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Second issue

Determination of HIV Status as a Pre-Requisite for Contracting English/Traditional Marriages: The Emerging Matrimonial Issue in Nigeria and Zambia

By

Mahmud Kayode Adebayo LL.B (UniMaiduguri), LL.M., Ph.D. (Unijos) BL (Lagos, Nigeria), Associate Professor Department of Private and Property Law, Faculty of Law University of Ilorin. E-Mail makayode@gmail.com

Olokooba Saka Muhammed B.A (Hons), P.G.D.E, LL.B, Ph.D. (Unilorin), LL.M (OAU, Ife), B.L (Abuja, Nigeria), Associate Professor Department of Business of Law, Faculty of Law University of Ilorin. E-Mail sakaskydlaw2002@gmail.com

Alili Ngozi LL.B., LL.M (Ife), Ph.D. (KSU) BL (Lagos, Nigeria), Associate Professor & HOD (Private & Property Law) Faculty of Law Kogi State University, Anyigba (Formerly, Senior Lecturer & HOD (Litigation) Nigerian Law School, Kano Campus). E-Mail, Email-ngozialili@gmail.com

Abstract

This paper examines the emerging matrimonial issue of determination of HIV status before contracting marriages in both Nigeria and Zambia. Using doctrinal method, the paper analyses the legality of the requirement for HIV/AIDS Screening as a pre-marital determinant in both Nigeria and Zambia. The effect and variations in the socio-cultural diversity in the two countries were also examined. Similarly, the effect of the screening on English/ traditional marriages and contemporary challenges facing the validity of the requirement in the two countries were diagnosed. The paper draws conclusion by offering meaningful and reasonable suggestions for the future practice and development of the law with regard to matrimonial causes in the two countries.

Keywords: HIV/AIDS; testing; screening, human rights; culture; discrimination; stigmatization.

Introduction

HIV/AIDS counselling and screening is a gateway to various HIV prevention, treatment, care and support services. It also provides an opportunity for people to learn about their serostatus, accept and cope with the outcome of the test results.[1] Apart from these, it also facilitates a kind of behavioural pattern among couples reducing the risk of infection, stigmatization and discrimination in the community. HIV counselling and testing are geared towards offering clear and unambiguous information for potential couples in the fight and prevention of the spread of the disease. It also strengthened family relationship.

Mandatory pre-marital HIV testing on the other hand refers to the requirement of an HIV test as a condition for entering into marriage[2]. The practice of mandatory pre-marital HIV testing first originated from the state of Louisiana and Illinois in the United State of America and has also been documented in Nigeria, Zambia, Burundi, Uganda, and host of other countries.[3]

The newly introduced Couples HIV Counselling and Testing (CHCT) afford partners to receive screening services together as well as their results. The HIV/AIDS scourge in Nigeria has been taking a larger toll on young couples, thus posing great danger to the marriage institution as the nucleus of procreation as a family, thus creating a great impact on the nation and its human existence as well as her development.

Counselling couples about HIV/AIDS is a kind of confidential dialogue between a person and a caregiver aimed at enabling the person to cope with the stress and make an informed personal decision relating to HIV/AIDS. Thus, Counselling couples about HIV/AIDS helps to make and consider options and services available to them in case they tested positive. It also affords them the opportunity of developing a psychosocial determination of how to cope with the positive/negative test result. If the couples decide to go on with the marriage despite being positive, counselling helps to facilitate risk reduction strategy.

Contemporarily 3Cs principle has evolved as part of CHCT, premarital HCT services. This 3Cs to wit: counselling, confidentiality and consent must be observed before screening is conducted. This is recommended so that the couples could be seen together where possible or separately where they so desire, so that they can share their test results and be made aware of the potential implications of the result on marriage decisions.

It follows therefrom that couple's counselling is recognized as an important and effective intervention in which the two couples are counselled and provided with HIV result as a couple. This will encourage the couple to start planning for their future and discuss a realistic risk reduction plan that they can implement together. However, in cases where the couples refuse to receive services together, they can be counselled on how to receive their results separately and then be encouraged on how to disclose the results to each other privately.[4]

In some instances, too, it is possible that the result can be discordant, i.e. one partner positive and the other negative. The need for disclosure at that time becomes imperative so as to boost mutual support and encouragement of the other party. Generally, in order to increase CHCT access to HCT services, certain strategies should be put in place so as to mitigate the impact of HIV/AIDS. Key among these strategies is to ensure a conducive policy environment. To actualised this, it is advisable for people to know their HIV status before and after marriage.

