

HIV/AIDS, LAW AND THE HUMAN RIGHTS QUESTION: TAMING DISCRIMINATORY PRACTICES

Abstract

This paper examined the concept of HIV/AIDS and appraised the rights of HIV/AIDS patients, vis-a-vis the workplace and access to medical facilities. It examined the extant position of the law on the rights of HIV/AIDS patients in Nigeria. The paper has also comparatively analysed Nigeria's law and policies and those of South Africa, India and Namibia regarding the rights of such patients. It contended that discrimination against HIV/AIDS patients is unlawful and should be deprecated. It equally canvassed for constitutional amendment and/or the enactment of a specific statute to protect the rights of HIV/AIDS patients in Nigeria.

INTRODUCTION

There is no gainsaying the fact that the HIV/AIDS epidemic is one of the most deadly diseases that have ever ravaged the human environment. In Nigeria, the first reported case of the disease was in 1986¹, and since then, the disease has so spread with a sense of rapidity that it was recently reported that Nigeria accounts for the third position among the nations of the world as far as HIV/AIDS infection is concerned.

In this paper, we will examine the concept of HIV/AIDS and appraise the rights of HIV/AIDS patients, vis-a-vis the workplace. Our argument tilts towards the position that discrimination in whatever guise is unconstitutional under the Nigerian laws. The paper recommends that every person should deprecate any discriminatory practice wherever it rears its ugly head. It is further recommended that there should be some constitutional amendment and/or the enactment of a specific statute with a view to protecting the rights of HIV/AIDS patients in Nigeria, as applicable in other jurisdictions.

DEFINITION OF TERMS

(a) Human Immunodeficiency Virus (HIV)

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¹Olawale, T.N., "Preventing the AIDS Disaster in Africa: Is it too late?", *International Journal for Medical Sciences*, Vol.1 & 2 (2005), p. 6.

The Human Immunodeficiency Virus (HIV) is the causative agent of AIDS. The virus enters human cells by binding with a receptor protein called CD4 located on human immune cell surfaces². The Oxford Advanced Learner's Dictionary of Current English³ simply defines "HIV" as "*the virus that can cause AIDS (abbreviation for 'human immunodeficiency virus')*." It should however be noted that a person who is a carrier of HIV may live for many years without necessarily contracting or having AIDS symptoms. These are the persons often referred to as HIV - positive or sero-positive persons⁴.

This virus is not transferrable through mere touch or bodily contact. It can only be transmitted through blood. Blood transmission could be through unprotected sexual intercourse with an HIV-infected person, through blood transfusion from an infected person, through use of infected needles, clippers and other sharp objects as well as through mother-child transmission during pregnancy⁵.

(b) Acquired Immune Deficiency Syndrome (AIDS)

On the other hand, Acquired Immune Deficiency Syndrome (AIDS) is the existence of one or more reliably diagnosed disease or diseases that are predictive of cellular immunity deficiency in the absence of any defined cause of reduced resistance such as an underlying cancer or steroid therapy or severe malnutrition⁶. In simple terms, AIDS is a disease which results in the total or substantial breakdown of the human body defence mechanism owing to the weakening of the immune system. It is the climax of HIV infection. In other words, where the HIV infection has deteriorated, it breaks down the body immune system and this leads to susceptibility to opportunistic infections which the broken down immune system is now unable to combat. AIDS is a fatal disease!

(c) Discrimination

The word "discrimination" means "The practice of treating somebody or a particular group in a society less fairly than others..."⁷ The Black's Law Dictionary defines discrimination as "the effect of a law or established practice that confers privileges to a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap..." Dictionary of Law defines the word as "The according of some differential treatment to

² D.O., Adeoye, *HIV/AIDS: Restoring Hope and Life*, (Lagos: Frankard Publishers, 2002) p. 9.

³ A.S., Hornby, *The Oxford Advanced Learner's Dictionary of Current English*, 7th Ed., (New York: Oxford University Press, 2005) p. 709.

⁴ Ato, S.D., "HIV/AIDS, Human Rights Issues and the Workplace", *Benue State University Law Journal*, Vol. 3 No. 1 (2009), p.67.

⁵ Odunsi, S.B., loc. cit.

⁶ Adeoye, D.O., op. cit., 7.

⁷ A.S., Hornby, op. cit. p. 417.

persons or bodies in the same position, e.g., sex or racial discrimination...”⁸ Discrimination means the unequal treatment of persons, on the basis of a given reason which does not have anything to do with merit, legal right or ability.

(d) Assessment of the Law and Policies for the Protection of HIV/AIDS patients in Nigeria

Preliminarily on this, it is important to emphasise the fact that there is no single national legislative document that exclusively details the rights of HIV/AIDS patients in Nigeria. In other words, and to put it in the words of Gidado & Epu, “there is no nationwide legislation for the protection of People Living with HIV/AIDS (PLWHA) in Nigeria.”⁹ This of course poses some difficulty to both individuals and public interest litigation organizations in their fight against discrimination against HIV/AIDS patients.¹⁰ This situation in Nigeria is quite unlike that in other countries like Australia, Canada and the United States of America, where national laws which prohibit discrimination against HIV/AIDS patients exist and expressly protect such patients.

At the national level in Nigeria, the closest protection afforded HIV/AIDS patients by the law is traceable to the general anti-discrimination posture of the Constitution of the Federal Republic of Nigeria, 1999 (The Constitution as amended)¹¹ and government policies which will be considered *anon*. The effectiveness of these constitutional and policy provisions will also be examined below. However and quite commendably, some states in Nigeria have passed specific anti-discrimination laws which, as a welcome development, seek to protect HIV/AIDS patients.

