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RESEARCH

**HIV/AIDS AND GENDER INEQUALITY IN AGRICULTURAL CO-OPERATIVES IN
KENYA: A CASE FOR INTERVENTION BY THE LAW**

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for the Award of the Degree of Master of Laws of the University of Nairobi**

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DECLARATION

I, MWONGELA CHARLES BENEDICT do hereby declare that this is my original and innovative work which has not been submitted nor intended to be submitted for a degree in any other university in compliance with the regulations for an award of the degree of Master of Laws (LLM).

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DEDICATION

This thesis is dedicated to the fond memory of my late dad Benedict Karau who passed on three months after I had defended the thesis but before my graduation. It is also a tribute to my mother Christine Kanario who under God's care underwent successful brain surgery while I was underway with this study.

ABBREVIATIONS AND ACRONYMS

AIDS	- Acquired Immune Deficiency Syndrome
ALL ER	- All England Reports
ART	- Anti-retroviral therapy
ARVs	- Anti-retroviral drugs
CEDAW	- Convention on the Elimination of All Forms of Discrimination against Women
CESCR	- Covenant on Economic, Social and Cultural Rights
GAD	- Gender and Development
HAART	- Highly effective antiretroviral therapy
HIV	- Human Immunodeficiency Syndrome
HRs	- Human Rights
ICA	- International Co-operative Alliance
IFAD	- International Fund for Agricultural Development
ILO	- International Labour Organisation
KFA	- Kenya Farmers Association
KUSCO	- Kenya Union of Savings and Credit Organisations
PLWHA	- People living with HIV/AIDS
SACCO	- Savings and Credit Co-operative Societies
SASRA	- Sacco Societies Regulatory Authority
TRIPS	- Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	- Universal Declaration of Human Rights
UNDP	- United Nations Development Programme
WID	- Women in Development
WOCCU	- World Council of Credit Unions
WTO	- World Trade Organization

TABLE OF CASES

KENYAN CASES

- 1 Annarita Karimi NJeru v the Attorney General [1979] KLR 154.
- 2 Kenya AIDS Society v Arthur Obel (1997) LLR 598 CAK.
- 3 M.W. v Republic [2013] eKLR.
- 4 Mathew Okwanda v Minister of Health and Medical Services & 3 Others [2013] eKLR.
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1. Hoffman v South African Airways 2000 (11) BCLR 1211 (CC); 2001 (1) SA (CC).
2. Jansen van Vuuren & another NNO v Kruger 1993 (4) SA 842 (A) (S.Afr.).
3. Minister of Health and Others v Treatment Action Campaign and Others (CCT 8/02, 2002 (5) SA 721 (CC) par 135.
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1. Cuerrier (1996) 141 DLR (4th), 503.
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1. *Constitution of Kenya*, 2010.
2. *Co-operative Societies Act* (Chapter 490 Laws of Kenya).
3. *Employment Equity Act* No. 5 of 1998 of South Africa.
4. *Mental Health Act* (Chapter 248 Laws of Kenya).
5. *National Gender and Equality Commission Act*, 2011.
6. *HIV and AIDS Prevention and Control Act* No.14 of 2006 (Chapter 246 Laws of Kenya).
7. *Patent (Amendment) Act* No. 15 of 2005, India Code (1970).
8. *Public Health Act* (Chapter 242 Laws of Kenya).
9. *Sexual Offences Act* No. 3 of 2006.
10. *SACCO Societies Act*, No. 14 of 2008.
11. *SACCO Societies (Deposit – Taking Sacco Business) Regulations*, 2010.
12. *South Africa Constitution*, 1996.
13. *Traditional Health Practitioners Act* No. 35 of 2004 (of South Africa).

LIST OF INTERNATIONAL INSTRUMENTS

1. Agreement on Trade-Related Aspects of Intellectual Property Rights.
2. Convention on Elimination of all Forms of Discrimination against Women.
3. Employment Policy (Supplementary Provisions) Recommendations, 1984.
4. European Convention on Human Rights, 1954.
5. Indigenous and Tribal Peoples Convention, 1989.
6. International Covenant on Civil and Economic Rights.
7. International Covenant on Civil and Political Rights.
8. Rural Workers Organisations Convention, 1975.
9. Universal Declaration on Human Rights (UDHR).
10. International Labour Organisation Constitution.

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ABSTRACT

This study considers the role of the law in mitigating the impact of HIV/AIDS in co-operatives in Kenya. Its main focus is on agricultural based co-operatives. HIV/AIDS is a leading cause of death in the world and is a global phenomenon traversing virtually all spheres of life. Its effects are not just medical. They have far reaching implications even in social and economic development. Co-operatives as self-actualisation measures aim at uplifting living standards of the co-operators but despite this important role they play, HIV/AIDS continue to weaken their ability to ensure effectual functioning. Consequently there is need to address HIV/AIDS on co-operatives, an endeavour of this study. It draws on experiences on how the law has been used in addressing this problem from Canada, a developed country with an entrenched and vibrant co-operative movement and South Africa, an African country with the most number of people living with HIV/AIDS. In so doing, it also considers the role and place of gender mainstreaming in halting and reversing the effects of HIV/AIDS from a multi-disciplinary viewpoint.

CHAPTER ONE

INTRODUCTION

1.1 Background

The relationship between HIV/AIDS¹ and the law has been a subject of robust consideration in the recent past. This is because of the devastating effects it has on human beings. Since the 1970s when it was first reported, the disease has affected over 60 million people.² At least 20 million people have died as a result of the disease and an estimated 42 million children have been orphaned.³ AIDS has been one of the leading causes of death in Sub-Saharan Africa in the last two decades.⁴ While it spares no human being, women bear its brunt owing to biological factors and structural inequalities in the status of women.⁵

In Kenya, one of the human efforts that HIV/AIDS has assaulted is collective human activity through the co-operative movement. While people have pooled their individual efforts to enhance their socio-economic wellbeing, HIV/AIDS has not only affected them individually but has had deleterious effect on their collective efforts. Whether the law which is perceived to be an instrument of social engineering can be used to address this problem is the intention of this study.

The term co-operation is derived from the Latin word ‘co-operari’. The word ‘co’ means ‘with’ and ‘operari’ means to ‘work’.⁶ Co-operation means working together. Consequently, those who want to work together to promote their common economic objectives voluntarily form a society

¹See Jane Dwasi, *The Human Rights to work in Era of HIV and Aids* (OCRA – Kenya Publishers 2010), 10.

²Andrew Bibby, *HIV/AIDS and Co-operatives* (Co-operative College 2009), 7.

³ibid.

⁴ibid.

⁵Supra note 2, 8.

⁶Cooperative Society in Kenya, available at

< [www.scribd.com/doc/12942813/co-operative society in Kenya](http://www.scribd.com/doc/12942813/co-operative-society-in-Kenya) > ‘accessed 12 December 2012’.

termed a “co-operative society”.⁷ The main objective is to provide support to the members by pooling their individual resources and utilising them in such a manner as to enjoy the benefits of economies of scale.⁸

Bwisa argues in affirming this position that co-operative efforts have occurred throughout documental human history.⁹ Early man co-operated with others to kill animals for survival and therefore people co-operate in order to achieve objectives that they could not attain if they pursued them individually.¹⁰ Indeed the reason why people form co-operatives is to amalgamate efforts together in tackling various socio-economic challenges.

The birth of the modern co-operative movement is however traceable in Europe, principally in Britain and France in the 19th century.¹¹ Owing to pressure caused by expansive capitalist development, increased mechanisation of work and unequal competition between themselves and large scale capitalist enterprises, workers and farmers were compelled to set up co-operatives of all types.¹² Less powerful members of society joined together in order to sever inequitable relations with the bosses, the bankers, the landlords and the store owners.¹³ They were striving to gain control over the food and the homes.¹⁴ The Rochdale Equitable Pioneers Society was among the earliest co-operative societies.¹⁵ It was formed by 28 people who after saving money for over a year, opened their co-op store and began by selling butter, sugar, flour, oatmeal and candles.¹⁶ Some of the early co-operators were therefore simply striving to access commodities and services beyond their reach as individuals. However, for many early social philosophers such as Pierre Joseph Proudhon and Karl Marx, co-operatives were vehicles for analysing, understanding

⁷ibid.

⁸ibid.

⁹ Henry Bwisa, ‘A History of Co-operative Movement’, *Sacco Star*, Issue 13, (2010).

¹⁰ibid.

¹¹ibid.

¹²History of the Cooperative Movement, available at <www.peoplesbookCOOP.org/page_id=121> ‘accessed 24 March 2014’.

¹³ibid.

¹⁴ibid.

¹⁵Brett Fairbairn, ‘The meaning of Rochdale: The Rochdale Pioneers and the Co-operative Principles’, available at <<http://usaskstudies.coop/pdf-files/Rochdale.pdf>> ‘accessed 6 October 2014’.

¹⁶ibid.

and promoting visions of radical change and to forecast economic activity that could occur in a classless, post-capitalist society.¹⁷

The modern co-operative movement in Kenya is traceable to the year 1908 when European farmers started the first co-operative known as Lumbwa Farmers Co-operative Society whose main purpose was the marketing of their cereals, fruits and dairy products.¹⁸ Before that date though the spirit of co-operation was evident and was displayed by Indians during the manual construction of the railway line from Mombasa into the hinterland of East Africa.

Kenya Farmers Association (KFA) was registered in 1930 as a co-operative society and it took over the role of supply of farm inputs hitherto played by Lumbwa Co-operative Society.¹⁹ Through agitation African smallholder farmers were allowed to form their own co-operatives and by late 1950s they were able to register and promote co-operatives for cash crops like coffee and pyrethrum.²⁰ At the dawn of independence there were 1,030 co-operative societies in Kenya with 655 being active with an estimated total membership of 355,000.²¹ After independence the founding president of the Republic of Kenya Mzee Jomo Kenyatta made a clarion call, “*harambee*” which was meant to galvanize the citizenry to marshal their efforts to expedite development. To date there are over 11,200 registered co-operative societies country-wide with a membership of over 6.1 million.²² Approximately 63% Kenyans draw their livelihoods directly or indirectly from co-operative-based enterprises.²³

Co-operative development in Kenya, like in most African countries has been broadly categorized into two phases, namely, the era of state control and that of liberalization.²⁴ During the first phase co-operatives emerged as dependent agents and / or clients of the state which served as

¹⁷ibid.

¹⁸Supra note 9.

¹⁹ibid.

²⁰ibid.

²¹ibid.

²²Samson Gunga, ‘The Cooperative Movement in Kenya and its Potential for Enhancement of ICT Livelihoods’ available at

<http://wikieducator.org/images/c/c8/PID_116.pdf>, ‘accessed 9 December 2013’.

²³International Monetary Fund, ‘Republic of Kenya’ (2007), the Kenya High Commission in the United Kingdom).

²⁴Fredrick Wanyama, ‘Surviving Liberalization: the Cooperative Movement in Kenya’ available at <http://www.ilo.org/public/libdoc/ilo/2009/109B09_237_engl.pdf>, ‘accessed 10 December 2013’.

instruments for implementing government socio-economic policies.²⁵ In the 1990s and in line with the new economic environment that was sweeping across Africa, Kenya enacted laws aimed at liberalising co-operatives.²⁶ The aim was to incorporate the universally accepted co-operatives principles.

In Kenya the dominant co-operative movement is the SACCOs which has been billed as the largest in Africa and among the top ten globally.²⁷ With assets worth over 230 billion Kenya Shillings and savings estimated at 190 billion Kenya Shillings SACCOs in Kenya constitute about 20% of the country's domestic savings.²⁸ Despite this critical role that co-operatives play, HIV/AIDS has a maligning effect on operations of co-operatives. With such an integral part to play in the economic framework of the country it is crucial that the sector's very survival is not threatened. It is feared that HIV/AIDS has actually led to closure of co-operatives because "AIDS overthrows all the good intents of the co-operatives' members".²⁹

1.1.1 HIV/AIDS, development and socio-economic rights

As discussed later in this study HIV/AIDS is not just a health issue. It regresses many developmental gains and if unchecked can lead to a reduction of the human population and weakening of the economy.³⁰ It is also a source of poverty because it diverts resources towards medication and care of those afflicted.³¹ It is expensive to give medical care to those affected by it and in most instances individuals have to look upon the government to provide medication.³²

²⁵ibid.

²⁶Supra note 24.

²⁷Evelyn Anguche, 'Challenges and Opportunities facing SACCOS in the current Devolved System of Government of Kenya: A Case Study of Mombasa County', (2014) 1(9) *International Journal of Sciences and Entrepreneurship* 288 available at www.ijssse.org/articles/ijssse_v1_i9_288_314.pdf 'accessed 6 October 2014'.

²⁸ibid.

²⁹Report of Regional Consultative Meeting on the role of Co-operatives in the Fight against HIV/AIDS, Mbabane, Swaziland, 27-29 August 2001 (on file with the author).

³⁰ Victor Angelo, 'HIV/AIDS, Population and Sustainable Development' (2003) 4 *Cadernos de Estudos Africanos*, 99 available at

<http://cea.revues.org/1562> 'accessed 6 October 2014'.

³¹ibid.

³²ibid.

HIV/AIDS impedes development and enjoyment of socio-economic rights by decimating large numbers of productive adults thereby eroding human development capital. It threatens family stability and security and corrodes savings and investments. Illness and death associated with the disease translates into less income. Resources are diverted to tackle the illness either through hospitalisation, medication, funeral expenses and taking care of the resultant orphans. This translates into lesser resources that would otherwise have been utilised in housing, social security and other social amenities or even investing in co-operatives. The outcome is denial of those affected directly or indirectly enjoyment of their socio-economic rights.

1.1.2 HIV/AIDS and women in the co-operative movement

Research shows that HIV/AIDS affects men and women differently.³³ Clinically, women are affected more than men because they get different sets of defined opportunistic infections³⁴ and a host of gynaecological infections.³⁵ There are also potential differences in efficacy of drugs between men and women.³⁶ On the work front, women account for more labour than men in agriculture in Asia, Sub-Saharan Africa, Middle East and North Africa.³⁷ Majority of these women agricultural labourers either work on land owned by spouses, families or neighbours or are hired in informal markets.³⁸ They also do not have contracts that provide them with direct control over the returns of their labour or that legally oblige employers to provide benefits or to adhere to existing labour laws.³⁹ Male monopoly of farming occupation thus casts the farm woman in the role of an assistant to her husband.⁴⁰ Women may work in the farm and contribute significantly to farm production, but have no income of their own yet they also carry the burden

³³ Nancy Goldstein and Jennifer Manlowe, *The Gender Politics of HIV/AIDS in Women: Perspectives on the Pandemic* (New York University Press 1997), 64.

³⁴ Michelle Murrain, "Different Rates of Opportunistic Infections in Women with AIDS", (1983) 2 *Journal of Women Health*, 243.

³⁵ Jenny Higgins, Susie Hoffman et al., 'Rethinking Gender, Heterosexual Men, and Women's Vulnerability to HIV/AIDS', (2010) *American Journal of Public Health*, 435.

³⁶ Supra note 33.

³⁷ The World Bank, *Gender in Agriculture Sourcebook* (The International Bank for Reconstruction and Development/ the World Bank 2009), 317.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Patricia O'Hara, *Partners in Production? Women, Farm and Family in Ireland* (Berghahn Books 1998), 3.

of childcare and domestic work.⁴¹ Gender division of labour is reinforced by ideologies and cultural traditions. The end result is that women participation and membership in agricultural cooperatives is conspicuously less than men.⁴²

It is argued that despite the stated obtaining scenario, there is not in place among the co-operative movement in Kenya any focussed legal mechanism for alleviating or mitigating the ripple economic effects that have been unleashed by the pandemic of HIV/AIDS. Co-operatives have not addressed the effects of the pandemic on the co-operatives' members and employees and if this situation is not addressed it could ultimately undermine the viability of co-operatives in Kenya perhaps even contrary to the cooperative principles. Co-operatives in Kenya as employers should borrow from the International Labour Organisation (ILO) which has in this regard developed the *ILO Code of Practice on HIV/AIDS and the World of Work* which offers a detailed advice and recommendations for good practice.⁴³ In reflecting upon how the law can be used to address the challenge of HIV/AIDS, this paper shall have some bias towards the gender dynamics and how a gender focussed response can alleviate the impact of HIV/AIDS, perhaps even better than law.

1.2 Statement of the problem

By causing illness and death of workers, HIV/AIDS reduces the stock of skills and experience of the labour force, and this loss of human capital is a direct threat to goals for poverty eradication and sustainable development.⁴⁴ Agricultural-based co-operatives where the bulk of Kenyans are based in the movement are affected due to induced mortality.⁴⁵ The membership dwindles as does member participation. Health status and productivity of members deteriorates and because the disease affects people in their prime ages, its impact on the productive workers is

⁴¹ *ibid.*

⁴² *Supra* note 40.

⁴³ International Labour Organisation, 'An ILO Code of Practice on HIV/AIDS and the World of Work' (2012) available at www.ilo.org/public/english/protection/trav/aids/publ/code.htm 'accessed 12 December 2012'.

⁴⁴ International Labour Organization, 'HIV/AIDS and Work: Global Estimates, Impact and Response' 2004 available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_116379.pdf 'accessed 12 October 2014'.

⁴⁵ *Supra* note 2, 10.

significant.⁴⁶The disease also afflicts employees of co-operatives. This introduces a problem of economic costs, being the costs of training and replacing experienced workers.⁴⁷ It has been observed that owing to HIV/AIDS Kenyan credit unions' profitability was at great risk due to default on un-serviced loans issued and in certain cases, bankruptcy.⁴⁸ Co-operatives in some countries have developed strategies to try and contain the HIV/AIDS menace. As shown in the comparative chapter, in South Africa, for instance, Home-Based Care Givers Co-operative of Soweto was formed to provide home-care services including bathing patients, treating bed sores and renewing dresses and bandages.⁴⁹ In Canada, Margaret Laurence Housing Co-operative meets housing needs of people with HIV/AIDS by purchasing land and property from run down neighbourhoods and building storey apartments which are affordable by those with low incomes associated with the HIV/AIDS.⁵⁰

It is for that reason that this contribution considers how the law could mitigate the effects of HIV/AIDS on agricultural co-operatives in Kenya. It also looks beyond the law to establish whether other multi-disciplinary approaches can alleviate the effects of HIV/AIDS on co-operative societies. The question is whether it is the law that can be used in Kenya to militate the effects of HIV/AIDS on agricultural co-operatives.