Due to the sanctity of the marriage institution, combating HIV/AIDS related issues is always a big challenge. According to Oluduro[5], in the past, the popular believe is that HIV/AIDS is a kind of punishment from God for sexual transgression, a divine curse for an immoral act, like having premarital sexual intercourse, being unfaithful to one's partner or behaving in ways that are contrary to certain religious teachings. He further stated that in the opinion of some clerics helping couples living with HIV/AIDS could be regarded as condoning the affected couple's act, thus equating the couple's status as kind of curse for his/her infidelity in the marriage. Rather than adopting a compassionate attitude, much stigmatization is further contributed to the couple's act, thereby worsening his/her guilt, blameworthiness, and discrimination. [6] All in an act that may not be solely by a party's fault.

On several occasion, evidence is bound when the causes of infection may be by mistake i.e using infected objects like a razor or unsterilized barbing clipper. Similarly, someone may be infected through medical error when infected while receiving blood transfusion. Though there are instances when many faithful partners are infected by an unfaithful spouse, whilst many innocent ladies/married women are infected through rape in their home by assailants or armed robbers[7]. In virtually all the cases, the consequential act

of either of the spouse is to move out of the matrimonial home thus leading to neglect, abandonment and denial of conjugal rights, desertion, and eventually divorce. But according to Akuyili[8], when such occurred, all parties ought to have protection under the law "regardless of faith." The issue now is how can they be protected since the most common practice in the contemporary Nigerian and Zambian marriages now is to insist on mandatory pre-marital HIV test particularly by the Christian clerics before joining the couples in matrimony, whereas among the Muslim clerics, it has not been sufficiently explored in both countries. What then is the legal basis of demanding for mandatory premarital HIV test for intending couples and what are the likely human rights issues that may emanated from such act in both countries?

Human rights issues in compulsory pre-marital HIV test is of concern. In fact, for most previous writers in this area National and international, the general perception among them is that the requirement violates individual fundamental right to marry.[9] Worthy mentioning too are Articles 2, 3, and 18[10] as well as Section 37[11] which all encourages the sanctity of human rights protection. Unfortunately, despite the validity of the argument of those writers, the synergy between both the ethical as well as the legal consideration *vis-a-vis* the sociolegal value or devalue which the compulsory pre-marital HIV test can bring to the matrimonial causes in Nigeria are not clearly addressed. This is the major lacunae that this paper hopes to fill.

Bases for Pre-Marital HIV/AIDS Test

From late 1990's Orthodox, Pentecostal as well as white garment churches in Nigeria have started the practice of mandatory premarital HIV/AIDS tests for those who wish to marry in their churches. This practice according to Oluduro trend has extended to other churches like the Catholic Communion and the Anglican Dioceses.[12] Thus in Nigeria today, there must be primary evidence of a HIV test certificate before the marriage rites will proceed. Some of the reasons put forward by the religious institutions (imams/pastors) to justify the requirement for premarital testing are that is aimed at curbing the spread of the HIV epidemic, discouraging of pre-marital sex among the congregation and averting calamity befalling the intending couples.[13]

Marriage is an institution ordained by God for everyone who wish to take advantage of it. Under the common law, marriage is defined as the voluntary union of a man and woman for life to the exclusion of others.[14] What is more elaborate under the English form of marriage is the issue of free consent of both parties. Under the Marriage Act,[15] in Nigeria, the consent of the parties is required for there to be a valid marriage under the Law.

Contemporarily in Nigeria, religious organizations are now making it a condition precedent for engaged couples to undergo mandatory HIV/AIDS tests before they are solemnized. In fact, making a pre marriage HIV/AIDS test a prerequisite to valid marriage is now becoming a fashion amongst religious bodies in Nigeria. To that effect, the proposed couples are frequently requested to present HIV/AIDS free certificate to the religious authority before they are wedded.

