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## **Legal/Judicial Enforcement Approaches towards Prevention and Protection of Children Infected and Living with HIV/AIDS in Nigeria** (Pp. 183-197)

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### **Abstract**

*The issue of children living with HIV is a serious problem in Nigeria. This paper will assess the problem of children living /infected with HIV including the underlying reasons for increase in the number infected yearly. It is also going to discuss current measures to be employed by all the stakeholders to curtail this infection. It is included that the measures are insufficient to end this child HIV infection. The paper posits that the effective means to end this child infection would be on a number of procedures put in place with clear standards of enforcement and where possible sanctions. Child HIV infection is not only peculiar to Nigeria. It is an international problem and needs international solution. Nigerian should for all intents and purposes wake up towards eradicating and managing the problem.*

## **Introduction**

There is no doubt that the greatest health problem threatening the human race in these times is the HIV//AIDS pandemic. Children are the envy of every society because they are the people who will take the baton from us when we are no longer there. Only as we move closer to realizing the rights of these children will countries more closer to their goals of development and peace. The rate at which HIV is spread in the country is alarming, hence the more percentage of children who will be infected. The activities of adults help in the spread of this virus. There is no law particularly in place to protect these children from being infected. And were infected the treatment procedure. The constitution that makes provision for them under S.17 of the 1999 are not justifiable. The child's Rights Act 2003, though in existence have not been adopted by most states of the Federation. In the states where it has been adopted, machinery for implementation is still very weak and non-operational.

## **Legal Definition of a Child**

A child is usually defined in relation to age. There are varying definitions of a child, as there are varying areas of law. A child is a young human being who is not yet an adult (Garner, 2004). The customary definition of a child varies from one ethnic group to another as a result of non-unification of customary laws in Nigeria. Thus a boy child in one ethnic group remains a child until he is initiated into an age grade society or until he or she is old enough to contribute financially to community development while in another childhood terminates upon attaining puberty.

For purposes of this paper, a child was defined under the African Charter on the Right and Welfare of the Child (1999), the United Nations Conventions on the Right of the Child (1989) and the Child's Rights Act (2003) as a person under the age of eighteen years.

## **HIV/AIDS**

The Human Immune –Virus (HIV) and Acquired Immune Deficiency Syndrome are caused by the HIV virus which acts by gradually weakening the immune system, which defends the body. The result of this leads to non-resistance of infections in the body. The infirmed person continues to suffer infection after infection from other microbes as a result of the reduction of the defensive mechanism of the body. The syndrome is known as AIDS.

The HIV/AIDS epidemic is about 15 years old as was reported by (UNAIDS 2004) continues to ravage the human race with severe consequences on the future hope of the country. Presently, there is no cure for AIDS, though there are anti-retroviral medications to enhance and increase the immune system, the fear and ignorance often leads to discrimination, violence and loss of lives against those living with it, their families and their siblings.

The effect of this ugly situation resulted in the murder of a South Africa woman called Guga Diamini (Action Aid Nigeria 2002). When she publicly declared in 1998 that she was HIV positive, the murder according to the report was traced to her community who believed that they as well were not safe. In 2000, a man in Soweto murdered his wife, father-in-law and committed suicide after he and his wife were diagnosed HIV positive (Ngiya, 2008).

In Nigeria, a newspaper report in (Daily Guardian 2001) had reported of a young man who was found dead in a hotel room and on searches done by the police in his hotel room, a HIV result

test that read positive was found in his suit case and on further post-mortem test he died after injecting himself with a dangerous drug or poison. The devastating consequences and myths surrounding this disease condition are the concern of the writers to address some truths and lies as it concerns HIV/AIDS for the continued hope, precaution and protection for the future leaders of tomorrow.

### **Modes of HIV Transmission**

HIV can be transmitted from one person to another in a number of ways. In Nigeria, three transmission mechanisms are more important – bisexual contact, mother-to-child transmission referred to as (MTCT) and blood transfusions.

### **Factors that Contribute to Transmission of HIV/AIDS**

Several social, economic, and cultural factors contribute to the spread of HIV and AIDS in Nigeria. Some of these include the socio-cultural norms and values around sex, sexuality and gender relations like female genital mutilation (FGM) most communities define early initiation of sex through early marriage multiple sexual relations through polygamy. Most communities defined a set of ideals that drive norms, through unwritten policies.

In most instances, these “policies” are very powerful in shaping the sexual and health seeking behaviour or lack of it among the community members.