1.3 Research questions

The questions that this research seeks to answer are;

⁴⁶International Labour Organization, 'Project Profile, COOPAIDS: HIV-AIDS Prevention and Impact Mitigation through co-operatives in selected African countries (2010) available at <www.ilo.org/public/english/employment/ent/coop/africa/download/hiv_aids_pro.pdf>, 'accessed 12 October 2014.

⁴⁷Supra note 2, 12.

⁴⁸World Council of Credit Unions Research Monograph Series Number 21, 'The Unpaved Road Ahead: HIV/AIDS and Microfinance,' (2002) available at

<www.woccu.org/pdf/monograph21.pdf> 'accessed 10 December 2012'.

⁴⁹Supra note 2, 21.

⁵⁰Supra note 2, 30.

- 1.0 What is the rationale for co-operation and how have agricultural-based co-operatives helped Kenyans?
- 2.0 How has the law in Kenya responded to the reality of the effects of HIV/AIDS on agricultural co-operatives?
- 3.0 How has the law been used elsewhere in responding to the reality of the effects of HIV/AIDS on agricultural co-operatives?
- 4.0 Is gender mainstreaming an effective tool in dealing with the impact of HIV/AIDS in agricultural co-operatives?
- 5.0 What measures, legal or otherwise can be taken to mitigate the effects of HIV/AIDS on agricultural-based co-operatives?

1.4 Hypothesis

The study is based on the following hypotheses:

- (a) The law on the co-operative movement has not recognised the impact of HIV/AIDS on the co-operative movement in Kenya.
- (b) The scourge of HIV/AIDS has had an incapacitating impact on agricultural co-operatives thereby limiting their possible use as vehicles of social, cultural and human development.⁵¹
- (c) Other jurisdictions have recognised the impact of the scourge of HIV/AIDS and have undertaken law review to reflect this reality, for example Canada and South Africa.
- (d) Gender inequality undermines the fight against HIV/AIDS in agricultural co-operatives in Kenya. Mitigation of gender inequality must inform law and policy towards mitigating HIV/AIDS.

1.5 Justification of the study

The study will assist in identifying the linkage between HIV/AIDS, development and enjoyment of socio-economic rights in the context of agricultural co-operatives and find ways of addressing the resultant challenges. Policy makers will draw perspectives from it and so will the legislators.

⁵¹Supra note 2.

It will inform the law reform on the regulation of co-operatives and assist in identifying ways in which the impact of HIV/AIDS in the co-operative movement in Kenya can be lessened.

This study focusses on agricultural co-operatives because they are largely rural-based and the bulk of the Kenyan population lives in rural areas.⁵² Rural areas in Kenya also have the highest percentage of poverty and studies have shown that there is a direct correlation between HIV/AIDS and poverty.⁵³ The level of ignorance on the negative effects of gender inequality in society is also highest in rural places with women owning only 3% of the land.⁵⁴ This study therefore interrogates what role, if any, the law can play in addressing the problem of HIV/AIDS and gender inequality in agricultural co-operatives. Such intervention by the law is looked at from national lenses because agricultural co-operatives are cross-cutting hence the law cannot be applied selectively.

1.6 Theoretical framework

The research is underpinned by three theories, namely; personalist-communitarian perspectives of human rights, Lockean and Hobbesian political thoughts in social contract, and socialist feminism. HIV has been said to be a human rights issue because it connects with human dignity, the premise of human rights. The Oxford Dictionary of Law defines human rights as rights and freedoms to which every human being is entitled. They are basic moral guarantees that people in all countries and cultures allegedly have simply because they are people.⁵⁵

Modern human rights proceeds from the premise that there will always be a government appointed or elected to exercise some powers on behalf of the citizenry; that in the exercise of this power the rulers views and interests will sometimes differ with those of the ruled; that these

⁵²IFAD, 'Enabling Poor Rural People to Overcome Poverty in Kenya', available at www.ifad.org/operations/projects/regions/pf/factsheets/kenya.pdf 'accessed 13 June 2014'

⁵³Janet Kawewa, *Situational Analysis on HIV/AIDS* (Department of Adult Education) available at www.unesco.org/education/tiie/pdf/Kawewa.pdf 'accessed 13 June 2014'.

⁵⁴Kenya's National Gender Context and its Implications for Conservation: A Gender Analysis (July, 2003)available at

www.nature.org/science-in-action/leading-with-science/kenya-gender-analysis.pdf 'accessed 13 June 2014'.

⁵⁵Internet Encyclopedia of Philosophy, '*Human Rights*', available at www.iep.utm.edu/hum-rts 'accessed 25 May 2014'.

conflicting views can only be resolved by national laws, and; that these laws must conform to an objective and universally accepted standard.⁵⁶Universality of Human rights is protected in various declarations and legal conventions, including the Universal Declaration of Human Rights (UDHR) (1948), the European Convention on Human Rights (1954) and the International Covenant on Economic, Social and Cultural Rights (CESCR) (1966).⁵⁷The Kenyan Constitution guarantees them in the Bill of Rights⁵⁸ as does the Constitution of South Africa which is a comparative study in this thesis.⁵⁹The underlying aspiration of the doctrine of human rights is to provide a set of legitimate criteria to which all nation-states should adhere and to uphold human dignity.⁶⁰ The doctrine is well placed to provide individuals with a tool for morally auditing the legitimacy of contemporary national and international forms of political and economic authority which confront people and claim jurisdiction over them.⁶¹

Personalist-communitarian perspectives of human rights has been chosen because it emphasises that the person lives in community with others and not as an isolated individual.⁶² It thus provides a more coherent contemporary approach to rights than 18th Century liberalism and 19th Century Marxism.⁶³ Proponents of this theory perceive rights based on Western philosophy and social thought in a manner which differs radically from traditional liberal conceptions by, inter alia, including economic and social rights in the catalogue of human rights.⁶⁴ Its key proponents, Mounier, Muritain and Unger criticise the individualistic property-oriented approach of Western liberalism, while at the same time rejecting Marxist collectivism.⁶⁵

Its proponents view human rights standards as evolving over time and as reflecting particular historical circumstances.⁶⁶ Their theories though not identical share in their emphasis on the concept of the “person” as distinguished from the concept of the “individual” and the view that the term “person” implies relationships with others in a community and a corresponding

⁵⁶ Ken Obura, ‘The Nature of Modern Human Rights Framework: Theoretical and Practical Perspectives’, (2014) *Journal of Law and Ethics*, 3.

⁵⁷Supra note 55.

⁵⁸*Constitution of the Republic of Kenya 2010*, articles 19 and 27.

⁵⁹*Constitution of the Republic of South Africa 1996*, section 7 (1).

⁶⁰ibid.

⁶¹ibid.

⁶² Virginia Leary, ‘Post Liberal Strands in Western Human Rights Theory: Personalist-Communitarian Perspectives’, in Abdullahi An-Naim, *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (University of Pennsylvania Press 2011), 107.

⁶³ ibid.

⁶⁴ Supra note 62, 106.

⁶⁵ ibid.

⁶⁶Supra note 62, 111.

emphasis on the community and the relations between persons and society.⁶⁷ They all focus on the roles and rights not only of individuals but also of communities, particularly communities smaller than the state and a corresponding view that rights may be claimed against groups as well as against states.⁶⁸ Further, they all make an effort to distinguish their social theories from Marxist collectivism and liberal capitalism and emphasise on praxis, or the practical implications of their social theories.⁶⁹ Its applicability to the study is because HIV/AIDS is a socio-economic and cultural inhibitor that might hinder enjoyment of human rights.

Agricultural co-operatives are tools for attainment of economic and social rights. The primacy of economic and social rights as human rights is evinced in their being listed in Articles 22 to 26 of the UDHR. They are further developed and set out as conditions necessary for prosperity and wellbeing as binding treaty norms in the CESC. ⁷⁰ HIV/AIDS impacts negatively on the socio-economic needs of the populace hence the linkage with human rights approach. This is because human rights provide an explanation on the relationship between the state and her citizenry on the one hand and the relationship between citizens *inter se* and what those relationships mean in terms of responding to phenomena that threaten the wellbeing of people.

Social contract theory refers to the informal agreement between the ruled and their rulers defining rights and duties of each.⁷¹ It posits that in primeval times, individuals were born into an anarchic state of nature, a state in which happiness was predicated upon particular occasions.⁷² By exercising natural reasoning, they formed a government by means of contract among themselves.⁷³ Though traceable back to the Greek sophists, its greatest currency emerged in the 17th and 18th centuries and is associated with Thomas Hobbes, John Locke and Jean Jacques Rousseau.⁷⁴

⁶⁷ Supra note 62,111.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ The *International Covenant on Civil and Economic Rights*, Articles 6 to 14.

⁷¹ Encyclopedia Britannica, 'Social Contract', available at www.britannica.com/EBchecked/topic/550994/social-contract <accessed 25 May 2014>.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

These philosophers compare the advantages of civil society with the disadvantages of nature.⁷⁵ Hobbes argued that a state of nature equals anarchy where life becomes “poor, nasty, brutish and short”.⁷⁶ This is caused by 4 features of the human condition, namely; equality of need, scarcity, the essential equality of human power and limited altruism.⁷⁷ Social services such as farming, industry, education and housing were not available in a “state of nature” because the social co-operation needed to produce these things is non-existent.⁷⁸ To circumvent this fate people need guarantees that one will not harm another and that people can rely on one another to keep their agreements.⁷⁹ As a result people form government by giving up some of their personal freedom (the freedom of anarchy) and give the government authority to enforce laws and agreements.⁸⁰ Locke in his *Second Treatises of Government* argued that sovereignty resides in the people.⁸¹ He also saw the need to consolidate human strength as advantageous. Rousseau’s works on the other hand, were dominated by a concern to find a way of preserving human freedom in a world where human beings are increasingly dependent on one another for the satisfaction of their needs.⁸² This he also believed had to be achieved through collective and not individual efforts. He notes in his social contract that if the state of nature endured, human existence would be imperilled.

Social contract theory underpins this research because of its belief that self-interest is what drives the need for a social contract. Co-operatives are about people pooling their resources together for their common good and ceding the rights of management of those resources to the boards and management of the co-operatives. Co-operatives also operate under the governing laws enacted by the government.

⁷⁵Supra note 71.

⁷⁶See Social Contract Theory, available at www.csus.edu/indiv/g/gaskilld/ethics/sct.htm ‘accessed 25 May 2014’.

⁷⁷ibid.

⁷⁸ibid.

⁷⁹ibid.

⁸⁰ibid.

⁸¹Stanford Encyclopedia of philosophy, *John Locke* available at Plato.stanford.edu/entries/locke/ ‘accessed 25 May 2014’.

⁸² ibid.

Defining feminism is problematic because the term is not a unitary concept but rather is a multi-faceted grouping of ideas and actions.⁸³ The concept has a set of core propositions and beliefs central to all feminist theories but many of the different strands of feminism seem to be not only divergent but sometimes forcefully opposed.⁸⁴ The Oxford Dictionary defines feminism as the advocacy of women's rights on the ground of equality of sexes. Feminism advocates equal rights and opportunities for men and women.⁸⁵ It postulates the existence of equality of sexes in the political, economic and social spheres.⁸⁶ It is an intellectual commitment and a political movement that seeks justice for women and the end of sexism in all forms.⁸⁷ Its themes are discernible in international instruments such as the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This convention obligates state parties to take all appropriate measures, including legislation to ensure the full development of women in order to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.⁸⁸ The Constitution of Kenya appreciates feminist perspectives in providing that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.⁸⁹

The various strands of feminism are based on their perception of what constitutes sexism, what exactly ought to be done about it, what it means to be a woman or man and what social and political implications gender has or should have.⁹⁰ These strands include socialist, radical, liberal, Black, and eco-feminism.⁹¹ Socialist feminists are concerned with challenging capitalism and male supremacy while radical feminism sees the basic division in all societies as that between men and women and clearly holds that men are the oppressors.⁹² Liberal feminists emphasise

⁸³ Jane Freedman, *Concepts in the Social Sciences Feminism* (Open University Press 2001), 1.

⁸⁴ *ibid.*

⁸⁵ Merriam-Webster, *Definition of Feminism* available at <www.merriam-webster.com/dictionary/feminism> 'accessed 25 May 2014'.

⁸⁶ *ibid.*

⁸⁷ Topics in Feminism, *Stanford Encyclopedia of Philosophy* available at <<http://plato.stanford.edu/entries/feminism-topics/>> 'accessed 14 December 2014'.

⁸⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, Article 3.

⁸⁹ *Supra* note 58, Article 27(3).

⁹⁰ *Supra* note 75.

⁹¹ Strands of Feminism Theory available at <<http://pers-www.wlv.ac.uk/~le1810/femin.htm>> 'accessed 14 December 2014'.

⁹² *ibid.*

equality between men and women in the public sphere – employment, education and politics.⁹³ Black feminists challenge perspectives and practices among white feminists that marginalised Black women by examining the impact of racism on Black women's lives.⁹⁴ Eco-feminists or ecological feminists make connections between men's oppression of women and their exploitation of nature and argue that women have a crucial role to play in environmental movement.⁹⁵ They see women's reproductive and nurturing roles as giving women superior insight into how humans can live in harmony with nature.⁹⁶

Socialist feminism has been preferred in this study because it incorporates among its perspectives the gender and development (GAD) approach.⁹⁷ Socialist feminists challenge capitalism and patriarchy at the same time by identifying the socially constructed division between productive and reproductive work as the basis of oppression of women.⁹⁸ It does not place "women" at the centre of analysis but stresses that gender is a social construct, beyond the biological sex and thus argues that gender-differentiated policies are crucial in reducing poverty.⁹⁹ It exposes the double workload that women face, does not use the household as the exclusive unit of analysis and opens doors to contributions by men who are committed to equality unlike earlier feminist perspectives.¹⁰⁰

Socialist feminism will be used to analyse the extent to which HIV/AIDS afflicts women more than men. HIV/AIDS affects women and men differently.¹⁰¹ Biological factors make women more vulnerable to HIV/AIDS infection than men.¹⁰² Structural inequalities in the status of

⁹³ Supra note 91.

⁹⁴ *ibid.*

⁹⁵ Karrren Warren, *Ecofeminism: Women, Culture, Nature* (Indiana University Press 1997), xi.

⁹⁶ *ibid.*

⁹⁷ Margarita Aguinaga, Miriam Lang, et al. 'Development Critiques and Alternatives: A Feminist Perspective', available at

<http://www.tni.org/sites/www.tni.org/files/download/beyonddevelopment_critiques.pdf> 'accessed 14 December 2014'.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ Supra note 86, 45.

¹⁰¹ Supra note 2, 10.

¹⁰² Supra note 2, 10.

women make it hard for women to take measures to prevent infection.¹⁰³ Patriarchy and social hegemonies deprive women of power to negotiate on matters of sexuality.¹⁰⁴ The number of illiterate women is higher than men worldwide and owing to illiteracy less women than men access HIV/AIDS awareness programs.¹⁰⁵ Women also make the majority of the World's poor and poverty contributes to the risk of HIV/AIDS.¹⁰⁶ They disproportionately shoulder the burden of caring for children orphaned by HIV/AIDS and taking care of HIV-infected family members.¹⁰⁷ Empowering women financially and increasing their capacities to make informed choices can help tackle HIV/AIDS. It is in this regard that HIV/AIDS has become 'feminised'.¹⁰⁸

Feminist theories are interlinked with human rights concepts because both schools of thought have as their central concern the human being. Human rights propound equality of humans while feminist perspectives reflect struggles of equality and equity in gender among humans. The ratification of the 19th Amendment to the Constitution of the United States which guaranteed women the right to vote thereby representing the first peaceful transformation of a politically excluded group into an included group is an example of this linkage.¹⁰⁹ The UN World Conference on Human Rights in Vienna in 1993 affirmed women's rights as full universal rights and identified violence against women in particular as a key issue on the global human rights agenda.¹¹⁰ Furthermore, basic human rights principles are linked to gender specific abuses such as domestic violence, sexual assault and forced pregnancy.¹¹¹ The campaign that culminated in Vienna did not proceed along an "add women and stir" approach, but aimed at making human rights more inclusive by making women experiences and feminist gender analysis central in all issues.¹¹² It is in this regard that the reflections of the GAD approach which resonate in socialist feminist theory find echo in this research.

¹⁰³ibid.

¹⁰⁴ibid.

¹⁰⁵Supra note 2, 10.

¹⁰⁶ibid.

¹⁰⁷ibid.

¹⁰⁸ibid.

¹⁰⁹Suzanne Murilley, *Women Suffrage and the Origins of Liberal Feminism in the United States 1820 – 1920* (President and Fellows of Harvard College 1996), 1.

¹¹⁰Charlotte Bunche, 'Legacy of Vienna: Feminism and Human Rights', (International Conference on Vienna + 20 Vienna, 27 June 2013), 1.

¹¹¹ ibid, 2.

¹¹² ibid.

1.7 Aims and objectives

This study seeks to find out whether HIV/AIDS has affected agricultural co-operatives in Kenya and then ponder on how the effects can be militated. In so doing, this research will pursue the following sub-objectives:

- (a) To interrogate the relevance of the co-operative movement to the realisation of socio-economic rights by Kenyans;
- (b) To explore the extent to which the negative impact of HIV/AIDS afflicts the agricultural co-operative movement in Kenya by limiting the realisation of social, cultural and human rights of Kenyans;
- (c) To explore means through which the law can be used as an instrument to re-engineer the agricultural co-operative movement in Kenya in mitigating the effects of HIV/AIDS;
- (d) To explore whether gender mainstreaming in agricultural co-operatives is an effective tool in tackling the menace of HIV/AIDS;
- (e) To find out whether any country has used the law to address the challenges HIV/AIDS has had on the agricultural co-operative movement;
- (f) To prospect for solutions, legal or otherwise, towards addressing the challenge of HIV/AIDSs on the co-operative movement;

1.8 Broad argument layout

The co-operative movement plays a pivotal role in poverty alleviation worldwide. The UN in recognition of this declared the year 2012 as the International Year for Co-operatives in an attempt to raise awareness of the part played by co-operatives in reducing poverty, unemployment and in fostering social integration.¹¹³ Poverty and unemployment are more rampant in developing countries which include Kenya where the co-operative movement has grown exponentially placing Kenya at the apex of the co-operative movement in Africa. Co-operatives operate largely on the strength of member contributions. The HIV/AIDS pandemic largely afflicts the income generating age group that constitute the base of these co-operatives. It affects the strength and viability of co-operatives in Kenya. This is owing to the resultant toll of the disease on human resource and income loss both on the employees as well as the members of the co-operatives.