CONSTITUTIONAL FRAMEWORK

The Constitution has guaranteed a number of fundamental human rights in favour of every person¹². However, we will only examine those rights that are most likely to be denied HIV/AIDS patients because of their HIV positive status.

(a) Right to Life

Section 33 (1) of the Constitution provides that:

⁸ L.B., Curson, *Dictionary of Law* (London: Financial Times Pitman Publishing, Fifth Edition 1998) P.118.

⁹Gidado, M.M. &Epu, A.A., “Law and Policy on Discrimination and Stigmatisation against People Living With HIV/AIDS in Nigeria”, *Nasarawa State University LawJournal*, Vol. 4 No. 1 (December 2011), p. 197.

¹⁰ O., Gbadamosi, *HIV/AIDS, Human Rights and Law* (Benin City: Koly Computer Guide, 2005), cited in Gidado, M.M. and Epu, A.A., loc. cit.

¹¹ See Section 42 of the Constitution.

¹² Note however that some of these rights apply to Nigerian citizens only. For example, the right to private and family life, right to freedom of movement and right to freedom from discrimination are not applicable to expatriate residents; only Nigerian citizens can enjoy these rights.

Every person has a right to life and no one shall be deprived intentionally of his life, save in the execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria.

We submit that the right to life applies to both HIV/AIDS positive and negative persons. Thus, every HIV/AIDS patient is entitled to live. It has been held in another jurisdiction that this right to life is not just a mere or bare right of existence but a right to have access to basic facilities which make life more meaningful and pleasurable or comfortable.¹³ Hence, HIV/AIDS patients are entitled to access to affordable drugs, to be treated and to combat or ameliorate the effect of the virus. They also have a right to earn a living. This right to life has been recognised under regional and international instruments to which Nigeria is a signatory.¹⁴

(b) Right to Dignity of the Human Person

Section 34(1)(a) of the Constitution expressly provides :

Every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subjected to torture or to inhuman or degrading treatment.

Applying the above to the issue under discussion, it is submitted that every HIV-infected person has a right not to be subjected to inhuman or degrading treatment. An example of such inhuman or degrading treatment would be where an HIV/AIDS patient is deprived of employment opportunity because he has tested positive to HIV/AIDS, despite the fact that he is still physically and mentally fit to do the work. It has been observed by a learned writer that in the absence of voluntary and informed consent, subjecting a job seeker to pre-employment HIV test amounts to a violation of his constitutional right to dignity of his person as provided in Section 34(1)(a) of the Constitution and Article 5 of the African Charter.¹⁵

(c) Right to Personal Liberty

According to Section 35(1) of the Constitution,

¹³ See the Indian case of *X v. Y Corp & Anor* (2002) 2 CHR p. 235 at p. 289, cited in Ato, S.D., op. cit., p. 79 where the Court held that the right to living is an important component of the right to life and that deprivation of means of livelihood amounts to deprivation of right to life.

¹⁴ See, for example, Article 4 of the African Charter on Human and Peoples' Rights, 1981 (the African Charter) and Article 6(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) as well as Article 3 of the Universal Declaration of Human Rights, 1948 (UDHR).

¹⁵Ato, S.D., op. cit., p. 68.

Every person shall be entitled to respect for his liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law...¹⁶

Obviously, this right also enures in favour of every person, no matter his or her HIV status. Though, the Constitution in Section 35(1)(e) provides for an exception to this right in a situation where a person suffers from a contagious disease: We however submit that HIV/AIDS is not a contagious disease properly so called, in that the virus cannot be contracted by mere contact or touch, it is only transmitted through blood. Therefore, the exception relating to confinement of those infected with contagious diseases does not apply or arise in the case of HIV/AIDS patients. Their right to personal liberty is therefore generally unfettered, unless restricted under the other heads of exceptions stated in Section 35(1)(b)-(d) or Section 45 of the Constitution.

(d) Right to Privacy

This right is given constitutional flavour by Section 37 of the Constitution which provides:

The privacy of citizens, their houses, correspondence, telephone conversation and telegraphic communications is hereby guaranteed and protected.¹⁷

All HIV/AIDS patients are protected against revelation or disclosure of their HIV status by their employers or medical practitioners without their consent first sought and obtained. According to Adeoye, this right is “*one of the most important rights involved and sometimes curtailed, in medical and legal responses to the HIV/AIDS epidemic.*”¹⁸ Apart from the Constitution, the International Covenant on Civil and Political Rights (ICCPR) also recognises this right to privacy¹⁹.

It should be noted that this right to privacy “*encompasses obligations to respect physical privacy, including the obligation to seek informed consent to HIV testing and ... the need to respect confidentiality of all information relating to a person’s HIV status.*”²⁰

The import and purport of the above is that mandatory pre-employment HIV testing violates the HIV/AIDS patient’s constitutional right to privacy. Worse still, disclosure of the patient’s HIV positive status to a third party without his consent amounts to an infringement of his

¹⁶ See also Article 6 of the African Charter.

¹⁷ See the case of *Hassan v. E.F.C.C.* (2014) 1 NWLR (pt. 1389) 607 where this right was judicially examined.

¹⁸ Adeoye, D.O., op. cit., p. 170 -171.

