

Realizing Children's Right to Education in Kenya as HIV/AIDS "Socio-Legal Vaccine"

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Abstract: Children living with, or affected by Human immuno-deficiency virus/acquired immune deficiency syndrome (HIVAIDS) the world over face myriad human rights challenges related to their education (UNAIDS, 2015). The responsible factors emanates from within and without their households. The paper seeks to analyse the link between the right to education and HIVAIDS in Kenya. It delves into three questions. Firstly, what is the link between HIVAIDS and the children right to education? Secondly, what does the children rights to education entail? Thirdly, can some educational imperatives augment children rights to education in ways that makes them stronger socio-legal vaccine against HIVAIDS? The paper proposes that the law ought to engender a more inclusive education system which entails the entrenchment and implementation of HIVAIDS education policies into the main school curricula, teacher training and civic education to the society through the media and outreach with a view to sensitizing the communities at the grassroots levels.

Key words: Children, Education, Epidemic, HIVAIDS, Human Rights and Social - Legal Vaccine.

1. INTRODUCTION

The HIVAIDS epidemic is the most severe social challenge hindering children's rights to education in Kenya. This hinges on the fact that the lives of millions of parents, children and teachers have been permanently changed by the epidemic, in ways that constrain schooling. It has had an unprecedented impact on children's access to education. This is even more crucial as education itself has been recognized as a "socio-legal vaccine" against HIVAIDS. Ensuring equal access to quality education for HIVAIDS affected children is essential both to fulfilling governments' human rights obligations and to combating the pandemic.

Every child is entitled to the right to education. The right is embodied in a myriad of international instruments and countries' legal regimes. That the children's right to education has gained pedagogic significance is not in doubt (Nolan, 2010; 132).

In Kenya, children's right to education is embodied in the Constitution and the Children's Act, among other legislations. For example the Constitution provides that "every child has the right to... free and compulsory basic education" (GoK, 2010; art. 53. [1b]). The Kenyan Constitution also recognizes various international treaties and legal principles as integral part of the domestic legal regime (GoK, 2010; art. 2. [5&6]). States have different levels of resources and as such, the law does not mandate exactly what kind of education must be provided, beyond certain minimum standards. Accordingly, the right to education is considered a right of progressive realization. By becoming party to the international agreements, a state agrees to take steps to the maximum of its available resources to the full

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realization of the right to education(UN, 1966; Art 2 [1]):
UN, 1989; Art 28).

2. THE HIVAIDS -EFFECT

The high burden of HIV and AIDS in Kenya accounts for an estimated 29 per cent of annual adult deaths, 20 per cent of maternal mortality, and 15 percent of deaths of children under the age of five. (NACC, 2016). The epidemic has also negatively affected the country's economy by lowering per capita output by 4.1 per cent. Kenya has an estimated 71,034 new HIV infections among adults and about 6,613 new infections among children annually (ibid).

In addition to this, young people (15-24 years) contributed 51% in new infections in the year 2015, a figure that has risen from 21% recorded in 2013. According to the recent HIVAIDS progress report, there were 35,776 new infections recorded among this group in 2015 bringing the total of young people living with HIV to 268,586.(ibid). This report further indicates that a whopping 3,853 youths died of HIV. These statistics demonstrate that the prevalence rate for children is still high.

The current *Kenya National HIVAIDS Strategic Plan 2015-2019* does not mention the importance of ensuring that children get access to education as a strategy of combating or mitigating the harsh effects of HIVAIDS amongst children [Strategic Plan 2015-2019]. It only mentions children in the context of PMTCT; HIVAIDS and sex education when entering adolescence; and protection of orphans and other vulnerable children. The Plan seems to focus on adults and does not highlight specific measures on the link between realization of the right to education and combating of HIVAIDS.

The HIVAIDS is one of the most severe social challenges facing children's right to education to date. Therefore, it has a profound connection with both international and domestic legal developments. The lives of millions of children, parents and teachers have been permanently changed by the epidemic, in ways that constrain their ability to go to school, to stay in school and to learn or to teach (Boler & Jellema, 2005). Further, the children affected by HIVAIDS are faced by a myriad of challenges such as stigma, lack of family support, chronic illnesses, poverty, lack of political will on the part of the government, poor implementation of policies that are in place to protect or mitigate their plight, among other things.

It is against this background that the society and specifically, governments must scale up their collective responses. Education is critically important as the most powerful 'socio-legal vaccine' against HIVAIDS infection (ibid). It can augment other mitigation measures (ibid). Further, the children who most need the protection and skills afforded by education, those affected or infected by the syndrome will not be able to attend school unless their special needs are addressed (ibid).

