



EXAMINING THE ROLE OF HUMAN RIGHTS IN ENHANCING CORPORATE GOVERNANCE IN PRIVATE SECTOR CORPORATIONS IN KENYA

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DECLARATION

I, Said Madiha Fofeek, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 23rd July 2021.

This dissertation has been submitted for examination with my approval as University Supervisor.

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Supervisor's Name: Peter Kiptanui

Date: 26th July 2021

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ABSTRACT

Corporations were viewed as property institutions whose main mandate was to make profits and maximize shareholder value. The separate legal personality of corporations meant that corporations could engage in business transactions and bear the potential risk of liability separately from its members or founders. Little or no attention was paid to human rights as a corporate responsibility since most of the accountability was towards shareholders. When undertaken without due regard for its potential impact on society, the corporate desire to maximize profit and minimize cost in the use of labor, land and services can lead to avoidable grievances.

Since most corporations have improved greatly since 2011, after the Guiding principles were introduced, more of the corporations cover up their actual violations behind the fact the Guiding principles are not legally binding. Which calls for binding legal rules with enforcement mechanisms to ensure compliance. Despite having the legal framework for protection against human rights abuses by corporations as well as other institutions, corporate human rights violations continue to be witnessed in the country

The proposed research will seek to test the hypothesis that a corporate governance framework which incorporates respect for human rights by corporations will result in better corporate governance practices in Kenya.

The proposed research makes recommendations for example; adoption of a Stakeholder Oriented Corporate Governance Private sector businesses must implement corporate governance frameworks that incorporate the influence of the organization in decision-making on its stakeholders. Further, development of a clear human rights policy by private sector corporations. The Constitution has explicitly expanded the obligations of civil rights to companies by its Charter of Rights. Corporations should have a specific human rights strategy, which would guide them in dealing with the human rights problems that might emerge, approved by the board of directors. Finally, establishment of effective human rights monitoring mechanisms within private sector corporations. The organization must provide robust human rights oversight systems in place in order to ensure the successful execution of a corporation's human rights policies.

LIST OF ABBREVIATIONS

AU – African Union

CACG - Commonwealth Association for Corporate Governance

CAT - Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

CBC - Commonwealth Business Council

CERD - International Convention on the Elimination of all Forms of Racial Discrimination

CEDAW - Convention on the Elimination of all Forms of Discrimination against Women

CMA – Capital Markets Authority

CRC - Convention on the Rights of the Child

CSR - Corporate Social Responsibility

EAC – East African Community

EPZs – Export Processing Zones

ERS - Economic Recovery Strategy for Wealth and Employment Creation

FIDH - International Federation of Human Rights

GDP – Gross Domestic Product

HURIA – Human Rights Agenda

ICCPR – International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICT – Information and Communication Technology

ILO - International Labor Organization

ILRF - International Labor Rights Fund

KHRC – Kenya Human Rights Commission

KNCHR – Kenya National Human Rights Commission

OAU - Organization of African Unity

OECD - Organization of Economic Cooperation and Development

PSDS - Private Sector Development Strategy

TNCs – Transnational Corporations

UDHR – Universal Declaration of Human Rights

UN – United Nations

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya, 2010.

The Capital Markets Act, Cap 485A of the Laws of Kenya.

The Companies Act, Cap 486 of the Laws of Kenya.

The Competition Act of 2010.

The Consumer Protection Act, Act No. 46 of 2012.

The Employment Act, Cap 226 of the Laws of Kenya.

The Environmental Management and Co-ordination Act, Cap 387 of the Laws of Kenya.

The Kenya Anti- Counterfeit Act of 2008.

The Labor Relations Act, Cap 233 of the Laws of Kenya.

The Labor Institutions Act, Cap 234 of the Laws of Kenya.

The Work Injury Benefits Act, Cap 236 of the Laws of Kenya.

The Occupational Safety and Health Act, Cap 514 of the Laws of Kenya.

The Public Health Act, Cap 242 of the Laws of Kenya.

CHAPTER ONE

INTRODUCTION

Background of the problem

The UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. It was developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises¹. These Guiding Principles are grounded upon: (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms². (b) The role of business enterprises as specialized organs of society performing specialized functions³. (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.⁴

The United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (the Guiding Principles) to provide a global standard for preventing and addressing the risk of adverse human impacts linked to business activity.⁵ The Guiding Principles implements the Framework to provide for an authoritative statement on the relationship between business and human rights.⁶ It further recognizes the importance of access to effective judicial and non-judicial remedies.

In this study the important pillar to assess is Pillar II of the UN Guiding Principles that sets out the global expectation that corporations should respect human rights.⁷ The expectation applies to all corporations operating everywhere, in all sectors. The corporate responsibility to respect entails a three step process. Firstly, to develop an appropriate policy commitment to human rights and

¹ UNHR, *Guiding principles on business and human rights implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31 16 June 2011.

² Clapham, A. (2010). *Human rights obligations of non-state-actors*. Oxford: Oxford University Press (reprint).

³ Arnold, D. G. (2010). Transnational corporations and the duty to respect basic human rights. *Business Ethics Quarterly*, 20(3), 371–399.

⁴ UNHR 17/31 (2011).

⁵ UNHR 17/31 (2011).

⁶ Robert C, *Beyond Ruggie’s guiding principles on business and human rights: charting an embracive approach to corporate human rights compliance*, 48 Tex. Int’l L.J. 33-62 (2012).

⁷ UNHR 17/31 (2011).

embedding it throughout the company.⁸ Secondly, to carry out human rights' due diligence⁹. Lastly, to provide for or cooperating in remedies operational level grievance mechanisms¹⁰.

