's secret subsists even after the patient has died ^[25].

4. Institutional Framework for the Protection of Persons Living With HIV and Aids

There is also a role which institutions play in the protection of persons living with HIV and AIDS. These institutions are both governmental and non-governmental.

1. Governmental Institutions

A Governmental institution is an agency of the government responsible for exercising oversight and administrative or specific functions of such agency. Governmental Institutions in Nigeria that operate to ensure protection of persons living with HIV and AIDS include, but are not limited to Federal Ministry of Health, National Agency for the Control of AIDS (NACA), National Human Rights Commission (NHRC).

i. Federal Ministry of Health

The guidelines of the Ministry are informed by the basic principles of equality, equity and social justice which align strongly with the Universal Declaration on human rights, as well as to promote universal access to comprehensive HIV/AIDS prevention, treatment and care for all persons in Nigeria. The guideline also focuses on pregnant women in the Prevention of mother-to-child transmission (PMTCT) and all persons who are at risk of contracting HIV infection are to be offered antiretroviral drugs as prevention ^[26]. The Ministry guidelines have also noted that the stigmatization of people living with HIV was a barrier to access to treatment adding that the government ought to step up its campaign against discrimination against people living with HIV and AIDS ^[27].

ii. National Agency For The Control of AIDS (NACA)

The National Agency for the Control of AIDS (formerly the National Action Committee on AIDS) was established in February 2000 to coordinate the various activities of HIV/AIDS in the country. Among other purposes, NACA's mandates are to coordinate and sustain advocacy by all sectors and at all levels for HIV/AIDS/STDs expanded responses in Nigeria, and develop the framework for collaboration and support from all stakeholders for a multi-faceted response to HIV/AIDS in Nigeria.

The Agency also serves to ensure that all parties in the war against HIV/AIDS see the National Strategic Framework as a framework for national and nationwide coordination of one response ^[28]. The Agency is mandated to provide overall coordination of the national response while State

Agencies for the Control of AIDS and Local Government Agencies for the Control of AIDS ensure the same in the States and Local Government Areas respectively. This responsibility entails establishing and sustaining relationships with diverse state and non-state actors at multiple levels. Currently, it interfaces five domains, State Agency for the Control of AIDS, Civil Society Organizations, Private Sector, Public Sector and Development Partners ^[29].

iii. National Human Rights Commission (NHRC)

The National Human Rights Commission was established by the National Human Rights Commission (NHRC) Act 1995 as amended by the NHRC Act 2010 in line with the resolution of the United Nations General Assembly which enjoins all member states to establish national human rights institutions for the promotion and protection of human rights. The commission serves as an extra-judicial mechanism for enhancing the enjoyment of human rights. Its establishment is aimed at creating an enabling environment for the promotion, protection and enforcement of human rights ^[30]. It also provides avenues for public enlightenment, research and dialogue to raise awareness of human rights issues. The commission is headed by the Executive Secretary who is also the Chief Executive Officer (CEO) with six departments in the administrative structure of the commission ^[31].

The complaint mechanism can be accessed by any people in Nigeria whose human rights have been violated, or by their agents to the chairman of the commission in writing. A complaint can also be submitted orally to a representative of the commission at the offices of the Commission. A complaint made orally must be transferred into writing by the officer or representative to whom it is made. For a claim to be admissible, the full information of the complaint, the facts in its support as well as the reliefs sought must be included. A complaint must contain the full names and contact addresses of the complainant and the body of persons against whom the complaint is made ^[32]. The establishment of the National Human Rights Commission is commendable, but to achieve the purpose for which it was established, the commission needs to exercise its powers judiciously to ensure that victims of human rights abuses are given the protection required.

2. Non-Governmental Institutions

A Non-Governmental Institution or Organization is a citizen-based association that operates independently of government, usually to deliver resources or serve some social or political purpose. A non-governmental institution or organization is also a non-profit voluntary citizens' group organized on a local, national or international level. It is task-oriented and driven by people with a common interest. They perform a variety of services and humanitarian functions, bring citizen concerns to Governments, advocate and monitor policies and encourage political participation through the provision of information. Some institutions are organized around specific issues, such as human rights, environment or health ^[33]. Several Non-Governmental Institutions are organized around issues about HIV and AIDS. They include the AIDS Prevention Initiative in Nigeria (APIN), the Institute of Human Virology Nigeria (IHVN), and the United States Agency for International Development (USAID).

Conclusion and Recommendations

There seems to be a general acknowledgement of the need to bring HIV/AIDS policies and programs in line with international human rights law, however, it is rarely carried out in reality. That being said, policymakers, program managers, and service providers must become comfortable using human rights norms and standards to guide and limit the action taken by stakeholders, governmental and non-governmental in all matters affecting the response to HIV/AIDS.

This work has highlighted the legal and institutional framework for the protection of persons living with HIV and AIDS in Nigeria and discussed the need to have strong institutions that guarantee the safety of persons living with HIV and AIDS in Nigeria. If our institutions are strengthened, it will go a long way in facilitating the protection of persons living with HIV and AIDS in Nigeria and eliminate or mitigate incidences of discrimination and stigmatization of victims. It will also encourage persons affected by the disease to approach the relevant authorities to access available help.

The work therefore makes the following recommendations in light of the above discussion

1. Prevention is the major objective of the HIV and AIDS programme, therefore, people need information and education about the epidemic. Such information should emphasize modes of transmission and means of avoidance. If people are properly informed it will change their disposition or attitude towards persons living with HIV and AIDS.
2. The use of the mass media is also very imperative and both Governmental and Non-Governmental Organizations should be more involved in community advocacy and community education programs on HIV and AIDS, which should include messages in vernacular.

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