Various reasons and bases may serve as the spring factor for pre-marital HIV/AIDS test. Amongst these factors are intention to know and detect the behavioural pattern of couples, morality level, socio-religious life of couples before marriage as well as general health status of couples pre-marritally. To get apt reaction as well as result for these factors the factors necessitating HIV testing for intending couples can be considered at variable stages. One of such variables according to Peter[16] is the socio-economic factor which is characterized by the behavioural pattern of either of the partner. Education is also an important determinant for being tested or not. For instance, educated couples are more likely to be health conscious, ready to use condom and if need be are more likely to submit for testing. Despite this however the issue of HIV related stigma is a limitation here.[17]

Next is economic variable. Indeed, needless to say that without any iota of doubt that many poor women, young ladies, widows and the likes do times engage in risky sexual behaviour for economic reasons. Nigeria and Zambia being a third world and developing countries are prone to economic upheaval. To survive most times, the female folk do engage in immoral activities such as sex hawking stripe dancing and other illicit activities that can easily exposed then to HIV/AIDS. Despite this, it may amount to an unwarranted judgment on infected couples to visit any form of condemnation or sins on them by discriminating and

stigmatizing them, doing this will invariably worsen their predicaments and same can damp their moral. The resultant effect of this most time is early death due to complication from HIV related diseases.

Descriptive statistic and Model Policy are another variables. These variables have to do with the demographic figure of how many married couples were tested and diagnosed over a specified period of time. Thus, prevalence of testing will also influence the average and percentage of couples who are ready to turn up for testing and counselling.[18] Similarly, getting their accurate data will reflect the level of winning or losing war on HIV/AIDS in a particular locality. Model policy therefore is a zenith compliment to descriptive statistic. In effect therefore, variations in health policies and priorities at both the State and Federal level will also influence the bases for pre-marital HIV/AIDS test.

HIV testing is generally unknown to the traditional marriage institution. The HIV/AIDS scourge is believed to be as a result of jettisoned traditional cultural practices, thereby displeasing the supernatural forces that are entrusted with protection of lives and wellbeing of the society[19]. The disease is also seen as a kind of vengeance from the ancestors, and that the only way to restore health is to relist strict adherence to those practices[20]. In reality, some of these centuries old cultural/traditional norms and practices necessitates risky behaviours that facilitates vulnerability to HIV/AIDS infection[21]. Take for instance the practice of wife inheritance, polygamy, sexual cleansing with a designated person as a form of ritual or spiritual cleansing, circumcision, betrothal of infected bachelor/spinster. All these acts may engineer the spread of the HIV scourge. Unfortunately, most of these traditional practices have core traditional values and are very difficult to review, changed, amend or adjust.[22]

As an avalanche, the traditional marriage institution does not also give credence to family planning issues or safe sex practice. There is nothing like sex education, marriage counselling or general medical fitness and certification before marriage. For instance, the issue of use of condom as a form of protection is not recognized. Even where there is a kind of awareness, it is being condemn as condoning illicit sexual pleasure. Use of condom is depicted as an immoral, blunt and misguided weapon against the theory of procreation. This is further buttressed by some religion clerics who perceived the use of condom as an affront to promoting marriage, monogamy, sexual morality, but rather promoting sexual promiscuity among the youths and sending wrong message to uninfected persons.[23]According to Paul Delay[24]:

What we've asked of the churches, particularly the catholic church, is that if you can't say anything nice about condoms, don't say anything at all... concentrate on abstinence and fidelity ... but don't say that condoms don't work or they 've got holes in them or they will break. Don't give misinformation.[25]

From the above quotation, it thus appears that sexual abstinence and mutual fidelity are the cornerstone of HIV/AIDS prevention. Fidelity may be workable in marriages, but abstinence may be a difficult task. In which case, education about avoiding contracting HIV/AIDS and spreading may be resorted to.

The compulsory requirement of mandatory HIV testing before solemnization of the marriage is frequent among the Christians unlike the Moslem Clerics in Nigeria. An appraisal of field study carried out in Sokoto State by Sambo *et al* [26]revealed that, most Muslim clerics were of the opinion that they can only insist on mandatory pre-marital HIV test if they got an instruction from the highest Islamic body as they do not have the right to stop intending couples from getting married to themselves, insisting that it is an injunction in Islam that the Almighty Allah has provided a remedy for any disease discovered on earth.[27]