Firstly, policy commitment should entail; a statement of policy articulating the corporations' commitment to respect human rights, periodic assessments of actual and potential human rights impacts of company activities and relationships, integration of these commitments and assessments into internal control and oversight systems and tracking as well as reporting performance.¹¹ Secondly, human rights due diligence is a potential game changer for companies: from "naming and shaming" to "knowing and showing." Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence.

As you know, companies routinely conduct due diligence to satisfy themselves that a contemplated transaction has no hidden risks. Starting in the 1990s, companies added internal controls for the ongoing management of risks to both the company and stakeholders who could be harmed by its conduct. For example, to prevent employment discrimination, environmental damage, or criminal misconduct. Lastly, company-level grievance mechanisms can contribute in two ways: under the tracking and reporting component of due diligence they provide the company with ongoing feedback that helps it identify risks and avoid escalation of disputes; they can also provide remedy, a means of alternative dispute resolution.

On its application, the UN Guiding principles, the international corporations have made great significant improvement. However, this is not the case in Africa where many transnational corporations have come under heavy criticisms for their poor labor conditions, inadequate compensation for land resource acquisition and use, poor consultations with local communities, forced displacement, environmental pollution, and the destruction of the sacred heritages of communities¹². Since most corporations have improved greatly since 2011, after the Guiding principles were introduced, more of the corporations cover up their actual violations behind the

⁸ UNHR 17/31 (2011).

⁹ UNHR 17/31 (2011).

¹⁰ UNHR 17/31 (2011).

¹¹ *Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework*, A/HRC/11/13, 2009, 49.

¹² MK Sinha (ed) *Business and human rights* (2013) 18.

fact the Guiding principles are not legally binding.¹³ This calls for binding legal rules with enforcement mechanisms to ensure compliance.¹⁴

In the domestic arena, human rights protection in Kenya has been anchored on the provisions of the Constitution. The independence Constitution provided a framework for the protection of fundamental rights and freedoms of the individual.¹⁵ Although there was no direct application of human rights protection to corporations under the independence Constitution, there have been legislative measures taken to provide for protection of such groups as employees, workers and consumers who are affected most by corporate activities. These include Acts of Parliament which offer protection for workers and employees such as the Employment Act¹⁶, the Labor Relations Act¹⁷, the Labor Institutions Act¹⁸, the Work Injury Benefits Act¹⁹, the Occupational Safety and Health Act²⁰ and the Public Health Act²¹.

Moreover, Kenya has ratified a number of international human rights instruments such as the ICCPR, ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and the Convention on the Rights of the Child.²² In addition, Kenya has also ratified International Labor Organization (ILO) Conventions that deal with workers'

However, despite having the legal framework for protection against human rights abuses by corporations as well as other institutions, corporate human rights violations continue to be witnessed in the country. This paper will mainly consider violations of the consumer rights and right to clean and safe environment.

¹³ Kiarie M, "Horizontalty and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations" (2011) 7(1) LSKJ 1-21.

¹⁴ Steiner H. J., Alston P. And Goodman R., "International Human Rights in Context: Law, Politics, Morals" (3rd Edition, Oxford, New York: Oxford University Press, 2007) 1398.

¹⁵ Chapter 4, *Constitution of Kenya*, 2010.

¹⁶ Cap 226, *Laws of Kenya*.

¹⁷ Cap 233, *Laws of Kenya*.

¹⁸ Cap 234, *Laws of Kenya*.

¹⁹ Cap 236, *Laws of Kenya*.

²⁰ Cap 514, *Laws of Kenya*.

²¹ Cap 242, *Laws of Kenya*.

²² Kenya's status of ratification of international human rights instruments -<http://www.ohchr.org/>-.

1.2 Statement of the problem

Traditionally, corporations were viewed as property institutions whose main mandate was to make profits and maximize shareholder value.²³ Corporations were largely incorporated in order to make it easier for entrepreneurs to conduct business. The separate legal personality of corporations meant that corporations could engage in business transactions and bear the potential risk of liability separately from its members or founders.²⁴ In addition, corporations also provided a platform where many members could be able to invest capital in the corporation and in return obtain a share in the corporation as well as partake of the profit made by the corporation through payment of dividends.

Consequently, these corporations perceived their social responsibility as simply maximizing profits within the law. As Milton Friedman put it, the only responsibility of business towards society is the maximization of profits.²⁵ As a result, the management and governance structures of corporations were organized with the aim of providing direct accountability only to shareholders.²⁶ Little or no attention was paid to human rights as a corporate responsibility.

One of the most difficult aspects of this problem has been finding such abuses, because they happen on a smaller scale to avoid attention, yet can be unbearably difficult for those afflicted. However, the most specific rights that are mostly violated by the private corporations are consumer rights and right to access clean and safe environments.

The unregulated pursuit of business objectives very often results in an adverse human rights impact on society. When undertaken without due regard for its potential impact on society, the corporate desire to maximize profit and minimize cost in the use of labor, land and services can lead to avoidable grievances. A clear example of this is the Bhopal case²⁷. The case predates the Guideline Principles, but it is of great significance as it highlights both the problems in assessing the

²³ Davies P. L. And D.D Prentice Gower's "*Principles of Modern Company Law*" (6th edition, Sweet & Maxwell: London 1997) 8.

²⁴ See the concept of separate legal personality espoused in the case of *Salomon v Salomon & Co Ltd* (1897).

²⁵ Friedman M., '*The social responsibility of business is to make profits*' in Steiner and Steiner (eds), *Issues in business and society* (New York: Random House) 1.