HIV/AIDS is not just a health issue. It reverses many development gains by reducing the productive population and weakening economy. Reduction in incomes due to the toll of HIV/AIDS leads to reduction in purchasing power by members of co-operatives and this is a direct threat to the realisation of economic and social cultural rights. HIV/AIDS is also a major source of poverty and discrimination in that it worsens existing problems of lack of adequate social protection and gender inequality. Consequently the extent to which the law can possibly be used to reinvigorate co-operatives in mitigating the effects of HIV/AIDS in co-operatives needs to be examined.

1.9 Literature review

There exists literature gap in the proposed area of research. There have however been general writings on co-operatives.

¹¹³United Nations, *International Year of Cooperatives*, available at http://social.un.org/coops_year/ 'accessed 12 December 2012'.

1.9.1. Evolution of the co-operative movement

Evolution of co-operatives in the world has been traced by Birchall.¹¹⁴ The book analyses the emergence of the International Co-operative Alliance (ICA) which developed co-operative principles along which co-operatives operate.¹¹⁵ However HIV/AIDS is not discussed yet the disease is an all pervading menace which is affecting all sectors of humanity.

1.9.2. History of the co-operative movement in Kenya

The history and development of the co-operative movement in Kenya, from colonial to post-colonial period and the emergence of a regulatory framework has been addressed by Ouma.¹¹⁶ The book indicates that until the mid-1940s only European farmers were allowed to form co-operatives in Kenya but thereafter the colonialists relaxed the grip by permitting Africans to form co-operatives.¹¹⁷ Origins of the regulatory framework governing the co-operative movement in Kenya to the enactment in 1945 of the Co-operative Ordinance and ultimately the legislation of the Co-operative Societies Act, in 1966 have been covered.¹¹⁸ However issues to do with the nexus between the impact of HIV/AIDS on the co-operative movement and how the law has responded to it have not been tackled. Gender mainstreaming has also not been discussed.

Co-operatives contribution to development of the national economy in Kenya has been written on by Kibanga.¹¹⁹ However no suggestion is made on how the law can be employed towards addressing HIV/AIDS and its likely negative impact on co-operatives.

¹¹⁴Johnston Birchall, *A History of the Co-operative Movement*, (Manchester University Press 1997).

¹¹⁵Supra note 76.

¹¹⁶Sylvester Ouma, *History of Co-operative Movement in Kenya*, (Pearl Marketing Co. Ltd, 1997).

¹¹⁷ibid.

¹¹⁸ibid.

¹¹⁹Manyara Kibanga, *A Commentary on the Co-operative Societies Act, 1997 No.12 of 1997* (Pearl Marketing Co. Ltd 2001).

1.9.3. Human rights and HIV/AIDS

Human rights to work in the era of HIV/AIDS has been researched on and published by Dwasi.¹²⁰The book defines HIV and AIDS and the challenges posed by HIV/AIDS to work and human rights to work. It also tackles prevention and mitigation of occupational diseases in relation to HIV/AIDS. The role of religion in the era of HIV/AIDS is addressed by tracing the legal foundations of the freedom of religion. Freedom of religion as a human right is discussed and the scope of applicability of freedom of religion in the context of HIV/AIDS is explored and the place of freedom of religion in the Kenyan Constitution tackled.¹²¹ However, issues on agricultural co-operatives and HIV/AIDS have not been addressed. This research is different because it principally ascertains the role of the law in mitigating the impact of HIV/AIDS in rural-based agricultural co-operatives.

In recognition of the impact of the HIV/AIDS menace in Eastern and Southern Africa the United Nations Development Programme (UNDP) commissioned a study whose findings were published in 2008.¹²² It found that the destructive force of HIV/AIDS epidemic is worsened and associated with a wide range of human rights violations.¹²³ It proposed strong and coherent human-rights based response by increasing social cohesion and the community's ability to respond to the epidemic.¹²⁴ A set of tools were developed to support policy, legislative review and reform.¹²⁵The tools included a guide to an effective human rights response, a checklist on human rights obligations to effectively address HIV/AIDS, a catalogue of international, regional, national human rights documents which could be useful when reviewing and drafting legislation and policy and when interpreting the laws.¹²⁶ Although that study did not particularly deal with HIV/AIDS in co-operatives its findings will be useful in this research especially in the finding

¹²⁰Supra note 1.

¹²¹Jane Dwasi, *Freedom of Religion as a Human Right: Opportunities and Challenges in the Era of HIV/AIDS* (OCRA – Kenya Publishers 2010).

¹²²*Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa*, (Pretoria University Law Press 2008).

¹²³ibid,3.

¹²⁴ibid.

¹²⁵ibid.

¹²⁶ibid.

that enhancement of enjoyment of human rights can mitigate the effects of HIV/AIDS. It will fill the gap that exists.

1.9.4. Feminism

The concept of feminism and in particular how gender inequality is entrenched in law has been addressed by among others, Albertine.¹²⁷ Razavi and Miller trace the emergence of the concept of Women in Development (WID) in which feminists criticise the trickle down theories of development.¹²⁸ The basic argument by Razavi and Miller is that modernisation impacts differently on women and men and that it greatly contributes to the deterioration of women's position.¹²⁹ WID demanded social justice and equity for women while placing blame on patriarchy. The critique on WID led to the evolution of GAD which advocated a focus on the social relations of gender, identifying the social construction of production and reproduction as the basis of women's oppression. These two feminist perspectives have not dealt with agricultural co-operatives as this study does. That notwithstanding the GAD approach will be useful in analysing the question of women and HIV/AIDS in agricultural co-operatives. The gap which this study seeks to fill is on whether the law can be used to mitigate the effects of HIV/AIDS on the co-operative movement.

The link between micro-finance and women's empowerment in the context of gender mainstreaming has been addressed by among others, Mayoux.¹³⁰ The works show that gender mainstreaming involves equality of women's access to services and mechanisms that ensure translation of that access into empowerment.¹³¹ It is argued that women empowerment needs to be an integral part of policies and that maximisation of the contribution of women's empowerment require equality in access of all micro-finance services and an adequate non-

¹²⁷Catherine Albertyne, *Feminism and the Law in Jurisprudence*, (Lansdowne, Juta & Co. Ltd).

¹²⁸Shahrashoub Razavi & Carol Miller, 'From WID to GAD: Conceptual Shifts in the Women and Development Discourse,' Occasional Paper 1, February, 1995, United nations Research Institute for Social development United Nations Development Programme, 2.

¹²⁹ibid.

¹³⁰Linda Mayoux, *Micro-finance and empowerment of women – A review of the key issues*, available at <www.ilo.org/wcmsp5/groups/public/ed_emp/documents/publication/wcms_117993.pdf> 'accessed 28 May 2014'.

¹³¹ibid.

discriminatory regulatory framework.¹³² This research is different in that it explores empowerment of women through gender mainstreaming in agricultural co-operatives.

Mainstreaming HIV/AIDS within housing co-operatives has been written on by Nduhura and Tomlison.¹³³ This research is different because it addresses mainstreaming HIV/AIDS within agricultural rural-based co-operatives.

1.10 Research methodology

The study relied on primary and secondary sources of data. The secondary sources are textbooks, scholarly articles and reports mainly obtained from libraries at the University of Nairobi, Co-operative University College and from the internet. Three methodological approaches were used, namely; doctrinal, socio-legal and comparative. Through the doctrinal approach, theories on law, principles of human rights, concepts and provisions speaking on law and HIV/AIDs were discovered, analysed and presented in a systemic form. A socio-legal approach involved a study of how the law operates in a social context to deal with HIV/AIDS. The comparative approach was used in reflecting on Canada and South Africa, whose experiences have influenced and supplied perspectives to this study.

Field research was necessary to have a practical feel of the study and to test the hypotheses by not just using available information but also incorporating reflections from individuals. Furthermore, much of the activities on rural-based agricultural co-operatives is undocumented. Consequently, questionnaires were administered in Meru, Machakos, Kiambu and Kajiado Counties. These counties were chosen because the bulk of agricultural co-operatives in Kenya is located in the coffee and dairy sectors which have very significant presence in the said counties. The difficulty in structuring and administering the questionnaires was that of selecting individuals who would reply by giving useful information. This was a challenge because most

¹³²ibid.

¹³³Dennis Nduhura and Richard Tomlison, *'Mainstreaming HIV/AIDS within Housing Cooperatives, Social Housing Institutions and NGOs That Provide Technical Assistance for Housing'*, (2009) available at [www.rooftops.ca/CMSImages/file/Regional % 20 Workshop % 20on % HIV, % 20 AIDS % 20 and % 20 Housing/Rooftops % 20 of % 20 Regional % 20 Canada % 20 - % 20 Report % 20 of % 20 Regional % 20 HIV and % 20 AIDS % 20 assessment % 20 with % Country % 20 reports % 20 annexed. Pdf](http://www.rooftops.ca/CMSImages/file/Regional%20Workshop%20on%20HIV,%20AIDS%20and%20Housing/Rooftops%20of%20Regional%20Canada%20-%20Report%20of%20Regional%20HIVand%20AIDS%20assessment%20with%20Country%20reports%20annexed.Pdf) > 'accessed 28 May 2014'.

respondents were illiterate and semi-literate farmers in agricultural-based organisations. Consequently, simple random sampling technique using structured or close-ended questions and unstructured or open-ended questions was used. In total 43 respondents were successfully interviewed. They filled and submitted back the questionnaire on the same day of the interview. Challenges encountered in the survey included the sensitive nature of debates on HIV/AIDS. Illiteracy among some respondents necessitated interpretation of the questions into mother tongue. Empirical study was applied in interpreting the data and the results were fused into the study.

The study recognised ethical issues that govern research. Consequently people's ideas were acknowledged and references provided. Identities of respondents interviewed were concealed and pseudonyms used. Upon completion of the study names of the respondents on the questionnaires were destroyed to conceal identities. The researcher's assistants, namely his court clerk and pupil were debriefed never to reveal any materials or information that may have come to their possession in the course of the study. The researcher acknowledges that he was previously known to Meru North Co-operative Union Limited of Meru County, having been the external lawyer for the said co-operative but states that this did not affect his objectivity of the study.

1.11 Limitation of the study

This study will not cover the origins and causes of HIV/AIDS. It will also not deal with scientific efforts undertaken in medical fields to find cure for HIV/AIDS. Practical challenges expected include a seeming lack of materials and texts in this topic in local libraries, particularly by legal scholars. The challenge will be mitigated by examining literature on the topic from other disciplines other than law and by referring to internet resources. This could entail financial constraints because some online libraries require subscription for one to access materials. The subject of HIV/AIDS is often viewed with stigma and hence some useful material and data may not have been disclosed and recorded for posterity.

1.12 Thesis Structure

1.12.1 Chapter One: Introduction

This chapter outlines the background of the study. It contains the statement of the problem. It depicts the scope of the study and explains the issues that the study is dealing with. It further defines the objectives of the study and identifies the research questions which are aimed at answering the research problem. The justification of the study and the limitations of the research have also been covered in this chapter. It outlines the theoretical framework as well as the hypotheses of the research. It also defines the research methodology applied in the study. To ground the study into its proper context this chapter also covers a literature review.

1.12.2 Chapter Two: Conceptual and legal framework

It analyses the evolution of the co-operative movement and its importance in Kenya as an economic pillar. It explores whether the co-operative movement is desirable today and its impact, if any to the socio-cultural welfare of Kenyans. It seeks to answer the question whether co-operatives help in the attainment of human rights. Also explored here is the place of the co-operative movement in Kenya after the promulgation of the Constitution in the year 2010. The legal and regulatory framework within which co-operatives operate in Kenya is examined. The gender representation in agricultural co-operatives is analysed with a view of exposing the imbalance between men and women in agricultural co-operatives so that the question of women subordination can be exposed with a view to redressing the same. Of critical concern is the Constitution of Kenya 2010, the Co-operatives Societies Act, the SACCO Societies Act (No. 14 of 2008) and the SASRA Act. The impact of the HIV/AIDS on the co-operative movement is examined as well as the applicability of the social contract theory in co-operatives in addressing the scourge of HIV/AIDS.

1.12.3 Chapter Three: Legal mitigation of the impact HIV/AIDS in Kenya

It examines how the law can be used effectively in containing the effects of HIV/AIDS pandemic. The role played by the law in dealing with the disease is undertaken, first from a global perspective, the general situation in Africa and the position in Kenya. It then examines whether existing HIV/AIDS-related laws in Kenya are in tune with current global trends and whether they amply address the HIV/AIDS challenges faced by agricultural co-operatives.

1.12.4 Chapter Four: Gender mainstreaming as a way of containing HIV/AIDS in agricultural co-operatives in Kenya

It is an overview on gender inequality with particular emphasis to agricultural co-operatives and the effects of that imbalance in worsening the HIV/AIDS situation. It examines how gender mainstreaming as a HIV-effect alleviation approach can be utilised in addressing the challenges of HIV/AIDS in agricultural co-operatives.

1.12.5 Chapter Five: HIV/AIDS, the law and co-operatives in South Africa and Canada: Some comparisons

It examines the reality of HIV/AIDS and how the law has reacted to the situation in South Africa and Canada. It interrogates the position of agricultural co-operatives in the two countries and how the law has been used to address HIV/AIDS. It explores whether and how gender mainstreaming has been employed in redressing gender inequality and containing HIV/AIDS. The two countries said experiences are interrogated vis-a-vis the position in Kenya.

1.12.6 Chapter Six: conclusion and recommendations

Recommendations will be proffered by offering various pragmatic measures geared towards sensitising co-operatives in Kenya on the realities of the HIV/AIDS pandemic and methods that can be employed to mitigate its negative impact. This will also be informed by the practices in South Africa and Canada.

CHAPTER TWO

CONCEPTUAL AND LEGAL FRAMEWORK: CO-OPERATIVE MOVEMENT IN KENYA

2.1 Introduction

This chapter defines co-operatives, traces their evolution, their place in the Kenyan constitution and their relevance in Kenya's economy. It explores philosophical and historical foundations of the concept of co-operation and interrogates the general state of co-operatives globally, in Africa and in Kenya. The structure of the co-operative movement in Kenya and the legal and regulatory framework governing co-operatives is tackled. The impact of HIV/AIDS and gender imbalance on agricultural co-operatives in Kenya is discussed and parallels drawn on how gender mainstreaming can be utilised as an effective tool in tackling the menace of HIV/AIDS in agricultural co-operatives.

2.2 Understanding co-operatives

A co-operative is “an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise”.¹ Co-operation is about working together to achieve a common purpose. The basic purport of co-operatives is fulfilment of the common needs of members.² “A co-operative stands for individual rights tempered by considerations of justice, equity and fair dealings as between man and man, and their great aim is to prevent the exploitation of the weaker by the stronger party”.³

¹1995 International Co-operative Alliance Statement on the cooperative identity, incorporated into 2002 International Labour Organization (ILO) Recommendation R.193 on the promotion of Cooperatives and the 2001 UN Guidelines aimed at creating a supportive environment for the development of cooperatives.

² Silas Kobia, *the Co-operative Movement in Kenya: Challenges and Opportunities* (Lukiko Consulting Trust 2011),8.

³See Eleanor Hough, *The Cooperative Movement in India* (UOP, Bombay 1966) 741.

Co-operatives are distinguishable from other forms of business organisations by their ideology, ownership, management and leadership structures.⁴ The basic principle of co-operation inheres in the statement – ‘*Each for all and all for each*’.⁵ Owners of co-operatives invest in them to create businesses which will benefit them through their patronage and not in anticipation of appreciation in value of their capital.⁶ Co-operatives bring economic opportunity to remote rural areas that may not be attractive to private investors.⁷

Consumer co-operatives provide their members with food and other products, housing co-operatives provide shelter, workers co-operatives provide decent work, credit co-operatives provide saving and credit while agricultural co-operatives help farmers to organise inputs needed to grow crops and to keep livestock, and then help them to market and process their products.⁸

2.3 Philosophical and historical developments of co-operatives

Philosophically, Thomas Hobbes argued that before governments existed, the state of nature was dominated by the problem of selfish individuals who competed on such ruthless terms that rendered life “solitary, poor, nasty, brutish and short”.⁹

Co-operation as a concept is closely intertwined with human evolution hence it finds expression even in religious texts. In the Bible Paul uses the human body to demonstrate how different parts work together for the good of the whole.¹⁰ The Koran makes brotherhood and co-operation (*muwasaat*) compulsory by requiring Muslims to help others if they are in hardship or trouble.¹¹ In Hinduism shared values are reinforced in the entire community and expectations of the individual and collective development are narrated in the oldest and sacred texts in Hinduism, the Vedas.¹² Buddhism as a religion arose in India as a spiritual force against social

⁴Andrew Bibby, *HIV/AIDS and Cooperatives* (Co-operative College 2009), 10.

⁵Ibid.

⁶Supra note 4, 7.

⁷Supra note 4, 13.

⁸Johnston Birchall, *Co-operative & the Millenium Development Goals*, Co-operation Branch & Policy Integration Dept., International Labour Office, Geneva, 2004.

⁹ibid.

¹⁰The Holy Bible (1 Corinthians 12:12 – 31) (New King James Version).

¹¹Organization of Islamic Cooperation, ‘Fraternity and Cooperation in Islam’, available at <www.al-islam.org/fraternity-and-cooperation-in-islam-wofis/cooperation-muwasaat-islam> ‘accessed 2 June 2014’.

¹²Allie Surina, *Human Labor and Cooperation in Ancient Civilizations: A Comparative Analysis of Human Labor in Religious Texts*, available at

injustices occasioned by degrading superstitious rites, ceremonies and sacrifices.¹³ It can therefore be surmised that the world's four major religions espouse the concept of co-operation in one way or another and to that extent the idea of co-operation can be said to be as old as religion.