¹⁹ Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

²⁰ Ato, S.D., op. cit., p.75.

right to privacy under the Nigeria's Constitution as well as under the various international instruments. Thus, personnel officials and employers themselves should be wary of the now rampant practice of subjecting prospective employees to unwarranted pre-employment HIV testing which, more often than not, has nothing to do with the physical and mental or intellectual fitness of the would-be employees to perform optimally at the workplace. Furthermore, health care providers like doctors and nurses should be mindful of the way they disclose the HIV status of their patients to third parties, including the patients' would-be employers even where such patients were originally referred to the medical personnel by the prospective employers. The consent of the patient must be sought and obtained before disclosure; doing otherwise would make the health care givers liable to the patients in the law of torts.

We however add, that this right, just like all other rights, is not absolute but can be derogated from where the occasion deserves it. Thus, in *Hassan v. E.F.C.C.*²¹, it was held that the constitutional rights to personal liberty and privacy are not absolute but qualified rights; hence, where the appellant in this case was arrested and detained based on a valid warrant of arrest for being in possession of fake currency notes, it was held that his arrest and the invasion of the privacy of his house was constitutional and that Section 45(1) of the Constitution has watered down or restricted the absolute effect of all rights contained in Chapter IV of the Constitution.²²

(e) Right to Freedom of Thought, Conscience and Religion

This right is embedded in Section 38 of the Constitution which states that:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, in the public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.²³

This right could be jeopardised as a result of discrimination or stigmatisation of HIV/AIDS patients. As can be seen under Section 39, this right does not end with personal worship or religious practice alone, but it extends to communal, corporate or public worship with others. Owing to ignorance among the majority of Nigerians, they tend to shun a known HIV/AIDS

²¹(Supra) at 624 paras D- H.

²² See also *Dokubo-Asari v. Federal Republic of Nigeria* (2007) 12 NWLR (pt. 1048) 320 and *Orji UzorKalu v. Federal Republic of Nigeria* (2014) 1 NWLR (pt. 1389) 479 at 524 paras F-G.

²³ See also Article 8 of the African Charter.

patient in public, including places of worship. This avoidance or stigmatisation prevents, albeit unconstitutionally, the patient from freely exercising his right to freedom of religion.

(f) Right to Peaceful Assembly and Association

Just like the right to freedom of religion, HIV/AIDS patients' right to peaceful assembly and association can also be a subject of abuse. Section 40 of the Constitution states that every person shall be entitled to assemble freely and associate with other persons for the protection of his interest²⁴. However, it should be noted that in the case of *Mbanefo v. Molokwu*²⁵, it was held that once a person voluntarily joins an association, he becomes bound by the rules and regulations of such an association and he thus cannot file a legal action for breach of his right to freedom of association, to challenge any disciplinary action like suspension from the association for his breach of the association's rules and regulations. In other words, his right to freely associate with other members of the association is subject to the rules and regulations of such association which he voluntarily submitted to²⁶.

Denial of this right could be actual or constructive. It is actual where an HIV/AIDS patient is outrightly ostracised or outlawed because of his HIV status. On the other hand, it amounts to constructive denial of the right to freedom of assembly and association where the acts of discrimination or stigmatisation makes the patient to recline or live a secluded life, thereby denying him the benefits or entitlements attached to such association or assembly.

(g) Right to Freedom of Movement

Every citizen of Nigeria, whether HIV positive or negative, is entitled to move freely throughout Nigeria and to reside in any part of Nigeria and no citizen of Nigeria shall be expelled from the country or refused entry into Nigeria or exit from Nigeria.²⁷

It has earlier been emphasised that HIV/AIDS, unlike Ebola Virus Disease (EVD), is not contracted by mere touch or contact, neither is it airborne. Therefore, it will be unlawful to quarantine or restrict the movement of HIV/AIDS patients on the basis of their HIV/AIDS status as such restriction will not be reasonably justifiable on public health ground.

²⁴ Articles 10 and 11 of the African Charter also recognise this Right.

²⁵(2014) 6 NWLR (pt. 1403) 377 at 408-410 paras B-H.

²⁶ It was further held in this case that the implication of Section 45(1) of the Constitution is that the right of the appellant to belong to any association cannot be granted in isolation of the rights of other persons within the community.

²⁷Except he has or is reasonably suspected to have committed an offence for which he is being restricted, tried or imprisoned before or after conviction. See Section 41 of the Constitution and Article 12 of the African Charter generally. See also the case of *Agbakoba v. Director of State Security Service* (1999) 3 NWLR (pt. 595) 314 where it was held that this right includes right to hold the Nigerian passport by which means the right of egress or exit can only be exercised.

The point being stressed here is that, HIV/ AIDS patients who are Nigerian citizens, like every other citizen of Nigeria, have a right to move about and reside anywhere in Nigeria since the virus they carry is not ordinarily contagious. Had the disease been contagious or infectious by mere physical contact, any restriction or deprivation of right to freedom of movement would have been legally justifiable under Section 45(1)(a) of the Constitution which preserves the validity of any law which restricts the freedom of movement of any person in the interest of public health. According to Raj, and we agree with him, since HIV/AIDS is not airborne or contracted by mere contact, there is no public health justification for segregation or restriction of the movement of HIV/AIDS patients.²⁸

(h) Right to Freedom from Discrimination

Among all the rights recognized by the Constitution as fundamental human rights, the right to freedom from discrimination arguably seems to be the most violated as far as HIV/AIDS patients are concerned. According to Section 42 of the Constitution:

1. A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:
 - (a) Be subjected either expressly, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
 - (b) Be accorded either expressly, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.
2. No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.²⁹

A careful examination of the above provisions will however reveal that the section does not actually expressly protect HIV/AIDS patients from discrimination. The section itemizes

²⁸ Raj, M., "Ethics, Human Rights, Law and HIV/AIDS", being a paper presented at the Pre- OAU Summit for Heads of States and Governments Conference held in Abuja, Nigeria on 22 April 2001, p. 4.