²⁶ Williams C. A. And Conley J. M. , "*Is there an Emerging Fiduciary Duty to Consider Human Rights?*" (2005) 74 *University of Cincinnati Law Review*, 75.

²⁷ *Indian Government v. Union Carbide Corporation* (1985).

causes/responsibilities of such disaster and the procedural problems that occurred during the prosecution.

In December 1984 at the Union Carbide plant (an American corporation) in the city of Bhopal (India) 27 tonnes of methyl isocyanate (a deadly gas) was released, spreading throughout the city. As a result, there have been estimated 2,000 deaths and more than 200,000 people with injuries. The environmental consequences persisted over the years after the Union Carbide negligence, continuing causing respiratory problems, disabilities and unhealthy living conditions for the population.²⁸

Kenya through constitutional and legislative framework has provided for a legal framework for human rights protection.²⁹ Thus, a corporation is bound by the provisions of the Constitution and other legislative instruments to ensure that it does not violate human rights in its activities and conduct. However, despite the aforementioned constitutional and legal framework for human rights protection, corporate human rights abuses continue to be witnessed in the country. Investigations of corporate conduct continue to show violations of human rights through unethical activities of corporations.³⁰

Other non-state actors such as corporations had thus been placed at the periphery of this legal regime as far as human rights protection was concerned. As a result, not much focus was placed on how corporate action promoted or undermined human rights and thus human rights did not feature as an agenda of corporate governance. The respect for human rights within private sector corporations should form part and parcel of their corporate governance practices. The continued disregard and violation of human rights by private sector corporations undermines corporate governance in Kenya and results in poor corporate governance practices. Corporate governance has been defined as the system by which corporations are directed and controlled.³¹ It deals with

²⁸ Kumar D, *Legal Aspect of the Bhopal case*, 1992, -<<http://www.legalservicesindia.com/article/373/Legal-Aspects-of-the-Bhopal-Gas-Tragedy.html>>-

²⁹ Article 20, *Constitution of Kenya*, (2010).

³⁰ Robert C, *Beyond Ruggie's guiding principles on business and human rights: charting an embracive approach to corporate human rights compliance*, 48 *Tex. Int'l L.J.* 33-62 (2012).

³¹ Report of the Committee on the Financial Aspects of Corporate Governance (Gee, 1992) commonly known as the 'Cadbury Committee' Report of 1992.

the relationships between the different participants of the corporation including the board of directors, managers, shareholders and other stakeholders of the corporation.³²

In view of this, there is a need to investigate adverse corporate conduct relating to human rights by private sector corporations in Kenya specifically consumer rights and right to clean and safe environment; and the role of human rights protection in enhancing corporate governance in private sector corporations in Kenya.

1.3 Purpose of the study or general aims

The respect for human rights within corporations should form part and parcel of their corporate governance practices. The continued disregard and violation of human rights by corporations undermines corporate governance in Africa most especially in Kenya which results in poor corporate governance practices. Therefore, there is a need to investigate corporate conduct relating to human rights.

1.4 Hypothesis

The proposed research will seek to test the hypothesis that a corporate governance framework which incorporates respect for human rights by corporations will result in better corporate governance practices in Kenya.

1.5 Objectives of the Research

- a. To investigate the human rights violations committed by corporations in Kenya.
- b. To assess the adequacy of the regulatory framework governing the respect for human rights; specifically consumer rights and right to clean and safe environment by corporations in Kenya.
- c. To examine the relationship between respect for the said rights and good corporate governance by corporations in Kenya.
- d. To make recommendations towards improvement of the regulatory framework governing respect for human rights by corporations in Kenya.

³² Claessens S., "Corporate Governance and Development" (2006) 21(1) The World Bank Research Observer 91-122.

1.6 Research questions

- i. What are the violations committed by corporations in Kenya with regards to consumer rights and clean and safe environment?
- ii. What is the regulatory framework that protects against human rights violations committed by private sector corporations in Kenya?
- iii. What is the relationship between good corporate governance and respect for human rights by private sector corporations in Kenya?
- iv. What regulatory reforms can be made for effective enforcement of human rights protection in private sector companies in Kenya?

1.7 Justification of the study

Being important economic players, private sector corporations wield significant power and influence in a country and hence have the potential to influence and affect the society either positively or negatively. Corporations are obligated under the Constitution to respect human rights as provided for under the Bill of Rights.³³ It is therefore imperative that corporations have effective policies and processes in place within their corporate governance mechanisms which are geared towards ensuring that all activities of the corporations are compliant with human rights standards.

Although there is an existing constitutional as well as legislative framework for human rights protection in Kenya, human rights violations by corporations continue to be reported. This study is expected to evaluate the adequacy of the regulatory framework governing the respect of human rights and its incorporation in corporate governance practices of corporations in Kenya and provide recommendations towards improvement.

This study will contribute valuable knowledge in the field of human rights and business in general and particularly to the relationship between human rights protection and good corporate governance in corporations. Not much research has been conducted in Kenya in this field and as such this study is expected to contribute towards increasing the knowledge on this subject. This study is also expected to make recommendations that will inform policy formulations and corporate governance practices in corporations towards ensuring that corporations adhere to and respect human rights standards as set out in the Constitution and the UN Guiding Principles.

³³ Article 260, *Constitution of Kenya*, (2010).

1.8 Scope and limitation of the study

This study is limited to examining protection of human rights in corporations in Kenya. This study is limited to Kenya because of time and resource constraints as well as the fact that there is a research gap in the country on the subject matter of the research project since not much research has been documented on the same. In addition, although the Constitution provides for corporations to respect all human rights and fundamental freedoms as provided for under the Bill of Rights, the research is limited to studying enforcement of human rights which directly relate to the conduct and activities of corporations in Kenya.