Other determinants driving the epidemic are poverty, livelihood choices, inadequate access to quality prevention information, skills and care products/services and finally the failure of Nigeria’s leadership to recognize the seriousness of HIV/AIDS and make it a priority issue needs to be in terms of attention and investment.

Under the child’s Rights Act (Constitution of Nigeria 1999), it also made provisions for the enforcement and protection of the right to health of a child. Similar provision are also stated under the Convention on the Rights of the Child (CRC 1989), the African Charter on Human and Peoples Right (ACHPR 1993) together with the African Charter on the Right and Welfare of the Child (ACRWC 1999).

There are also international declarations on HIV /AIDS

Millennium Development Goals (MDGs) – it has in its target 6 the provision to combat HIV/AIDS, malaria and other diseases

Abuja Declaration on HIV/AIDS-In this declaration, presidents of African countries pledged to set a target of allocating at least 15% of our annual budget to the improvement of the health sector

Dakar for framework for Action on Education for all-The governments, organizations, agencies, groups and associations represented at the world education forum pledge ourselves to implement as a matter of urgency education programmes and actions to combat the HIV/AIDS pandemic.

United Nations General Assembly on Security (UNGASS) Declaration-This body made a declaration of commitment on HIV/AIDS (“Global Crisis Global Action) where they resolved to lend huge financial support to African and to other poor continents For the treatment of HIV/AIDS.

## **Rights of an Unborn Child for Purposes of being prevented from HIV/AIDS**

### **Preamble**

The basic ethical duties of the doctor are to respect life and to serve humanity. In some instance the doctor may find him/herself in a situation, where these commitments are in contradiction with the society.

This is especially true when the life and well being of an embryo or foetus is in question.

The concepts of humanity and human rights have taken millenniums to evolve. Written “Bills of Rights” during the last few centuries have basically granted citizens protection against their governments and some power to announce individual opinions. Philosophers of the age of enlightenment maintained, as expressed in the United States Declaration of Independence (US Declaration of Independence 1776) that all people are “endowed by their creator with certain unalienable rights. These “natural rights” as it were, were distinct from “civil rights” approved by the governments. The United Nations (Universal Declaration of Human Right 1948) published the Universal Declaration of Human Rights (UOHR) as a standard for all nations with particular sentiments to the rights of any human being in its

Article I UDHR –

*All human beings are born free and equal in dignity and rights.*

In the declaration of the rights the UN declared in 1959 that: The child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth.

The (Child’s Right Act 2003) states:

A child may bring an action for damages against a person for harm or injury caused to the child willfully, recklessly, negligently or through neglect before, during or after the birth of that child.

### **Right of a child**

The Encyclopaedic dictionary (New International Dictionary 2004) defines a right as that done in accordance with or conformable to moral law or to some standard of rightness; equitable, just. It is also that which is conformable to a standard of propriety or to the conditions of the case; proper, fit; suitable and most desirable or preferable. Black’s Law Dictionary (B. A. Garner 2004) defines Right inter-alia as

A power, privilege or immunity guaranteed under a constitution, statute or decisional laws or claimed as a result of long usage.

In order to explain the right of a child and the ethical background of the doctor and make it understood and accepted by the general public, the World Medical Association gives a declaration on the rights of the unborn.

### **Beginning of life**

Life on earth has begun in ancient times and then developed into millions of different living species: The life of an individual human being begins with conception and ends with death.

### **Civil rights**

Societies have created their constitutions and other legal and moral codes, according to which rights are granted to the members of the society. The whole society is committed to defend these rights. Rights accumulate gradually with age, full rights of the society are usually granted when an individual reaches the full legal age.

### **Right to life**

The right to life is the most basic of all rights, and belongs also to the embryo in a mother's womb. Societies have to provide legislation concerning events that invade this right.

The physician respects all forms of life. Different societies have in laws or otherwise defined at which stage the life of an embryo or foetus is protected like the life of a new-born baby. RIGHT TO BE BORN WANTED

Every child has the right to be born in a socially safe environment and have a mother and a father.

To avoid unwanted pregnancies young people should early enough be taught a responsible attitude in the establishment of a family and in getting own children. They have to be taught the basic facts of reproduction and be informed about family planning and contraception. Counselling ought to be accessible to all.

### **Right to healthy development**

The pregnant woman must not be exposed to work or environment which could carry a risk to the normal development of the unborn.

Health counselling must be guaranteed to the pregnant woman, so that she could act in the best interest of the unborn and avoid risk which could jeopardize its healthy development

During the pregnancy the mother must be offered regular controls to exclude and prevent diseases and other risks.