The reason for the apparent dichotomy in the level of HIV awareness among the Christian and Moslem clerics may not be far-fetched. This could be attributable to the common fact that discussions on issues of sexuality among religious leaders are often misconstrued by their congregations. For instance, there was a general objection to the mentioning of condoms during sermons as a means of preventing HIV/AIDS, according to the congregation advocating the use of condom would amount to an open cheque for promiscuity and immorality. Similarly, it is on record that, Christianity in Nigeria embraced western education earlier than the time Muslims started embracing western education. Colonialism also aided the earlier embracement of western education which now champion the pre-marital testing before marriage in Nigeria. It is a common fact in most quarters in Nigeria that Christian clergymen are more rooted in formal education unlike their Islamic clerics' counterpart hence their aggressive insistence on mandatory pre-marital testing before marriage in the church.[28]

Ethical and Legal Considerations

As it is in Nigeria today, there appears to be no specific law or regulation as regards the nexus between moral obligation and legal obligation in relation to premarital or post marital HIV testing. What we have in existence are policy guidelines devised by the Federal Ministry of Health. In fact, clinics, hospitals, or health centres are a times contracted by faith-based organization to perform the tests and the government endorses the practice as a matter of convention. Practically therefore, there is no specific act or law that made the premarital HIV testing compulsory for any intending couples. Despite this however, there are some ethical and legal issues that are bound to surfaced.

Globally, marriage Counsellors are expected to recognize the fundamental rights, dignity and worth of all people.[29] Every potential couple has the right to know his or her HIV status giving the right atmosphere and condition. Similarly, under the general human rights norms, there exist the rights to information for making choice about one's health and well-being; right to education; privacy; non-discrimination; equal protection; right to marry and establish family life; right to attain the highest attainable standard of physical and mental health.[30]

Similarly, in order to achieve the best ethical requirement with regards to patient's health It is pertinent to note that all health workers are enjoined by ethical principles to do all that is necessary and available to provide the best possible care through the use of diagnostic and follow up treatment.[31] It follows therefrom that HIV screening must be conducted only on request adhering to the principles of counselling, confidentiality and consent. Marriage counsellors are enjoined to provide services to people irrespective of their age, sex, race, culture, religion and value system devoid of any discrimination.

Additionally, it is ethically required that information about HIV status of couples tested during the process of pre-marital screening especially positive should be referred to affordable health services that offers HIV interventions. Services like antiretroviral treatment, post-traumatic support, prevention counselling, psychosocial and nutritional support must also be provided. In some cases, the couples may be given the choice whether to marry or not regardless of the result, while in other cases church leaders may actively counsel against the marriage particularly if couples are serodiscordant.[32]

What is intriguing therefore is the interplay between ethical cum legal issues as it relates to issues like informed consent in HIV testing, voluntariness in conducting the HIV test, the procedure to be followed, individual's choices or a kind of preferred anonymous screening? The argument surrounding informed consent has to do with situations where a patient gives permission to a health care provider to proceed with the testing procedure based on the understanding that he is fully aware of the advantages, risks, implications and consequences of the result whether positive or negative on his/her personal life.[33]

Closely linked to the issues of informed consent is the required age for testing. In Nigeria for instance, the minimum age of 18 years as provided for in the Constitution should be considered before informed consent will become valid. However, in case of infant or children, the parent's or legal guardian's consent is needed before conducting a test, for instance if the paternity of the children of the marriage was in issue.[34]

Furthermore, as regards the issue of voluntariness, under certain circumstances, mandatory HIV test is not acceptable except in situations like rape, which must be carried with a court order and the result made known to the Magistrate or the Judge only. In this wise, the legal consensus is that HIV testing should not be made compulsory for purposes of pre-employment, insurance, education, or travelling purpose as it may infringed on the constitutional protected right to privacy, but the test may be conducted on request based on referral to appropriate government institutions or laboratories.[35]

On the anonymity, credence has been led to the fact that the guiding principle is confidentiality which must be guaranteed. Thus, counselling and testing centres on adherence to the protection of privacy and confidentiality (both visual and auditory) of the spouse concerned. Confidentiality here connotes both the record, filing system and test result of the couples. Anonymity is relevant for purposes of confidentiality in information between a patient and the Counsellor. This is seen in the way code numbers or pseudo names of patients are used in facilitating HIV counselling and testing.[36] However, this confidentiality can be waived with the consent of the patient.