1.9 Chapter summary

Corporations are obliged to uphold the interests of the countries in which they work, acknowledged in international law and in national law. Via the application of the human rights responsibilities to companies, the Constitution has, thus, established a way to make corporations responsible for human rights abuses in Kenya although the international system for human rights does not even allow for contractual legal obligations with regard to corporate rights responsibility. The numerous regulatory instruments, which also included corporate human rights responsibilities, have since been discussed. However, since the corporate human rights policy in Kenya has been binding and enforceable, companies are still expected to follow appropriate criteria in terms of human rights.

CHAPTER TWO

2.1 Literature Review

To investigate the human rights violations committed by corporations in Kenya.

Kibwana³⁴ notes that the absolute observance and protection for human rights, as established by domestic law and by international law. He pointed out that states are not the only ones that abuse human rights. Private and businesses are both abusing and should be made responsible for human rights. He believes they should be efficiently and strictly upheld in order to fully enjoy human rights. The regulation of human rights is also vital in maintaining strong organizational responsibility for the defense of human rights.

To examine the relationship between respect for the said rights and good corporate governance by corporations in Kenya.

Claessens³⁵ in examining the relationship between corporate governance and development observes that corporate governance, until recently, only featured in discussions by a handful of scholars and shareholders. He states that it has now “become a mainstream concern – a staple of discussion in corporate boardrooms, academic meetings, and policy circles around the globe.” He notes that the increased interest in corporate governance has been a result of the negative impact of corporate behavior on countries around the world occasioned by deficiencies in corporate governance practices which has endangered the stability of the global economy. He observes that the objective of good corporate governance in any economy is to maximize the contribution of corporations to the overall economy of a country and with due regard to all stakeholders of the corporation who include the corporation’s shareholders, employees, consumers, creditors, regulators (government) and the society at large. He argues that corporations have no alternative but to behave “responsibly” towards stakeholders since corporations cannot operate without them and this will ultimately be of benefit to the corporation. While agreeing with Claessens that socially responsible behavior by corporations such as respecting the environment has a positive on the relationship between the corporations and their stakeholders, I disagreed with his opinion that this has “little direct business justification”.

To the contrary, when the relationship between a corporation and its stakeholder is thriving, then the likelihood of the corporation’s success in meeting its objectives is more and this is a direct

³⁴ Kibwana K., *Fundamental Rights and Freedoms in Kenya* (OUP: Nairobi, 1990) 83.

³⁵ Claessens S., “Corporate Governance and Development” (2006) 21(1), *The World Bank Research* 91.

business justification for consideration of social issues such as human rights. In addition, although Claessens had noted that labor rights form part of stakeholder issues that corporations need to deal with, he had not addressed the issue of human rights directly and how they affect corporate governance.

To assess the adequacy of the regulatory framework governing the respect for human rights; specifically consumer rights and right to clean and safe environment by corporations in Kenya.

Ruggie³⁶ The "Protect, Respect and Remedy" concept was proposed in order to offer clarification on the subject of human rights and industry. This latter was developed to be regarded as the principles of the UN. While noting the primary role of the State to protect against violations of human rights, he acknowledged that businesses had an obligation to uphold human rights. He believed that there is no damage to corporate responsibility for human rights. This ensures that companies should prevent abuses of human rights and take constructive steps to tackle the harmful consequences they have had on human rights. Ruggie thus emphasized the value of proper vigilance by companies in successfully upholding the corporate duty of protecting human rights. Due diligence as described as the "steps a company must take to become aware of, prevent and address adverse human rights impacts."³⁷ Hence, in Ruggie's opinion, the extent of corporate responsibility to which human rights is respected should be determined by the sphere of influence and complicity of the corporation. Thus, the extent of the human rights responsibilities of corporations depends on the activities of a corporation in a specific context. **McCorquodale**³⁸ questioned the distinction made by Ruggie between 'duty' of the state implying a legal obligation and a corporate 'responsibility' implying a moral obligation. The definition of corporate responsibility must, in his opinion, be based on the expectation that businesses have legal, social and moral responsibilities in respect of the organization in which they work. This criticism was

³⁶ Ruggie J., "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011).

³⁷ Ruggie J., "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011).

³⁸ McCorquodale R., "*Corporate Social Responsibility and International Human Rights Law*" (2009) 87 *Journal of Business Ethics*, Supplement 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights 391.

supported by **Deva**³⁹ who argued that the use of the term ‘responsibility’ as opposed to ‘obligation’ is misleading since it suggests that corporate human right responsibilities are without legal consequences.

In the opinion of **Mwaura**,⁴⁰ corporations have taken advantage of the opportunities for trade presented by globalization to increase shareholding for the benefit of their shareholders. In their quest to maximize their profits, corporations have engaged in practices which violate the human rights of individuals and societies such as forced and child labor, discrimination, providing deprived working conditions to employees and environmental degradation among others. The recognition that corporate activity has had a detrimental impact on human welfare has led to the need to hold corporations accountable for human rights violations. He further argued that as a result of activities carried out by corporations, they should have responsibilities for protecting human rights. While leading the application of the Kenyan bill of rights to all persons, including corporations, he observed that this will change the way business is carried out in the country as corporations will have to take into account human rights concerns as part of their business risks. He, however, contended that there still lacks clear identification of the parameters of indirect corporate liability for human rights violations which is necessary for the effective enforcement of human rights protection.