As the epidemic continues to spread with no vaccine in sight, there has been growing recognition, first, that prevention is critical and second, that prevention requires more than just transmitting accurate health information. The most effective way to prevent HIVAIDS is by educating and helping people to change behaviours that put them at risk, such as age of sexual debut, number of sexual partners and use or non-use of condoms. These behaviours are usually embedded in deep social, economic and cultural patterns, so that billboard advertising or flyers distributed in health clinics may have little effect unless accompanied

by other efforts. So the new emphasis on accompanying treatment with prevention has generated interest in the power of education as a complementary weapon against HIVAIDS. School systems have a threefold role to play in fighting it.

HIVAIDS also leads to stigmatisation. Stigma is basically social exclusion to a person by other members of the society. Children affected by HIVAIDS and those living with HIVAIDS are often victims of marginalisation. The other children distance themselves from these children and they are faced with a negative learning environment. In an interview by the Human Rights Watch in Uganda, a neighbouring country, children orphaned by HIVAIDS said that on top of the emotional difficulty of losing a parent, they were sometimes stigmatised and teased by classmates for being orphans or for "having HIVAIDS." [Human Rights Watch Report,[2005] One of the interviewees, Charles W, who was orphaned at age eight and had his school fees subsidized by The AIDS Support Organization (TASO) in Uganda, said that his classmates and teachers nicknamed him "TASO Child" and treated him differently from other children:

My classmates, they knew my parents had died, they caused problems for me. I was segregated. I was known as 'The son of AIDS,' and teachers and students would call me 'TASO Child.' . . . When we were sharing desks, the kids wouldn't want to sit next to me. . . . It would be terribly hurtful as a child to be called 'TASO Child.' It was only name calling no physical abuse, but still...

HIVAIDS further lowers the supply for education in the society. It has often been projected that a decrease in the demand for education leads to a similar decrease in the number of classes, schools, teachers and other personnel requisite for the delivery of the education curriculum (ibid). Indeed, fewer students in the system and a lower demand for places in various institutions of learning consequently lead to a smaller supply of facilities.

2.1 Lack of Family Support

A child affected by HIVAIDS, or whose parents are infected and ill, or dead, lack family support and this adversely affects their accessibility to education. In an interview by the Human Rights Watch conducted in Nairobi, Kenya, Florence N. said that her teacher did nothing when she explained that she needed to work to support her mother who was living with HIVAIDS. (ibid)

"...I'd wake up in the morning and we wouldn't have anything to eat. Our clothes would be dirty, and we didn't have any soap to wash them. So I'd do casual work, maybe do some washing for someone and get 20 shillings [U.S.\$0.25] to buy soap, or maybe some food. I'd stay home from school about two days a week. When I explained to the teachers why I wasn't coming, they said nothing..."

2.2 Special Effect On Children

The society places low expectations on children living with HIVAIDS. They are also faced with stigma. In an interview carried out on Kenyan children living with HIVAIDS, Njeri (2012; 114) reveals that the society has not been all-welcoming to the children. In fact, such children are often

seen as outcasts who deserve nothing but banishment from the society. One of the interviewees, Karisa, had the following to say:

"...the conditions there were very bad. The villagers insulted us and when we went to school the other children abused us because most of the people knew about our parents .it was very hard even to study..." (ibid)

From this excerpt, it is evident that the pupil's psychological and mental faculties are negatively affected. The child feels condemned on the basis of their HIVAIDS status and cannot concentrate in class. This has a negative impact on this child's realisation to their right to education.

Another challenge faced by children affected by HIVAIDS and those living with HIVAIDS is increased responsibilities at home. Worth noting is the fact that the education of children who assume such roles and head their households gets hindered in one way or another and hence these children become unable to go school since they have to work to provide for themselves and meet their expenses in school. The net result of this sad state is that education becomes less relevant and loses meaning to such children.

In another instance, Children affected by HIVAIDS and those living with HIVAIDS are at times forced to work at home in instances where the parents are HIVAIDS positive and sickly. This results to tiredness during classes and erratic school attendance which in the long term renders a Lower learning process.

2.3 Chronic Illnesses and Poverty

Children affected by and vulnerable to HIVAIDS are forced to drop out of education due to unaffordable schools fees. It is worth noting that families affected by HIVAIDS are economically disadvantaged majorly by the high cost of medical care and the loss of income from deceased adult members of the family [Erica L. Pufall, 2014; 2] Indeed, children who are orphaned or are otherwise affected by HIVAIDS either pull out of school or do not get enrolled to school at all due to the financial constraints of their affected families and have to assume responsibilities of heading or providing for households (ibid).