Disease threatening the mother or the unborn have to be taken care of in proper fashion. Check-ups and treatments in the interest of the unborn have to be easily available to the mother.

### **Right to safe delivery**

Risk factors threatening the safety of the delivery have to be searched for with regular check-ups and if possible treated during pregnancy it is advisable to give the mother and the father counselling in order to prepare them to the delivery and nursing of the new-born child.

In choosing the time, place and method of delivery the safety of the mother and the baby is of the highest priority. Hygienic and well equipped facility as well as trained personnel have to be available to the mother.

### **Physician as the protector of the unborn**

The physician shall in all possible ways try to promote the rights of the unborn given in this declaration.

It is the writers' opinion that it is pertinent to also include the law as the protectors of the unborn. If this is done you find out that all pregnant mothers must as a compulsion of law test for HIV in the first trimester of their pregnancy for early detection of the virus never to transmit the virus to an innocent unborn child.

### **Children living with HIV /AIDS vis-à-vis their protection**

Children are recognized as one of the population group that are at high –risk to HIV/AIDS problems. Consequently , there is need to adequately make policies and laws that will take care of them.

### **The Child's Rights Act (2003) provides that:**

In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service , court of law, administrative or legislative authority, the best interest of the child shall be given the primary consideration

Going by the provisions of section I of the child's Rights Act one begins to wonder if the provisions of chapter II of the 1999 Constitution on the health right of a child should be justifiable.

Be that as it may, it has been consistently held that the provisions of chapter II of the 1999 constitution are non-justifiable. It had been held that they are fundamental objectives and derivative principles of state policy without any legal connotation on the part of the actors who are in breach of it.

The controversy generated by the provisions of chapter II is even more worrisome when placed side by side with the provisions of the same constitution. The Constitution of Nigeria (2004) places onerous responsibility on all authorities:-S.13.

All authorities –legislature, Executive and judiciary are under the duty and responsibility to conform to, observe and apply the provisions of chapter II of 1999 Constitution.

Then one may also begin to question what were the rationale behind the provisions of chapter II 1999 constitution? The Constitutional Drafting Committee, the body that was instrumental to the emergence of our constitution had given six reasons to buttress their inclusion of Chapter II:

- The state has a duty towards its subjects, and that power given to them should not be for the personal enrichment of the politicians.
- The power held by actors for the state should be for the welfare and advancement of the society as a whole
- The objectives are designed as targets which must be conformed to for development and should be regarded as a yardstick for judging the performances of any government.
- The objectives are for definition of goals for the nation without which it would continue to drift aimlessly.
- The objectives should serve as a constant reminder and guide to successive government
- Spelling of the objectives removed them from the province of political controversy.

By these reasons one can comfortably argue that these objectives should be justifiable. The courts have consistently held that they are not justifiable (*Badejo v Minister of Education 1996*).

If we go by the reasons or rational behind the inclusion of chapter II of 1999 constitution one can say without equivocation that their reasons guarantees the right to health under section 19. Also the right to health of a child could be viewed as a customary norm of international law in respect and promotion of human right. Be that as it may, then every customary norm of international law binds every nation state whether or not it has been ratified it (*Mohini Jain v State of Karnataka 1992*).

There is a presumption in favour of this customary right of the Nigeria child to the provisions of S.19 Chapter II of the 1999 constitution which is, that the state does not intend to breach its international obligation owed to the child on health.

A deregulated Nigerian judiciary as pointed out by S.13 should be able to make positive impact in this direction whenever there is infringement of this right to a child with HIV/AIDS seeking medical attention and that is refused or is not attended to or there is no medical clinic within his or her reach to access.

### **Strategies for the prevention and protection of child HIV/AIDS**

#### **A. Enactment of Laws:**

Nigeria recorded its first case of HIV and AIDS in 1986 and it was not until eleven years later (1977) that the country first put in place a national HIV and AIDS policy, which was prepared by the ministry of health. HIV and AIDS were first handled as a medical problem. Later, the country developed a comprehensive multi-sector response that draws in other stakeholders-the national Action committee on Aids (NACA) and the emergency Action plan (HEAP). These are all welcome developments provision of.

The writers opine that if the legal personnel are also co-opted as part of the stakeholders in drafting into law legislations that will be in place to prevent-and protect the HIV/AIDS child and the unborn child from contacting the virus and also when contacted access to adequate treatment with penal sanctions attached to the breach of the law.

