



GLOBAL JOURNAL OF HUMAN-SOCIAL SCIENCE: C  
SOCIOLOGY & CULTURE  
Volume 14 Issue 5 Version 1.0 Year 2014  
Type: Double Blind Peer Reviewed International Research Journal  
Publisher: Global Journals Inc. (USA)  
Online ISSN: 2249-460X & Print ISSN: 0975-587X

## HIV and Social Policy in Sub-Saharan Africa: Future Goals for Protecting the Children in Sub-Saharan Africa

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*Introduction-* The onerous task of protecting orphans in Africa requires a multifarious effort aimed not only at infusion of public, private or international funding into the care and treatment of HIV/AIDS but also the building of economic and legal systems that integrates social and cultural representation and identity of the people such as those that energize the primary base and involve these vulnerable victims of HIV/AIDS. Goals and objectives of governments and institutions working in this field of health should be a collaborative effort towards an effective coordination of work strategically designed for children in partnership with mental health, social, medical and legal personnel. It is my opinion that this will promote easy access to all available resources especially in countries such as Nigeria, Uganda and South Africa where HIV/AIDS is very endemic. In order to prevent abuse and improve access to health care, ethical and legal issues, much attention should be paid to the underlying social and economic problems that contributed to the spread of the disease. Orphans have been greatly affected by the high level of poverty, infectious diseases reaching epidemic levels, lack of education and inadequate health, legal, social and economic infrastructures.

*GJHSS-C Classification : FOR Code: 160512p*



*Strictly as per the compliance and regulations of:*



# HIV and Social Policy in Sub-Saharan Africa: Future Goals for Protecting the Children in Sub-Saharan Africa

Dr. Foluke O. Dada

## I. INTRODUCTION

The onerous task of protecting orphans in Africa requires a multifarious effort aimed not only at infusion of public, private or international funding into the care and treatment of HIV/AIDS but also the building of economic and legal systems that integrates social and cultural representation and identity of the people such as those that energize the primary base and involve these vulnerable victims of HIV/AIDS. Goals and objectives of governments and institutions working in this field of health should be a collaborative effort towards an effective coordination of work strategically designed for children in partnership with mental health, social, medical and legal personnel. It is my opinion that this will promote easy access to all available resources especially in countries such as Nigeria, Uganda and South Africa where HIV/AIDS is very endemic. In order to prevent abuse and improve access to health care, ethical and legal issues, much attention should be paid to the underlying social and economic problems that contributed to the spread of the disease. Orphans have been greatly affected by the high level of poverty, infectious diseases reaching epidemic levels, lack of education and inadequate health, legal, social and economic infrastructures.

Aside from the various social and economic infrastructures, law and legal reforms will actively play a major role in regulating behaviors, improving access and treatment, providing for present and future personal and proprietary interests of the victim and ultimately help in developing the full potentials of the general populations and increase economic growth and stability of the countries. These are issues that governments have control over and the effective intervention of the government not only on the policy level, but on implementation and enforcement aspects will ensure public health and safety. As part of the larger strategy that seeks to protect children's psychosocial health, the legal system of the three countries in focus must provide

the framework for a workable HIV/AIDS policy through the development of laws and the implementation of policy issues and instruments that regulate human behavior, develop environmentally adaptable social norms and views that are in sync with new developments in health care designed to manage disease outbreak and health care service and delivery across the various communities of the sub Saharan region of Africa. Additionally, "some of the social and institutional issues that must be addressed for national poverty reduction are also of vital importance for an effective and lasting response to HIV/AIDS."<sup>1</sup>

The future goals for sub-Saharan African countries therefore will therefore be better enumerated by looking at the different areas of possible future development including but not limited to policy and system development, systemic management of social and legal infrastructures and framework, adaptation of existing and new systems to existing cultural and social systems, implementation of key systems for a direct community involvement and benefit and the introduction of solid, evidence based monitoring and evaluation systems in line with recent development in technology and international monitoring systems that may bolster the achievement of the millennium goals and national economic and health development of the citizens.

Most of the Public health, social policy and system development and policy delivery framework within government establishments must include a multi-disciplinary approach for the development of national HIV/AIDS framework. These take the form of the development of social and public health policies such as "surveillance, screening and testing for HIV/AIDS; prevention of mother-to-child transmission, which involves issues of testing of expectant mothers and newborns; confidentiality/disclosure of HIV information; partner notification and contact tracing; isolation and quarantine; blood, tissue and organ supply; universal infection control precautions; post-exposure prophylaxis

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<sup>1</sup> J.D Puymbroeck, "Beyond Sex: Legal Reform for HIV/AIDS and Poverty Reduction", (2008) 15 Geo. J. on Poverty L. & Pol'y 781

rules; and access to condoms".<sup>2</sup> The practicability of these policies within the African system will depend largely on legal enforcement mechanisms that are in place on which the sustainability of applicable policies and systems will depend. For example, the recent review of the HIV policy environment in Uganda, the need to continually develop a strong and supportive legal and policy environment was identified as key to the scale up of the fight against HIV/AIDS.<sup>3</sup> According to this review however, "the dynamics and magnitude of the social, psycho-social and economic impact of HIV/AIDS call for formulation and articulation of specific and appropriate policy, legal and administrative instruments for containing the epidemic and protecting the rights of those at risk of infection, the infected and affected, and ensuring that the non-infected remain uninfected. The existing policy guidelines needed to be reviewed and updated for adaptation to make them consistent and relevant to the current HIV/AIDS situation coupled with current developments in the country and international level."<sup>4</sup> The Ugandan National Strategic Plan on HIV/AIDS adopted a combination theoretical approach which is fourfold. These are:

- (i) to scale-up biomedical interventions to achieve universal access targets,
- (ii) uphold behavioral interventions,
- (iii) address socio-cultural and economic drivers of the epidemic and
- (iv) re-invigorate political leadership at all levels to enlist their commitment to HIV prevention.<sup>5</sup>