In the Kenyan context, incidences have been reported to the effect that teachers prevent AIDS-affected children from enrolling or even attending school because they are unable to pay school fees or other costs [Human Rights Watch Report, 2005]. They are also stigmatised because of inadequate uniform and learning materials. In addition to this, the concentration levels go down and this may be attributable to hunger.

2.4 HIVAIDS Lowers The General Demand For Education By Those Infected Or Affected

The pandemic has had a general effect of school-going children absenting themselves from school for long periods of time. Some of the reasons for this is that the children mostly lack school fees and that they are usually compelled to take turns while nursing HIVAIDS patients at home and working at the farm to provide for themselves due to the decreased labour [UNESCO, 1994; 13] This state of affairs has the resultant effect of fewer children wanting to go to school and therefore a decreased demand for education generally.

2.5 HIVAIDS Interrupts The Teaching-Learning Process In Institutions Of Learning

The social interactions that mark the teaching-learning process between learners and their instructors have been marred and scarred by the HIVAIDS pandemic. This is evident in the manner in which infected and/or affected children are often discriminated against, ostracised or even isolated from their colleague while in classrooms (ibid).

Further, such learners may end up being suspended from the system or even forced to quit learning wholesomely. Suffice it to note, infected and/or affected teachers may end up getting their social and health benefits suspended or their summary dismissal from the system.

2.6 Special Effect On Teachers

Teachers are key stakeholders within the education system. Among many other roles, they serve as role models, mentors and guardians to the children put under their care and guidance. In this regard, they form a central cog in achieving the Sustainable Development Goals, since education is regarded both as a right and as a pillar in the fight against poverty. Like everyone else, teachers are also susceptible to HIVAIDS. In countries with reportedly high HIVAIDS infection rates, this susceptibility is highly noticeable. As more and more teachers die, an already weakened educational system faces the dual challenge of increasing numbers of pupils and decreasing numbers of teachers.

On another limb, the cost of HIVAIDS to the education system as a result of teacher deaths and absenteeism is substantially high hence severely hindering the ability of

the education system to deliver quality education, since funds that could be invested in improving the standards of education are often diverted to other courses related to HIVAIDS .

In view of the foregoing, children are directly affected when a teacher who is living with HIVAIDS absents themselves from school. The children may miss a class. Further, it is also important to note that teachers are not trained on how to deal with HIVAIDS and in some instances they may perpetrate stigma to children affected by the HIVAIDS pandemic.

3. LEGAL FRAMEWORK

The Kenyan laws thus, the Constitution, legislations, customary law and international law recognises the children rights to education. There have also been a couple of court cases that have been decided pertaining to the same. Pursuant to article 2 (5, 6) of the Constitution of Kenya, pertinent international laws and legal principles are recognised as integral part of the Kenyan law. Kenya is a state party to the major human rights treaties. Kenya has ratified the CRC and the ACRWC. On the national level, key protections are laid down in the Constitution [2010], the HIV Prevention and Control Act [2006] and the Children's Act [2001]. Kenya has adopted the monist approach as far as international law is concerned (Constitution, 2010; Article 2(5). However the High Court has in the past held that international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution (Wanjiku &Anor v AG & Anor, 2012]. These are discussed herein below.

3.1 Constitutional Provisions

The Constitution lays down a normative and structural framework for the protection of human rights in Kenya. It embodies a comprehensive Bill of Rights which sets out both the general rights extending to citizens in general and those of specific groups including children, the youth and persons with disabilities. The inclusion of children's rights in the Constitution illustrates the determination of the government to adhere to its international and constitutional obligation towards children.

Article 53 (1) (b) of the Constitution stipulates that every child has the right to free and compulsory education. Departing from the conventional limitations on socio-economic rights, article 53 of the Constitution creates immediate obligations upon the state to fulfil socio-economic rights of children. In effect, the government is henceforth bound to provide 'education' to children irrespective of budgetary implications. The new duty on the state with respect to health is greater than that provided for in the Children Act, which vests responsibility on both parents and government [Children's Act, 2001; sec 21]

In tandem with international children's rights, the new Constitution establishes in Kenyan law internationally acclaimed principles on the rights of children, such as best interests of the child which is now to be paramount in every matter concerning children[Constitution, 2010 ; Article 53(2)]. It further recognises age as a ground for discrimination, which is critical to the application of the rest of the rights recognised in the Bill of Rights to children. The new constitutional framework creates room for strategic rights litigation for children thus affording an opportunity to enhance jurisprudence on children's matters. Building on the seemingly narrow scope covered by article 53 of the constitution, it is possible to develop extensive

jurisprudence for children as has happened in other progressive jurisdictions such as South Africa [Treatment Action Campaign case, 2002].