This conclusion of the writers is borne out of the National Program that was launched in Ghana to encourage compassion on parents and children living with HIV. One of the participants noted with deep compassion that if there is a law in place to adequately cater for these children that when they grow up they will appreciate the love and care given to them.

This will slow the spread of HIV because people will be free to declare their status. Accordingly, a formal legal framework needs to be created for ensuring the legal observance and implementation of the rights of children infected/living with HIV/AIDS

### **B. Policy development**

In its determination towards eradication and protection of HIV/AIDS, a national policy on HIV and AIDS was approved in 2003 (Idigbo, et al 2004). Aspects of the policy which are currently being implemented include:

- (i) Development of guidelines for example, a curriculum to integrate HIV and AIDS in the school teaching programmes has been developed
- (ii) Advocacy work towards creating an enabling environment to secure uninterrupted funding for HIV/AIDS control

These policies are not enough though they are laudable achievements. There is need to develop a national sexual and reproductive health policy for Nigeria. In developing this policy the involvement of people in policy process should begin from the local government levels to national level. We should adopt the bottom up approach and a culture of feedback on information. The reason for this argument is because in Nigeria most policies are initiated from the top and forced on the citizenry. There should be grassroots involvement that will incorporate people that are already infected and the parents of these children to know what are the challenges and difficulties that they face in the management of the virus.

### **C. Creating Awareness**

Awareness creation will include dissemination of information to the populace, capacity building for advocacy, media involvement, networking and information sharing and dissemination of policies.

The truth is that though law can be very useful in social engineering to bring change, it cannot achieve that without certain parameters, and that is creating awareness to educate the target groups that these laws are in place for them.

The populace both adults and children must be educated about the laws and policies that are in their favour, their rights as contained in these instruments and the better opportunity for them to appreciate them.

The awareness creation should be done in different languages that are existent in the country.

The NACA has been trying to do that in just the three major languages, but there are other minority languages.

Efforts should seriously be made to educate them in the languages that they understand better.

#### **D. Child's rights act**

In an attempt to protect the specific rights of Nigerian child over the years, the child's Right Act has been passed into law. It is a comprehensive piece of legislation encompassing all aspects relating to the welfare and care of the child as well as the right of a child to health, health services and the right of a child in need of special protection measure which children living with HIV AIDS are part and parcel of this protection and also the right of an unborn child to be protected against harm (Child's Right Act 2003). Nigeria is therefore one of the countries that has opted to include both protection and prevention measures.

Notwithstanding the passing of the child's Right Act, there are no concerned efforts and resources that are put in place for the implementation of the Act. Some authors, among whom is Ladan (2005) have suggested that the child's Rights Act is a toothless bull dog, that can bark but cannot bite. This flaw could be attributed to non-functionality of the family court that was envisaged by the Act.

The African charter on Human and people's Rights contains provisions on protection of child's rights to health and based on the fact that the provisions of this law have been signed into law in Nigeria under CapA9 Laws of the Federation 2004 and by the decision in (Abacha v Fawehinmi 2000) a child can conveniently bring an application for enforcement and prevention.

#### **E. Establishment of appropriate ministry for HIV/AIDS children**

The ministry of Women and Youth Development though in existence cannot conveniently and adequately cater for the needs of these children. There should be a holistic ministry with specific portfolio to which complaints can be lodged on violations of this right. We could better call it an Ombudsman that will take appropriate action.

#### **Challenges to prevention and protection**

From the preview above, it can be said that existing Nigerian measures ignore several realities of HIV/AIDS children.

The basic fact is that what is needed is not a new law but rather means to enforce the ones that are already in place. Some of the challenges are:

### **1. Gaps in dissemination of information on the rights of children living with HIV/AIDS**

This is of deep and general concern. A lot is not known concerning the prevention of transmission to these children by their already infected mother. Poor and lack of information on what the pregnant mother should do. The need to start anti-natal on time, to get tested for HIV/AIDS and the protection where the child had already got infected. The children anti-retroviral drugs that is available for them to access. Efforts should be made to educate the illiterate mothers on what they should do when they are pregnant and even when they are not pregnant.

### **2. Gaps in the multi-sectoral approach**

Opening up the multi-sectoral approach to respond to HIV/AIDS is still a problem in some states and many still view HIV and AIDS as health sector responsibility. Even where the State Action Committee on AIDS (SACA) has already been established, this institution is often situated at health commissioners offices with due influence on the health sector member. We are of the opinion that this is a human right issue and should be treated as such and not only as a health problem

### **3. Gaps in funding approach**

The Federal system of government advocates for decentralization but in practice things are highly centralized including funding of state governments. The states depend on federal government for revenue and funding for implementing programmes including that on HIV and AIDS. Governments should be more committed, honest and responsible with government property. There should be sincere budget allocation to these children to wit the future leaders of our dear country.