The introduction of legally backed and directly relevant public health policies with strong emphasis on mental health care for children will create an avenue for the enforcement of the legal rights of the children especially within the mental health field that has been neglected by many countries within the sub-Saharan region of Africa.<sup>6</sup>

Social factors affecting the effective control and management of the disease include the burdens

imposed by abject poverty despite the huge influx of funds and resources from international, regional and local organizations, the burden of disease such as TB, Malaria, and Measles exacerbated by the poor access to medical services caused mainly by poverty, lack of information, education and poor transportation and communication systems. The spate of progress in many parts of sub-Saharan Africa has been slowed down by localized infrastructural and systems failure occasioned mostly by government failure to understand the importance of consistent and persistent push to ensure that the effect of the disease is minimized on those that are already infected and the spread curtailed through adequate funding and the establishment of social systems designed to guarantee local access to primary and community healthcare services that incorporate HIV/AIDS program for pregnant women and children and ensure community educational services that serve the purpose of constant community awareness and that which encourages community participation at all levels. Recently, the Global Fund to Fight AIDS,

Tuberculosis and Malaria recently announced a shortage of around \$4 billion that is needed to continue funding essential HIV, TB and malaria services in 2010. The coalition believes there is a \$10.7 billion funding gap for regional implementation of the Global Plan to Stop TB<sup>7</sup> with international donors and the already hard pressed African governments unable to meet with funding/financial obligations needed to actively curtail the spread of HIV/AIDS.<sup>8</sup> This is in contravention of the pledge by African leaders at the Abuja, Nigeria meeting in 2001<sup>9</sup> to set aside 15 percent of their national expenditure towards health. However, the cost of healthcare in most African countries is not commensurate with the average income and as such is reflected in the high disparity in the standard of living in Africa and in other developed parts of the world. In South Africa for instance, the average hospital stay for people with HIV is four times longer than for those with other illnesses. This will obviously increase the pressure on hospitals and healthcare services that are already over-burdened.<sup>10</sup> This problem as exists in South Africa may be tackled by improving on other social models that aid access to basic health and social needs of the family which may ultimately help to reduce the burden of disease within the country.

<sup>2</sup> See L.Gable et al., *Legal Aspects of HIV/AIDS: A Guide for Policy and Law Reform* (2007) The World Bank Global Initiative on HIV/AIDS Program and Legal Vice Presidency. On-line version at: [http://books.google.com/books?id=J3pWINGgbV4C&printsec=frontcover&dq=lan ce+gable+legal+aspects+of+hiv/aids&source=bl&ots=CEYGLAg0 pP&sig=xdDDCEQp90XGtvydOd6CtRBILOk&hl=en&ei=qR5uS-r-lou2M8HTydcE&sa=X&oi=book\\_result&ct=result&resnum=1&ved=OCA4Q6AEwAA#v=onepage&q=&f=false](http://books.google.com/books?id=J3pWINGgbV4C&printsec=frontcover&dq=lan ce+gable+legal+aspects+of+hiv/aids&source=bl&ots=CEYGLAg0 pP&sig=xdDDCEQp90XGtvydOd6CtRBILOk&hl=en&ei=qR5uS-r-lou2M8HTydcE&sa=X&oi=book_result&ct=result&resnum=1&ved=OCA4Q6AEwAA#v=onepage&q=&f=false)

<sup>3</sup> See N. Asingwire, and S. Kyomuhendo, "Development of a National Overarching HIV/AIDS Policy for Uganda: A review of the HIV/AIDS Policy Environment" (2003) ONLINE at [http://www.aidsuganda.org/pdf/Review\\_of\\_AIDS\\_policy\\_environment.pdf](http://www.aidsuganda.org/pdf/Review_of_AIDS_policy_environment.pdf)

<sup>4</sup> "id"

<sup>5</sup> Uganda: National Strategic Plan for HIV/AIDS, (2011- /12 – 2014/15) Published January 2012. Online at [http://hivhealthclearinghouse.unesco.org/sites/default/files/resources/uganda\\_national\\_strategic\\_pl an\\_for\\_hiv\\_aids\\_2011\\_2015.pdf](http://hivhealthclearinghouse.unesco.org/sites/default/files/resources/uganda_national_strategic_pl an_for_hiv_aids_2011_2015.pdf) Last visited July 14, 2014.

<sup>6</sup> See Tumwesigye et al. (2013) Policy development, implementation and evaluation by the AIDS control program in Uganda: a review of the processes Online version at <http://www.health-policy-systems.com/content/11/1/7>

<sup>7</sup> K. Palitza, "Health-Africa: Global Financial Crisis Leads to HIV Budget Cuts" (May 18 2009) InterPress Issues published at: <http://www.globalissues.org/news/2009/05/18/1527> (last visited February 9, 2014)

<sup>8</sup> "id"

<sup>9</sup> The Abuja Framework for Action for the Fight against HIV/AIDS, Tuberculosis and other Related Infectious Diseases 2001 and the Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases 2001

<sup>10</sup> See the 2009 AIDS Epidemic Update at: [http://data.unaids.org/pub/Report/2009/JC1700\\_Epi\\_Update\\_2009\\_en.pdf](http://data.unaids.org/pub/Report/2009/JC1700_Epi_Update_2009_en.pdf) for a comprehensive update

Due to pressure from international organizations such as the WHO, Governments of countries in sub-Saharan Africa have been undertaking efforts aimed at combating the spread of HIV/AIDS in recent years. However, more has to be done to develop social systems and develop infrastructures that will enhance local policies and promote the achievement of millennium development goals within the stipulated period. Concerted efforts at reducing poverty in sub-Saharan Africa will promote the health of the people and increase the earning potentials and spending power that will ultimately help in developing the economies of the countries within the region and the global economy in general. At this point it is worthy to note the efforts of governments of the USA and the Republic of Korea to respond positively to the call by UNAIDS for the removal of visa/immigration and travel restrictions on people with HIV/AIDS effective January 1, 2010. Efforts such as this will promote the human rights of individuals especially the rights to freedom of movement and association and encourage world trade development and advancement in world economy and technological development. Also, the trend of criminalizing HIV/AIDS by many countries of the world has been criticized as working to unfairly punish women who often do not make sexual decisions within many cultures in Africa. These women ultimately pass the disease to the unborn children who then become the unwilling victim of societal condemnation and abuse. These children should be protected and afforded the necessary training and upbringing that will ensure that HIV/AIDS is controlled especially amongst the youth.