²⁹ This right against discrimination is however subject to laws regulating appointment into the Armed Forces and the Nigeria Police. See Section 42 (3) of the Constitution.

indices or indicators on which discrimination can be gauged and such indicators include community leaning, ethnicity, place of origin, sex, etc. There is no mention or reference to health status. In other words, HIV status or general health status is not one of the indicators mentioned in Section 42 of the Constitution. It is trite law that the express mention of one thing means the exclusion of other things not mentioned.³⁰ Hence, under the current constitutional framework, before an HIV/AIDS patient can successfully challenge any discriminatory practice against him under Section 42, he may need to show in evidence that, apart from being discriminated against on the basis of his HIV status, he is also being discriminated against on grounds such as sex, place of origin, ethnicity or political cleavages. Discrimination on the basis on HIV status alone may not be enough to win a civil suit founded on Section 42. We however query the extant position of the Constitution which has not expressly prohibited discrimination on health or HIV status. The issue is worsened with the absence of any Act on the matter. We therefore canvass for an amendment to the Constitution or the enactment of an anti-HIV discrimination Act so as to keep the Nigerian Constitution in line with the trends of what is obtainable in other developed countries where discrimination against HIV patient have been outlawed, either constitutionally or statutorily. Be that as it may, though there is no express constitutional provision or other national legislation that clearly prohibits discrimination against HIV/AIDS patients, it is submitted that there are other binding regional and international instruments to which Nigeria is a signatory which the patients may rely upon to institute a legal action for discrimination. For example, Article 26 of the ICCPR obligates state parties to the Covenant to guarantee to all persons (HIV/AIDS patients inclusive) equal and effective protection against discrimination on certain grounds and “other status.”

According to the United Nations Commission on Human Rights, “other status” as used in Article 26 of the ICCPR includes HIV status; thus the Article outlaws discrimination on grounds of HIV status.³¹ The ICCPR, being a domesticated instrument in Nigeria, is a binding document³² and same can be urged on Nigerian Courts in a bid to seek redress for discrimination on grounds of HIV status.

³⁰ See the case of *Godwin Azubuikwe v. Government of Enugu State* (2014) 5 NWLR (pt. 1400) 364 at 402 para D where it was held that “It is an elementary rule of statutory interpretation and application that the express mention of one thing in a statutory provision excludes those not mentioned.”

³¹ The United Nations Commission on Human Rights, “The Protection of Human Rights in the Context of Human Immune Deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)”, Resolution 1995/44, cited in Odunsi, S.B., *op. cit.*, p.16.

³² See *Fawehinmi v. Abacha* (2000) 6 NWLR (pt. 660) 228.

Another instrument that will aid in the fight against discrimination against HIV patient is the African Charter.³³ By the tenor of Article 3 (1) & (2) of the Charter, “Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.”³⁴

NATIONAL POLICIES ON HIV/AIDS

Quite apart from the above constitutional provisions and international instruments, the Federal Government of Nigeria has over the years come up with policies aimed at protecting HIV/AIDS patients. These policies have improved HIV/AIDS patients’ accessibility to education and employment. They have also reduced discriminatory practices against the patients.

One remarkable policy is the National Workplace Policy on HIV/AIDS which was introduced during the President Olusegun Obasanjo administration. This policy makes ground-breaking provisions for the protection of HIV/AIDS patients in Nigeria, both at private and public workplaces. It does not only educate them on their rights, but the policy equally enlightens the patients on the way and manner to seek redress on the enforcement of such rights. The overall goal of the policy is to control the spread of the virus in Nigeria, cater for those already infected and mitigate its impact such that all Nigerians will be able to achieve or attain socially and economically productive lives, free of infections and their effects.³⁵

Additionally, there is the Federal Ministry of Science and Technology (The Ministry) Policy Document for the Control and Management of HIV/AIDS among Staff, 2004 which aims at protecting HIV/AIDS patients among the staff of the Ministry. This Policy Document specifically states, among other things, that every staff, whether HIV positive or negative, is equal before the law and that they have equal rights and obligations. The Policy Document prohibits discrimination or victimization and harassment against HIV/AIDS patients/staff; it protects the confidentiality of the HIV status of every worker at the Ministry, unless there is informed consent for disclosure. The document further provides that unauthorised disclosure of a staff’s HIV status will ground disciplinary measures against the staff or boss making the disclosure³⁶.

³³ This Charter has been domesticated in Nigeria by virtue of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (LFN), 2004.

³⁴ See also Article 2 of the African Charter which provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

³⁵ Gidado, M.M. and Epu, A.A., *op. cit.*, p. 203.

³⁶ The summary of all these is that disclosure of HIV status is not mandatory at the Ministry, rather, the Ministry is mandated, under the Policy Document, to create an environment that encourages openness about HIV/AIDS matters and best practices on HIV/AIDS intervention. Finally, the Policy Document provides

STATE ANTI-HIV/AIDS DISCRIMINATION LAWS IN NIGERIA

Some states in Nigeria have begun to fill the lacuna created by the national legislations none of which has expressly prohibited discrimination against HIV/AIDS patients. These laws have not only attempted to protect the patients, but they have also sought to curb the spread of the virus in the respective states where they are in force. A brief look at some of these laws will suffice.