From the foregoing discourse therefrom, we can deduced that compulsory or mandatory premarital HIV/AIDS testing will no doubt infringe on the individual as well as intending couples right to privacy, since at the end of the day, the information/result may not only be shared between the intending couples alone, but shared directly or indirectly between immediate families, church leaders and congregation, thus compounding the problem of stigmatization and discrimination of the intending couples who are now at the juncture of being branded People Living With HIV/AIDS (PLWHA).[37]

It has however been argued that pre-marital HIV testing policies open many possible routes for involuntary disclosure of HIV status, thus thereby attracting negative social consequences of such disclosure especially in situation where HIV/AIDS remains highly stigmatized.[38] In order words when viewed from the context of confidentiality, it is obvious that the right to control information regarding oneself especially sensitive information, from non-consensual divulcation and public scrutiny is at stake if the couples status is shared among immediate family members or church congregation.

Since there is no specific law that provides for a mandatory premarital HIV/AIDS tests, it follows that any condition, policy or law that purports to limit or prevent any individual or intending couple from exercising his/her rights to marry contrary to the Constitution of the Federal Republic of Nigeria shall to that extent be *null and void ab-initio*. [39] Thus the Mosques and Churches demand for HIV screening certificate before solemnizing the marriage is mere cosmetic and have no basis in law. Thus as rightly observed by Oluduro[40], thereby submits that pre-marital testing for HIV/AIDS should not have any place in an effective response to the control of the epidemic, since the benefit of proper counselling is often not provided.[41] The generality of opinion is that given that marriage is a union before God and man, any restriction of freedom of marriage must have a compelling justification else the demand for mandatory pre-marital HIV testing will be become questionable and appears discriminatory and will increase women's vulnerability to social vices and marginalization in the society.[42]

Purposely of what importance then is the rationale or ethical benefit behind any proposed mandatory HIV testing policy? According to Kass,[43] (reiteratively) the general goal of any public health programme is the reduction of population mortality or morbidity. Pre-marital HIV testing has initiated by religious and civil institutions as a means of promoting pre-marital abstinence and reinforcing the traditional religious prohibition against sex outside marriage.

Furthermore, even though the proposed policy on mandatory HIV testing if done right could help early detection of HIV as well as the prevention of the spread of the infections among those planning to marry which will invariably at the long run help to prevent transmissions to potential spouses and future children. However if care is not taken, various religious bodies could also be guilty of complicities in wrong doing if they married persons of unknown serostatus.[44] Thus, for any mandatory pre-marital HIV testing to be reasonable, meaningful and effective it is necessary to abrogate any negative behaviour that might endanger and which may worsen the post-trauma situation of the patients.

Challenges of Pre-Marital HIV Testing

Stigmatization and discrimination if tested positive is a major obstacle to HIV testing for couples. The potential spinster or bachelor may experience the resultant effect of being shunned and ostracized by her potential in-laws. In addition to this, he/she may be excluded from the chosen place of worship or disengaged from his place of work. The victim may suffer psychological depression and early death. In the crudest traditional society, the victim may be banished for incurable disease and if he/she dies, the evil forest will be burial ground.[45] The foregoing despicable fears often debar potential couples from going for HIV/AIDS screening to avoid the unknown. In Nigeria for instance, this fear of discrimination in several cases has been witnessed in most areas of life; the like educational sector, health care sector, peer grouping and in the places of employment. This in the long run negatively affects the collective effort of fighting the disease. On the other way around, it makes the victim to suffer in silence. Conceivably, the most significant challenge that denies people access to HIV testing and counselling is stigmatizing laws and practices. Stigmatizing laws have the potency of discriminating against vulnerable population such as commercial sex workers, injecting drug users (IDU's), homosexuals, lesbians, and transsexuals. Furthermore, these laws discriminate against people living with HIV when it comes to issues of employment, marriage and founding

a family, by depriving them of adequate health care services.[46] Persistent stigmatization and discrimination is a common factor that prevent people from willingly seeking HIV test and counselling.

In addition to fuelling stigma and discrimination against people living with HIV/AIDS, pre-marital mandatory testing has further led to an increase and proliferation of fake HIV/AIDS screening certificate showing false negative statuses.[47] Notably, the prohibitive cost involved in identifying a single HIV/AIDS positive and the propensity to get retroviral drugs, has equally led to intending couples avoiding being solemnized in the states/ churches/mosques where such a mandatory test existed.[48]

It thus obvious from the foregoing that where practicable, pre-marital HIV testing should not be made mandatory, rather intending couples should be encouraged to go for voluntary testing or counselling in which they will be effectively counselled on the issue and thereafter be left to decide for themselves whichever way to go. However, this is without prejudice to countries like Bahrain, Guinea, UAE, and Saudi Arabia, that have enacted laws and policies mandating pre-marital HIVB testing.[49]

The Zambia Experience

The Zambia like Nigeria too, has evolved her own National Guidelines for HIV Counselling and Testing in 2002. It will also be appreciated both countries (Nigeria/Zambia) have the same colonial heritage both traditionally, culturally and the same English legal system.