To make recommendations towards improvement of the regulatory framework governing respect for human rights by corporations in Kenya.

In addressing this issue, **Ratner**⁴¹ asserted that corporate responsibility should be established and enforced by imposition of human rights obligations on corporations to be determined in view of a specific corporate activity. Ratner proposed that in seeking to determine how corporations can be held responsible for human rights it is important to take into consideration the “corporations’ diverse structures and modes of operation within a particular country.” He asserted that development of corporate duties relating to protection of human rights should be cognizant of four issues namely, “the corporation’s relationship with the government, its nexus to affected

³⁹ Deva S., “*Guiding Principles on Business and Human Rights: Implications for Companies*” (2012) 9(2) European Company Law 101,103.

⁴⁰ Mwaura K, “*Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity In Human Rights Violations*” (2011) 7 (No.1) The Law Society of Kenya Journal, 1.

⁴¹ Ratner S. R., “*Corporations and Human Rights: A Theory of Legal Responsibility.*” (2001) 111 the Yale Law Journal 443,533.

populations, the particular human right in issue, and the place of individuals violating human rights within the corporate structure.” Ratner proceeded to argue that corporations with close ties with the government or performing functions ordinarily performed by the government should bear more human rights responsibilities. His argument is hinged on the notions of control and complicity.

By providing that the Bill of Rights is binding on all persons including corporations, the Constitution has made it clear that respect for human rights in Kenya is no longer a mere responsibility without legal consequences but a legal obligation. **Muriuki**⁴² observed that corporations have the responsibility to uphold the rights of others. Thus it is important for corporations to incorporate respect for human rights in their business practices. This, he noted, was not only beneficial to the society and the individuals affected by the corporation, but was also beneficial to the corporation’s corporate image.

From the foregoing analysis, although the current literature focuses on the extension of human rights norms and standards to corporate actors which forms part of this proposed study and is therefore relevant, much of the literature has concentrated on multinational corporations and therefore by extension deal only with the international human rights framework. In addition, much of the debate in the existing literature dwells on the issue whether business corporations are subject to human rights obligations and if so, to what extent these obligations are. Not much has been documented regarding the enforcement of human rights protection where corporations are concerned in Kenya and more significantly the role of corporate governance in the promotion and protection of human rights. This is what this research proposes to study and thereby fill the existing knowledge gap.

⁴² Muriuki S. W., “*Business and Human Rights in Kenya: Embracing Corporate Constitutional Compliance*” (2013) 9(2) LSKJ 102.

2.2 Theoretical Framework

This study is premised on the integrative social contracts theory propounded by Thomas Donaldson and Thomas Dunfee.⁴³ This theory, which is largely influenced by the social contract theories of John Locke and John Rawls, is based on the notion that there exists a social contract between business and society and consequently there are some obligations of business towards society.⁴⁴ Corporations operate within the society and their existence is sanctioned by the society or, in other words, society has given them a “license to operate”.⁴⁵ The integrative social contracts theory proposes two levels of social contracting namely macro-social contract which relates to all rational contractors and micro-social contract which are explicit or implicit agreements by members of a given community.⁴⁶

The theory posits that under the macro-social contract there are some basic moral principles (hyper-norms) which are so fundamental that all rational people would agree upon them as the basis for any social contracting.⁴⁷ These hyper-norms are deemed to be universal in nature and are therefore superior to the micro-social contracts which are essentially binding agreements or contracts between interested parties in a community. The hyper-norms would include social responsibilities such as avoidance of gratuitous harm to others, honoring contracts, treating people and organizations fairly and respecting human rights.⁴⁸

Cognizant of the fact that corporations are social actors in the society and that their policies and activities have major implications for those directly and indirectly involved in the business, this theory provides a framework within which decision making within corporations can be made with respect to their impact on relevant communities, ethical norms and universal moral standards including universally accepted human rights. Since corporations derive their workforce, profit and

⁴³ Donaldson T. and Dunfee T., ‘*Towards a Unified Conception of Business Ethics: Integrative Social Contracts Theory*’, (1994) 19 *Academy of Management Review*, 252–284 and *Ties That Bind: A Social Contracts Approach to Business Ethics*, Harvard Business School Press: Boston, 1999.

⁴⁴ Garriga E. and Mele D., “*Corporate Social Responsibility Theories: Mapping the Territory*” (2004) 53 *Journal of Business Ethics* 51-71.

⁴⁵ K.V. Bhanu Murthy, *Business Ethics and Corporate Responsibility – A New Perspective* (Paper presented at Workshop on ISO 26000 Guidance on Social Responsibility and the implications for Developing Countries, New Delhi, 2007).

⁴⁶ Aucther L. and Dziejwa M., “*Managing Business Values in a Globalized Economy by ISCT (Integrated Social Contract Theory) – A Comparative Study*” (2013) 3 (2) *The Business & Management Review* 208-220.

⁴⁷ Garriga E. and Mele D., “*Corporate Social Responsibility Theories: Mapping the Territory*” (2004) 53 *Journal of Business Ethics* 51-71.

⁴⁸ Wall S. and Rees B., *International Business* (2nd edition, Pearson Education Limited, 2004).

other resources from the society, they must be socially responsible in general and more specifically to the affected constituents of the society. Consequently, respect for human rights is one of the responsibilities that corporations must discharge.