In Enugu State, there exists the Enugu State HIV/AIDS Anti-Discrimination and Protection Law³⁷. Section 1 of the Law provides that no one suspected or presumed to be infected with HIV-including members of vulnerable populations and their partners, caregivers, associates and families shall be subjected to any form of restriction, stigmatisation, unfair treatment or discrimination either directly or indirectly on the basis of their HIV status or HIV related circumstances. The Law further makes provisions against vilification, abuse or degrading treatment or derogatory statement against persons on the basis of their HIV/AIDS positive status.³⁸

Section 5 of the Enugu Law is another interesting section. The section prohibits discrimination against HIV/AIDS patients vis-a-vis offer of employment as well as forbids mandatory pre-employment HIV/AIDS test or dismissal from employment solely on the basis of HIV positive status.

Another state law on anti-HIV discrimination is the Rivers State Employees with HIV/AIDS (Non-Discrimination) Law, 2005. This Law protects the interest of HIV/AIDS positive employees by prohibiting refusal of employment on the basis of HIV status. The Rivers Law also criminalises the act of compelling prospective employees to undergo compulsory pre-employment test or discriminating against such employees after they have tested positive. Just like their HIV negative counterparts, HIV positive employees are entitled to equal opportunities for training, re-training, promotion and retirement benefits.³⁹

JUDICIAL ATTITUDE TOWARDS THE PROTECTION OF HIV/AIDS PATIENTS

In Nigeria, there is a dearth of case-law on the position of the law as regards the rights of HIV/AIDS patients. One of the reasons for this could be the absence of a nationwide one-stop legislation that is protective of HIV/AIDS patients. Another reason could be ignorance among

protection against unlawful termination of appointment of HIV/AIDS patients except the virus has rendered them medically incapacitated or physically and mentally unfit to continue to render services at the workplace.

³⁷Enugu State of Nigeria Law No. 2, 2005.

³⁸ See Section 1 of the Law.

³⁹ See Section 5 of the Rivers Law generally.

the patients as to their rights under the already discussed regional and international instruments and states laws assuming they reside in the states that have anti-HIV discrimination laws. Under this sub-heading, we will examine the judicial attitude of Nigerian and foreign Courts on the issue of rights of HIV/AIDS patients.

In the recent case of *Georgina Ahamefule v. Imperial Medical Centre & Anor*⁴⁰, the Lagos State High Court presided over by Hon. Justice Y.O. Idowu held that the termination of an HIV/AIDS patient's employment solely on the ground of her being HIV positive was illegal, unlawful and actuated by malice and extreme bad faith.

In that case, the Plaintiff had been an auxiliary nurse with the 1st Respondent since 1989. The Plaintiff later discovered that she was pregnant and that her skin was having boils as a result of which she sought the medical attention of her employers (i.e., the Defendant Imperial Medical Centre). The 2nd Defendant who was a doctor working with the 1st Defendant carried out medical examinations and diagnostic tests on the Plaintiff but refused to disclose the nature of the outcome of the tests to the Plaintiff. Rather, he referred her to another doctor in the University of Lagos Teaching Hospital who, upon carrying out further tests, informed the Plaintiff that she was HIV positive. Both the 2nd Defendant and his doctor friend did not give any pre or post-HIV test counseling to the Plaintiff before and after the test; in any case, the tests were run without her informed consent.

Subsequently and surprisingly⁴¹, the Defendants terminated the Plaintiff's appointment based on her HIV positive status. This brought untold emotional and psychological hardship on the Plaintiff as a result of which she had a miscarriage. When she went to the Defendants for treatment and evacuation of the miscarried baby, she was denied medical attention consequent upon which she instituted this legal action with the aid of a Non-Governmental Organisation. The Plaintiff challenged the unlawful termination of her appointment, relying on the provisions of the Constitution, the African Charter and other international instruments.

After 12 years of legal battle, the Plaintiff finally got judgment in her favour on 27 September, 2012 wherein Justice Y.O. Idowu deprecated the action of the Defendants and awarded the sum of N7, 000,000.00 (Seven Million Naira) in favour of the Plaintiff as compensation for unlawful conduct of HIV test on her without her consent and as general damages for wrongful termination of her employment. In the words of His Lordship:

⁴⁰ See <https://theeagleonline.com.ng/nurse-wins-landmark-case-in-nigeria-over-dismissal-for-testing-positive> (accessed on 22/08/2014 at 4pm).

⁴¹ It is surprising because it was later shown in evidence that the Plaintiff contracted the HIV through blood contact with patients in the course of her duty as a nurse working with the Defendants.

The defendants' action in denying the plaintiff medical care on grounds of her HIV positive status constitutes a flagrant violation of the right to health guaranteed under Article 16 of the African Charter on Human and Peoples' Rights.⁴²

Such was the pronouncement of the Court which has, of course, become an epochal decision that will chart a new course in correcting the wrongs, discrimination and stigmatisation that HIV/AIDS patients usually suffer in Nigeria. The decision also gives a beam of hope to those who have lost their jobs or job prospects or denied medical and accommodation facilities because of their HIV positive status.

However, a cursory look at the above decision will reveal that it was not really based on the Constitution or other Nigerian legislation. Rather, the case was majorly fought and decided on the provisions of the African Charter. It will be recalled that the Charter, having been domesticated, is a binding document in Nigeria, subservient only to the Constitution.⁴³

Similarly, in the case of *Festus Odafe & Ors v. Attorney-General of the Federation & Ors*⁴⁴, it was held that under Sections 34(1) and 42 of the Constitution and Section 8(1), (2) and (3) of the Prisons Act⁴⁵, HIV/AIDS infected prison inmates are entitled to the right to life, right to dignity of the human person and freedom from discrimination as well as access to health care facilities.