The Guideline was developed by multidisciplinary team representing public health workers, Non-governmental organizations, physicians, social counsellors and laboratory experts. Inputs from a wide range of experts such as support groups, people living with HIV/AIDS (PLWHA), donors, the private sector people with disability, were all co-opted. The aim and objectives was to ensure that practice of counselling, testing and knowledge of one's serostatus is encouraged with the view to change sexual behaviour which is a very important factor in any HIV prevention and treatment.

Among others, the guideline equally makes provision for regulating of HIV testing approaches and technology, strengthening and support for expansion and extension of HIV counselling and testing, provision of adequate information regarding result of HIV test to all patient and also to assess appropriate health care treatment and prevention of mother to child transmission.

According to Ben Chirwa,[50] it has been proved through research that counselling and testing is cost effective, it plays a vital role in the provision of care and support programme. The potentials include improved health conditions through good nutritional diet, access to ART and prevention of other sexually transmitted diseases. It also affords opportunity for safer reproduction techniques, reduces mother to child infection, and further reduces the spread, burden and stigma of HIV. It is a catalyst for behavioural change so that patient can remain uninfected.

Zambia too like Nigeria, has a generalized heterosexual HIV epidemic, the demand for counselling and testing is growing proportionately especially among the vulnerable groups like intending couples and adolescents. Also testing for HIV/AIDS is not mandatory onto patients, but rather offered under mutual agreements, based on informed consent and perceived need[51]. The patient is supposed to understand the importance of HIV testing before making an informed consent which can be given orally or in writing.

Furthermore, confidentiality must be maintained too, and it must not be shared except to the patient. Patient requesting for testing result for official reasons such as employment should be referred to the doctor in charge who may authorize release of the written result[52]but the human rights of the patient should be protected.

Unique, innovative and far reaching are the provisions under the Nigerian as well as Zambians' Guidelines for HIV/AIDS Counselling and Testing, is that pre-marital and marital counselling and testing services[53] should be encouraged but should remain voluntary and confidentiality maintained. Provision is also preferred and recommended that couples receive their results together. If the couples are reluctant to reveal the results to each other, individual counselling and testing should be encouraged as a first step, so that the couple will reveal the results to each other before the marry.

The guideline further provides for the protection of rights of individuals and couples in case they are tested positive. Efforts should be made to prevent negative outcomes for HIV positive individuals and discordant couples i.e. (where one partner is tested positive and the other negative). In such a situation, additional counselling services should be recommended as directed by the guidelines, that is referral services like medical, social, legal, spiritual and psychological support services would be helpful and made accessible to either couple.

However, the *Zambian Guidelines* specifically spelt out the ethical code of conduct for HIV Counsellors^[54] under the General Principles of Consent, Competence, Confidentiality, Respect for Human Rights, Personal Conduct/Integrity and Disciplinary Measures. It enjoins counsellors to be responsible for their own competence, effectiveness, conduct, physical safety, and should avoid any compromise of the counselling profession.

Counsellors are expected to possess requisite training, skills and techniques in the art of counselling. The counsellors would be monitored regularly by a supervisor, and in addition to proper delineation of boundaries and limitations while making appropriate referrals to other expertise. Counsellor must obtain the patient's consent to engage in counselling and testing in a private and confidential setting. The nature of counselling must also be properly explained to the patient taking into consideration the nature of any contractual obligation as to timing, duration, confidentiality, cost /fees for services rendered.^[55]

Equally, the counsellors must maintain adequate records of their work with the patients while protecting the identity of individuals, groups, or others. No information concerning patient's HIV test should be given without the patient's permission, though recognizing the fact that any agreement between counsellor and the patient may be reviewed and changed by joint negotiation. The only exemption to the requirement of confidentiality are in cases where the court of law order to the contrary; or on the patient's request; or where the patient's infected continues to behave in a way that present a clear and manifest danger to individuals or public.^[56]