Over the years, social development outcomes have been uneven across and within Sub-Sahara African countries resulting in "the escalation in poverty, anemic growth rates, persistence in the structural weaknesses of these economies, and reversal in social development indicators, raise major challenges for them."<sup>11</sup> According to the United Nations Research Institute for Social Development, there is a great necessity for tackling social challenges stemming from reduced capacities despite years of social reform. As a result, "this social deterioration, which has taken place over the last two decades, shows the urgency of social policy in the region."<sup>12</sup> This will also be in line with the nine priority framework developed by UNAIDS to reduce sexual transmission of HIV, mothers from dying and babies from becoming infected with HIV, ensure that people living with HIV receive treatment, prevent people living with HIV from dying of tuberculosis, protect drug users from becoming infected with HIV, remove punitive laws, policies, practices, stigma and discrimination that

block effective responses to AIDS, stop violence against women and girls, empower young people to protect themselves from HIV and enhance social protection for people affected by HIV.<sup>13</sup>

## II. PROVISION OF LEGAL DEFENSE FOR CHILDREN AND ORPHANS

The South African Constitution however, affords its citizens some due process procedural and substantive rights in various sections of the constitution and guarantees every citizen the right to freedom including the right to bodily and psychological integrity and privacy rights, including the right to keep personal communications private. There is also a broad grant of equal rights and protection to all persons. Unlike the United States where equal protection extends only to state actors performing public functions, the South African Constitution guarantees privacy rights that extends to both private and public actors. The Constitutional Court stated that "This question, left unanswered in the interim constitution, was cleared up by Section 8 of the final Constitution: the Bill of Rights doesn't only apply vertically (from the state downwards, to its citizens) - it also applies, where applicable, horizontally (between one citizen or private body and another)." The Constitutional Court of South Africa has declared that Section 28 of the Bill of Rights, entitled "Children" is the most important legislation giving constitutional rights to children in South Africa. The section provides that;

- a) *Every child has the right to*
  1. a name and a nationality from birth;
  2. family care or parental care, or to appropriate alternative care when removed from the family environment;
  3. basic nutrition, shelter, basic health care services and social services;
  4. be protected from maltreatment, neglect, abuse or degradation;
  5. be protected from exploitative labor practices
  6. not be required or permitted to perform work or provide services that -
    - a) are inappropriate for a person of that child's age; or
    - b) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  7. not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -

<sup>11</sup> See UNRISD Social and Policy Development (2000-2005) 'Social Policy in Late-Industrializers: Sub-Saharan Africa and the Challenge of Social Policy'

<sup>12</sup> "id"

<sup>13</sup> See the UNAIDS AIDS Epidemic Update (2009): 'Outcome Framework 2009-2011' published at [http://data.unaids.org/pub/Report/2009/JC1700\\_Epi\\_Update\\_2009\\_en.pdf](http://data.unaids.org/pub/Report/2009/JC1700_Epi_Update_2009_en.pdf)

- a) kept separately from detained persons over the age of 18 years; and
  - b) is treated in a manner, and kept in conditions, that take account of the child's age;
8. have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- a) not be used directly in armed conflict, and to be protected in times of armed conflict.
9. A child's best interests are of paramount importance in every matter concerning the child.
10. In this section 'child' means a person under the age of 18 years.

Despite the broad language used in the Bill of Rights, courts in South Africa are enjoined to keep the constitution in mind when interpreting the provisions of the Bill. S. 39 (1) (a) of the Bill stipulates also that, "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom." This applies generally to children especially those infected or affected by HIV/AIDS who are generally unable to protect themselves or unable to access most of their vital daily needs within the society. The Court in *Hoffman v. South African Airways* (supra), recognized this need and affirmed that individuals who are not able to defend themselves have the right to be represented in legal suits by associations and groups and those acting in the public interest to "approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened" with the court being authorized to issue appropriate relief "including a "declaration of rights". The Court has also affirmed in the case of *Minister of Health and others v Treatment Action Campaign and others* (supra) where the Treatment Action Campaign (TAC) and two other parties challenged the government's policy on the prevention of mother-to-child transmission of HIV which permitted the use of Nevirapine at a limited number of pilot sites only affecting a significant group of HIV-positive mothers and children who did not have access to the research sites and were effectively denied access to a potentially life-saving medical intervention provided free of charge to the South African government for a period of two years by its manufacturers. The Court addressed the question whether the applicants had shown that the measures adopted by the government fell short of obligations under the Constitution. The Court said provision of a single dose of nevirapine was essential as far as children were concerned.

The Court in *Khosa v. Minister of Social Development* (supra) also affirmed that, "the right of access to social security, including social assistance for those unable to support themselves and their dependants is entrenched because as a society, we value human beings and want to ensure that people are

afforded their basic needs". The court stated further that "a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational" Other legislations that provide specific protection for children in South Africa include:

- The Child Care Act of 1983, which makes it a criminal offence if a person who has to maintain a child doesn't provide the child with clothes, housing and medical care and the prohibition of virginity testing and male circumcision for children under 16; The Basic Conditions of Employment Act of 1997, which makes it illegal to employ a child under 18;
- The Domestic Violence Act of 1998, which defines different forms of domestic violence and explains how a child can get a protection order against the abuser; and
- The Films and Publications Act of 1996, which protects children from exploitation in child pornography.
- The Natural Fathers of Children Born out of Wedlock Act of 1997.
- Abolition of Corporal Punishment Act
- The Children's Act No 38 of 2005(updated to Government Gazette 33076 dated 1 April, 2010) as amended by the Children's Amendment Act, No. 41 of 2007 and the Child Justice Act, No. 75 of 2008
- Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 Of 2007

These legislations take effect to protect the best interests of children in all foreseeable manners within the ambit of the law. The interrelationship between the rights affording protection to children can be seen in the multi-layered legislations enacted both at the national and international levels harnessing local and international resources for the protection of such rights. These laws should also serve as the legal premise for advocating for policy change and harnessing the rights and privileges under the law for the benefit of the orphans and other vulnerable children.