TRENDS FROM OTHER JURISDICTIONS

Australia, Namibia, South Africa and the United States of America are some of the jurisdictions where the rights of HIV/AIDS patients have been statutorily and judicially affirmed. It is therefore instructive to examine the trends in these jurisdictions, with a view to drawing some lessons from them in the bid to protect the rights of HIV/AIDS patients in Nigeria.

In the South African case of *Hoffman v. South African Airways*⁴⁶, the Plaintiff who was HIV positive made an application to the Defendant for employment as cabin attendant. Out of the 5 stages of the selection process, he passed 4 and failed one which was the medical stage. That is, he tested positive to HIV consequent upon which the Defendant refused to employ him. The Plaintiff instituted a legal action against the Defendant, contending that the Defendant's

⁴² See <https://theeagleonline.com.ng/nurse-wins-landmark-case-in-nigeria-over-dismissal-for-testing-positive> (accessed on 22/08/2014 at 4pm).

⁴³ See *Fawehinmi v. Abacha* (supra).

⁴⁴ Suit No. FHC/PH/CS/680/2003, cited in Gidado, M.M. and Epu, A.A., op. cit., 207.

⁴⁵ Cap P29, LFN, 2004.

⁴⁶ (2001)1(10) BHRC,571; 3(HRL) 146 -148 (2002) (2) SA 628. See the Employment Equity Act of South Africa .

refusal to employ him based on his HIV positive status violated his constitutional rights to equality, non-discrimination and human dignity and that same amounted to unfair labour practices. The defence was that the refusal to employ the Plaintiff was justifiable on public health and economic interest grounds. The Court found in favour of the Plaintiff and held thus:

People living with HIV/AIDS are one of the most vulnerable groups in our society...Discrimination against them is an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. People who are living with HIV must be treated with compassion and understanding. They must not be condemned to “economic death” by the denial of equal opportunity in employment⁴⁷.

With the above pronouncement, the South African judiciary outlaws refusal to employ a person on HIV positive basis. The Court thus tacitly made a declaration to the effect that the termination of employment on the ground of HIV positive status is unlawful, illegal and invalid.

In the Namibian case of *Nanditume v. Minister of Defence*⁴⁸, the Applicant sought to be enlisted in the Namibian Defence Force but was refused entry after he had tested positive to HIV during the pre-recruitment medical screening. He thus brought this Court application, arguing that the refusal to enlist him based on his HIV status was discriminatory and should be declared illegal and unlawful. He predicated the legal action on Section 107 of the Namibian Labour Act of 1992 which forbids discrimination in employment on grounds of disability. He led evidence to show that, despite his HIV positive status, he was still strong and in good health to the extent that his HIV status will not undermine or disturb his performance as a military man. He showed in evidence how he had earlier served in a combatant position in a guerrilla army, even while being HIV positive.

In a landmark decision, the Namibian Court held that the Applicant’s rejection from being enlisted in the Defence Force solely on the basis of his HIV status was tantamount to unfair

⁴⁷ Also in *Jansen Van Vuurein & Anor v. Kruger* (1993) (4) S.A. 842 (A), it was held that an HIV patient is entitled to confidentiality of his HIV status. This ruling was delivered against a patient’s doctor who disclosed the patient’s HIV status to his (doctor’s) colleagues during golf game, not as professionals sharing information to enhance the patient’s treatment. Since there was no consent or authority from the patient, and in the absence of a public health justification, the doctor was held liable for unauthorised disclosure of confidential information relating to patient’s HIV status.

⁴⁸ Case No. ILC 24/98 Labour Court of Namibia (2000).

discrimination which not only violated the provisions of the Namibian Labour Act, but which also breached the Guidelines for the Implementation of a National Code on HIV/AIDS in Employment, 1998 which provides that, “*There shall be no pre-employment testing and employers shall not discriminate against HIV positive employees.*” The Court clearly stated that being HIV positive only is not a sufficient reasonable criterion on which to exclude a person from recruitment into the Defence Force, but that the present health condition and/or fitness of the person with regard to the rigours of military operations should be the deciding factor.⁴⁹

It has been observed elsewhere, and we agree, that the above position of the Namibian Court is sound and accords with prevailing medical opinion that state that, generally, an HIV positive person can still effectively carry out military and other strenuous duties unless and until his “viral load” reaches a certain limit.⁵⁰

Furthermore, in the Australian case of *X v. The Commonwealth*⁵¹, the Applicant tested positive after commencing training into the Australian Army. He was thus refused enlistment, in compliance with the Australian Defence Force Policy for the Detection, Prevention and Administrative Management of Human Immunodeficiency Virus (HIV) Infection, 1989. Clause 12 of the Policy provides that all newly inducted entrants into the Force who have potentially serious diseases and all HIV infected persons shall be discharged from the Force. The issue was whether the discriminatory practice of not enlisting the HIV positive applicant was justifiable under Section 15(4)(a) of the Australian Disability Discrimination Act of 1992 which provides that no discrimination exists in a situation where an employee “*would be unable to carry out the inherent requirements of a particular employment.*”

While the Applicant led medical evidence to show that he was medically fit as to be able to carry out the inherent requirements of the Australian military operations, like engaging in combat-related tasks of an average soldier despite his HIV infection, the Respondent’s defence was merely based on the fact that the Applicant being an HIV/AIDS patient would pose a danger or risk to other soldiers.