It should be noted that any decision to break confidentiality should be agreed upon by both the counsellor and patient in the presence of the counsellor's supervisor. Counsellors should at all times not exploit any counselling relationship for the gratification of personal desires either by demanding for sex, unfair treatment, discrimination or stigmatization or passing derogatory remarks on their patients.^[57]

Respect for fundamental rights, dignity and worth of patients is expected to be the watchword for all counsellors. Service must be delivered to patients irrespective of race, culture, religion, values or belief system. Far outreaching too is the provision in the guidelines that all personnel involved in HIV counselling and testing should sign an oath of confidentiality that corrective measures should be taken against them upon breach of the oath and further disciplinary action may be taken depending on the ethical code and level of gravity of the breach committed by either terminating his/her service and payment of damages.^[58]

Human Rights Principles in Pre-Marital HIV Counselling: Filling the *Lacunae*

The human rights principles most relevant to HIV/AIDS counselling and testing which every patient, intending couples and victims should adhere to, cursorily are:- rights to privacy; right to non-discrimination; right to have a family; right to attainable standard of physical and mental health; right to informed consent before a medical procedure is carried out.

i) Right to privacy:

Due to the stigma and discrimination attached to the loss of Privacy and confidentiality if HIV positive status is disclosed, counselling and testing services must therefore be adequately safeguarded in order to ensure that no testing occurs without informed consent, that confidentiality is protected in public, private and social spheres. Information about HIV status must not be disclosed to third parties without the consent of the individual concerned. Right to privacy is guaranteed through strict observance of confidentiality in carrying out HIV testing, keeping of records and non-disclosure of results.^[59]

As discussed by the Writer in the previous discourse, there are exceptions to this rule of confidentiality in the context of unequivocal consent given by the patient to share the information, or where the information to

be given is under compulsion of law of the law i.e as a material evidence in a court proceedings, or where the information is necessary to further medical research among medical professional colleagues, but even then the identity must be concealed; anonymous and unlinked testing.[60]

Apart from these exceptions above, the test result must in all cases be given to the patient in person and privately to ensure compliance with confidentiality and adequate support.

ii) Right to non-discrimination and stigmatization:

Discrimination with its attendant's components must not exist in any counselling and testing setting. There must feature equal protection, and equality before the law, else it deprives the intending patients of free and fair access to testing mechanisms.

The right to freedom from discrimination was further secured by Section 42 of the 1999 constitution of Nigeria. As discussed above, the application of this right manifest in two ways. Firstly, the presence of stigma in a community makes it more difficult to prevent HIV spread in general. Secondly, counselling and testing programme which allow most people to know their HIV status, can actually decrease the stigma and discrimination, foster normalization and provide an avenue for more effective HIV prevention and care.

UNAIDS stated that arbitrary discrimination against people living with HIV/AIDS can have devastating public health consequences,[61] as discrimination tends to instil fear and intolerance. It leads to a situation where you have an interference with effective prevention by discouraging individuals from turning up for testing and seeking for information on how to best protect themselves and others.[62]

The long-term effects will be a deepened adverse impact on people living with HIV/AIDS and actual HIV/AIDS prevention mechanisms. It is no doubt that the effectiveness of a HIV/AIDS prevention policy or programme depends on reaching those who are at risk and encouraging them to adopt safer behaviour. It is therefore essential to avoid those habits and practices that will drive people away from seeking preventive knowledge about the HIV/AIDS.[63]

iii) Right to marry:

in this respect, very astonishing is Section 37 of the Nigerian Constitution, 1999 which guarantees right to marry and own a family. It provides thus: The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected[64] Flowing from the Writer's previous discussions above on this issue, the legal position is that any policy/guidelines that run afoul of constitutional provision shall to the extent of the inconsistency be null and void. So therefore, any mandatory pre-marital HIV testing or the requirement of HIV free certificate as a condition for solemnizing a marriage is void and same shall be discouraged.

iv) Right to the highest attainable standard of physical and mental health:

It is undisputable that quality and free counselling and testing contribute to the physical and mental health of those who wish to know their status. It is also an integral part of supportive medical care characterized by quality information about pre and post counselling and testing, informed consent and promotion of reproductive health; hence the constitutional guarantee of this right.

v) Right to informed consent before medical procedure:

From the foregoing discourse, it is also evident that it is a standard medical practice that there should be informed consent before any medical procedure. The imminent risk and the benefit of the procedure should be explicably explained to the patient to facilitate the requirement of informed consent too.[65]