The legal rights of children in Nigeria on the other hand, have been under scrutiny for years due to the country's record of arbitrary human rights abuse and child maltreatment at various levels. Nigeria recognizes Civil, Customary and Islamic laws as the basis of its legal system. However, these three forms of law vary in significant forms and applicability may be subject to territorial and personal submission to the laws. Conflicts arising from these laws have been settled with the Constitution trumping any other law that operates to contradict the applicable law within the country. As stated earlier, the repugnancy rule also operates to bring the local laws and custom into conformity with rules of natural justice, equity and fairness which hopefully will guide against arbitrary application of such customs and aid the development of workable social

policies that will enhance the lives of all vulnerable children.

The protection of the legal rights of children including Children orphaned and made vulnerable by AIDS is well within the ambit of the law although enough is currently not being done to ensure that children who are in desperate need of such protection are provided with the necessary resources that is envisaged within the purview of the law. Formerly, the Children and Young People's Act (CYPA) which was originally passed by the British Colonial Government in 1943 to regulate juvenile justice was in force which was later revised and incorporated into Nigeria's federal laws in 1958 (formerly Chapter 32 of the Laws of the Federation of Nigeria and Lagos.) This law has since been abrogated by the Child Rights Act (2003). The Child Rights Act provides the minimum age for marriage as 18 years within the country's civil marriage whilst the Sharia Law and most Customary laws allow for girls younger than 18 to be married. The usual age of marriage under many local laws remain around 14-15 years of age. This is a serious issue in the effort to combat HIV/AIDS in children as many of the children become entangled in polygamous marriages and exposed to many venereal diseases they have no control over. Although many religious bodies require a mandatory HIV testing before marriage, mandatory testing for HIV is illegal under Federal law. The age of consent for testing is 18 years except where the child engages in risky behavior or is a matured minor who is able to give consent. The Act also provides for the appointment of a guardian ad litem for the child where necessary. Sections 50-52 of the CRA 2003 provide for the protection of children in need of care and against physical or moral danger and empowers "a child development or police officer or any other authorized person to bring a child in need of care and protection before a court for a corrective order, if he has reasonable grounds for believing that the child is an orphan or is deserted by his relatives, neglected, ill-treated or battered by his parent or guardian or custodian, or found destitute, wandering, homeless or surviving parent undergoing imprisonment, mentally disordered, or otherwise severally handicapped; or found begging for alms, or in company of a reputed/or common thief or prostitute, or otherwise beyond parental control or exposed to moral or physical danger."

Notably, the various international and regional laws ratified by Nigeria and otherwise applicable subject to domestication and the Constitution of Nigeria affords many of the rights outlined in the early part of this chapter which includes the right to life, dignity and personal liberty, right to the highest attainable standard of health. Listed below are some of the laws protecting the rights of children in Nigeria:

- The Child's Rights Act (CRA) 2003;

- Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003;
- Ebonyi State Law No. 010 (2001) on the Abolition of Harmful Traditional Practices Against Children and Women;
- Edo State Female Genital Mutilation (Prohibition) Law 2002;
- Edo State Criminal Code Amendment Law 2000;
- Bauchi State Hawking by Children (Prohibition) Edict of 1985 CAP 58;
- Cross River State Girl Child Marriages and Female Circumcision (Prohibition) Law 2000;
- The Sharia Penal Codes of Zamfara, Kano Kebbi, Kaduna and Sokoto States of Nigeria equally protect children against various forms of physical and psychological violence.

The Nigerian Agency for the Control of HIV/AIDS Act (2006) created Nigerian Agency for the Control of AIDS (NACA), an agency responsible for the development and management of all resources in cooperation with external agencies work to effectively manage HIV/AIDS disease in Nigeria. The National Human Rights Commission through the office of the Special Rapportuer on Children was also established in the year 2000 with the mandate to monitor, investigate, conduct researches and provide legal assistance to children who are victims of human rights abuses. Hopefully, the law can and should be used to monitor and develop tools and social policies designed appropriately to help children access and enjoy all the legal protections available to them. Governmental policies geared towards education including 'train-the-trainer' schemes should also be revamped or instituted where such are lacking.

One major challenge for children is the lack of legal advocacy and representation of children in courts of law. The lack of representation cannot be totally blamed on the total lack of laws or policies to protect the children but is reflective of the cultures of the people that often do not recognize children as individual rights bearers. Ensuring that the orphans and children affected by HIV/AIDS are identified and protected is key to the development of the law in the field of health and disability law within the sub-Sahara African region. Government must ensure that social, legal and welfare policies reflect the needs of the vulnerable within the society and as a matter of priority create avenues and agencies responsible for the administration of child welfare within the countries. Bar Associations must also encourage members to provide some hours of pro bono service within their community to help develop the law and generally the legal system of the country. This will help bring to the forefront issues that affect children and orphans within the society. Health lawyers will also be able to work with the insurance companies and rural health care plans to ensure that children and those



affected by HIV do not only rely on international agencies and other governmental agencies for their medication and other medical necessities that they may be able to attain through other efficient means.