The Court, while toeing the line of the decision in the *Hoffman* and *Nanditume* cases, held that HIV positive status alone was not enough or sufficient reason to disqualify a person from being enlisted into the army, except the infection has deprived him of the capacity or strength

⁴⁹ However, this beautiful judicial position has been legislatively overruled by the Namibian Legislature. See Figueira, M., “Namibian Parliament Overrides SADC Panel Labour Court on Military Testing”, *Canadian HIV/AIDS Policy & Law Review*, Vol. 7 (2002), pp. 42- 43.

⁵⁰Odunsi, S.B., op. cit., p. 12.

⁵¹ (1999) HCA 63, 2 December, B53, 1998.

needed to surmount the rigours inherent in military operations. The Court however refused the Applicant's reliefs in this case. The Court was of the view that both the physical strength/fitness of an applicant and the need to protect fellow soldiers from being exposed to HIV transmission should be taken into consideration in deciding whether the discrimination was justifiable under the Act. In other words, the Court held that the discrimination was justifiable on the basis that the Applicant's HIV positive status would pose a risk of HIV transmission to fellow soldiers.⁵²

The decision in the *Commonwealth case* can be justified on a major ground. Military regiments or camps are known for their strenuous and "contagious" lifestyle. Owing to the possibility of a rapid spread of HIV in the event of blood spill as a result of an injury during training, it may be justifiable to curtail or restrict the right of HIV/AIDS patient from enlistment into the military. This will balance the rights of such a patient with the rights of the generality of the people. In other words, the public health concern of the fellow soldiers who may be exposed to HIV transmission should supersede the individual health concern of a single soldier. In *Orji Uzor Kalu v. Federal Republic of Nigeria*⁵³, it was held that "Public policy generally requires a balancing of interests which may conflict." After all, it is often said that where the rights of one person stop is where the rights of another person begin.⁵⁴

Canada is another jurisdiction which leans towards the protection of HIV/AIDS patients. As a matter of fact, the Canadian Courts have held that HIV/AIDS is a disability within the purview of the Canadian Human Rights Act of 1977; thus, there is a provision for non-discrimination against HIV/AIDS patients.

In the Canadian case of *Fountaine v. Canadian Pacific Ltd.*⁵⁵, it was held that the termination of the employment of a cook after he had tested HIV positive was discriminatory and therefore illegal and unlawful. As protective as this decision may sound, we however query it. Does this case not fall within the "exposure to risk" exception like the above military cases? A cook is more often than not expected to handle knives and other cutlery which may spill blood during the cooking process. Does the presence of a cook with an HIV-infected blood

⁵² The Court balanced the equation in favour of the need to protect other soldiers from contracting HIV through or during blood spill or bleeding which may result from military rigorous training.

⁵³(Supra).

⁵⁴ See Section 45 of the Nigerian Constitution which derogates from the rights of individuals in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons. Although we have earlier contended that discrimination against HIV/AIDS patients cannot be justified under the derogation provisions of the Constitution, we however think the military setting, being a peculiar setting that is highly susceptible to blood spill, should be an exception.

⁵⁵(1989)29 CCEL.

not expose the lives of his employers to risk of contracting HIV through blood- to - food transmission?

Furthermore, in the Indian case of *X v. Y Corp & Anor*⁵⁶, the Petitioner was a casual labourer with the Respondents till his appointment was terminated after he had tested positive to HIV. His employment was terminated without regard to a statement in a medical certificate to the effect that despite his HIV positive status, he was still physically fit and could perform his work for another 12 years. The Court held that the termination on the basis of HIV positive status without due regard to the medical certification of fitness for task was arbitrary, unreasonable, illegal and an infringement on the Petitioner's rights. The Court thus made an order of reinstatement in favour of the HIV patient.

ENFORCEMENT OF THE RIGHTS OF HIV/AIDS PATIENTS IN NIGERIA

It is a settled legal position that where there is a right, there should also be a remedy. In other words, for every right violation, there is a remedy (*ubi jus ibi remedium*). Thus, in the event of violation of any of the rights examined in this paper and other rights enuring in favour of HIV/AIDS patients, the patient should be entitled to enforce such rights by seeking an appropriate remedy before any Court of competent jurisdiction.

The Constitution has given a flavour to this hallowed principle when it provides in Section 46(1) that:

Any person who alleges that any of the provisions of this Chapter [Chapter IV which deals with Fundamental Human Rights] has been, is being or likely to be contravened in any State in relation to him may apply to a High Court⁵⁷ in that State for redress.

Section 46 (3) of the Constitution further empowers the Chief Justice of Nigeria to make Rules with regard to the procedure for the enforcement of fundamental human rights at the High Court. It was pursuant to this sub-section that the then Chief Justice of Nigeria, Hon. Justice Idris Legbo Kutigi made the *Fundamental Rights (Enforcement Procedure) Rules of 2009*.⁵⁸

The 2009 Rules have introduced some far-reaching innovations into the law and practice of fundamental rights enforcement in Nigeria. Commendably, the 2009 Rules have given room or opportunity for public interest litigation in Nigeria. The Preamble to the Rules mandates the Court to encourage and welcome public interest litigation and that no human rights case

⁵⁶ (supra).

⁵⁷ High Court here means the Federal High Court, High Court of a State or of the Federal Capital Territory.

⁵⁸ Order XIV Rule 1 of these Rules abrogated the *Fundamental Rights (Enforcement Procedure) Rules of 1979* which was the applicable Rules before 2009.

may be dismissed or struck out for want of *locus standi*. Thus, Non-Governmental Organisations (NGOs) and other public interest bodies can now file and prosecute human rights cases for and on behalf of indigent and illiterate section of the Nigerian society. This extant position of the Law is a radical departure from the 1979 Rules under which public interest litigation was not allowed without the Applicant showing that he has *Locus Standi*.