3.2 The HIV and AIDS Prevention and Control Act

In 2006, the HIV prevention and control Act was enacted to ensure the rights of people living with HIV (PLHIV) and those affected by HIVAIDS are protected and promoted. This was a step in the right direction. The objective of this Act as provided under the preambulatory provisions are as follows:

...to provide measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes

In spite of this proclamation of intent by the drafters, the content of the Act suggests a different and grimmer reality for children living with HIVAIDS. Firstly, the preamble does not recognise specific vulnerable groups such as children, MSM, prisoners, LGBTI, women, among others. It is argued that this Act has forced these vulnerable groups to go underground. They are unable to access comprehensive health care services, education on HIVAIDS care, treatment and support, thus making them more vulnerable.

Secondly, the preamble places a significant emphasis on adults and as such it is argued that the legislation seems to adopt a 'first adults then children approach.' By not setting

out a specific category of vulnerable groups such as children, it is argued that the Act has restricted access to information and education for children and this adversely affects CLHIV.

Third, the Act stipulates that anyone under the age of 18 needs parental consent for testing (GoK, 2006; sec 14(1) b). The expression "mature minor" is not defined in the legal framework. Confidentiality of a child's HIV status is compromised by the law as the results are released to the parents (GoK, 2006; sec 18(1) b & 22(1) c). The parents may opt to conceal this information due to stigma or lack of knowledge as they are not informed through civic education or other ways. These have adverse effect on the realization of the right to education as a child that has engaged in risky behaviour may not be aware of their HIV/AIDS status and may end up in and out of school due to opportunistic infections. The law does not allow parents or other caregivers to authorize third parties, such as community health care workers, to take children for testing.

Further, there are inadequate community health workers, social workers, and counsellors who can play a crucial role in educating and convincing caregivers to test children and in ensuring that Children are treated.

3.3 The Children's Act

The Children's Act of 2001 is the primary Kenyan law which sets forth legal obligations of all duty bearers - the government, parents, and civil society- to respect, protect and fulfil the rights of children. It has been commended as it is the first example of a comprehensive enactment in Kenya which gives effect to any international human rights treaty to which the country is a party (Wabwire, 2005; 394).

With regard to children's right to education, section 7 of the Act stipulates that every child shall have a right to education, the provision of which shall be the responsibility of the parents and the Government. The Kenyan government has made modest efforts that are geared to making Kenyan children's right to primary education a reality. However, this study argues that specific measures need to be put in place to ensure education acts as a socio-legal vaccine to combat the harsh effect of this scourge particularly among children. The free primary education programme although faced with challenges, stands out as the most significant development. However more needs to be done.

Section 22 confers jurisdiction on the High Court to enforce any of the rights of the child and confers legal standing (*locus standi*) on any member of the public to institute action and approach the Court for such enforcement. This is a positive step as it encourages education rights litigation. Perceptions of children and childhood have often implicitly and/or explicitly influenced how courts have interpreted children's rights and applied such provisions (Nolan, 2010). For instance, in its *Advisory Opinion on the Juridical Condition of the Child*, the Inter-American Court of Human Rights stated that education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights (Advisory Opinion, 2002).

The Court had previously commented in this decision that the best interest's principle is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development,

making full use of their potential, as well as on the nature and scope of the CRC. Here, the Court specifically justified the paternalistic best interest principle in terms of, amongst other things, the need to develop the child's potential – that is, to maximise the child's future capacity for autonomy. In the context of the right to education, litigation is a powerful tool as it will provide an opportunity to interpret what the right to education entails and the obligations of the state.

In certain respects however, the Act falls short of a full guarantee of the provisions of international law. In answering the question whether the Act really 'brings home' the rights of the child, scholars have argued that 'contrary to popular impressions, the legal framework falls far short of what is required to establish a credible children's rights regime' (Wabwile, 2001). This view is motivated by the flaws in the Act and what these scholars describe as the absence of 'more radical and pragmatic reforms' (ibid).

3.4 International law

The following international instruments are herein analysed for their provisions on children rights to education. These are, the Universal Declaration of Human Rights 1948 (UDHR); The International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR); Convention on the Rights of the Child of 1989 (CRC); Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW). Further, various international law instruments, specify that primary education must be "compulsory and available free to all" (UN, 1948; Art.26 [1]; UN, 1966, UN, 1989: UN, 1979). Secondary education, including vocational education, must be "available and accessible to every child" with the progressive introduction of free secondary education (UN,