Pooling of resources together makes it cheaper to enjoy human rights such as the right to health care, food and shelter. Co-operators forego individualism on the realisation that it is for their own good so as to secure basic necessities which would otherwise be the preserve of the strongest members of the society in a state of nature. In this regard they are in agreement with Hobbes that men are basically selfish, are driven by the fear of death and the hope of personal gain and that life in a state of nature would be nasty, brutish and short.¹⁴ Arguably that is why the spirit of co-operation pre-existed the modern day government.

The Kenyan Constitution¹⁵ provides that every person is entitled to social and economic rights which include; right to the highest attainable standards of health, adequate housing, reasonable standards of sanitation, freedom from hunger, clean and safe water in adequate quantities, social security, education and emergency medical treatment.

However courts while interpreting the state's duty towards realisation of these rights have tended to give the state a leeway by finding that provision of these rights is subject to progressive realisation. In *Mathew Okwanda v Minister of Health and Medical Services & 3 Others*¹⁶ the petitioner had been diagnosed with diabetes mellitus and his condition was deteriorating and he had no means to take proper care of himself. His prayers for enforcement of social and economic rights under article 43 of the Constitution of Kenya, 2010 were dismissed on the ground that these rights are to be achieved progressively and that the petitioner must plead his case with particularity. There was no finding on any concrete measure that the state had taken or was taking to actualize the rights. Arguably, such technical interpretation of constitutional provisions

<<http://alliesurina.files.wordpress.com/2012/12/value-of-human-labor-and-cooperation-in-religious-texts-of-ancient-civilizations.pdf>> 'accessed 2 June 2014'.

¹³ibid.

¹⁴Nigel Warburton, *A Little History of Philosophy*, available at

<<http://yalebooksblog.co.uk/2013/04/05/thomas-hobbes-solitary-poor-nasty-brutish-and-short/>> 'accessed 6 June 2014'.

¹⁵*Constitution of Kenya*, Article 43.

¹⁶Nairobi H.C. Petition No. 94 of 2012 [2013] eKLR.

on economic and social rights and which is traceable to *Annarita Karimi Njeru v the Attorney General*¹⁷ has the effect of rendering attainment of these rights via litigation in Kenya a pipe dream.

2.4 Co-operatives worldwide

As a modern phenomenon, co-operatives originated in England amongst the industrial workers in the mid-nineteenth century.¹⁸ During that time it became increasingly difficult for factory workers to secure food supplies, housing, health and other amenities.¹⁹ It thus became necessary for the working masses to organise themselves in order to secure necessities at affordable prices. The ‘Rochdale Pioneers’ which was started in 1844 in Manchester, England is the earliest known modern co-operative.²⁰ The principles formulated by the Rochdale Pioneers form the basis of modern co-operative movement worldwide.²¹

Globally it is estimated that 800 million people are members of co-operatives and another 100 million are employees of co-operatives.²² Co-operatives cover activities in the fields of agriculture, credit and banking, insurance, retailing, wholesaling, industry and commerce.²³ In 1895, the International Co-operative Alliance (ICA) which is a member of the United Nations (UN) was formed as the umbrella federation of co-operatives.²⁴

Since the ‘Rochdale Pioneers’ co-operatives as instruments of poverty alleviation and wealth creation have been embraced by many countries.²⁵ In recognition of the importance of co-operatives in resolution of major problems the United Nations (UN) through its specialised agency, the International Labour Organisation (ILO) has collaborated with co-operatives since 1955.²⁶ This culminated in the drawing up of a Supplementary Understanding to the Cooperation

¹⁷[1979] KLR 154.

¹⁸Pramod Kadam, ‘Cooperative Movement in the World; Role of Cooperative Movement in Sustaining Rural Economy in the Context of Economic Reforms: A Case Study of Ahmednagar District (Chapter 3)’, available at <http://shodhganga.inflibnet.ac.in/bitstream/10603/2502/9/09_chapter%203.pdf> ‘accessed 6 June 2014’.

¹⁹ibid.

²⁰Supra note 2, vii.

²¹ibid.

²²ibid, 7.

²³Supra note 2, 7.

²⁴ibid.

²⁵ibid.

²⁶Food, Agriculture & Decent Work, ‘Cooperatives & Producer’s Organizations’ available at

Agreement signed in 1947.²⁷ In 1971 the integrity Committee for the Promotion and Advancement of Cooperatives (COPAC) was created to promote co-operatives through dialogue, co-operative training, and collection and dissemination of information.²⁸ The Memorandum of Understanding (MOU) signed between FAO and ILO in 2004 expressly mentions co-operatives.²⁹ Indeed the UN proclaimed in December, 2009 the year 2012 as the International Year of Co-operatives.³⁰ In so doing the UN aimed at; (i) increasing public awareness about co-operatives and their contribution to socio-economic development (ii) promoting the formation and growth of co-operatives for socio-economic empowerment; and (iii) providing an enabling environment through policies, laws and regulations.³¹

The ILO specifically recognises co-operatives in its constitution.³² A number of international labour standards make direct or indirect reference to co-operatives. The Rural Workers Organisations Convention, 1975, the Employment Policy (Supplementary Provisions) Recommendation, 1984 and the Indigenous and Tribal Peoples Convention, 1989 give examples of how specific groups may organise, including in the nature of a co-operative, and to what end co-operatives may be used by their members, or the emphasis that groups living according to cultural traits which are not the ones of the majority of society should be protected in their association, including co-operatives.³³

2.5 Co-operatives in Africa

Most African societies were historically communitarian in nature. Various activities such as fishing, farming and initiation were carried out in common. Upon colonising the African continent Europeans forced natives into labour in pursuit of the continent's natural resources,

www.fao.org/fao-ilo-coop/en/ 'accessed 13 April 2014'.

²⁷ibid.

²⁸ibid.

²⁹ibid.

³⁰General Assembly, Cooperatives in social development, 3rd committee, 64th session A/RES/64/136, 11 February 2010.

³¹Cooperative Society in Kenya, available at

www.scribd.com/doc/12942813/co-operative-society-in-kenya 'accessed 12 December 2012'.

³²*International Labour Organisation Constitution*, Article 12.

³³International Labour Organization, International Labour Conference, 89th Session., June 2001 Report V(I) Promotion of Cooperatives, available at

www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-v-1.htm 'accessed 6 June 2014'.

acquired land, introduced cash crops and disrupted many pre-colonial inter-African trading patterns.³⁴ Early co-operatives were organised primarily to benefit white farmers by providing the inputs necessary to increase production, to pool supply, or export needed agricultural crops to industrialising Europe.³⁵ After the colonial period virtually all African countries recognised the crucial role played by co-operatives in poverty alleviation.³⁶

2.6 Co-operatives in Kenya

Co-operatives were introduced in the colony to serve the interests of the white farmers and to provide the mother country with raw materials.³⁷

The earliest co-operative in Kenya was established in 1908 by white settlers at Lumbwa, Kericho County.³⁸ It was initially registered not as a co-operative, but under the Companies Ordinance and it was meant to provide dairy and other agricultural support services to the white settlers.³⁹ It was succeeded by the KFA which was registered in 1923.⁴⁰ The Co-operative Societies Ordinance was enacted in 1931 to govern registration of co-operative societies.⁴¹ The legislation prohibited Africans from participating in co-operatives.⁴² Through political agitation a second legislation was enacted in 1945 which allowed Africans to become members of co-operatives.⁴³ It also created the office of Registrar of co-operative societies.⁴⁴

³⁴Jack Shaffer, *Historical Dictionary of the Cooperative Movement*, (Scarecrow Press 1999), p. 418 -25.

³⁵Patrick Develter, Ignace Pollet and Fredrick Wanyama, *Cooperating Out of Poverty: The Renaissance of the African Cooperative Movement* (Geneva International Labour Office, 2008), p. 8.

³⁶Fredrick Wanyama, 'Cooperatives for African Development: Lessons from Experience', available at <<http://social.un.org/coopsyear/documents/WanyamaCOOPERATIVESFORAFRICANDEVELOPMENT.pdf>> 'accessed 3 June 2014'.

³⁷ibid.

³⁸Supra note 36, 29.

³⁹ibid.

⁴⁰Supra note 36, 30.

⁴¹ Victor Angelo, 'HIV/AIDS, Population and Sustainable Development' (2003) 4 *Cadernos de Estudos Africanos*, 99 available at

<<http://cea.revues.org/1562>>'accessed 6 October 2014'.

⁴²ibid.

⁴³ibid.

⁴⁴ibid.

After independence the government promoted co-operatives with an aim of utilising them as commercialisation tools of the smallholder farm sector.⁴⁵ Current membership in farmer co-operatives in Kenya is approximately 600,000 active members to be found in two sectors, namely; the co-operative coffee sector with approximately 400,000 members and the co-operative dairy sector with about 100,000 members.⁴⁶ *Kenya Government Sessional Paper No. 10 of 1965* published soon after independence laid emphasis on the promotion of co-operatives as key vehicles for development.⁴⁷ Co-operatives were viewed as vehicles for implementation of “African Socialism” in the economic development of the country.⁴⁸

Thus whereas evolution of the co-operative movement in Europe was spurred by the industrial revolution, the modern concept was introduced to the Kenyan people, top down, by both pre-independent and post-independent governments. However, the values and practice of co-operation among the communities of Kenya pre-existed the introduction of the modern concept of co-operatives.

In Kenya co-operatives are a major contributor to the overall economy and they are found in almost all sectors of the economy.⁴⁹ It is estimated that 63% of Kenyans participate directly or indirectly in co-operative –based enterprises.⁵⁰ Because of the significant economic role played by co-operatives the government has over the years maintained an institutional framework to govern the movement.⁵¹

Currently the Ministry of Co-operative Development and Marketing coordinates co-operative development in Kenya whose main duties include registration and liquidation of registered co-operatives, enforcement of the Co-operative Societies Act,⁵² formulation of policy, supporting

⁴⁵ibid.

⁴⁶ibid.

⁴⁷Supra note 4.

⁴⁸Supra note 4, 35.

⁴⁹Fredrick Wanyama, ‘Surviving liberalization: the cooperative movement in Kenya’, Coop Africa Working Paper No. 10 (International Labour Organization), 3.

⁵⁰ibid.

⁵¹Supra note 36, 4.

⁵² Chapter 490 Laws of Kenya.

development of a conducive environment for co-operative growth, registration of co-operative audits, and carrying out inquiries, investigations and inspection.⁵³

Development of co-operatives in Kenya can be broadly categorised into phases, namely that of state control and that of liberalization.⁵⁴ The first era witnessed origin and substantial growth of co-operatives as dependent agents and /or clients of the state.⁵⁵ During this era co-operatives served as instruments for implementing government socio-economic policies and in some ways failures of state policies were replicated in the co-operative movement.⁵⁶ Owing to the new economic wind which was sweeping across Africa, Kenya formulated new policy and legislation in 1997 whose effect was to liberalize co-operatives by creating a framework that sought to facilitate the development of commercially autonomous, member-based organisations which would be democratically and professionally managed, self-controlled and self-reliant business enterprises.⁵⁷ This framework was contained in *Sessional Paper No. 6 of 1997*.⁵⁸

The Constitution of Kenya recognises economic and social cultural rights to include enjoyment of:-⁵⁹highest attainable standard of health, which includes the right to health care services, including reproductive health care; accessible and adequate housing, and to reasonable standards of sanitation; freedom from hunger, and to have adequate food of acceptable quality; clean and safe water in adequate quantities; social security; and education.

Freedom of association provided for in the constitution guarantees every person the right to form, join or participate in the activities of an association of any kind.⁶⁰ We view associations anticipated by the constitution to include agricultural co-operatives.

2.6.1 Government's role in co-operative development

⁵³Supra note 49.

⁵⁴Supra note 49, 1.

⁵⁵Supra note 36, 1.

⁵⁶ibid.

⁵⁷ibid.

⁵⁸Supra note 52.

⁵⁹Supra note 15, Article 43 (1).

⁶⁰Supra note 15, Article 36.

Since co-operatives are private entities, to what extent should government be involved in their management? Studies drawn about the evolution of co-operatives in countries where they were never state-sponsored and in socialist/communist countries suggest minimal involvement by governments in co-operatives.⁶¹

However, owing to weak economic and political conditions in Africa there was need for co-operatives to partner with governments.⁶² This was meant to raise people's awareness of the importance and benefits of co-operatives.⁶³ Before independence the government intervention in co-operatives was meant to suit the interest of the white settlers.⁶⁴ After independence the government sought to use co-operatives as vehicles for fostering development and this necessitated creation of a legal framework hence the enactment of the Co-operative Societies Act in 1966.⁶⁵ The Co-operative Societies Rules were enacted in 1969 bestowing the oversight role of co-operatives upon the Commissioner.

Initially the government's intention was to transfer the promotion and supervision of co-operatives to Kenya National Federation of Cooperatives (KNFC) but this was not realised.⁶⁶ Whilst KNFC started well by promoting and guiding the CBK, KUSCO and CIC it failed in its advocacy role to ensure that co-operatives remained independent of the government to chart their own destinies.⁶⁷ Owing to KNFC's weakness the government expanded its bureaucratic control over co-operatives.⁶⁸

2.6.2 The Kenyan co-operative legislation

⁶¹Supra note 2, 93.

⁶²Supra note 2, 94.

⁶³ibid.

⁶⁴ibid.

⁶⁵ibid.

⁶⁶ibid.

⁶⁷Supra note 2, 94.

⁶⁸ibid.

The current legislation that governs co-operatives in Kenya is the Cooperative Societies (Amendment) Act of 2004. The statute does not give a definition of a co-operative society.⁶⁹ It merely states in its preamble that “a co-operative society” is a society registered under section 4 of the Act.⁷⁰ Section 4 of that Act merely gives the guidelines which a society must meet in order to qualify for registration, namely; it must promote welfare and economic interest of its members, has incorporated in its by-laws the cooperative principles of voluntary and open membership, democratic member control, economic participation by members, autonomy and independence, education, training and information, and concern for community in general.

The SACCO Societies Act⁷¹ similarly states that a “co-operative society” has the meaning assigned to it by the Cooperatives Act. What is clear though is that the requirements for registration of a cooperative society which are set out in the Act have been borrowed from the guidelines set out by the International Cooperative Alliance.

The SACCO Societies Act⁷² of 2008 regulates the licensing, registration, supervision and promotion of SACCOs which form a big chunk of co-operatives in Kenya. It establishes the SACCO Societies Regulatory Authority (SASRA) whose functions include licensing of SACCOs to carry out deposit-taking business.⁷³ SASRA also has power to intervene in management of a SACCO that it may deem to be mismanaged.⁷⁴ Also established under the Act is a Deposit Guarantee Fund to secure each SACCO member’s deposits (excluding shares) up to an amount of KES 100,000/=.⁷⁵

Cooperatives have been devolved to the counties under the new Constitution.⁷⁶ However, the mandate to formulate economic policy and planning as well as agricultural policy is reserved for the national government. Conflicts between the central and county governments in terms of policy implementation could arise due to this non-clear allocation of functions.

⁶⁹Supra note 52.

⁷⁰ibid.

⁷¹Chapter 490B Laws of Kenya.

⁷²Act No. 14 of 2008.

⁷³ibid, Section 5.

⁷⁴ibid.

⁷⁵ibid.

⁷⁶Supra note 15, Fourth Schedule.

2.6.3 The structure of the co-operative movement in Kenya

Kenyan co-operatives are structured vertically to include primary co-operatives at the bottom, district / commodity co-operative unions, national co-operative organizations (NACOs) and one confederation.⁷⁷ The confederation, the Kenya National Federation of Cooperatives (KNFC), whose membership includes national co-operatives, some co-operative unions and primary co-operatives is not affiliated to any union.⁷⁸ KNFC acts as the linkage between Kenyan co-operative movement and the world's co-operative movements.⁷⁹

Co-operatives in Kenya have also been structured horizontally on economic sector basis.⁸⁰ Hence co-operatives have been classified either as agricultural or non-agricultural depending on the products which they are engaged in marketing.⁸¹

2.7 Impact of HIV/AIDS on agricultural co-operatives

HIV/AIDS affects agricultural production and household food security through; loss of household labour, time spent on caring for afflicted household members means less time spent on agricultural activities and household tasks which lead households reducing or delaying weeding and often choosing to plant less labour-intensive crops and smaller areas of land, decreasing the ability of households to purchase vital inputs such as fertiliser and improved seed.⁸²

Death of adults has inter-generational consequences because adults die before passing down their knowledge and skills.⁸³ Indigenous local knowledge of such things as plants and animal

⁷⁷Supra note 4, 7.

⁷⁸ibid.

⁷⁹ibid.

⁸⁰ibid.

⁸¹ibid.

⁸²ibid.

⁸³Strengthening Institutional Capacity in Mitigating HIV/AIDS Impact on the Agricultural Sector, available at <www.fao.org/docrep/007/y565e/y565e03.htm> 'accessed 7 June 2014'.

biodiversity, the cropping cycle, proper nutrition, and the availability and use of local medicines is also lost.⁸⁴

Poverty and gender inequalities worsen the spread and impact of HIV/AIDS in a number of ways.⁸⁵ Owing to poverty HIV transmission increases due to inferior health care, increased labour migration and the associated risk of multiple partners.⁸⁶ Women and children are compelled to barter sex for money and food, exposing them to the risk of infection.⁸⁷ For those already infected, poverty-linked malnutrition increases susceptibility to opportunistic infections, leading to an earlier onset of full-blown HIV/AIDS.⁸⁸

HIV/AIDS impacts on the lives of women disproportionately because women carry the burden of caring for the sick and orphans while also securing a livelihood for the household.⁸⁹ It worsens gender-based differences in access to land and other productive resources like labour, technology, credit and water.⁹⁰ Credit is particularly important for women farmers given their role as food producers and providers.⁹¹ Where a wife survives the death of her husband from HIV/AIDS, the weak position of women, and the stigma attached to the disease, contributes to stripping or grabbing of productive assets from the surviving widow and her children.⁹² Disempowerment of women contributes to the spread of the disease by making it difficult for women to protect themselves from being infected by their partners.⁹³

2.8 Conclusion

⁸⁴ibid.

⁸⁵ibid.

⁸⁶ibid.

⁸⁷ibid.

⁸⁸ ibid.

⁸⁹ibid.

⁹⁰ibid.