Another innovative feature of the 2009 Rules is the simplified procedure for the institution of fundamental rights proceedings. Unlike the 1979 Rules, there is no requirement to apply for leave of Court before filing a substantive application for enforcement of one's rights.⁵⁹ Thus an application, which could be made by any of the originating processes accepted by the Court, lies without leave of Court.

The 2009 Rules further provides that once an originating application has been filed, the Court shall fix the application for hearing within 7 days from the day it was filed.⁶⁰ This obviously will ensure quick dispensation of justice in human rights proceedings⁶¹.

These radical innovations⁶² heralded by the 2009 Rules will, in no small measure, engender a speedy dispensation of justice on fundamental human rights issues in Nigeria. We only hope that victims of HIV stigmatisation, discrimination and harassment will explore the provisions of these Rules with a view to seeking redress. It should however be noted that such HIV/AIDS patients can only seek main or principal reliefs that strictly relate to breach of fundamental rights. In other words, they cannot hide under the cover of fundamental right proceedings to seek extraneous reliefs that are not mainly fundamental rights-related. In the case of *Hassan v. E.F.C.C.*⁶³, the Court stated that the rights that can be enforced under the Fundamental Rights (Enforcement Procedure) Rules must be those ones that have been specifically mentioned in Chapter IV of the Constitution and that an action can only be commenced pursuant to the said Rules where the main claim or relief borders on the enforcement of any of the rights in Chapter IV.⁶⁴

⁵⁹ See Order II Rule 2 of the 2009 Rules.

⁶⁰ See Order IV Rule 1 of the 2009 Rules.

⁶¹ The 2009 Rules have even made provisions for *ex parte* application in exceptional cases of urgency where the life or liberty of the applicant is involved. See Order IV Rule 3.

⁶² Another innovation under the 2009 Rules is that time does no longer run against the institution of human rights proceeding. In other words, unlike the 1979 Rules which provided that an application for human rights enforcement must be filed within 12 months from the day of the alleged violation of the right, the 2009 Rules expressly provides that an application for the enforcement of Fundamental Human Right shall not be affected by any limitation statute whatsoever. See Order III Rule 1 of the 2009 Rules.

⁶³(2014) 1 NWLR (pt. 1389) 607 at 624 paras D-H.

⁶⁴ See also the case of *Sea Trucks (Nig.)Ltd. V. Anigboro* (2001) 2 NWLR (pt.696) 159.

RECOMMENDATIONS

Flowing from the above examination of the rights of HIV/AIDS patients, we recommend the following with the aim of better protecting the rights of the patients while at the same time protecting the public health interest of the society.

- (a) A Federal Anti-HIV Discrimination Act should be enacted by the National Assembly so as to expressly prohibit discriminatory practices against such patients. The proposed Act should also make provisions for the establishment of an enforcement body charged with the responsibility of ensuring compliance with the provisions of the Act. Happily, the President has just assented to a bill passed by the National Assembly in this regard;
- (b) There should be a well-coordinated sensitisation campaign. This campaign should be double-edged; first, to sensitise the public against the misconceived belief that HIV can be contracted by mere bodily contact, thereby discouraging them from stigmatising or discriminating against HIV patients; second, the campaign should be geared towards enlightening HIV patients on their rights and the way and manner to enforce such rights in the face of actual or threatened violation. The mass media, both print and electronic can assist in this regard;
- (c) The states which are yet to enact state Anti-HIV Discrimination Laws should do so with utmost urgency and ensure that the provisions of such laws are religiously enforced;
- (d) All existing laws and policies on disabilities in Nigeria should be reviewed to meet the needs of the current global trend. Also, all human rights protection bodies like the National Human Rights Commission and the Legal Aid Council should be empowered in terms of finance and manpower to enable them discharge their statutory responsibilities;
- (e) Legal Practitioners and other professionals should learn to offer free services and advice to HIV/AIDS patients so as to alleviate their psychological trauma and give them a sense of belonging;
- (f) Nigeria should wake up to her responsibilities under international treaties or instruments to which it is a signatory. It should key into other instruments that are protective of HIV patients and other vulnerable members of society;
- (g) The constitutional provisions relating to right to health or medical facilities and right to equal employment opportunities⁶⁵ should be moved to Chapter IV of the Constitution

⁶⁵Section 17 (3) (a) and (d) of the Constitution. Note that Article 16 of the African Charter guarantees right to enjoy the best attainable state of physical and mental health.

by way of constitution amendment. This will make for their enforceability in the Court of Law⁶⁶;

(h) Courts in Nigeria should be liberal-minded in interpreting the Constitution and other laws in favour of victims of rights violation.

CONCLUSION

This paper has examined some of the rights that accrue to HIV patients. We have examined the laws, policies and instruments that have been made to protect HIV patients, both within and outside Nigeria. We have also taken a look at the judicial attitude of Nigerian and foreign Courts towards the protection of HIV patients.

Our findings reveal that Nigeria does not currently have adequate legal and institutional framework to combat discriminatory practices against or violation of the rights of HIV patients. Consequently, recommendations have been made with a view to engendering a better or more enhanced legal regime on the rights of HIV patients in Nigeria. It is our belief that if the recommendations in this paper are taken seriously, the interest of HIV patients, and by extension, the interest of the larger Nigerian society will have been better catered for.

⁶⁶ By Section 6(6)(c) of the Constitution, Section 17 is not enforceable or justiciable because it falls within the Fundamental Objectives and Directive Principles of State Policy.