1989; Art 28[1]). At the regional level, the right to education is also recognized in the African Charter on the Rights and Welfare of the Child (AU, 1990; Article 11 [3]). This Charter calls on states to "provide free and compulsory basic education" and to "encourage the development of secondary education in its different forms and to progressively make it free and accessible to all" (AU, 1990; Article 11 [3]). The African Charter specifically calls for "measures to encourage regular attendance at schools and the reduction of drop-out rates" (ibid). The education provisions of this Charter contain a broad guarantee of non-discrimination for all disadvantaged groups, calling on states to take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Of the various international instruments set out above, the ICESCR is the primary international instrument that deals with the right to education. One of the unique provisions under the ICESCR is the right to primary education which is subject to a special provision that obligates states;

.....to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge measures to encourage regular attendance and the reduction of [school] drop-out rates (UN, 1966; Art 14)

Under the ICESCR, the realization of this right is comprised of six aspects; compulsory and free education at least at the primary level, quality, education in human rights, the freedom of parents or guardians to choose an educational institution, the possibility for physical or legal persons to set up and run educational institutions, the principle of non-discrimination and international cooperation.

Although the right to education is a right of progressive realization, the prohibition on discrimination is not. The Committee on ICESCR, responsible for monitoring compliance states that,

The prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.[

Committee on ESCR, para 6]

Thus, regardless of its resources, the state must provide education on the basis of equal opportunity.

“without discrimination of any kind irrespective of the child’s race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth, or other status.[CRC, 1989; Art. 18(2)]

“Other status,” as explained below, includes children’s or their parents’ HIVAIDS status. Discrimination in access to education need not be overt or intentional in order to breach rights standards. *De facto* discrimination, or discrimination caused by underlying factors rather than intent or law, is prohibited under international law. The Committee on Economic, Social and Cultural Rights has clarified that education should be accessible to “especially the most vulnerable groups, *in law and in fact*,” and that “States parties must closely monitor education, including all relevant policies, institutions, programmes, spending patterns and other practices, so as to identify and take

measures to redress any *de facto* discrimination.” (ibid). Merely eliminating formal barriers to education without taking steps to address underlying social conditions that impede educational access may be insufficient to ensure equality for vulnerable populations.

Historically, examples of *de facto* discrimination in access to education have included lower school enrolment and completion rates among girls, poor access to education for children with disabilities, or consistently lower quality of education among ethnic minorities (ibid). In many cases, the underlying factors that contribute to *de facto* discrimination may themselves be human rights abuses, as when unremedied violence or discrimination against girls, including sexual violence, contributes to diminished school enrolment or completion rates. *De facto* discrimination can be accompanied by formal discrimination, as when children affected by, or those living with HIVAIDS are barred from school due to stigma, loss of parental care or other related hardships (ibid).

Interpretations of the CRC show that children affected by or living with HIVAIDS constitute a protected class for the purpose of the guarantee of non-discrimination in international law. As noted above, the CRC specifically prohibits discrimination on the basis of “the child’s or her or his parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth *or other status*. The Committee on the Rights of the Child, the expert body that monitors the Convention on the Rights of the Child, interprets “other status” to include HIVAIDS status of the child or his or her parents [CRC Committee, 2003]. In its General Comment on HIVAIDS and the Rights of the Child, the Committee specifically recognizes the particular

challenges faced by children affected by HIVAIDS and those living with HIVAIDS in access to primary education and calls on governments to address the challenges.

The Committee seeks to remind the States parties of their obligation to ensure that primary education is available to all children, whether living with HIVAIDS, orphaned or otherwise affected by HIVAIDS. In many communities where HIVAIDS has spread widely, children from affected families are facing serious difficulties staying in school.

. . . . States parties must make adequate provision to ensure children affected by HIVAIDS stay in school and to ensure the qualified replacement of sick teachers so that children's regular attendance at schools can is not affected, and that the right to education of all children living within these communities is fully protected.....(ibid).

This interpretation of the CRC ought to be read alongside the Convention's provisions on children deprived of parental care. Article 20 of the Convention provides that:

...a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

This provision captures the situation of many children affected by HIVAIDS and should compel governments to ensure alternative means of support for such children; both as a right in itself and as a means of safeguarding other rights, including the right to education. Finding ways to

support and monitor extended families, foster parents, community-based organizations and other alternative means of support is one of the key steps governments can and should take to ensure children affected by HIVAIDS and those living with HIVAIDS are in a position to access education.

Currently we do not have a treaty that specifically addresses HIVAIDS. However we have soft law in the form of the United Nations General Assembly Special Session (UNGASS) Declaration of Commitment on HIVAIDS (2001). The first international HIV and AIDS Conference in Africa were held in July 2000 in Durban, South Africa. This conference highlighted the problems Sub-Saharan Africa and other low-income countries face in tackling the HIV and AIDS epidemic. This was immediately followed by a resolution passed by the UN Security Council recognising the threat posed to international and regional stability by HIV and AIDS and a call for further action on HIV and AIDS prevention and care went out [G.A.Resolution, 2000]

Following the Millennium Summit, with only 9 months preparation time, UNAIDS organized the UNGASS on HIV and AIDS (ibid).