Conclusion and Recommendations

Conclusion:

It is feasible from the foregoing discussions that HIV/AIDS in both Nigeria and Zambia is not just starting, but it has spread so fast to the level of being endemic, epidemic and pandemic cutting across various facet of the society. HIV/AIDS is now an emergency that desired apt attention socially and legally in the countries of focus as well as other countries of the world. In an effort to actualised and achieved the curtailment of the dreaded scourge, the two most popular religion in the countries of discussion are now using compulsory detective mechanism through pre-marital test. Unfortunately, that effort as could be gleaned from the discussion in this paper is limited and curtailed by various emerging medical, ethical and legal challenges, especially human rights issues. Some of the common challenges confronting the efforts as far as marital causes is concerned were examined and the limitation in them pointed out where necessary. In the final analysis, the paper outlined the human rights principles in the HIV/AIDS counselling and posited that discrimination with it attendant's components must not exist in testing, treatment, pre and post trauma counselling and that the effectiveness of a HIV/AIDS prevention policy or programme largely depends on reaching those who are at risk, thus such group should be encouraged to adopt safer behaviour couple with legal protection. Furthermore, it is posited in the paper that even though various human rights issues are bound in the compulsory HIV/AIDS pre-marital test but once the 3Cs to wit: counselling, confidentiality and consent are strictly observed before and after screening is conducted most of the issues may be prevented and the major factor stopping most intending couples in the two countries from believing in and or participating in an HIV/AIDS pre-marital test to wit, stigma and discrimination may be eliminated.

Recommendations:

The cornerstone of HIV testing scale-up must include improved protection from stigmatization and discrimination as well as an assured access to integrated prevention, treatment and care services. Furthermore, the condition under which patients undergo HIV testing must be anchored on a human rights approach that protects their human rights and gives recognition to ethical principles. Public health strategies and human rights promotion should be mutually reinforced. Thus, the global awareness in response to HIV screening especially as it relates to pre-marital testing should be grounded in sound public health practice and also respect for the protection and fulfilment of human rights norms and standards. The voluntariness of pre-marital HIV testing must remain at the heart of all HIV policies and programmes in compliance with human rights principles and benefits.

Akin to this also is the urgent need to reduce HIV/AIDS related stigma and discrimination at all levels notably among intending couples. A supportive legal and policy framework should be designed to safeguards the human rights of the couples. Similarly, care should be taken to ensure that vulnerable populations have access to ethical, appropriate and effective HIV testing and counselling services as well as to follow up prevention, care, treatment and support services, otherwise the existing inequalities and inequities can be expected to exacerbate.

Additionally, more emphasis should place on ethical process of conducting the test. By this, the purpose of the test and benefits to the individual being tested must be identified, and assurances of guarantee confidentiality of all medical information. Likewise, the implication of a positive test result including access to sustainable treatment and care for the people living with HIV/AIDS should be well addressed and more elaborate to carter for new cases. The conditions of the 3 "Cs" (confidentiality, counselling, and consent) enumerated earlier on in the discourse of this paper, should continue to be the underpinning as well as guiding principles for the conduct of HIV testing for individuals.

Various health sector policies that have direct impact on HIV testing and counselling should be enshrined in national legislations and regulations put in place to enforce them. There should be free and unhindered access to these policies for instance, the Drugs Regulatory Authority of respective health ministries and other bodies responsible for regulating supplies of quality and safety of testing and counselling programmes, should indicate the conditions under which new supplies may be registered and should also specify those that are allowed to dispense these commodities.

A community-based approach can also be developed towards testing and counselling on HIV/AIDS. It is part of community action plan that talking about HIV testing and counselling may lead to people realizing that their behavioural pattern can help reduce the risk exposure of vulnerable groups like intending couples.

This will serve as an important community intervention in the spread of the HIV. Moreover too, there is need for adequate information management to keep records of intending couples i.e. those tested positive for referral services, their addresses, personal details, movements, and most importantly a platform may be created for them to exchange ideas, for sharing updates about their statuses, products sources and familiarization with policies and legislations relevant to medical components. Finally, abiding by the 3Cs principle to wit: Counselling, Confidentiality and Consent while dealing with HIV patients by the stakeholders in the health sector is highly recommended. Doing this will certainly aid the zenith achievement of the preventive intention of the proponent of the principle.

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Email.: info@gambialawreview.gm
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