Where a child loses either or both of their parents to HIV, the state must ensure that foster care or 'Kafallah' under the Islamic law or adoption or other forms of placement either with extended family members or guardians is provided for the children. The means and resources to navigate through successful placement process must be established by the government in order to ensure the protection of the children. State counsels and private health law advocates must ensure that any form of disability is provided for and that placement does not endanger the lives of the children in any way. This is most applicable in South Africa since the country has Children's Court but a lot is left to be desired of the governments of other countries in Sub-Saharan Africa such as Nigeria that do not have well established child welfare systems in place. More could still be achieved by the South African courts especially in the coordination of resources to reach those in the hinterland who may be cut off from certain rights and benefits due to poverty and other social-cultural barriers preventing them from obtaining the much needed services.

### III. THE WAY FORWARD

The issues discussed in this paper depicts the inter-relatedness of the various psycho-social problems faced by Children orphaned and made vulnerable by AIDS and children generally in sub-Saharan Africa using the three focus countries as focal points for extrapolating issues and ways to address these issues. It is my opinion that the law will play a pivotal role in this regard. For children generally, governments must strive to work in consonance with the International Guidelines put forward to encourage proactive and uniform work towards the achievement of the goal to combat the HIV disease globally especially the guidelines to promote a rights-based response to the HIV epidemic such as developing equality legislation to protect the victims of HIV from unfair discrimination, guidance on law reform to support public health interventions such as introducing laws that support treatment programs by allowing the importation of drugs; and coordinate a multi-sectoral response to HIV/AIDS, by establishing an inclusive and participatory National AIDS Council and guidance on creating a supportive environment for groups vulnerable to HIV or affected by HIV for example, law reform decriminalizing homosexuality.<sup>14</sup>

Governments in sub-Saharan Africa must use public

funds, social policies and legal measures to back health policies being that the systems are just being developed and the levels of poverty and other social impediments may not allow individuals to obtain optimal healthcare that may be required to help in reducing or combating the spread of HIV/AIDS within the communities. The recent speech by the President of South Africa, Jacob Zuma to the National Council of Provinces in October 2009 is commendable particularly because of the call to the end of denialism and his optimism to cut the rate of new infection by half and for about 80% access to antiretroviral therapy by 2011.<sup>15</sup> This level of motivation must be followed by positive actions and heavy investments by governments to prevent transmission of the disease especially prevention of mother-to-child transmission, which is a major source of infection in children. Using successful government-backed health care systems as the Canadian system as a guide, the criteria for such public administration of healthcare must be based on public administration, comprehensiveness, universality, portability and accessibility.<sup>16</sup> There must be centralized monitoring system and enforcement of laws currently in place with the possibility of future development in all spheres of the society necessary for disease prevention useful for the control of future outbreaks of disease and infections. The different health insurance schemes must be organized in such a way as to allow for free health insurance for children and affordable healthcare premiums for adult family members considering the economical and demographic factors that operate within the African communities. This will be a departure from the free market economy model due to the sharp inequalities in the economic and social status of the people. A system similar to one described as "subsidized entrepreneurial model". Describing the Canadian health model, G.R. Weller explained that health insurance schemes "essentially subsidized the already existing health delivery system, and although health resources were still viewed as primarily a consumption good, they were seen to be so inequitably distributed that some public policy was needed to bring about greater equity".<sup>17</sup> Such inequities cannot be over-emphasized in the African situation where problems in the administration and delivery of healthcare services are evidently inherent. The author suggests the following measures to be taken as part of the general efforts to overhaul the mental health systems in sub-Saharan Africa for the benefit of children and families needing mental health care within the region:

<sup>15</sup> UNAIDS Outlook Report 2010 supra

<sup>16</sup> Section 7 of the Canada Health Act R.S.C. 1985, c. C-6

<sup>17</sup> G.R Weller, 'From "Pressure Group Politics" to "Medical-Industrial Complex: The Development of Approaches to the Politics of Health Care, J Health Polit Policy Law. 1977 Winter;1(4):445-70. Also, PERSPECTIVES ON CANADIAN HEALTH AND SOCIAL SERVICES POLICY: HISTORY AND EMERGING TRENDS', (Carl Meilecke & Janet Storch eds., 1980)

<sup>14</sup> See Aids & Rights Alliance of South Africa (ARASA), (2009) "HIV/AIDS & Human Rights in South Africa" published at: [http://www.saf aids.net/files/ARASA\\_Human\\_rights\\_report\\_2009.pdf](http://www.saf aids.net/files/ARASA_Human_rights_report_2009.pdf)

#### IV. SOCIAL POLICY REGULATION AND LEGISLATION

Social policy regulation and legislation will help to combat social problems associated with HIV/AIDS in children and orphans. A clear and strong commitment and concerted effort by governments of the sub-saharan countries geared towards poverty eradication, public education, social security and pension administration, health status monitoring and the promotion of primary health strategies at the local levels through social programs directed particularly at rural populations and those directly at risk of infection among other things will work to promote the general health of the people.

Additionally, the continued support of the WHO in furthering the health systems of the focus countries through the Health Sector Strategic Plans ( I & II) developed for the three countries will strengthen the health systems and help deliver "interventions that are cost-effective and sustainable" to all citizens.<sup>18</sup>

Overall, countries must seek to establish mental health legislations that will integrate mental health policies that include family support networks, coalition of social support groups and programs that encourage rehabilitation services to be provided for the children (especially where parents are either not able to physically provide care for the children for a reason or the other including but not limited to poverty, illness or death) or when parents are just not available to care for their children and other human rights issues that will enhance the welfare and rights of the children.