This was the first conference dedicated exclusively to HIV and AIDS and also the first UN conference to explicitly involve civil society groups in the entire process [Roseman & Gruskin, 2003]. During this session, a declaration of commitment on HIV and AIDS was formulated which was a result of the discussions, negotiations and compromises between member states, civil society and NGOs.

Of the 103 substantive articles of the Declaration, article 54, 58 and 65 are of particular importance for the purpose of this study. Article 54 calls upon states to provide access to

treatment to HIV positive women to reduce mother to child transmission of HIV. Article 58 on the other hand, calls upon states to enact legislation to ensure full enjoyment of human rights and fundamental freedoms by vulnerable groups such as children to ensure access to health, treatment, care and support. Finally, article 65 calls upon states to implement national policies and strategies to build and strengthen governmental, family and community capacities for children and ensure that they access education, shelter, good nutrition and health.

In the absence of a treaty that exclusively addresses the legal issues surrounding HIV and AIDS, it can be argued that the Declaration is a step in the right direction.

Kenya has also ratified the African Charter on the Rights and Welfare of the Child. The ACRWC is the most comprehensive regional instrument on children's rights. The ACRWC was created as a response to CRC to represent an African concept of children's rights. The wording of ACRWC is designed to reflect virtues of the African civilisation. It is 'Africa Sensitive'[M. Mpaka, 2010]. The ACRWC is said to be the most progressive of the treaties on the rights of the child. The most significant innovation empowers the monitoring committee to receive communications from any person, group or non-governmental organisation recognised by the African Union. So children have been empowered and can petition the Committee on alleged violation of their rights including economic, social and cultural rights [A Lloyd, 2002]. Furthermore, unlike the CRC, the welfare of children is the primary consideration.

Of the 31 substantive articles of the ACRWC, article 14 is of particular importance for the purpose of this study. This

article expressly provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. However it is important to note that this article is widely worded and does not specifically address the issue of 'comprehensive treatment' for CLHIV.

3.5 Selected Case Analyses

Most of the case law after the promulgation of the Constitution that touches on HIV/AIDS primarily focuses on the interpretation of the right to health. So far only two cases have been litigated in this area. In the case of *P.A.O. & 2 others v Attorney General* [2012] the Constitutional Division of the High Court held that one of Kenya's intellectual property laws namely the Anti Counterfeit Act was unconstitutional.

The High Court of Kenya interpreted the obligation of the state to right to health. This was a petition by three PLHIV who argued that their right to life, right to human dignity and right to the highest attainable standard of health were threatened by the enactment of the Anti-Counterfeit Act, 2008, specifically sections 2, 32 and 34, to the extent that the enforcement of the provisions would affect their ability to access their lifelong need for generic ARVs. These provisions classified generics as counterfeits thereby effectively prohibiting importation and manufacture of generic drugs and medicines in Kenya.

One of the petitioners had a five year old son who is HIV positive. Mr Anand Grover, the then United Nations Special Rapporteur was enjoined in the suit as an interested party. The petitioners argued that they could only enjoy their right to life if they had limitless access to the generic drugs which they used daily and any limitation to this

access is in violation of article 24(2) (c) of the Constitution.¹

It was also argued that the Anti-Counterfeit Act posed a threat to the rights of children to the extent that it was in conflict with article 53(2) of the constitution which guarantees to every child the right to basic health care services (ibid, para 32). The petitioners then urged the High Court to be guided by international treaties and the decision of the Constitutional Court of South Africa in the case of *Fose v Minister of Safety and Security and the Minister of Health v Treatment Action Campaign and Others* and to fashion an appropriate remedy in accordance with the provisions of the Constitution [2002].

The court observed that the right to health not only encompasses a positive duty to ensure that citizens have access to health care services and medications, but must also encompass the negative duty not to do anything that would in any way affect access to health care services and essential medicines. The Court also noted that the contested provisions of the Anti-Counterfeit Act threatened to violate the Constitutional rights to life, human dignity and highest attainable standard of health (ibid, para 87). It is important to note that the Court did not address its mind to the issue of children.

This was a landmark case which also highlighted the applicability of international instruments in Kenya and the usefulness of the UN special rapporteur on the right to health to make recommendations on issues surrounding the Right to Health, particularly in relation to laws, policies and practices that may represent obstacles to the right being realised (ibid, para 33).

In 2010 and in the more recent case of *Aids Law Project Vs Attorney General and Others* [2010] the High Court of Kenya declared section 24 of the HIV and AIDS Prevention and Control Act ("Act") unconstitutional. In this case, the petitioners, sought a declaration that this section was unconstitutional and "unacceptable discrimination" on the basis of health status.