⁹¹Wairimu Mwangi, *Exploring Linkages Between Agriculture and HIV/AIDS: A Multilevel Study of the Impact of Consumption Regimes in Women's Vulnerability to HIV/AIDS in Kenya (2009)* available at <www.ifpri.org/sites/default/files/publications/kenyawomen.pdf> 'accessed 7 June 2014'.

⁹²Supra note 18.

⁹³ibid.

This chapter has defined co-operatives and traced their philosophical and historical development by explaining why co-operation concept predates government. It has traced roots of modern co-operatives in England amongst the industrial workers during the industrial revolution. It demonstrates economic contribution of co-operatives worldwide. It discusses co-operatives in Africa through three phases, namely; pre-colonial, colonial and post-colonial. The impact of HIV/AIDS on agricultural co-operatives, the link between the disease, rural populations and poverty and why the disease impacts more on women than men was discussed.

CHAPTER THREE

APPLYING THE LAW TO MITIGATE HIV/AIDS IN KENYA

3.1 Introduction

This chapter interrogates the effectiveness of the law in containing the effects of HIV/AIDS pandemic in Kenya. Empirical evidence suggested that co-operatives have been affected by HIV/AIDS. Out of 41 respondents interviewed in this study 31 indicated that HIV/AIDS has a negative impact on agricultural co-operatives. It reviews Kenyan legislations as well as the judicial role and attitude towards HIV/AIDS and the co-operative movement in Kenya. It does this generally but with a specific focus on agricultural based co-operatives.

The rationale for this inquiry is that HIV/AIDS carries sociological, economical as well as medical faces.¹ Co-operatives too should be interested in addressing the impact of HIV/AIDS, partly because co-operatives themselves face difficulties and challenges arising from HIV/AIDS, but primarily because co-operatives subscribe to a set of beliefs which compel them to want to address issues of HIV/AIDS.² An ILO report has summarised it thus; ... “whilst most other enterprises talk always about money, co-operatives talk about values of a human being... The co-operative movement works on principles”.³

Interrogation of the law and HIV/AIDS is important because the law proscribes certain behaviours or tendencies, and in doing so, shapes politics, economics, and society.⁴ Because of its real or perceived coercive potential, it has ability to bridge the gap between vulnerability and

¹ Abdesslam Boutayeb, ‘The impact of HIV/AIDS on human development in African countries’, (2009) 9 (Suppl) *BMC Public Health* s 3.

² *ibid*, 7.

³ ILO, Cooperatives in the Fight against HIV/AIDS, A Board Member’s Guide. nd. (On file with author).

⁴ Global Commission on HIV and the LAW: Risks, Rights & Health, July 2012, p.3, available at <www.hivlawcommission.org/resources/report/Executive-Summary-GCHL-EN.pdf>, ‘accessed 21 June 2014’.

resilience to phenomena including HIV/AIDS.⁵Laws, enforcement and justice systems, greatly influence the lives of HIV – positive people or have the potential to do so.⁶

Kenyan laws on HIV are generally punitive in nature. Punitive and discriminatory laws and policies that result in denial of access to justice for people with and at risk of acquiring HIV fuel the epidemic by punishing vulnerability – hence promoting risky behaviour, hindering people from accessing prevention tools and treatment thereby exacerbating stigma and social inequalities that render people more vulnerable to HIV infection and illness.⁷

3.2 Legal issues in HIV/AIDS

In the realm of HIV/AIDS the law sets in to deal with surveillance, screening and testing for HIV/AIDS, prevention of mother to child transmission of HIV (PMTCT), disclosure of HIV information, partner notification, responsibility of the patient, duty of the physician or counsellor, powers of government agencies, isolation and quarantine, blood/tissue/organ supply, universal infection control precautions, post-exposure prophylaxis, access to technical means of prevention (condoms) and male circumcision.⁸ Others are to do with protection against discrimination based on HIV status, denial of employment, criminal statutes on sex work, sexual offences, rights of association and expression, access to medical treatment, property ownership and inheritance, traditional practices, sexual and economic exploitation, informed consent in clinical research, access to medicines – patented and generic drugs, TRIPS agreement under the WTO, and free trade agreements.⁹Legal and ethical issues related to HIV surveillance and testing

⁵Centre for Disease Control and Prevention, ‘HIV and the Law’, available at <www.cdc.gov/hiv/policies/law/>, ‘accessed 21 June 2014’.

⁶International HIV/AIDS Alliance, ‘Enabling environments for effective HIV responses: A leadership challenge for the commonwealth’, available at <www.hivpolicy.org/Library/HPP001810.pdf>, ‘accessed 21 June 2014’.

⁷Strengthening Institutional Capacity in Mitigating HIV/AIDS Impact on the Agricultural Sector, available at <www.fao.org/docrep/007/y5656e/y5656e03.htm> ‘accessed 7 June 2014’.

⁸Lance Gable, et al. *Legal Aspects of HIV/AIDS: A Guide for Policy and Law Reform* (The International Bank for Reconstruction and Development / The World Bank 1818 H Street NW Washington DC 20433).

⁹ibid.

are critical owing to the sensitive personal information and issues of consent, privacy and confidentiality involved.¹⁰

Various jurisdictions have thus come up with laws, policies and guidelines dealing with HIV testing. In the United States of America (USA), for instance, HIV testing and treatment issues are governed by a horde of federal and state laws, principles of common law, constitutional provisions and various codes of ethics.¹¹ Kenya has taken steps to domesticate treaties and passed domestic laws specifying the implementation and enforcement which include the Kenyan Constitution and the HIV and AIDS Prevention and Control Act.¹² Thus compulsory testing for HIV is prohibited in Kenya¹³ and consent of the patient is mandatory before testing is carried out.¹⁴ Exceptions to this provision include a person charged with an offense of a sexual nature under the Sexual Offences Act, 2006 (No.3 of 2006) who may be compelled to undergo an HIV test.¹⁵ Similarly a person who offers to donate any tissue shall, immediately before such donation undergo an HIV test.¹⁶ As a matter of policy, testing is also mandatorily carried out on pregnant women who attend pre-natal clinics.

In the English case of *X v Y & Others*¹⁷ two doctors sought orders restraining the publication of confidential information which had been obtained by a journalist from confidential records showing that the two doctors had been diagnosed with AIDS in a health authority but still continued with their general practice. A permanent injunction was granted against the disclosure of the confidential records on the ground that the public interest in preserving the confidentiality of the hospital records outweighed the public interest in the freedom of the press to publish such information.

¹⁰ibid,3.

¹¹Catherine Hanssens, 'Legal and Ethical Implications of Opt-Out HIV Testing', (2007) 45 (Supplement 4) *Clinical Infectious Diseases* s 232.

¹²Andre Rodrigues Verani, Allosys S.S. Orago, Charles N. Kariuki et al, 'Laws and pediatric HIV testing: Realizing the Right to Health in Kenya', (2013) *Journal of International Providers of AIDS Care* (JIAPC).

¹³*HIV and AIDS Prevention and Control Act*, section 13.

¹⁴ibid, section 14.

¹⁵*HIV and AIDS Prevention and Control Act*, section 13(3).

¹⁶ ibid, section 9.

¹⁷(1988) 2 All ER 648.

In *S-T (formerly J) v J*¹⁸ a female-to-male transsexual concealed her true gender and married a female. The court observed, obiter, that if certain matters of health are concealed, e.g. HIV or AIDS a marriage may be voidable or even void for want of capacity.

In the arena of trade it is now a prerequisite that any country wishing to join the World Trade Organization (WTO) must become party to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).¹⁹ TRIPS is an international treaty which globalizes and regulates intellectual property.²⁰ Many countries execute the TRIPS Agreement in order to benefit from joining WTO.²¹ However, although developing countries are granted four years to comply with the requirements of the TRIPS Agreement, most of them are not equipped to meet the demands. The TRIPS Agreement has generated a dilemma because developing countries such as Kenya often need lifesaving drugs which they cannot produce themselves and cannot acquire without special provisions.²² Implementation of strict patent protection substantially limits drug availability to developing countries.²³

India has circumvented this hurdle by enacting a new patent Act²⁴ that increases the threshold required to extend a patent right, so that slight changes or simple combinations of pre-existing drugs are no longer enough to extend the patent rights and this in turn increases the availability of generic drugs. If more countries followed India's example, more generic drugs would become available at lower prices and hence affordable for developing countries.²⁵

3.3 HIV/AIDS and law in Kenya

¹⁸(1998) 1 All ER 431.

¹⁹Kingston Gogo, 'The Implications of TRIPS Agreement 1994 of the World Trade Organization for the developing Countries', (2011) 1 *Afr.J.Soc.Sci.* 41.

²⁰Ashley Cohen and Cassandra Montgomery, 'Tripping Over TRIPS: Developing Countries' Access to Lifesaving Medications', (Spring 2014) *Northeastern University Law Journal Extra Legal*.

²¹*Agreement on Trade-Related Aspects of Intellectual Property Rights*, article.31.

²²Supra note 333.

²³Molly Land, 'Rebalancing TRIPS', (2012) 33 *MICH. INT'L L.* 433.

²⁴*The Patent (Amendment) Act*, No. 15 of 2005, India Code (1970).

²⁵ *ibid.*

The legal framework on the right to health in Kenya springs from the constitution²⁶ which provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care and that no person shall be denied emergency medical treatment. General rules of international law also form part of Kenyan law²⁷ and consequently international treaties and conventions touching on health apply.

Legislation that address specific health issues in Kenya include the Public Health Act²⁸ which addresses general matters of public health, the Mental Health Act²⁹ which deals with issues of mental health and the Sexual Offences Act³⁰ which governs a wide range of sexual offences. The primary legislation on HIV/ AIDS in Kenya is the HIV and AIDS Prevention and Control Act, 2006.³¹ The purpose of the Act as stated in its preamble is to provide measures for the prevention, management and control of HIV and AIDS, to provide the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at the risk of HIV and AIDS infection, and for connected purposes.

The objects and purposes of the Act include promotion of public awareness about the causes, modes of transmission, consequences, means of prevention, and control of HIV and AIDS.³² They also cover extending to every person suspected or known to be infected with the disease full protection of his human rights and civil liberties by prohibiting compulsory HIV testing except as permitted under the Act, guaranteeing the right to privacy of the individual, outlawing discrimination in all forms and subtleties against persons with or perceived or suspected of having HIV and AIDS, ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS, promotion of utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission and

²⁶*Constitution of Kenya 2010*, Article 43 (1) (a) and (2).

²⁷ *ibid*, Article 2 (5).

²⁸ Chapter 242 Laws of Kenya

²⁹ Chapter 248 Laws of Kenya

³⁰ Chapter 62A Laws of Kenya.

³¹ Cap 246A Laws of Kenya.

³² *ibid*, section 3.

to positively address and seek to eradicate conditions which aggravate the spread of HIV infection.³³

Despite the vital role played by co-operatives in uplifting peoples livelihoods, the word co-operative does not feature anywhere in the entire Act. That notwithstanding, it might be oversight to say that co-operatives are excluded. Given the general phraseology of this Act, one would say that everyone is covered including co-operatives.

Under the Act³⁴ the duty to provide HIV and AIDS education and information is vested on the Government which is required to carry out a comprehensive nationwide educational and information campaign through its various ministries, departments, authorities and other agencies. Since the category of people to whom the government is obligated to accord that service is not indicated chances are that the government could limit the scope of the education and information to a segment of the population and as a result part of the population, especially the agricultural-based poor risk being left out. The method via which the education and information is to be implemented is also limiting as it is to be via:³⁵

- (a) Employment of scientifically proven approaches;
- (b) Focus on the family as the basic social unit;
- (c) Encouraging of testing of individuals; and
- (d) To be carried out in schools and other institutions of learning, all prisons, remand homes and other places of confinement, amongst the disciplined forces, at all places of work and in all communities throughout the republic.

Going by the categorisation of groups of people who stand to benefit from the education and information to be offered by the government, agriculturalists are disadvantaged. This is because literacy levels are lowest in rural areas and in any event most of those populations may not be in schools, places of confinement, formal employment or in the disciplined forces. Co-operatives should have been included as some of the institutions through which

³³ibid.

³⁴Supra note 31, section 4.

³⁵Supra note 31, section 4 (2).

the government will be obligated to disseminate education and information on HIV and AIDS.

Co-operatives have also been excluded from the institutions listed as the ones through which education and information is to be offered. I argue that impliedly the government does not appreciate the catalytic role played by co-operatives in reaching to and empowering people. This is contrary to the stated commitment of the government in Kenya Government Sessional Paper No. 10 of 1965 which as seen in the previous chapter, emphasised the promotion of co-operatives as pivotal vehicles for development.

Section 8 of the Act which deals with HIV and AIDS education and information in communities restricts itself to requiring the ministry to act in collaboration with every local authority. Not only are co-operatives not mentioned but also reference to local authorities is outdated following the promulgation of a new Constitution in year 2010 which abolished local authorities and replaced them with County Governments. Furthermore, since HIV and AIDS is a health issue, it is not clear whether it now belongs with central government or the devolved units.

Part VIII of the Act deals with discriminatory acts and practices. Discrimination in the workplace,³⁶ in schools,³⁷ restriction on travel and habitation³⁸ and inhibition from public service³⁹ on the grounds of a person's actual, perceived or suspected HIV status is outlawed. Also prohibited is exclusion from credit and insurance services,⁴⁰ discrimination in health institutions⁴¹ and denial of burial services⁴² on the grounds only of the person's actual, perceived or suspected HIV status. By making reference to credit services, the framers of the Act ought to have realised the critical role played by co-operatives in that sphere, and in particular to rural poor agricultural communities.

³⁶Supra note 31, section 31.

³⁷Supra note 31, section 32.

³⁸Supra note 31, section 33.

³⁹Supra note 31, section 34.

⁴⁰Supra note 31, section 35.

⁴¹Supra note 31, section 36.

⁴²Supra note 31, section 37.

Although the Act makes extensive provisions on outlawing discrimination on grounds of a person's actual or perceived HIV status, it is silent on the negative impact of gender inequality in fuelling the spread of HIV and AIDS.

The Kenyan Constitution addresses gender discrimination by guaranteeing equality and freedom from discrimination and in particular by providing that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, social and cultural spheres.⁴³ There is also in place specific legislation on gender and equality.⁴⁴ The Act in recognition of gender inequality incorporates principles of gender mainstreaming with the aim of "...ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres, so as to ensure that women and men benefit equally, and that inequality is not perpetuated".⁴⁵

Considering the manner in which HIV/AIDS is contracted, spread and its consequences, gender discrimination should have been included as a category of discrimination outlawed and punishable under the Act. 40 out of 41 respondents interviewed in this research felt that empowering women can mitigate the effects of HIV/AIDS. Some of the reasons given included; empowering women means supporting the family,⁴⁶ they can reverse impact HIV/AIDS since they perform most of the agricultural work,⁴⁷ and it reduces prostitution.⁴⁸

⁴³ Supra note 26, Article 27(1) & (3).

⁴⁴ *National Gender and Equality Commission* (Act No. 15 of 2011, Act No. 12 of 2012).

⁴⁵ *ibid*, section 2.

⁴⁶ John (pseudo name).

⁴⁷ Michael (pseudo name)

⁴⁸ Daniel (pseudo name)

HIV/AIDS-related litigation in Kenya has been scarce. In *Kenya AIDS Society v Arthur Obel*⁴⁹ the plaintiffs sought a temporary injunction to stop the defendant, a medical doctor from selling or offering for sale, the drug ‘pearl omega’. It was alleged that the drug was ineffective against AIDS and was merely being used to fleece AIDS sufferers of their money. The orders were refused on the ground that it had not been shown that laws regarding research, manufacture and distribution of drugs were not complied with. In another case⁵⁰ a husband petitioned for divorce against his wife who had tested HIV – positive and sought to have the wife vacate their jointly-owned matrimonial home where they were living with their two children on the ground that she posed a grave risk to his life and the life of the children. The appellate court ordered reinstatement of the wife into the matrimonial home after considering the law of custody and the fact that the wife was still strong and healthy despite her HIV status for some 5 years.

The legal framework governing co-operatives in Kenya is the Co-operative Societies Act⁵¹ which deals with the constitution, registration and regulation of co-operative societies and the Sacco Societies Act⁵² which deals with licensing, regulation, supervision and promotion of Saccos. Neither statute mentions the words HIV/AIDS yet the disease grossly affects the poor and illiterate persons, majority of whom are located in rural areas and within the reach of co-operatives. In that regard the Acts can be said to have a limiting effect. There is no provision on how co-operatives can address HIV/AIDS and gender inequality.

3.4 Conclusion

HIV/AIDS has impacted negatively on agricultural co-operatives in Kenya. Legal issues in the field of HIV/AIDS and the general global trends on the reaction of the law to HIV/AIDS which is to shun criminalization of HIV/AIDS infection were discussed as were factors that fuel the epidemic.

⁴⁹(1997) LLR 598 (CAK).

⁵⁰*Midwa v Midwa* (2000) 2 EA 453.

⁵¹Chapter 490 Laws of Kenya.

⁵² Act No. 14 of 2008.

The co-operative legislation in Kenya was examined and it was shown that the legislation does not address the problem of HIV/AIDS. Similarly the current legal regime on HIV/AIDS does not target co-operatives as vehicles for achieving its purpose. Ways of addressing HIV/AIDS in agricultural co-operatives were also discussed.

CHAPTER FOUR

GENDER MAINSTREAMING: PROSPECTIVE ANTIDOTE FOR THE EFFECT OF HIV/AIDS IN AGRICULTURAL CO-OPERATIVES IN KENYA

4.1 Introduction

This chapter discusses gender mainstreaming as an antidote to the effect of HIV/AIDS on agricultural co-operatives. The rationale is that although the law may address social problems such as HIV/AIDSs, the law does not necessarily respond to all social problems.

Gender mainstreaming refers to making gender equality central to all activities.¹ It is a strategy for making women's and men's concerns and experiences an integral part of the design of implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated.²

In developing countries, women are vulnerable and among the poorest of the rural poor.³ Strategies and programmes for development had largely overlooked the question of gender equity.⁴ Arguably poverty is not just lack of access to sufficient food but is also closely associated with a person's lack of access to productive assets, services and markets.⁵ Kenyan women have enjoyed less favourable treatment than men in many spheres of life including in co-operatives.⁶

Historically and in many societies, gender inequality was part and parcel of an accepted male-dominated culture.⁷ Division of labour between sexes is a major factor which causes unequal

¹Rebeca Tiessen, *Everywhere/Nowhere: Gender Mainstreaming in Development Agencies* (Kumarian Press 2007), 2.