This study is also premised on the natural rights theory. Human rights are rights which emanate from the inherent dignity of every human being.⁴⁹ The formulation of natural rights, which underlie the basic understanding of human rights, derives from the natural law theory. The natural rights theory was articulated by John Locke (1632-1704) who advanced the theory that there are natural and individual rights which the ruler of any society must guarantee.⁵⁰ Individuals are born with inherent basic rights which are given by God or nature and therefore cannot be taken away. According to Locke, man by contract, surrendered part of his liberty to the sovereign (being the state or the government) for the main purpose of protection of human entitlements.⁵¹

Hence, man gave up the power to enforce his rights or entitlement to the government but not the rights themselves. Hence the social contract between the governor and the governed, with the protection of rights as the basis for that contract. Locke considered the content of natural life to be life, health, liberty and property.⁵² These can be said to be the basis of the contemporary idea of human rights articulated in the various international instruments today such as the UDHR which recognizes these rights as fundamental rights and freedoms for all peoples.

However, the principles underlying human rights go beyond the relationship between the government and the individual and extend to non-state actors or private entities such as corporations.⁵³ “Human rights are an expression of human dignity and the right to be protected in that dignity.”⁵⁴ Corporations should in their decision making structures and processes take into account and consider human rights as exemplified both in the international law of human rights and domestic law of the country of operation.⁵⁵

⁴⁹ The preamble of the UDHR recognizes the inherent dignity and equal and inalienable rights of all human beings.

⁵⁰ M.D.A. Freeman, Lloyd's *Introduction to Jurisprudence* (7th edition, London: Sweet & Maxwell, 2001) 112.

⁵¹ M.D.A. Freeman, Lloyd's *Introduction to Jurisprudence* (7th edition, London: Sweet & Maxwell, 2001) 112.

⁵² M.D.A. Freeman, Lloyd's *Introduction to Jurisprudence* (7th edition, London: Sweet & Maxwell, 2001) 115.

⁵³ Cragg W., “*Human Rights and Business Ethics: Fashioning a New Social Contract*” (2000) 27 *Journal of Business Ethics* 205, 213.

⁵⁴ McCorquodale R, “*Corporate Social Responsibility and International Human Rights Law*” (2009) 87 *Journal of Business Ethics*, Supplement 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights 391.

⁵⁵ Williams and Conley.

This study is finally based on the stakeholder theory of corporate governance. The stakeholder theory is based on the view that the corporation should be run not only in the interests of the shareholders but also the interest of other constituents of the corporation known as stakeholders. According to the theory, shareholders are just but one of the competing and diverse groups that contribute to a corporation and are affected by the actions of a corporation.⁵⁶ Consequently, rather than the corporation working towards creating value for the shareholders only, the stakeholder theory holds that the corporation should create value for all stakeholders.

According to Merrick Dodd, a renowned professor at Harvard Law School and proponent of the stakeholder theory, the corporation was a social as well as an economic institution and therefore it had a social service in addition to its profit making function.⁵⁷ Hence, the proper purpose for a corporation was not restricted to increasing shareholder value but also included considering the welfare of the employees, ensuring good quality products for consumers and making positive contribution to the welfare of the community as a whole.⁵⁸ R. Edward Freeman, a proponent of the stakeholder theory defines stakeholders as “any group or individual who can affect, or is affected by, the achievement of a corporation’s purpose”.⁵⁹ These include employees, suppliers, consumers, government, creditors and the society at large in which the corporation operates. The interests of these stakeholders should be taken into account in the decision making process of a corporation.

Accordingly, business should be managed for the benefit of all stakeholders.⁶⁰ Incorporating the interests of stakeholders in the decision making process of a corporation ultimately is to the benefit of the corporation as it results in the reduction of transaction costs which ultimately contributes to profit.⁶¹ Additionally, treating employees, suppliers, consumers and the society well amounts to respect for individuals, which is “a greater good that business cannot ignore.”⁶² Consequently, the

⁵⁶ Keay A., “*Stakeholder Theory in Corporate Law: Has It Got What It Takes?*” (January 4, 2010) available at SSRN: -<http://ssrn.com/abstract=1531065> or <http://dx.doi.org/10.2139/ssrn.1531065>-.

⁵⁷ Dodd E. M., “*For Whom Are Corporate Managers Trustees?*” (1932) 45 Harv. L. Rev. 1145, 1148.

⁵⁸ Stout L. A., “*Bad and Not So Bad Arguments for Shareholder Primacy*”, (2002) 75 Southern California Law Review 1189.

⁵⁹ Freeman R. E. , *Strategic Management: A Stakeholder Approach* (Boston: Pitman Publishing, 1984) 49.

⁶⁰ Nordberg D., “*The Ethics of Corporate Governance*” (July 2007) available at Social Science Research Network: -<http://ssrn.com/abstract=1004038>-, 10.

⁶¹ Nordberg D., “*The Ethics of Corporate Governance*” (July 2007) available at Social Science Research Network: -<http://ssrn.com/abstract=1004038>-, 10.

⁶² Nordberg D., “*The Ethics of Corporate Governance*” (July 2007) available at Social Science Research Network: -<http://ssrn.com/abstract=1004038>-, 10.

respect for human rights is an issue that business has to contend with and is a matter which is relevant and important for corporate governance. Therefore, the chosen theory is stakeholder's theory since it assists in answering the research questions.

2.3 Research Methodology

This dissertation is carried out primarily through the design of historical or documentary studies. The design of the documentary study involves the identification and study of already existing data.⁶³ This study design requires the exploration and interpretation of evidence currently available to reach results on causes and patterns that may clarify or forecast the future.⁶⁴

This study style is chosen because of the documentary review of human rights abuses by private corporations in Kenya and the legal and regulatory system regulating enforcement in Kenya. This review would analyze the Constitution, the applicable Legislative acts, legislation and international conventions and instruments on human rights. It will then discuss the human rights implications of business operations in Kenya. The thesis would therefore primarily include the analytical and doctrinal review of the law on human rights duties on corporations in Kenya and how the enforcement of human rights protection will affect the corporate governance practices in the country.