Section 24(1) of the Act required a person aware of being HIV-positive to "take all reasonable measures and precautions to prevent the transmission of HIV to others" and to "inform, in advance, any sexual contact or persons with whom needles are shared" of their HIV-positive status. Subsection (2) prohibited "knowingly and recklessly, placing another person at risk of becoming infected with HIV". Contravention of these provisions was a criminal offence punishable by imprisonment for up to seven years, and/or a fine. Under section 24(7), a medical practitioner who becomes aware of a patient's HIV-status may inform anyone who has sexual contact with that patient of their HIV-status.

The petitioners argued that the undefined terms of "inform", "in advance" and "sexual contact" renders section 24 vague and overbroad, contrary to the principle of legality. It submitted that the provision violates the right to a fair hearing, equality, non-discrimination, and sexual privacy. In a unanimous judgment of a sitting of three judges of the High Court, it was held that the central issue was the provision's vagueness and over breadth. Focusing solely on the absence of a definition for "sexual contact", the Court held that it is impossible to determine what acts are prohibited. Further, given that section 24 places no obligation on sexual contacts who have been informed of another's HIV-status to keep that information confidential,

the provision does not meet the standards for a justifiable limitation of the constitutional right to privacy.

In its decision issued on March 18, the three-judge panel ruled Section 24 of the HIV/AIDS Act which criminalized transmission of HIV was unconstitutional under the Kenyan Constitution, as the provisions are too vague and that disclosing patients' HIV status violates their rights to privacy and confidentiality. The judges also advised the State Law Office to review the HIV/AIDS Act to "avoid further litigation" surrounding the law.

From the foregoing analysis of the law, policy and case law, it is quite evident that there is need for strategic impact litigation on the right to education in the context of HIV/AIDS. This will direct the government on the specific measures that need to be put in place to ensure that the realization of education mitigates the harsh effects of HIV/AIDS particularly amongst vulnerable groups such as children.

4. RECOMMENDATIONS/WAY FORWARD

Children's' right to education is an important aspect of human rights law. It is one of the human rights bundles which sufferance embodies the negative effects of HIV/AIDS. When children rights to education is given the right legal and policy impetus, the effects of HIV/AIDS can be reduced. Again when the HIV/AIDS issues are given the right stimulus, the Children rights to education is also augmented. It is that asymmetrical relationship that provides the foundation for the "socio-legal vaccine" as far as the HIV/AIDS effects are concerned.

Therefore, consideration of various advances in the law pertaining to children's right to education is crucial. It is upon that understanding that the paper argues for the integration of more emphasis on HIV/AIDS education. Most governments and especially in Africa have not integrated HIV/AIDS curriculum into the compulsory and examinable general curriculum. This is a big challenge as children are not well equipped with matters pertaining to HIV/AIDS. Lack of adequate information regarding HIV/AIDS has been and still remains to be a leading reason as to why there have been outrageous responses to its spread. Indeed the responses therefrom have always ranged from reasonable to illogical [Jarvis R, 1991]. In addition to this, the children are faced by difficulties in adhering to ARV treatment due to lack of understanding. Integrating HIV/AIDS in the syllabuses will, without doubt, have a net effect of increased awareness about the pandemic which will subsequently inform the formulation of sound policies and strategies aimed at curbing its spread.

Completion of at least a primary education is directly correlated with dramatic reductions in HIV/AIDS infection rates, even if pupils are never exposed to any specific HIV/AIDS education or life skills programmes in the classroom [UNICEF, 2004]. The reasons for this are not adequately researched, but a general foundation in education equips individuals with cognitive skills needed to understand, evaluate and apply health information.

Education also boosts earning power, self-confidence and social status, giving young people and especially young women increased control over sexual choices (ibid). Girls who are in school are more likely to delay sex than their out-of-school peers. Third, schooling is a sustained and

powerful socialisation process, shaping values, identities and beliefs through daily exposure. Education informs individuals. Schools have the potential to be efficient and inexpensive vehicles for passing on HIVAIDS information and promoting safe behaviour, because they reach the right target group (children and youth) at the right time (when their values, beliefs and sexual behaviours are still open to change), and reach them daily over a period of months and years.

Many high prevalence countries are already starting to experience shortages of nurses, teachers and other key workers. There is therefore both a social and a moral imperative for schools to take some responsibility in teaching all children and young people about sexual reproductive health; both to encourage behaviour shifts that are in the interests of the whole society and so that young people can have a chance to protect themselves from infection.