²ECOSOC 1997/2 as cited in UN 2002.

³ibid.

⁴ibid.

⁵ibid.

⁶ Oduor, Maurice and Odhiambo, Ruth Aura, Gender Equality in the New Constitutional Dispensation of Kenya (December 16, 2010). Available at

SSRN: <<http://ssrn.com/abstract=1726378>>accesses 7 August 2014'.

⁷ibid.

share of women in development.⁸ Because division of labour has been justified on the basis of women's child bearing function, distribution of tasks and responsibilities between men and women has mainly restricted women to the domestic sphere.⁹ However, the perception that women cannot, for instance join the army as foot soldiers has been debunked by Israel's rightfully feared *sabrahs* women commandos.¹⁰

While women represent nearly 50% of the world's adult population and one-third of the total labour force, they labour nearly two-thirds of the total working hours but get only one-tenth of world's income and own less than 1% of property.¹¹ The nature of agricultural activities generally undertaken by women in rural areas of the developing and underdeveloped world is labour-intensive which is bereft of new technologies, yet their wages are generally less because it is assumed that the efficiency of their labour is poor compared to that of men.¹²

Data collected in this study confirms that women carry heavier burden of the impact of HIV/AIDs in agricultural co-operatives than men. Out of 41 respondents interviewed 32 indicated that women bear the burden of HIV/AIDS problems compared to 4 who felt that men carry the heavier burden.

4.2 Understanding gender

Gender is socially construed.¹³ Whereas 'sex' describes a biological distinction between men and women, 'gender' is a social construct differentiating the power roles, responsibilities, and obligations of women from that of men in society.¹⁴ It refers to the fact of being male or female, especially when considered with reference to social and cultural differences, not differences in biology.¹⁵

⁸ibid.

⁹ibid,2.

¹⁰ibid.

¹¹Supra note 6, 3.

¹²ibid.

¹³Peter Conrad and Kristin Baker, 'The Social Construction of Illness: Key Insights and Policy Implications', (2010) 51 (5) *American Sociological Association* 567.

¹⁴Tomris Turmen, 'Gender and HIV/AIDS', (2003) 82 *International Journal of Gynecology and Obstetrics*, 411.

¹⁵Oxford, Advanced Learners Dictionary.

Gender is differentiated from sex by the argument that “one is not born, but rather becomes a woman.”¹⁶ Gender is an aspect of identity acquired gradually while sex refers to the invariant, anatomically distinct and factic aspects of the female body.¹⁷

Gender equality is such a fundamental issue that the U.N. regards it as a human right and it is also one of the 8 Millennium Development Goals that serve as a framework for halving poverty and improving lives.¹⁸ This is because women empowerment is a vital tool for eradicating poverty and advancing development.¹⁹

4.3 Women, gender and co-operative movement

Generally, the percentage of women in agricultural co-operatives is lower than that of men.²⁰ In developing countries, empirical evidence suggests that rural women are poorer than men.²¹ This results from gender bias which entrenches their lack of education, unequal property rights and their limited control over resources.²²

Constraints which impede women’s effective participation in co-operatives include; high illiteracy rates and poverty among rural women, lack of leadership and adequate participation in the organisational and economic affairs of their agricultural co-operatives, absence of property inheritance rights, restriction on acquiring membership of agricultural co-operatives resulting in deprivation of farm credit etc, lack of appropriate agricultural technology, lack of marketing facilities and opportunities, traditional, religious and cultural obstacles, less participation in decision-making, lack of skills and attitude in leadership and management development, and lack

¹⁶Simon de Beauvoir, *The Second Sex* (New York: Vintage Books 1973) 301.

¹⁷ibid.

¹⁸ibid.

¹⁹Steven Sinding, ‘Population, poverty and economic development’,(2009) *Philosophical Transactions of the Royal Sciences* 364.

²⁰Daman Prakash, *Rural Women, Food Security and Agricultural Cooperatives*, 2003,1.

²¹ibid,2.

²² IFAD, ‘Women and Rural Development’, available at www.ifad.org/pub/factsheet/women/women_e.pdf, ‘accessed 2 August 2014’.

of secretariat supporting functions for women's organisations and allocations of funds for them in co-operative organisations.²³

This research showed that men outnumber women in membership to agricultural co-operatives in Kenya. 19 respondents stated that women are fewer compared to 11 respondents who indicated that men are fewer. It also emerged that men are the main owners of the land where the agricultural activity takes place.

Various movements have attempted to deal with gender equity.²⁴The women in development (WID) movement was anchored on the belief that gender is a basic factor in division of labour and that women's labour at home and on the farm is generally under-reported.²⁵ It contended that to uplift the status of women there should be a deliberate strategy to bring gender to the attention of policy-makers.²⁶ It envisaged solutions to women's problems as "technological fixes" of one type or another, hence typical WID projects tended to be income-generating activities with social and welfare components in it.²⁷

The efficacy of the WID approach was later questioned for its failure to interrogate why women's position was often declining and for failing to question what the nature and sources of women's subordination and oppression were.²⁸ It was also guilty of focusing on women as producers and ignoring or minimising their reproductive role.²⁹The focus has been to move away from the WID approach to embrace gender and development (GAD).³⁰ GAD 'gender analysis' which identifies the differences between men and women in productive work and access to

²³Supra note 20, 1.

²⁴Supra note 20, 2

²⁵Martin Walsh, 'Gendering Development: from WID to GAD and Beyond' (Gender and development, lecture 1) available at

www.academia.edu/1741298/Gendering_development_from_WID_to_GAD_and_beyond_Gender_and_development_lecture_1, 'accessed 2 August 2014'.

²⁶ibid.

²⁷ibid.

²⁸ibid.

²⁹ibid.

³⁰ibid.

resources.³¹ It sees men and women as different categories involved in discreet relations and hence it emphasises gender mainstreaming as an effective way of redressing gender inequality.³²

The nexus between women and co-operatives in the context of gender integration may be summarised, thus; a co-operative being a social development agency should play an active role in advocating for gender equality, since women have been active in development work, they should play crucial role in development, co-operatives can be venues to improve women's social status and economic conditions, and co-operatives should promote women's empowerment by integrating gender concerns and formulating strategies to address gender issues.

I argue that for agricultural co-operatives to prosper and attain optimum potential in Kenya the role played by women in rural agricultural areas must be made central. Land ownership needs to be addressed to ensure that women stake property rights to land to enhance their capacities to obtain credit facilities and inputs. Acquisition of new farming techniques, methods and implementation of extension services should bear in mind woman as key end users because as already seen it is women who perform the more tedious and repetitive farming jobs such as weeding the crops. All respondents interviewed in this study stated that empowering women can reverse the impact of HIV/AIDS on agricultural co-operatives.

4.4 Conclusion

In order to improve women participation in agricultural co-operatives appropriate mechanism should be identified to provide development opportunities to women in rural areas.³³ Co-operatives should be encouraged to have special programmes and tasks for women to perform in the organisational and business affairs.³⁴ This would empower women economically to be able to

³¹Christine Heward and Sheila Bunwaree, *Gender, Education & Development: Beyond Access to Empowerment* (Zed Books Ltd 1999), 2.

³² *ibid.*

³³The International Women's Human Rights Clinic, *Women's Land and Property Rights in Kenya – moving forward. Into a new era of equality: a Human Rights report and proposed legislation*, available at <www.thesummit.gjil.org/2012/10/article-women-land-property.html> 'accessed 3 August 2014'.

³⁴*ibid.*

negotiate safe sex practices and to reduce women's poverty levels because the spread of HIV is directly linked to poverty.³⁵ Co-operative legislation and government policies should also be reviewed to encourage women to become members of co-operatives and to participate in decision-making processes.³⁶ Due credibility to achievements of women in agricultural co-operative development should be given through publicity, exchange of visits, participation in meetings and conferences.³⁷ Successful experiences from other jurisdictions should be replicated.³⁸

Co-operatives should promote education and training programmes for women through vocational and literacy. [In the course of such trainings HIV/AIDS messages and education can be passed to women.](#) Favourable conditions should be created for women to market their products through agricultural co-operatives (agricultural co-operatives in Japan set apart a space in their shopping areas exclusively for the Women's Associations).³⁹ Deliberate efforts should also be made to enable women to acquire proprietary rights over the land to aid them in acquiring credits, farm inputs and to employ modern technology.

³⁵Paul Rohleder, Leslie Swartz, Seth Kalichman et al., *HIV/AIDS in South Africa 25 years on: Psychosocial Perspectives* (Springer New York Dordrecht Heidelberg London 2009).

³⁶ibid.

³⁷ibid.

³⁸ibid.

³⁹Supra note 33, 12.

CHAPTER FIVE

ADDRESSING THE IMPACT OF HIV/AIDS IN SOUTH AFRICA AND CANADA: A COMPARATIVE ANALYSIS

5.1 Introduction

This comparative analysis which covers South Africa, Canada and Kenya will entail an examination of the reality of HIV/AIDS and gender inequality and how these twin issues have affected agricultural rural-based co-operatives and how the law has reacted to the challenge. An examination is made on whether gender mainstreaming was an approach that was used to deal with the menace of HIV/AIDS on the co-operative movement by South Africa and Canada. Parallels and differences are drawn between each of the two jurisdictions against Kenya in terms of the incidence and real impact of the disease, the reaction by the law, the effects of the disease on agricultural co-operatives and the efficacy of gender mainstreaming as a remedy to the situation.

Whereas Canada is classified as a developed country, South Africa and Kenya are generally categorised as developing countries and hence the approaches by the three countries on matters touching on development, such as health and agriculture could be differentiated by that divide.¹

Preference for South Africa is, firstly because her incidence of HIV/AIDS is so high that HIV/AIDS is the leading cause of death in that country.² The country also has the highest levels of both HIV and gender-based violence in the world and international literature suggests that these two vices are inter-linked.³ Hence because this research centres on the effects of HIV/AIDS on agricultural co-operatives in Kenya, a comparison with a country that is so

¹Syed Shamsuzzoh, Viva Dadwal, Paul Rutter et al., 'Developed-developing country partnerships: Benefits to developed countries?' (2012) 8 *Globalization and Health* 17.

²Max Bachmann and Fredrick Booysen, 'Health and economic impact of HIV/AIDS on South African households: a cohort study', (2003) 3 *BMC Public Health* 14.

³Elena Ghanotakis, Susanah Mayhew and Charlotte Watts, 'Tackling HIV and Gender-Based Violence in South Africa: How Has PEPFAR Responded and what are the Implications of Implementing Organisations', (2009) 24 *Health Policy and Planning* 357.

severely affected by the disease and gender inequality manifested through gender-based violence would be an enriching endeavour.

Secondly, South Africa has a fairly entrenched co-operative movement which dates back to 1892 with very substantial presence in the agricultural sector.⁴ Thirdly, both Kenya and South Africa are located in the Sub-Sahara hence the two countries are perceived to share some common experiences and challenges such as stigmatization of HIV/AIDS.⁵

Canada, a developed country, has been chosen because of its extremely entrenched agricultural co-operative movement.⁶ Canada's has also promoted co-operative movements in developing countries a lot.⁷ The target is to identify the dichotomy, if any, between the trends that HIV/AIDS takes among the developed world in terms of the propensity of its location among the population, whether and how it has impacted on agricultural co-operatives, the extent of gender inequality, if any, and whether gender imbalance takes a cross-cutting link to the trajectory that HIV/AIDS takes. The aim is to find out how the problem has been dealt with by the law, whether gender mainstreaming has been applied, the success or failure of those approaches and whether the experiences can work in a developing country such as Kenya.

5.2 South Africa

5.2.1 The reality of HIV/AIDS in South Africa

HIV/AIDS is the leading cause of death in South Africa. In 2001, 25% of pregnant women attending antenatal clinics in South Africa were HIV-positive.⁸ Kenya though also experiencing

⁴UnathiSonwaibileHenama, 'Trade Unions and Credit Operatives: The Case of National Education, Health and Allied Workers, Savings and Credit Co-operatives in South Africa', [2012], 1 no. 1 *International Journal of Cooperative Studies*, 25.

⁵Lissane Brown, Lea Trujillo, Kate Macintyre, 'Interventions to Reduce HIV/AIDS Stigma: What Have we Learned?' (2001) *Tulane School of Public Health and Tropical Medicine*, 14.

⁶Co-operative Movement, *Canadian Encyclopedia*, available at www.thecanadianencyclopedia.ca/en/article/co-operative-movement/, 'accessed 12 August 2010'.

⁷The Canadian Co-operative Association, available at www.coopscanada.coop/, 'accessed 12 August 2014'.

⁸Department of Health, *HIV Prevalence Survey 2001*, (Johannesburg, South Africa National Department of Health 2002).

high incidents of the disease had a prevalence rate of 7% during the same period.⁹ Both countries belong to sub-Saharan Africa which accounts for more than two-thirds of the world's HIV infections.¹⁰

One way in which the South African government has attempted to deal with HIV/AIDS is by devising policies geared toward home-based care.¹¹ The strategy has however been militated by high levels of illiteracy and falling incomes as household members become ill, lose employment, use available resources and succumb to death.¹²

Stigma is an obstacle in tackling HIV in Sub-Saharan Africa as it impedes uptake of HIV testing and leads to an increase in sexual risk-taking behaviour.¹³ Stigma also inhibits serostatus¹⁴ disclosure to sexual partners and potential treatment supporters, delays in ART initiation, and non-adherence to ART.¹⁵ In South Africa, myths and stigma associated with HIV/AIDS persist.¹⁶ In 1998 a South African woman who publicly disclosed her HIV- positive status was beaten to death for her candor.¹⁷ It is partly owing to this situation that laws that protect people from discrimination based on their HIV status become critical in South Africa.¹⁸

A self-help measure to deal with the problem of HIV/AIDS in South Africa was the formation of Soweto Home-Based Caregivers Co-operative which was set up in 1998 by a handful of middle-aged women with basic Red Cross training.¹⁹ It complements physician care and the

⁹Boaz Cheluget et al., 'Evidence for Population Level Declines in Adult HIV Prevalence in Kenya', (2006) 82 (Suppl 1) *Sexually Transmitted Infections* i21.

¹⁰ Gita Ramjee and Broodie Daniels, 'HIV in sub-Saharan Africa', (2013) 10 *AIDS Research and Therapy* 30.

¹¹Supra note 3, 3.

¹²ibid.

¹³Eileen Pitpitan, Seth Kalichman, Lisa. Eaton et al, ' AIDS – Related Stigma, HIV Testing, and Transmission Risk Among Patrons of Informal Drinking Places in Cape Town, South Africa', (2012) 43 Issue 3 *Annals of Behavioural Medicine* 362.

¹⁴Serostatus refers to the state of being seropositive or seronegative for a particular antibody. Prior to seroconversion, the blood test is seronegative for the antibody; after the conversion, the blood test is seropositive for the antibody. See; *Meriam Webster Dictionary* available at

<www.merriam-webster.com/medical/serostatus> 'accessed 17 August 2014'.

¹⁵Alexander Tsai, David Bangsberg, Susan Kegeles et al., ' Internalized Stigma, Social Distance, and Disclosure of HIV Seropositivity in Rural Uganda', (2013) 46 issue 3 *Annals of Behavioural Medicine* 285.

¹⁶ibid.

¹⁷ibid.

¹⁸ibid.

¹⁹Roberta Staley, 'The Future of the Soweto Home-Based Caregivers Co-operative in AIDS – ravaged South Africa is in Question', available at

<<http://robertastaley.ca/links/pdf/lifeline-soweto.pdf>>, 'accessed 12 October 2014'.

administration of ARVs by giving home-care to those afflicted by HIV/AIDS.²⁰ Its success has been replicated elsewhere in the country.²¹

²⁰ibid.

²¹ibid.

5.2.2 Gender inequality in South Africa

Gender inequality largely manifests itself in South Africa through gender-based violence, and as at 2006 the country was ranked top worldwide for the greatest incidence of reported rape and sexual violence.²² Gender-based violence in South Africa is associated with social and economic conditions in the country's townships and a history of apartheid.²³ Gender-based violence refers to physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty occurring in public or private.²⁴

Research carried out in Ghana, Kenya and South Africa has shown that the three countries have some commonalities of experience in gender-based violence, particularly in the fact that the vice is used as a vehicle of revenge and retribution, as a desire for respect, as a means of control over female sexuality, and ultimately as an assertion of collective notions of masculinity.²⁵

Sexual violence can lead to HIV infection directly as a result of the traumatic encounter, or indirectly because it predisposes the victim to risky behaviour in the future.²⁶ In South Africa legal intervention in dealing with gender-based violence has been through promulgation of laws that provide training services for health workers, the police, men and knowledge translation to debunk notions that make women believe that men are entitled to sex as of right.²⁷

²²Helen Moffet, 'These women, they force us to rape them: rape as narrative of social control in post-apartheid South Africa', (2006) 32 *Journal of South African Studies* 129.

²³Maghboeba Mosavel et al., 'Perceptions of gender-based violence among South African youth: implications for health promotion interventions', (2011) *Health Promotional International*, available at <<http://heapro.oxfordjournals.org/content/early/2011/07/05/heapro.dar041.full.pdf+html>> 'accessed 13 August 2014'.

²⁴Supra note 19.

²⁵ Georgina Yaa Oduro, 'Gender-based violence: Young Women's Experiences in the Slums and Streets of three Sub-Saharan African Cities', (2012) 10 no. 3 *Theory and Research in Education* 275.

²⁶ Neil Anderson, Anne Cockcroft and Bev Shea, 'Gender-based Violence and HIV: Relevance for HIV Prevention in Hyperendemic Countries of Southern Africa', (2008) 22 (Suppl 4) *AIDS* s73.

²⁷ *ibid*, 83.