Main and secondary sources would be the basis of the proposed results. It is recommended that an in-depth analysis of applicable international human rights resources, the Constitution and the relevant law should be carried out with the key data sources. As for secondary sources of material, the books, magazines, papers and studies on the topic of study are checked and consulted in both hard copying and soft copies via the Internet.

⁶³ Mugenda O. M. and Mugenda A. G., *“Research Methods: Quantitative and Qualitative Approaches”* (Nairobi: Acts Press. 1999) 167.

⁶⁴ Oso W. Y. and Onen D., *“A General Guide to Writing Research Proposal and Report: A Handbook for Beginning Researchers”* (Revised Edition, The Jomo Kenyatta Foundation, 2009) 85.

CHAPTER THREE: AN OVERVIEW OF HUMAN RIGHTS VIOLATIONS

3.1 Introduction

Company and human rights concerns have for a very long time been viewed as distinct and unconnected issues. Human rights responsibilities were viewed as part of the domain of state rather than corporation. Perhaps this impression was due to the larger emphasis on civil and political rights rather than economic, social and cultural rights and thus to the presumption that human rights concern only civil and political rights viewed as the security of the State.⁶⁵ Moreover, most universally accepted instruments of human rights acknowledge States as parties and thus, while involving intervention by non-state actors, they mostly attach States as the primary holders of duties in compliance with the instruments.⁶⁶ As such, corporate management of businesses have little obligation at all to ensure the protection of human rights in their organizations.

However, while Governments are increasingly responsible for upholding and safeguarding human rights, businesses are also obliged to ensure that their actions do not breach human rights.⁶⁷ The concern then is not whether businesses should be held responsible for the defense of human rights, but rather to what degree. A privilege created by one person creates the corresponding responsibility for another person. Human rights contribute to four degrees of obligation, including respect, security, promotion and compliance.⁶⁸ Respect for human rights requires simply that the rights of individuals are not abused and that it reflects a duty-holding responsibility, passive or negative.⁶⁹ On the other hand, the protection, advancement and enforcement of human rights reflects an active and constructive obligation, which involves ensuring that human rights are not infringed and taking positive steps required to ensure the successful fulfillment of human rights.

For corporations, human rights duties are largely framed in negative terms and their responsibilities entail ‘doing no harm’ as opposed to taking positive measures towards the

⁶⁵ Leisinger K., “*Business and Human Rights in The United Nations Global Compact and the Office of the High Commissioner of Human Rights, Embedding Human Rights Into Business Practice*” (Joint Publication of the UN Global Compact and OHCHR)51.

⁶⁶ the ICCPR and the ICESCR bind the state parties to the covenants.

⁶⁷ Amis L., Brew P. and Ersmarker C., “*Human Rights: It is Your Business: The Case for Corporate Engagement*” (International Business Leaders Forum, 2005).

⁶⁸ Amis L., Brew P. and Ersmarker C., “*Human Rights: It is Your Business: The Case for Corporate Engagement*” (International Business Leaders Forum, 2005).

⁶⁹ J. Ruggie, “*Protect, Respect and Remedy: A Framework for Business and Human Rights*”, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc A/HRC/8/5 (7 April 2008) 24.

realization of human rights.⁷⁰ However, it is not necessarily the case that the human rights duties for corporations only constitute a passive responsibility. To the contrary, to respect human rights also involves both negative and positive requirements.⁷¹ Although corporations have the responsibility to respect all human rights, there are human rights standards which directly affect business and are thus directly pertinent to corporations.⁷² These standards include the principles and rights that directly affect the corporation's employees and workers such as labor rights, health and safety standards, principles that affect the community to which the corporation provides goods and services such as consumer rights and protection and rights which affect the community within which the corporation operates such as, land use rights and environmental rights.⁷³

However, as noted above, corporations have not only failed to respect human rights, their minimum responsibility, but they have been involved in violations of human rights. Private sector corporations, large and small, all over the world are being found guilty of violating human rights.⁷⁴ Kenya is no exception and reports continue to be published of violation of human rights by private sector corporations in the country. This chapter will examine these human rights violations perpetrated by private sector corporations and the effect of these violations.

3.2 Human Rights violations by Corporations in Kenya

It is without a doubt corporations have positively impacted Kenya in various ways towards human development; providing employment, supplying goods and services to the community, being the consumer of raw materials and products.⁷⁵ In addition, corporate initiatives which seek to improve the lives of the communities within which corporations operate such building of educational and social infrastructure promote human rights. In Kenya, companies such as Co-operative Bank of Kenya Limited and Equity Bank Limited, for example, have provided education scholarships to

⁷⁰ J. Nolan and L. Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87 (2) Journal of Business Ethics 433-451, 441.

⁷¹ J. Nolan and L. Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87 (2) Journal of Business Ethics 433-451, 443.

⁷² J. Nolan and L. Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87 (2) Journal of Business Ethics 433-451, 444.

⁷³ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006)

⁷⁴ Amis L., Brew P. and Ersmarker C., "Human Rights: It is Your Business: The Case for Corporate Engagement" (International Business Leaders Forum, 2005).