#### V. REGISTRATION OF BIRTHS/MARRIAGE/RELATIONSHIP COUNSELING

Countries in sub-Saharan Africa must gear up on efforts to ensure the registration of all births within their region as this will enhance the accurate collection and collation of data necessary to plan for public services and infrastructures and maximize resources available for the control and treatment of HIV and many of the endemic diseases within the sub-region. Additionally, it will promote the legal protection of each and every identifiable child born to families dealing with the disease and encourage the provision of services to any child affected by HIV whether the parents are available or not. This will be within the purview of S. 7 (1) of the Convention on the Rights of the Child and the different laws of the countries providing for rights of the child. Relationship counseling is another vital issue. For orphaned children, loss of parents and other social support systems may result in mental illnesses as

explained earlier.<sup>19</sup> Child trafficking laws must be enforced so as to protect children from child traffickers who prey on orphans who may not have been affected by the disease initially but lost their parents to HIV/AIDS. With the high incidence of poverty, children may resort to prostitution and other sex work to sustain their daily needs thereby exposing them to more harm and other contagious diseases including HIV/AIDS. Protecting the identity of each child right from birth through birth registration with the adequate keeping of records will ensure that each infected child is treated as individual rights bearer and protected by law. In order to achieve this, the government must also provide social amenities and resources that will improve access to healthcare at the rural level within the primary healthcare services provided by the governments of the focus countries.

#### VI. ACCESS TO QUALITY EDUCATION

Education is a major tool that will help to overcome HIV/AIDS prevalence and transmission in Africa. Many are still unsure as to the modes of transmission of the disease thereby circumventing the prevention efforts that aim to reduce the spread of HIV/AIDS within sub Saharan Africa. Funding public education and public awareness programs that reach both city/urban dwellers and the rural communities will work as a vehicle to address the behavioral aspect of the disease.

Training of social workers and other professionals within the social welfare and healthcare system administration will be an important aspect of the improvement of the welfare of orphans and vulnerable children. The effectiveness of most of the primary healthcare systems will only be relevant or significantly felt within the system if the personnel required and the necessary tools and equipments are available to people across the board such as that encompassing both rural and urban dwellers who suffer from the disease.

Sex education must be included in the school curriculum as a required subject from the primary to the university level. Emphasis should be placed on prevention strategies that not only seek to curtail the spread of the infection through the traditional methods of transmission such as sex, blood transfusion and mother-to-child transmission but also to prevent new infections through drug use, sharing of needles and other routes that are currently unknown by the vast majority of the people.

Also, more lawyers should offer pro-bono services to indigents, orphans and vulnerable people who are generally not able to access legal and social

<sup>18</sup> See [http://www.who.int/healthmetrics/library/countries/hmn\\_uga\\_his\\_2007\\_en.pdf](http://www.who.int/healthmetrics/library/countries/hmn_uga_his_2007_en.pdf)

<sup>19</sup> See Dada F.O, "HIV & Psychiatry in Children – Using the Law as a Tool to Achieve" Child-Centric" Psychosocial Policies in Sub-Sahara Africa". Holy Cross Journal of Law & Public Policy, USA. Vol XV, 2011 Num. 1 pp. 91 - 127

services due to the peculiar difficulties faced by the children who are left without social or basic amenities and often robbed of inheritance and property rights at the death of the adult family member or caregiver. Importantly, parents must be encouraged to prepare wills and record deeds and other title documents to any property or assets that they may have in order to protect their children.

## VII. ACCESS TO INFORMATION TECHNOLOGY & CHILD ABUSE & NEGLECT TRACKING SYSTEM (CANTS) TO IMPROVE CHILD WELFARE SYSTEM

Government should be made accountable to the people through an audit system that conforms to professional accounting standards. Transparency and accountability is vital to promote proper management and avoid wasteful spending resulting from lack of coordination of programs.<sup>20</sup> Governments need to ensure that adequate funding is diverted to building infrastructures where people can access services more readily. Information must be managed effectively using modern technology for electronic medical records backed with privacy and anti-trust laws that provide the basis for legal enforcement of all violations or flagrant abuse of the system. E-health should be encouraged to make it easier for medical personnel and patients to have easier access to their medical records when they need to. In the case of orphans, such easy access will enable them to obtain better service and allow for a coordinated treatment plan when necessary.

A Child Abuse & Neglect Tracking System is needed to protect vulnerable orphans and children affected by or those infected with HIV/AIDS. In most parts of sub-Saharan Africa, there is a breakdown of the family/kinship care system partly due to the spread of HIV/AIDS that have taken the lives of many adults within families who would have taken care of the younger children. Governments need to step up and provide support systems such as foster care, adoption, guardianship or the support of extended family structures to absorb the children left behind by HIV/AIDS within the African communities. Surveillance, screening and testing of HIV/AIDS in infants/children and the parents will help to determine the spate of the disease

and the accurate control measures to be put in place by the governments. Prevention of Mother-to-Child Transmission has worked effectively to control HIV/AIDS in most developing countries and will work in sub-Saharan Africa if such surveillance systems are adequately monitored. The paramount legal issue here is the protection of the privacy of the individuals whose health records have been compiled. Here, local privacy rules should be reviewed and made specific to healthcare especially for the protection of orphans and other vulnerable children who may need social workers or guardians to act on their behalf. Confidentiality of such information obtained and kept will also be essential to the future success of healthcare delivery and administration. For children, ethics committees must be created to develop child-centric rules that will ensure the protection of the children and support the delivery of healthcare services to them more easily and responsibly.

A child welfare system backed with legislations, legal policies and enforcement procedures that are carefully managed and included in the National Plans of Action will ensure that children are supported and provided with adequate healthcare services within the countries and also work to adequately and properly steer the countries into the achievement of the MDGs and other local and regional laws, treaties and covenants that are in place to regulate the sphere of child protection. In Nigeria and Uganda for example, there is a need to establish family courts separate from the general civil court system whereby the family courts function with concurrent civil jurisdictions with the state high courts in the administration of family issues, exercise jurisdiction over juvenile delinquency, dependency, child neglect, child abuse, child and spouse support, adult misdemeanor crimes against juveniles, paternity of children, custody and visitation of children, adoptions, terminations of parental rights, divorces and annulments, specific enforcement of separation agreements, imperiling the family relationship, property divisions, guardianship over minors, orders of protection from abuse and intra-family misdemeanor crimes. Although South Africa has a family court system, this system is not without its own faults and will need to be generally overhauled.