5.2.3 Agricultural co-operatives in South Africa

The first co-operative in South Africa was established in 1892.²⁸ Currently the legislation governing co-operatives is the Co-operatives Act of 2005.²⁹ South African legislation on co-operatives was greatly influenced by the colonial history in which agriculture was a vital component of white capital building during the apartheid era where co-operatives were used by the apartheid government as disaster assistance mechanisms to the farmers in the form of debt consolidation.³⁰

In post-apartheid South Africa the Presidential Growth and Development Summit of 2003 endorsed special measures to support the growth and development of co-operatives.³¹ Due to this history, co-operatives in South Africa have been broadly categorised into two groups, namely; the established co-operatives which are largely white - owned, and emergent co-operatives mostly established in the 1990s and subsequently.³²

Most of the poor people in South Africa are located in the rural areas and they rely on subsistence agriculture.³³ The country has established agricultural co-operatives as a way to tackle food insecurity in rural areas by enabling farmers to pool their resources together in order to improve their chances of getting better agricultural output.³⁴ They also enable smallholder farmers get support from the government and the private sector hence improving sustainability and long-term job creation.³⁵ Agricultural co-operatives also stimulate competition through economies of scale, opening up access to information through better market networks, reducing barriers to market entry through the pooling of resources and improve individual bargaining power through collective action.³⁶

²⁸ibid.

²⁹ibid.

³⁰Supra note 4, 4.

³¹ibid.

³²ibid.

³³ Boyana Thabiso. et al ' A Review of the Possibilities of Alleviating Poverty and Food Insecurity Challenges in South Africa Through Agricultural Cooperatives', (2013) 8(6) *African Journal of Agricultural Research* 1340, 1343.

³⁴ ibid.

³⁵ ibid.

³⁶ ibid.

Boyana and Tshuma³⁷ identify constraints faced by agricultural co-operatives in South Africa to include lack of arable land, inadequate education, inadequate skill, conflicting and unclear goals, and institutional constraints.

5.2.4 The law and HIV/AIDS in South Africa

The Constitution of South Africa came into force on 4th February, 1997 and represented the end of apartheid.³⁸ Its themes therefore largely reflect the struggle against inequality.³⁹ Its equal protection guarantee provides: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”⁴⁰ It also provides that “everyone has inherent dignity and the right to have their dignity respected and protected.”⁴¹ South African case law also construes the Constitution broadly.

*Hoffmann v South African Airways*⁴² demonstrated that discrimination by employers by excluding HIV –positive applicants or subjecting applicants to pre-employment testing is impermissible in South Africa. It was noted that PLWHA must be treated with compassion and understanding by showing *ubuntu*⁴³ towards them.⁴⁴

Kenya’s constitution too has an elaborate bill of rights which contains equality guarantees.⁴⁵ Article 27 is emphatic that: “every person is equal before the law and has the right to equal protection and equal benefit of the law.” This provision, it would appear, was copied word for word from the South African constitution whose promulgation preceded that of Kenya. However, in terms of application of the constitution it would appear that Kenyan courts have not been as robust and liberal as their South African counterparts.

³⁷Supra, note 4, 4.

³⁸ibid,756.

³⁹ibid.

⁴⁰*South Africa Constitution 1996*, chapter.2,section.9.

⁴¹ibid, section 10.

⁴²2000 (11) BCLR 1211 (CC); 2001 (1)SA (CC).

⁴³See *Pretoria City Water v Walker* 1998 (2) SA 363 (CC).

⁴⁴ 2000 (11) BCLR 1211 (CC); 2001 (1)SA(CC).

⁴⁵Constitution of Kenya, chapter 4.

The Constitutional Court in South Africa has equally interpreted the extensive constitution's privacy guarantees in *Jansen van Vuuren & another NNO v. Kruger*⁴⁶, popularly known as "The McGeary Case". McGeary tested HIV-positive, and his doctor subsequently revealed McGeary's status to a friend. The court found the disclosure unacceptable on constitutional and policy grounds because HIV-status disclosure violated the constitutional guarantee to privacy and that allowing the behaviour would have harmful policy repercussions as it would dissuade individuals from getting an HIV test and learning their status and it would also expose a victim to stigma and discrimination.

The Kenyan constitution contains similar privacy guarantees that outlaw search or seizure of the person, home and property, unnecessary revelation of information relating to family or private affairs and infringement of private communications.⁴⁷ By extension therefore disclosure of confidential HIV information by health providers and hospitals is outlawed. In *C.O.M. v Standard Group Limited & another*⁴⁸ the High Court awarded the petitioner KSHS 1,500,000/= in general damages plus costs of the petition for breach of his constitutional rights to dignity and privacy⁴⁹ after the respondents published the petitioner's photograph and name in a Kenyan daily newspaper⁵⁰ disclosing his HIV positive status when the information had been obtained by the respondents in confidence. Evidently Justice Lenaola was persuaded by the South African jurisprudence in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*.⁵¹

The South African Constitution also guarantees "the right to have access to health care services, including reproductive health care..."⁵² There is a similar provision in the Kenyan constitution which provides that no person shall be denied emergency medical treatment.⁵³

5.2.4.1 Statutory protections

⁴⁶1993 (4) SA 842 (A) (S.Afr.)

⁴⁷*Supra* note 45, Article 31.

⁴⁸ [2013] eKLR.

⁴⁹*Supra* note 45, Articles 28 and 31.

⁵⁰ The Standard of 21st September, 2010.

⁵¹ 2007 (5) SA 250) CC.

⁵²*Supra* note 40, chapter.2, section 27.

⁵³*Supra* note 45, Article 43.

In addition to the constitution a number of South African statutes deal with HIV-status discrimination.⁵⁴ Under the Employment Act, “No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds including ...HIV status.”⁵⁵ Employers are also barred from demanding disclosure of HIV status upon hire, during an individual’s employment, or when an employee requests sick leave.⁵⁶ An employer may also not test an employee for HIV unless pursuant to a court order.⁵⁷ It is also illegal in South Africa for practitioners of traditional medicine to represent themselves as able to cure HIV/AIDS.⁵⁸

South Africa has not criminalised HIV transmission and infringement of private communications is outlawed.⁵⁹ On the contrary, transmission of HIV is criminalized in Kenya.⁶⁰ It is an offence in Kenya for a person who is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus to fail to take all reasonable measures and precautions to prevent the transmission of the virus to others, or to fail to inform in advance, any sexual contact or person with whom needles are shared of that fact.⁶¹ It is also an offence to place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk.⁶² Deliberate transmission of HIV is also an offence in Kenya⁶³ and there is evidence of cases that have been prosecuted on that account.⁶⁴ Proof of HIV/AIDS infection has also been relied upon by Kenyan courts as corroborating evidence in convicting in cases relating to the offence of defilement⁶⁵ and committing indecent act with a child.⁶⁶

A question therefore arises as to why HIV/AIDS death rates in South Africa continue to grow yet the country has such an elaborate constitutional and legislative framework addressing the disease

⁵⁴Erwin Chemerinsky, *Constitutional Law, Principles and Policies* 678 (3d ed.2006).

⁵⁵*Employment Equity Act* 5 of 1998, section 6.

⁵⁶*ibid.*

⁵⁷ *Supra* note 55, section 7 (2).

⁵⁸*Traditional Health Practitioners Act* (South Africa) 35 of 2004 s.49 (g) – (i).

⁵⁹*ibid.*

⁶⁰*HIV and AIDS Prevention and Control Act*, section 24.

⁶¹ *ibid.*

⁶²*ibid.*

⁶³*Sexual Offences Act No. 3 of 2006*, Section 26(1).

⁶⁴ See *M.W v Republic* [2013] eKLR.

⁶⁵*Sexual Offences Act No. 3 of 2006*, section 8 (1) (4).

⁶⁶*ibid.*, section 11 (1).

and which is largely in line with the recommendations by the UN.⁶⁷ Reasons given are that South Africa has eleven official languages and this complicates education provision and publication of information about the virus, half of the country's population live below the poverty line and nearly a quarter of the population is unemployed.⁶⁸ Customary laws are also constitutionally⁶⁹ recognised and traditional leaders' legal decisions have legal binding authority.⁷⁰ This affects interpretation of gender roles and enforces societal belief that men may have numerous sexual partners, while women may not.⁷¹

On the contrary, Kenya has only two official languages. Arguably therefore, it is easier to convey HIV information in Kenya than in South Africa. Customary law and traditional dispute resolution mechanisms in Kenya are also circumscribed compared to South Africa. In its supremacy clause, the Kenyan constitution states that "...any law, including customary law that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid."⁷²

In Kenya like in South Africa, interpretation of gender roles in manners that suggest that men are entitled to multiple sexual partners while women are not is evident from the fact that polygamy is practised in several communities.⁷³ Such practices coupled with traditional beliefs held by some communities in Kenya to the effect that wife inheritance checks the spread of HIV by confining the widow to one partner have been shown to be retrogressive as they actually increase the risk of HIV/sexually transmitted infections (STI) infection.⁷⁴

⁶⁷Joint United Nations Programme on HIV/AIDS (UNAIDS) and the World Health Organization (WHO), [2006], 1 *AIDS Epidemic Update*, available at <http://data.unaids.org/pub/EpiReport/2006/2006_EpiUpdate_en.pdf>, 'accessed 30/7/2014'.

⁶⁸ibid.

⁶⁹Supra note 40, chapter 12 section 211.

⁷⁰Brenda Oppermann, 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States', [2004] 77 *HASTINGS WOMEN'S L.J.*, 65.

⁷¹Olive Shisana and Alicia Davids, World Health Org., *Correcting Gender Inequalities is Central to Controlling HIV/AIDS*, Ref. No. 04-015750 (2004), available at <www.who.int/bulletin/volumes/82/11/editorial11104html/en/>, 'accessed 30/7/2014'.

⁷²Supra note 45, Article 1 (2) (3).

⁷³Kawango Agot, Ann Vander Stoep, Melissa Tracy et al., 'Widow Inheritance and HIV Prevalence in Bondo District, Kenya: Baseline Results from Prospective Cohort Study', (2010) 5(11) *PLOS ONE* e14028.

⁷⁴Constance Rose Ambasa-Shisanya, 'Widowhood in the era of HIV/AIDS: a case study of Siaya District, Kenya', (2007) 4(2) *SAHARA – J Journal of Social Aspects of HIV/AIDS: An Open Access Journal* 606.

Poor leadership on the fight against HIV/AIDS in South Africa is a major impediment which has perpetuated myths about the disease.⁷⁵ In 2005, the current president of South Africa, who was then the country's head of the National Aids Control Council, while testifying at his trial for raping an HIV - positive woman revealed that he refused to use a condom for he felt immune from the virus because he took a shower after the sexual act.⁷⁶ To her compliment there is no such leadership or political pronouncements which have been witnessed in Kenya.

Review of the applicable law undertaken herein suggests that just like Kenya, South Africa has not linked the law with co-operatives in the fight against HIV/AIDS. That is so because the Constitution of South Africa does not make provision for co-operatives in terms of expanding enjoyment of human rights. The statutory laws in place in the fight against HIV/AIDS also don't contemplate co-operatives in the fight to contain the disease.

5.3 Canada

5.3.1 Introduction

Canada has three levels of government: a central federal government, ten provincial governments, and three territorial governments, and a hundred of regional, municipal, county and aboriginal governments.⁷⁷ The country has a vibrant history of co-operatives in rural development, but the diversity of forms and experience in all of Canada is too large to permit generalization, save on basic principles and organization.⁷⁸ As a result this comparative analysis will largely draw from western Canadian co-operatives and will not deal with Ontario, Quebec, and Atlantic Canada. Western Canadian co-operatives have been chosen because they perceive

⁷⁵Megan Heneke, 'An Analysis of HIV-Related Law in South Africa: Progressive in Text, Unproductive in practice,' [2009]18 *Transnational Law & Contemporary Problems* 771.

⁷⁶Chege Mbitiru, *Zuma Presidency World Would Raise Serious Questions*, ALLAFRICA.COM, May 22, 2006.

⁷⁷Zhu Shufang and Leonard Apedaile, 'Co-operative Organization in Rural Canada and the Agricultural Co-operative Movement in China: A Comparison', (1998) 98 *Occasional Papers Series Centre for the Study of Co-operatives University of Saskatchewan* 1, 13.

⁷⁸*ibid*, 11.

themselves as closely conforming to the ICA principles on values of self-help, self-responsibility, democracy, equity and solidarity.⁷⁹

This sub-topic will address the reality of HIV/AIDS in Canada, a brief history of the co-operative movement in western Canada with a bearing on agricultural co-operatives and the question of gender inequality and how it has manifested itself in Canada with the co-operatives under focus in mind. It will examine how legal measures that have been applied in mitigating HIV/AIDS in Canada.

5.3.2 The reality of HIV/AIDS in Canada

As at 2008 approximately 65,000 Canadians were living with HIV and 3,300 men and women were being diagnosed with the infection annually.⁸⁰ Of these infections, 48% comprise of men who have sex with men while other disproportionately affected groups include injection drug users, Aboriginal Peoples, and migrants from endemic countries.⁸¹

The population most affected by HIV/AIDS in Canada is that of men who have sex with men,⁸² whereas the most affected population in both Kenya and South Africa is women.⁸³ Comparatively, HIV/AIDS is not such a serious problem in Canada because as at 2011 the prevalence rate in that country was 0.2% of the population.⁸⁴

In Canada deaths resulting from opportunistic infections where the disease is untreated occurs within 10 to 15 years.⁸⁵ However, owing to availability of highly effective antiretroviral therapy

⁷⁹ibid.

⁸⁰Qingxiong Yang et al, 'Estimates of the Number of Prevalent and Incidental Human Immuno Deficiency (HIV) Infections in Canada', [2008], 101 *Canadian Journal of Public Health*, 486.

⁸¹ibid.

⁸² Yujiang Jia et al, 'Dynamics of the HIV Epidemic in MSM', (2014) 2014 Article ID 497543 *BioMed Research International* 3.

⁸³ Gita Ramjee and Brodie Daniels, 'Women and HIV in Sub-Saharan Africa', (2013) 10 *AIDS Research and Therapy* 30.

⁸⁴ Public Health Agency of Canada (PHAC). Summary: estimates of HIV prevalence and incidence in Canada, 2011. Ottawa: Surveillance and Epidemiology Division, Professional Guidelines and Public Health Practice Division, Centre for Communicable Diseases and Infection Control, PHAC; 2012 available at www.catie.ca/en/hiv-canada/2/2-2?utm_source=google&utm_medium=cpc&utm_term=1&utm_content=en&utm_campaign=hc accessed August 2014'. 16

⁸⁵Moss A. R, Bachetti P, 'Natural History of HIV Infection', [1989], 3 *AIDS*, 55.

(HAART) since 1996, the disease, though a chronic condition has become manageable with PLWHA leading a near-normal life.⁸⁶ This is because health care is provided under the National Health Insurance Program (“Medicare”) which ensures that HAART is subsidized across Canada and that all residents have reasonable access to medical services.⁸⁷ In contrast Kenya’s health system is highly inequitable and does not meet universal coverage.⁸⁸ As a result those afflicted by the disease in Kenya are unlikely to lead near-normal lives unlike their counterparts in Canada.

Canadian studies indicate that women’s biological differences render them more susceptible to HIV than men due to socio-economic factors such as gender, income, education, unemployment, access to stable housing, access to health services, social support services, social networks, social environments (eg, rural environments), racism, and early childhood development.⁸⁹ Canadian reports show that interventions which focus on women’s empowerment and recognize the importance of building leadership among women at risk of HIV/AIDS play an important role in making women resilient to HIV.⁹⁰ Canada thus recognises gender mainstreaming as a way of tackling HIV/AIDS.

One way of addressing HIV/AIDS in Canada has been through support of women-specific activities by developing projects, coalitions and networks that are women-centred because the social and cultural realities of both sexes is different.⁹¹

HIV/AIDS in Canada has also been addressed through formation of a co-operative. Margaret Laurence Housing Co-operative is a non-profit co-operative developed with the assistance from the Province of Ontario’s Home Now Program and provides affordable housing to low and moderate individuals and families, and in particular to PLWHA.⁹²

⁸⁶Joel Carpenter et al, ‘Antiretroviral Therapy for HIV Infection in 1996’, [1996], 276 *JAMA*, 146.

⁸⁷Government of Canada, Health Canada (2012), “Canada’s Health care System (Medicare) Available at <www.hc-sc.gc.ca/hcs-sss/medi-assur/index-eng.php>, ‘accessed 5 August 2014’.

⁸⁸ Jane Chuma & Vincent Okungu, ‘Viewing the Kenyan health system through an equity lens: implications for universal coverage’, (2011) 10 *International Journal for Equity in Health* 22.

⁸⁹ibid.

⁹⁰Supra note 86.

⁹¹Supra note 70,90.

⁹² Co-operative Housing Federation of Toronto, ‘Margaret Laurence Co-op: Converting Elevator Shafts into 16 Affordable Apartments’, available at

5.3.3 Gender inequality in Canada

Canada is ranked sixteenth in world on the UN's gender equality index of 2008.⁹³ Consequently, gender, even in developed countries such as Canada has a profound impact on women's vulnerability to HIV and is a "key driver" of women HIV/AIDS infections worldwide.⁹⁴

Factors which lead to gender inequality include stereotyped sexuality whereby gendered norms associated with masculinity encourage men to have multiple sexual partners and to have sexual relationships with younger women.⁹⁵ Femininity encourages sexual innocence/ignorance, passivity, meekness, and submissiveness in women, leading to their increased vulnerability.⁹⁶ Gendered norms also erode women's inability to negotiate safer sex practices, increase risk of sexual assault and involvement in survival sex work.⁹⁷ As regards women who use injection drugs, an injection-dependent relationship has been noted to exist between injection drug-using women and men, which effectively limit women's power and control over drug preparation, needles and injecting and this further increases women's vulnerability.⁹⁸

In responding to HIV/AIDS scourge, Canada proceeds from the premise that since women make up to 51% of the total Canadian population, and they account for over ¼ of the estimate of HIV infections, they should usually be captured as part of the audience for a wide-range of responses.⁹⁹ And although some of the responses target the whole community, there are those that contain women-specific activity components.¹⁰⁰ Programmes have also been developed to

<www.coophousing.com/development/development_laurence.asp>, accessed 12 October, 2014.

⁹³UNDP, *Human development report 2010. The real wealth of nations: pathways to human development* (Pelgrave Macmillan 2010).

⁹⁴ Supra note 84.