It is proposed that HIVAIDS curriculum be entrenched as a compulsory part of the general school syllabus. For example, the Kenyan Institute of Education had inserted a weekly compulsory HIVAIDS lesson into all primary and secondary state curricula. Further, HIVAIDS lessons have been integrated in nearly all teaching subjects in the curriculum. In her interviews, Maryanne Njeri finds out that teaching about AIDS in schools since helps the children to know more about the disease, how it is transmitted and how it can be prevented. These particular finding cements the fact that an informed society is key in the fight against the spread of the pandemic.

Additionally, while young people do not necessarily learn about sex from their teachers, schools are viewed by young people as important and trusted places to learn about HIVAIDS. Education protects societies. Over the medium to long term, keeping education systems functioning is critically important to mitigate the loss of human capital as increasing numbers of adults die, taking their skills and knowledge with them (UNICEF, 2003).

4.1 Teacher Training

Teachers are the fulcrum upon which the success of school-based HIVAIDS education depends. Their importance cannot be over-emphasised. In Zambia, the Ministry of Education had identified the looming problem of AIDS-related teacher shortages and has taken a number of steps. First, there is a policy of non-discrimination. The Ministry appointed an HIVAIDS *in the workplace technical adviser*. In addition, the HIVAIDS component of in-service training includes VCT services and teachers are encouraged to be tested and seek help.

4.2 Outreach Campaigns by Professionals

It is recommended that outreach civic education be conducted by professionals such as lawyers and medical practitioners on the medical issues surrounding HIVAIDS and the legal aspects at the grass root level. This can be achieved by the relevant stakeholders such as civil societies, lawyers, teachers through trade unions and medical practitioners forming one umbrella body with the noble goal of reaching out to the communities. Visitations would be made to schools, churches and media would also be used (Kembo, 2010).

4.3 Law against *de Facto* Discrimination in

Access to Education

Governments should review relevant legislation and judicial decisions to ensure that the rights of children affected by HIVAIDS and those living with HIVAIDS are protected from non-discrimination in access to education. This should be explicitly recognized in national law and in the implementation strategies. This right should include protection against *de facto* discrimination, or discrimination resulting from underlying vulnerabilities as well as from intent or animus (Kembo, 2010).

Governments should use demographic and household surveys, as well as studies of children not captured by these surveys (for example, 'street' children), to monitor school enrolment among affected children and those living with HIVAIDS, including orphans and children whose parents are chronically ill. At the policy level, they should create links between ministries of education and national human rights commissions to develop a specific policy and strategic plan for preventing systemic discrimination in access to education for children affected by HIVAIDS and those living with HIVAIDS.

4.4 Strengthened Capacity of Community-Based Organizations (CBOs)

The place of CBOs should be strengthened in the education sphere. Governments should strengthen the departments of social development to support community-based organizations (CBOs) that provide support to children affected by HIVAIDS and those living with HIVAIDS. They should lift restrictions on the ability of CBOs to provide effective care to children, such as arbitrary funding bottlenecks and needless bureaucracy in access to government grants.

National and regional governments should provide timely and effective assistance, oversight and technical support to both caregivers and CBOs. They should specifically support the efforts of CBOs to monitor abuse and neglect in the home, ensure care for children affected by HIVAIDS and those living with HIVAIDS whose extended families do not care for them and advocate for children's right to education before school authorities.

4.5 Strategic Impact Rights Litigation

There should be a public interest litigation case that seeks to interpret the obligation of the state in ensuring right to education. The main purpose of litigation is to influence the state to review the education. In addition to this the litigation will also influence the budgetary consideration on education. As mentioned in study, the potential impact of rights litigation is significant. Litigation may affect access to education for both the litigants and the population in a positive way. In structuring a strong education system litigation case, various experts and stakeholders will be brought on board such as civil society organisations which are vocal, the education and health professionals, the UN Special Rapporteur on the Right to Education and the children themselves whose voice must be heard and the media. It will also be important to mobilise the children to attend the court proceedings once the hearing commences and this would involve co-operation of teachers and the parents or guardians.

5. CONCLUSION

Emphasis on consultations of all stakeholders with emphasis on the involvement of children ought to be part the law. Such laws can influence both the governments and donors in such way that they meaningfully involve all the

stakeholders. Emphasis on children living with, or affected, by HIV/AIDS in the formulation of education policies and programs should not be forgotten. Stakeholder evaluations on school outcomes of children affected by HIV/AIDS in which such children are asked about the difficulties they face in enrolling, remaining, and advancing in school ought to be part of such systems. Research into the precise hardships that contribute to children living with, and affected by HIV/AIDS develop protocols for involving children in this research ought to part of the systems too.

Proper interrogation of the law pertaining to the children right to education and HIV/AIDS can help in case building a more inclusive society.

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