Public-Private Partnerships (PPP) and other collaborations with local, regional and international bodies are useful tools to achieve universal access to care. An important group within this strategy will be women's groups especially those within child-bearing age. Also, professional bodies from legal, medical, social and educational fields will be able to contribute on a multi-disciplinary basis to the development of child-centric policies that will promote the health of orphans and vulnerable children infected or affected by HIV/AIDS through the formulation of ethical rules that set the standard for the inclusion and treatment of children.

<sup>20</sup> See <http://www.urc-chs.com/projects/research/research-proj.html> Center for Human Services "A five-year project awarded to URC in August 2008 by the Centers for Disease Control is working to strengthen and expand HIV/AIDS comprehensive care and treatment services in the State of Enugu in the Federal Republic of Nigeria. The PEPFAR-funded project, renewable on an annual basis, is providing services in HIV Counseling and Testing (HCT), Prevention of Mother-to-Child Transmission (PMTCT), Antiretroviral Therapy (ART) for Adults and Children, laboratory infrastructure strengthening, TB/HIV integration, Basic Care and Support to people living with or affected by HIV/AIDS and Orphans and Vulnerable Children (OVC)"

Although these rules cannot be legally enforced, ethical and professional principles often ensures the equitable treatment and management of health issues in children.

### VIII. FRAUD PREVENTION STRATEGIES

Fraud is a major problem in many parts of Africa. Many African nations have lost major parts of their resource to fraud perpetrated across the different levels of government resulting in loss of economic opportunities within the continent. Governments of sub-saharan African countries must endeavor to develop strategies that will help alleviate, if not eliminate the wide-spread fraud within the health care system as an important government strategy/priority. As part of the fraud prevention strategy in sub-saharan Africa, the governments of the countries within the region must make and enforce specific laws that prohibit stigmatization, discrimination and unfair or differential treatment of the vulnerable children by healthcare workers.

### IX. REFORM

The law has always taken the back seat in the provision of basic amenities and protection of human rights (including the right to health care) in most African countries. The absence or inadequacy of legislation needed to protect children often result in social and political ills within many African nations. Legal reform could possibly take the form of an actual introduction of laws into the legislature and the actual setting of regulatory framework, policies and systems that will enhance and ensure the protection of the vulnerable group consisting of women and children and ultimately benefit the entire community as a whole. Legal reform should engage public/private partnership and an active commitment to international treaties and regulations that have been ratified by the governments of the focus

countries. The legal profession through its professional associations must strive to work with the government in order to form medical-legal partnerships that not only participate, advise, supervise and provide technical support for the law making mechanisms of the state but also responsibly contribute actively legal services that may be needed especially by the children and their families. Government must strive to institute and fund regulatory bodies that will coordinate the affairs of the health service providers, insurance and other health professional groups to ensure consumer protection.

Also, there is an urgent need for a complete overhaul of the child welfare system of the three focus countries. Juvenile Justice System, state and national child protection agencies needs to be established and where they are in existence such as in South Africa, they need to be overhauled to ensue that services reach the children across the board. Many times, orphans and children often become victims of their circumstances and get thrown in adult jails where they are maltreated and sometimes abused. The author will advocate for medical-legal partnership for children advocating for government-funded, state run healthcare for children from birth to adulthood (about 18 years) where lawyers may provide pro bono services for all children and families in need of such through government appointed social and legal agencies under the active monitoring and guidance of the appropriate professional and regulatory bodies. Additionally, healthcare professionals and lawyers need to work together with the government to coordinate and support many of the rural and community healthcare programs that are currently run in a highly decentralized fashion.

The author suggests a community-based psychosocial model channeled through the Primary Health Care System encompassing the following:



Figure 7 : PHC /Community Based Psychosocial Health Service Model

The above suggested model advocates a centralized system of care targeted at children especially those orphaned by HIV/AIDS and/or those affected or infected by the disease. The case can be made for a centralized system of care since it facilitates an all-inclusive system that targets the specific group of children and helps focus limited resources and funding on the group that is most in need of such services. A community-based model that is culturally sensitive, trajected through primary health care delivery system centralized under Local Health Authority Boards for the purpose of aiding easy access to care and treatment, efficiency in disease management, improved use of information technology for data collection and a fairer or equitable resource allocation within each health care system. This is more so important in tackling the challenges posed by the various mental health issues presented by children infected or affected in any way by HIV/AIDS. Thus, "providing assessment, early intervention and continued monitoring at the primary care level, with a coordinated management plan including primary care clinicians, mental health professionals, school personnel, and others involved in the care of the child, offers the unique opportunity to engage families and maintain young people in treatment without stigma".<sup>21</sup> Nutritional programs that are targeted at young children especially those in the rural areas must be given urgent priority. Many of the UN projects have already infused money into Africa through their various projects. Governments must better coordinate the activities of agencies and participating agencies working in the countries in order to ensure that the efforts at alleviating hunger and poverty embarked upon by these agencies are managed efficiently and reach those needing such services across the communities. Utilizing educational interventions have the capability of diffusing some of the fears, anxieties and ignorance surrounding mental illness within the different African cultures and other HIV/AIDS related social problems such as stigma, depression, sadness resulting from loss, bereavement and economic loss. Care at the primary level should integrate professionals in the various fields of healthcare, social service, legal, education and community support system that must contribute to the different healthcare needs of children in order to achieve optimal care level.

Major barriers to health development in SSA such as funding and availability of trained professionals must be tackled by the governments. There must be a commitment to develop and provide modern infrastructures needed for the training of those professionals and provide equipments and resources

for trained professionals within the various pediatric units that cater to the needs of children in need. This will provide an enabling environment for the professionals to be encouraged to continue to practice within the region. Financial barriers to development must be primarily tackled through a centralized control system that manages and allocates resources through the primary healthcare system reaching those as far away as the remote villages within the regions. In Uganda, the mental health system for example is effectively worked out in such a way that almost every patient has some access to basic medication. This structure can be worked out in other parts of SSA, for example, in Nigeria, each ministry is required to commit at least 1% of their budget to HIV/AIDS funding. A good size of this contribution should be used to promote the efforts at HIV/AIDS prevention, treatment and management issues. A reasonable amount of government resources should ideally be diversified into the provision of adequate health care services for children being SSA is a predominantly youthful population. In this light, the mental health needs of orphans should be emphasized and incorporated into National Plans of Action. This should result in adequate National, State/Provincial and Local level health policies being developed for the psychosocial development of orphans and children generally. Funding received from international, local and private partners should be centrally administered in order to avoid waste and combat fraud that is mostly perpetrated in a loose system that is bereft of adequate records and legal enforcement.