⁹⁵Yuan Lou, Beaujot Roderick. What happens to the 'healthy immigrant effect': The mental health of immigrants to Canada Discussion Paper no. 05-15.2005 [cited 2010 Dec].available at <<http://sociology.uwo.ca/popstudies/dp/dp05-15.pdf>>, 'accessed 8 August 2014'.

⁹⁶ Richard Wilkinson and Michael Marmot, *Social determinants of health. The solid facts* (2nd ed. Geneva: World Health Organization. 2003).

⁹⁷ *ibid.*

⁹⁸ Supra note 84.

⁹⁹Supra note 84, 116.

¹⁰⁰ *ibid.*

reduce the risk of HIV transmission in correctional facilities with the aim of enabling prisoners to access age, gender, and culture appropriate prevention and treatment tools and services.¹⁰¹

Other women-specific measures target reduction of violence against women, eg a project named *Les femmes et leur Sante sexuelle...verse une prise en charge* is intended to increase women's knowledge and capacity to better manage their sexual well-being and to adopt safer sex practices.¹⁰² Women are also offered free confidential counselling about the risks of HIV infection and HIV treatment during pregnancy.¹⁰³ Others target capacity building by providing training, building knowledge and skills, and forging partnerships through information sharing and peer support and counselling.¹⁰⁴

5.3.4 Agricultural co-operatives in Canada

Canada is an industrialised country which depends on international trade and its agriculture is based largely upon independently-owned, family-operated farms whose operations are governed by market forces.¹⁰⁵

Co-operatives in Canada's economy enjoy more than 50% market share in the sectors of processing and marketing of grain, dairy goods, poultry, honey, maple products, fruits and vegetables, and livestock.¹⁰⁶ Steady growth and resilience of co-operatives in Canada has been linked with voluntary participation independent from the state, clear focus, activity beyond local boundaries, organization to suit their focus, and adaptability.¹⁰⁷

Historically co-operatives emerged in Canada due to the need to secure market outlets for production and a conviction that individual initiative could be best motivated through earnings from private and exclusive property rights. Co-operatives in colonial Kenya also arose out of the need to market produce. Consequently it is argued that modern co-operatives in Kenya have no attachment to the cultural umbilical cord of the Kenyan communities and their traditions. Even

¹⁰¹Supra note 84, 117.

¹⁰² Supra note 84, 117.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵*ibid.*

¹⁰⁶Supra note 77, 9.

¹⁰⁷Supra note 77, 15.

though some of the traditional communal principles evident in pre-colonial Kenya may be evident in the co-operative principles applicable in co-operatives in Kenya today, they are there by sheer coincidence.

Canada has three sets of government, namely federal, provincial and territorial governments. Kenya has a national government and forty seven county governments.¹⁰⁸ In Canada, the federal and provincial administrations have progressively moved from a promotional role to a passive role while the municipal governments' involvement is limited to matters of taxation.¹⁰⁹ In Kenya agriculture and cooperative societies are some of the functions which have been devolved to the counties.¹¹⁰ Considering that the new constitution which created devolution has been in place for barely two years now, it is yet to be seen what role, if any, the county governments will play in agriculture and co-operatives.

Co-operatives in Canada are today treated as independent businesses, akin to any other company, apart from their functions as social movements and hence they are not granted any special privileges on matters of taxation and finance.¹¹¹ I argue that Kenya being a developing country cannot afford this Canadian model because rural based farmers in Kenya are relatively poor and illiterate hence to subject their co-operatives to the same treatment as that meted to private companies would be counter-productive. It would result in increased costs of agricultural inputs, inaccessibility of field extension services and erosion of market competitiveness contrary to the aims and objectives of co-operating.

Some of the problems facing Canadian rural co-operatives include lack of understanding of co-operative principles owing to rapidly growing membership and pressures of activities.¹¹² In the Kenyan context ignorance, particularly in the rural areas is linked to illiteracy and poverty. Consequently it can be surmised that majority of rural agricultural Kenyans do not understand the co-operative principles.

¹⁰⁸Supra note 45, Article 6.

¹⁰⁹Supra note 75, 13

¹¹⁰Supra, note 45, Fourth Schedule part 2.

¹¹¹Supra note 75, 14

¹¹²Supra note 75, 22.

5.3.5 Law and HIV/AIDS in Canada

Canada, just like many countries has criminalised exposure and transmission of HIV to another person.¹¹³ Although there is no law specifically criminalizing HIV in Canada, the Supreme Court has indicated that in certain instances, even in the absence of a specific provision in the *Criminal Code* about non-disclosure of HIV status, failure to disclose an HIV positive status to a sexual partner can transform consensual sex into aggravated (sexual) assault.¹¹⁴

In *R v Hollihan*¹¹⁵ it was held that a man accused of having unprotected sex with a woman without disclosing his HIV-status could be tried for the offence of common nuisance.

Canada therefore, just like Kenya, criminalizes HIV transmission with Kenya statutorily prohibiting the act.¹¹⁶ The two jurisdictions thus suffer the disadvantages associated with criminalising HIV/AIDS transmission.¹¹⁷

Canadian law on HIV/AIDS is silent on how co-operatives can be utilised in tackling the disease. The co-operative law is equally silent on whether the law can play any role in tackling HIV/AIDS.

¹¹³Canadian HIV/AIDS Legal Network, available at www.aidslaw.ca/EN/issues/criminal_law.htm, 'accessed 24 July 2014'.

¹¹⁴*R v Cuerrier* (1996) 141 DLR (4th), 503.

¹¹⁵(1998) 171 Nfld. & P.E.I.R. 133.

¹¹⁶Supra note 60.

¹¹⁷George Ayala, Keletso Makofanane, Glenn-Milo Santos, et al. , 'Access to Basic HIV-Related Services and PrEP Acceptability among Men Who Have sex with Men Worldwide: Barriers, Facilitators, and Implications for Combination Prevention', (2013) 2013 Article ID 593123 *Journal of Sexually Transmitted Diseases* 1, 4.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSIONS

This research discussed HIV/AIDS and its effect on agricultural co-operatives in Kenya. The primacy of the co-operative movement in attainment of socio-economic rights was shown and a link drawn on how the sector is being undermined by the impact of HIV/AIDS. The multiple faces of HIV/AIDS were discussed because the disease is not just a health issue but also has non-medical aspects because it exacerbates poverty, worsens gender inequality, lacks known cure and available treatments are expensive and unavailable to most people.¹

It was shown that punitive and discriminatory laws and policies that result in denial of access to justice for people with and at risk of acquiring HIV fuel the epidemic by punishing vulnerability.² This is because they promote risky behaviour by discouraging access to prevention tools and treatment and exacerbate stigma and inequalities that render people more vulnerable to HIV infection.³ Legal challenges associated with HIV/AIDS arise because policy makers and health care providers dealing with the disease must weigh serious ethical questions about protection of rights, maximization of benefits, and mitigation of risks using scarce resources.⁴

Answers to the question whether gender mainstreaming is a remedy to the challenge were sought. In doing so gender was differentiated from sex by showing that gender is an aspect of identity gradually acquired while sex is the factual and distinct anatomic aspect of the body.⁵ Consequently that gender equality denotes measurable and equal representation of women and men.⁶ It was shown that gender equality is so fundamental that it is one of the eight

¹ibid.

²ibid.

³ibid.

⁴Ashley Cohen and Cassandra Montgomery, 'Tripping Over TRIPS: Developing Countries' Access to Lifesaving Medications', (Spring 2014) *Northeastern University Law Journal Extra Legal*.

⁵Simon de Beauvoir, *The Second Sex* (New York: Vintage Books 1973) 301.

⁶ibid.

Millennium Development Goals aimed at halving poverty and improving lives.⁷ Gender inequality is largely manifested in the subordination of women in various ways and some of the factors that cause it include division of labour between the sexes⁸ and discriminatory laws and practices.⁹

Gender mainstreaming brings gender issues into the mainstream of society by assessing implications for men and women of any planned action including legislation, policies or programmes.¹⁰ It makes concerns and experiences of women and men an integral part of design, implementation, monitoring and evaluation of policies and programmes in all political and economic spheres, so that men and women benefit equally.¹¹

A comparative study on how South Africa and Canada have applied the law in dealing with the issue of HIV/AIDS was undertaken with the aim of borrowing useful practices and learned experiences. It emerged that even in the developed countries such as Canada which face lesser challenges from HIV/AIDS the law coupled with multi-disciplinary approaches has played bigger role in dealing with the spread of the disease than in Kenya. Undoubtedly HIV/AIDS has seriously impacted on human development in African countries, not just in health issues but in all components of human development.¹² The disease curtails socioeconomic gains and is a challenge to human security because it depletes efforts of alleviating poverty, achieving universal primary education, promoting gender equality, reducing child and maternal mortality, and ensuring environmental sustainability.¹³ Addressing challenges posed by HIV/AIDS therefore requires a multidisciplinary approach.¹⁴

⁷What is Gender Equality? International Planned Parenthood Federation, available at <www.ippf.org/our-work/what-we-do/gender/what-gender-equality>, 'accessed 20 July 2014'.

⁸Amber Peterman, Julia Behrman and Agnes Quisumbing, 'A Review of Empirical Evidence on Gender Differences in Non-land Agricultural Inputs Technology and Services in Developing Countries', (2010) (International Food Policy Research Institute).

⁹Lissane Brown, Lea Trujillo, Kate Macintyre, 'Interventions to Reduce HIV/AIDS Stigma: What Have we Learned?' (2001) *Tulane School of Public Health and Tropical Medicine* 1.

¹⁰International Labour Organization, Gender Equality Tool Definition of Gender Mainstreaming available at <www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm>, 'accessed 20 July 2014'.

¹¹ibid.

¹²Abdesslam Boutayeb, 'The impact of HIV/AIDS on human development in African countries', (2009) 9 (Suppl 1) *BMC Public Health* s3.

¹³ibid.

¹⁴ibid.

In the comparative analysis an endeavour was made to avoid borrowing wholesale from other jurisdictions, or just comparing the shared common characteristics.¹⁵ It entailed finding out what has succeeded or failed to succeed in those other jurisdictions and interrogated the reasons underlying the success or failure before recommending or rejecting the approach or method applied by the jurisdiction under review. Distinct as well as shared experiences between the jurisdictions under study were discussed with the aim of distilling out best practices for recommendation to Kenya.

A cross-cutting theme identified in the three jurisdictions reviewed is that while biology is a key determinant that influences women's risk of HIV transmission, treatment outcomes, disease progression, and commorbidities,¹⁶ gender is a key determinant because of the way it interacts with and influences other determinants.¹⁷ A gender mainstreaming approach is recommended for Kenya because as demonstrated, gender imbalance is a serious problem that affects women negatively in Kenya.

From the South African experience it is evident that the country has arguably the most extensive and encompassing textual constitutional and statutory provisions dealing with human rights and HIV/AIDS in line with UN recommendations, yet owing to other unique factors the country has not been able to stem the spread and incidence of HIV/AIDS. Consequently although South Africa has not succeeded in stemming the tide of HIV/AIDS despite following the UN recommendations as relates to promulgation of laws and policies, especially by ensuring that HIV transmission is not criminalized, its example on the trend which the law should take is recommended for Kenya.

It is clear that since the 1980s when the HIV/AIDS pandemic was first reported, the law has reacted in varied ways. Some jurisdictions developed laws which are sensitive to the needs of those with HIV/AIDS by seeking to guarantee heightened levels of confidentiality and freedom

¹⁵Deane Kroeze, 'Doing Things with Values: The Role of Constitutional Values in Constitutional Interpretation', (2001) 265 *Stell LR* 268.

¹⁶ Refers to disease or other pathological processes that occur simultaneously with another. See also *The Free Dictionary* available at <http://medical-dictionary.thefreedictionary.com/comorbid> <http://medical-dictionary.thefreedictionary.com/comorbid> 'accessed 17 August 2014.

¹⁷ Angela Cescon, Sophie Patterson, Keith Chan, et al., 'Gender Differences in Clinical Outcomes among HIV-Positive Individuals on Antiretroviral Therapy in Canada: A Multisite Cohort Study', (2013) 8(12) *PLoS ONE* e83649. doi: 10.1371/journal.pone.0083649.

from discrimination.¹⁸ Others have used the law as a tool to limit the spread of HIV by imposing liability for its transmission or restricting the freedoms of those who are HIV-positive.¹⁹

Canada and Kenya have criminalized HIV transmission / exposure. Globally, however, the trend has been towards legislation that outlaws discrimination based on HIV/AIDS status. This is in recognition that criminalization of HIV exposure / transmission is an eco-social-structural process that is linked to the disadvantages and injustices some people suffer as a result of everyday practices of a liberal society.²⁰ Evidently criminalization of HIV transmission / exposure has limited benefits for the population health and may adversely affect individual behaviour.²¹ In this respect therefore the South African approach to law relating to HIV which does not criminalize the transmission of HIV/AIDS would be recommended.

One of the major problems facing co-operatives in the three countries is traceable to the adoption of the ICA co-operative principles which are to do with sustaining the willingness to cooperate but which are increasingly getting challenged by other business institutions.²² The dynamics of change challenge conventional practice of doing “business as usual” and relying only on the ICA principles as adopted at the 1995 Manchester congress.²³

6.2 RECOMMENDATIONS

6.2.1 Law Reform

Kenyan legislation on HIV/AIDS²⁴ should expand its scope of reaching targeted groups by taking on board co-operatives as one of the ways for implementation. The HIV and AIDS Prevention and Control Act No. 14 of 2006 should be amended to specifically include co-

¹⁸James Chalmer, *Legal Responses to HIV and AIDS*, available at <www.hartpub.co.uk/books/details.asp?isbn=9781841137261>, ‘accessed 22/6/2014.’

¹⁹ibid.

²⁰ World Health Organization: *A Conceptual Framework for Action on the Social Determinants of Health* (Geneva, Switzerland: World Health Organization 2007).

²¹ ibid.

²²Zhu Shufang and Leonard Apedaile, ‘Co-operative Organization in Rural Canada and the Agricultural Co-operative Movement in China: A Comparison’, (1998) 98 Occasional Papers Series *Centre for the Study of Co-operatives University of Saskatchewan* 1, 31.

²³ibid.

²⁴*HIV and AIDS Prevention and Control Act*.

operatives as one of the educational and information strategies for carrying out campaigns on HIV/AIDS prevention. It should also be amended to include co-operatives among the already existing category of people to whom the government is obligated to accord HIV/AIDS education and information, and to outlaw discrimination based on gender. All Kenyan laws touching on HIV/AIDS transmission should also be amended to ensure that transmission of the disease is not criminalized so as not make key populations to go underground leading to avoidance of testing and disclosure.²⁵

Similarly the legal regime on co-operatives²⁶ ought to be reviewed to appreciate the phenomenon of HIV/AIDS and gender inequality as a reality. Empowering women is a powerful tool in mitigating HIV/AIDS because it enables them to make informed choices. Less stringent means on lending to women should be explored because women lack collateral, especially land which was confirmed both from the literature reviewed as well as from the field study to be in the domain of men.

6.2.2 Internal initiatives by co-operatives

Internal co-operative society initiatives ought to be encouraged. This can be through amendment of the co-operative laws to compel co-operatives to play an active role in tackling issues of HIV/AIDS and gender inequality. Affirmative action may be employed such as reserving and creating gender-specific roles within co-operatives with the aim of uplifting the status of women.

6.2.3 Role of courts

A re-examination of the role of the courts in enforcing normative standards is needed. Kenyan courts should apply progressive interpretation in jurisprudence on human rights and dignity and this regard useful lessons can be borrowed from jurisdictions such South Africa and Canada.

6.2.4 Gender mainstreaming

²⁵Strengthening Institutional Capacity in Mitigating HIV/AIDS Impact on the Agricultural Sector, available at <www.fao.org/docrep/007/y5656e/y5656e03.htm> 'accessed 7 June 2014'.

²⁶Chapter 490 Laws of Kenya and Act No. 14 of 2008.

Since HIV/AIDS disproportionately affects women than men, a gender mainstreaming approach in tackling the impact and spread of the disease is recommended in drafting of legislation and policy. Support of women-specific activities by developing projects, coalitions and networks that are women-centred should be encouraged.²⁷ The Canadian example where female-specific radio programmes have been started would be useful.²⁸ Measures should also be put in place aimed at reduction of violence against women. There should also be capacity building through training, provision of knowledge and skills, forging of partnerships through information sharing and peer support and counselling.²⁹

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²⁸Population-Specific HIV/AIDS Status Report (Public Health Agency of Canada), available at <http://publications.gc.ca/collections/collection_2012/aspc-phac/HP40-43-2-2012-eng.pdf>, 'accessed August 10 2014'.

²⁹Ministère de la culture des communications et de la Condition Feminine: Turning equality in law into equality in fact. Government policy for gender equality (Quebec: Gouvernement de Quebec 2007).

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APPENDIX 1

My name is Mwangela Charles Benedict, a Master of Laws student at the University of Nairobi writing on HIV/AIDS and Gender Inequality in Agricultural Cooperatives in Kenya: a Case for Intervention by the Law?

I wish to obtain information from you. Any information given will be treated with confidentiality and will not be divulged except with your own consent as this research recognises the ethical and moral issues that govern research.

APPENDIX 2

QUESTIONNAIRE ADMINISTERED TO MEMBERS OF AGRICULTURAL CO-OPERATIVES

1. Personal details;
 - a) Name.....
 - b) Level of education.....
 - c) Profession.....
 - d) Gender.....
2. Are you a member of any cooperative society?
3. If so, is it an agricultural cooperative society?.....
4. Who owns the land where you grow your agricultural crops?.....
5. What is the ratio of men to women in your agricultural cooperative society?
6. Do you think agricultural cooperatives are important? (Explain your answer).....
7. Have you benefitted directly or indirectly in the agricultural cooperative society?
8. In your view what challenges face agricultural cooperative societies?
9. Do you believe HIV/AIDS has had an impact in cooperatives in general and on agricultural cooperatives in particular? (Explain your answer).....

10. What has your agricultural cooperative society done to deal with HIV/AIDS or should be done?
11. In your view who largely takes care of those affected by HIV/AIDS in your locality? Is it (a) men, or (b) women?
12. In your view what should be done to mitigate the effects of HIV/AIDS?
13. Do you think empowerment of women can play an important role in reversing the impact of HIV/AIDS in agricultural cooperatives?
14. If so, what type of empowerment? (Explain your answer).....