### **4. Lack of right-based approach to HIV and AIDS programming**

Non-discrimination is a human right and yet discrimination against HIV-positive individuals in the society is common, including the workplace, villages and schools. For example, there were mixed reaction to the recent incident reported in the media about a mother whose declaration of her sero-status in public resulted in her child being dismissed from school. Although the HIV/AIDS policy advocates for right - based approach, reproductive right programme is still inadequate and there is need for behaviour change communication by experts.

### **5. Lack of legal backing, policies and inadequate enforcement**

Many policies exist that are related to HIV and AIDS but they are not enforced because they lack the legal operating framework. For example, the Nigerian policy on harmful traditional practices aims to reduce the incidence of FGM by half before 2015, but it shies away from making the practice a crime. Another example is the child's Rights Act that the family court has not come into existence and no matter has been filed in court against any person. In view of the health implications of early marriage on child bearing and the attendant consequences, appropriate legislation should be enacted to deal with offenders. A federal legislation that will cut across the whole nation irrespective of religion or any other reason, whatsoever, should be put in place.

### **6. Gaps in programming**

Many policy implementers do not see the link between HIV and overall development. In a given community affected by HIV and AIDS, there is a need for a comprehensive programme but this is sometimes overlooked. Similarly, programmes do not seem to realize that voluntary counseling and testing is not just related to prevention but also to care and support. HIV and AIDS is a development issue and integrating HIV interventions across existing development efforts and sectors in both the public and private arena make prevention more effective. In addition, it helps to reduce cost and improve the efficiency and sustainability of the programme.

### **7. The Role of Non-Governmental Bodies**

The NGOs and faith based organizations should also get seriously involved because the government alone cannot successfully prevent or protect these children. Therefore, it is the duty of non-governmental organizations and faith based organizations to increase awareness on the rights of these children towards their parents and the states. The NGOs and faith based organizations activities will contribute greatly to eliminating poverty, improving education and enforcement of rights where they are breached through public impact litigation (PIL) Mechanisms.

## **Effective Measures for Prevention and Protection of Child HIV/AIDS**

### **1. Media Involvement**

This will entail involving journalists and lawyers in HIV and AIDS programme work including monitoring and evaluation. Media engagement would offer them opportunities for work in HIV and AIDS.

The involvement of the media will get the large populace to know the implications and consequences of bearing a child with HIV/AIDS. The phobia that the mother will be jailed or face other wrath of the law, will make mothers especially single mothers to be more careful and help in preventing HIV/AIDS.

## **2. De- Stigmatizing HIV and AIDS**

This also very necessary that laws be put in place to prosecute anyone who stigmatizes a person who has HIV/AIDS. This stigmatization has led to a lot of people infected to keep quiet and keep transferring to others. We must show them care and concern.

## **3. More Budgetary Allocations**

Government should budget more on HIV/AIDS victim. This will enable more parents with their children to have greater access to the anti-retroviral drugs. It is their right and that should be enforced where government details.

## **4. Advocacy on Specific HIV and AIDS for Children**

There should be an active participatory advocacy efforts to address socio-cultural, legal and other barrier to HIV and AIDS . socio-cultural barriers includes cultural beliefs and attitudes which are held and promulgated by local leaders and institutions. Legal barriers includes the absence of laws needed to enforce implementation of existing policies. There are several important national policies that currently do not have enforceable laws, e.g.; the policies of FGM, age of marriage, control of wilful transmission of HIV etc.

## **Conclusion**

The truth is that Nigeria by streaming a lot of policies on prevention and protection of the rights of the child against HIV/AIDS transmission, it is not enough to solve the problem of HIV/AIDS in children. Despite some of the measures put in place to solve this problems, yet the pandemic continues to spread at a very unprecedented pace. The challenges faced by this pandemic are being tackled but yet if government, parent, NGOs and faith based organizations do not put enough commitment, the human race may become extinct. We may not find persons to whom we can hand over the mantle of leadership tomorrow. As an American scholar put it “if our American way of life fails us, then the children we neglect to cater for many take a revenge on us tomorrow (C. Bellamy 2008). Let us rise up and collectively take the bull by the horn.

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