The role of law is quite paramount. Many of the archaic laws within the region must be updated and adequate sentencing of offenders provided. Legal professionals must be encouraged at the national Bar Council level and at local areas to engage in some amount of pro-bono services for children. Effective Legal Aid Clinics must be developed to tackle the problems faced by children and their families and those that are vulnerable within the society. Medical-Legal Partnerships must be established and must be donor-funded, government supported via promulgation of adequate laws that seek to protect children effectively within the bounds of the law with targeted training of officers on child-friendly procedures and guidelines for child protection. Public/Private Partnerships must be encouraged as a major source of funding and community development. Health Insurance Schemes must operate within the confines of the law and must include public funded basic health care services for children as a matter of priority in order to ensure a healthy population in the nearest future that will be healthy enough to contribute positively to overall development of any nation. To this end, each of the countries in SSA must initiate and implement National

<sup>21</sup> V. Eapen, Et Al., "Integration Of Child Mental Health Services To Primary Care: Challenges And Opportunities" Ment. Health Fam. Med. 2009 March; 6(1): 43-48

Child and Adolescent Mental Health Policy such as is the case in South Africa.<sup>22</sup>

The goal of improving public health in Sub-Saharan Africa is one that should be accorded a high priority. Protecting the psychosocial health of orphans and children made vulnerable by HIV in can only be achieved by employing all the tools and resources made available through various sources effectively. Governments in sub-Saharan Africa must commit to financing mental health services within the existing healthcare structure. The necessity for developing and implementing policy statements and guidelines and a governmental commitment to the future growth and development will help to infuse the much needed energy and direction into community development and the improvement of the health of the people. Hopefully, this will be an achievable goal for Africa in the nearest foreseeable future.

1. Constitution of South Africa 1996 S. 12
2. "id" S. 14
3. "id" S. 14 (d)
4. See *Hoffman v. South African Airways* 2001 (1) SA 842 (A) (S. Afr.) Here, the court held that the airline company must afford reasonable accommodations to their HIV-positive employees, in this case, an HIV-positive employee was not able to obtain the mandatory yellow fever vaccination because of possible complications with the immune system of the HIV positive employee
5. See *United States v. Guest*, 383 US 745, 762 (1966) where the court stated that equal protection "speaks to the state or to those acting under the color of its authority". See also the civil remedies for violations of constitutional rights under 'the color of law' provided under 42 U.S.C. S. 1983
6. See <http://www.constitutionalcourt.org.za/text/rights/bill.html#Vertical> last visited December 18, 2009
7. The needs of children were the most urgent and the state was obliged to ensure that children were accorded the protection contemplated by section 28 of the Bill of Rights. It also ordered that the government make provision for the training of counselors and take reasonable measures to extend testing and counseling facilities. See: <http://www.constitutionalcourt.org.za/text/rights/bill.html#Vertical>
8. See also S. 12 (2) of the constitution of South Africa
9. "id"
10. Culled from the Constitutional Court website at: <http://www.constitutionalcourt.org.za/text/rights/bill.html#Vertical>
11. According to Nigeria Demographic and Health Survey 1999 (NDHS 1999), the general data for 15–19-year-olds show that married girls have less knowledge about HIV than unmarried girls; they are less likely to have heard of HIV (50 percent vs. 83 percent) and are less likely to know that HIV can be transmitted from mother to child (38 percent vs. 52 percent). Nationwide, 20 percent of girls were married by age 15, and 40 percent were married by age 18. Among married girls aged 15–19, 62 percent have already given birth. Almost one out of four married girls gave birth before age 15
12. According to the Population Council (2004) Child Marriage Briefing: Nigeria, 48% of the girls in the Northwest were married by 15 years and 27% of married 15-19 year-old females were in polygamous marriages. Report published online at [http://www.popcouncil.org/pdfs/briefingsheets/NIGERIA\\_2005.pdf](http://www.popcouncil.org/pdfs/briefingsheets/NIGERIA_2005.pdf)
13. See Federal Government of Nigeria (2003) National Policy on HIV/AIDS 2003
14. See Section 75(3) of the Children's Act which says, 'Nothing contained in sections 72, 73 and 74 of this Act interferes with or affects the power of the Court to consult the wishes of the child in considering what order ought to be made under section 74 of this Act or diminishes the right which any child has to exercise on his own free choice'
15. See also Section 89(4), Section 90(5), Section 91(6)
16. See for example, United Nations Convention on the Rights of the Child (CRC), the AU Charter on the Rights and Welfare of the Child
17. S. 34 (1) Constitution of the Federal Republic of Nigeria 1999
18. "id" See S.35 (1)
19. See Federal Ministry of Women Affairs, Abuja: Country Report on Violence Against Children 2004 published at: <http://www2.ohchr.org/english/bodies/CRC/docs/study/responses/Nigeria.pdf>

<sup>22</sup> See Robertson, et al., 'Systems of Care in Africa' (2004) H. Remschmidt, et al. 'Facilitating Pathways: Care, Treatment and Prevention in Child & Adolescent Mental Health (pp. 71-88), Springer, Berlin. See also, Omigbodun, Olayinka, 'Developing Child Mental Health Services in Resource-Poor Countries' *International Review of Psychiatry*, June 2008; 20(3): 225-235 emphasizing the importance of practical Child and Mental Health Policy Guidelines as against one that eventually becomes a mere decoration on bookshelves. (pg. 230)