⁷⁵ Kenya National Commission on Human Rights (KNCHR), *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report 103, 2011).

needy students in the country.⁷⁶ This contributes towards the realization of the right to education as provided for under the Constitution.⁷⁷

However, corporate activities can also undermine human rights through activities which lead to environmental degradation, engaging in forced and child labor, engaging in discrimination practices and poor working conditions for the employees.⁷⁸ Investigations on corporate conduct conducted in Kenya have revealed human rights abuse and violations across many business sectors such as the clothing, manufacturing, agricultural and mining sectors.⁷⁹

3.3 Environment degradation by corporations.

There exists an irrefutable link between the environment and human rights. A clean, healthy and conducive environment is a prerequisite to the enjoyment of human rights. For instance, the damage to the environment can result in climate change which brings drought and famine and hence affecting the enjoyment of the right to life and health. Thus, that environmental preservation and conservation enhances the enjoyment of human rights cannot be gainsaid.⁸⁰ Article 42 of the Constitution guarantees the right to a clean and healthy environment which includes the preservation and conservation of the environment not only for the present generation but also for future generations. Consequently, corporations have the obligation under the Constitution to promote the right to a clean and healthy environment, ensure public health and safety standards, protect natural resources and observe the principle of sustainable development.⁸¹

As discussed above the protection of the environment is a key element in the process of safeguarding human rights. This is because human beings depend on the environment in which they live for basic needs such as food, water and shelter. A safe, clean and healthy environment is therefore essential to the enjoyment of other human rights.⁸² The degradation of the environment

⁷⁶ -<http://co-opbank.co.ke/images/PDFs/coopbank%20increases%20education%20scholarships.pdf> and <http://equitygroupfoundation.com/>- (01 September 2020).

⁷⁷ Article 43(1)(f), *Constitution of Kenya*, 2010.

⁷⁸ Mwaura K, “*Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity In Human Rights Violations*” (2011) 7 (No.1) *The Law Society of Kenya Journal*.

⁷⁹ The Kenya Human Rights Commission, *A Comparative Study of the Tea Sector in Kenya: A Case Study of Large Scale Tea Estates* (Nairobi: Kenya Human Rights Commission, 2008) and Kenya National Commission on Human Rights, *The Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (2006).

⁸⁰ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006) 114.

⁸¹ Article 69 (2), *Constitution of Kenya*, 2010.

⁸² Office of the High Commissioner on Human Rights Commentary on Human Rights and the Environment - <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.aspx>-

undermines the human dignity and well-being and impedes other human rights such as the right to life, health, food, water and sanitation. Private sector corporations can through their activities contribute towards the degradation of the environment.

In Magarini, for example, the activities of the salt manufacturing companies had adverse effects on the environment to the detriment of the community in the area. There were findings of contamination of fresh water sources surrounding the community as well as depletion of the coastal forests and woodlands due to the salt manufacturing companies' actions and activities.⁸³ Mangrove trees, coastal forests and woodlands were destroyed to make way for the construction of salt harvesting ponds. The dykes constructed by the companies restricted free flow of water to and from the sea resulting in high salinity in the area and thereby causing harm to the vegetation which was a habitat for different types of fish.

The community had also been affected since fresh water sources such as wetlands, springs and wells had been contaminated due to the salt manufacturing activities. As a result, the community did not have access to fresh and non-salty water and thereby forcing them to purchase fresh water for domestic use from the salt manufacturing companies. The salt manufacturing companies also discharged untreated water which was highly saline to the environment hence causing harm to the marine life and the soil in the locality. This adversely affected the people's food security and livelihoods.

In 2002, the Kenya Human Rights Commission (KHRC), a non-governmental organization, released a report which lay out the extent of violations of human rights of workers in Del Monte Kenya Limited and the struggle to expose these violations.⁸⁴ Among the human rights violations being carried out by the Del Monte Company against its employees and the community within which it operated included displacement of people from their land and unsafe use of pesticides which had adverse effects on the employees. The Del Monte case brought into sharp focus the corporate human rights impact in Kenya and the violations perpetrated by private corporations.

⁸³ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006)

⁸⁴ Kenya Human Rights Commission, *“Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers' Rights at Del Monte Kenya”* (KHRC: Nairobi, 2002).

Finally, in December 2013, the Athi River Mining Company Limited was accused of causing environmental degradation in Kilifi County through pollution by the Human Rights Agenda (Huria).⁸⁵The report by Huria stated that the activities of the company had adverse environmental and health effects on the community neighboring the company.

3.4 Violations of consumer rights.

Prior to the promulgation of the Constitution in 2010, the rights of consumers had not been exhaustively provided in the Constitution. Moreover, consumer rights were contained in different legislations which made it difficult to enforce the same. However, the Constitution now expressly provides for consumer rights.⁸⁶ These include the right to goods and services of reasonable quality, information necessary for consumers to gain full benefit from the goods and services provided, the protection of consumers' health, safety and economic interests and to compensation for loss or injury arising from defects in goods and services. It is noteworthy that the Constitution provides that these consumer rights apply to goods and services offered by both public and private persons.⁸⁷ This perhaps is in recognition of the immense role played by the private sector in the provision of goods and services in the country. Accordingly, private sector corporations are bound under the Constitution to respect and protect consumer rights.

In addition to the constitutional protection of consumer rights, there are a number of legislations which seek to protect the rights of the consumers. Key among these is the newly enacted Consumer Protection Act⁸⁸ which provides for the protection of the consumer and prevents unfair trade practices in consumer transactions.

Effective consumer protection is necessary to ensure that the products bought by consumers are safe to use and meet the required performance standards. In addition, it ensures that adequate information should be availed to the consumer to enable them make informed decisions and marketers are prevented from using fraudulent methods to sell their products. As observed in the previous chapter, before 2012, Kenya did not have a specific legislative instrument that governed consumer protection. Provisions relating to consumer protection in different sectors of the

⁸⁵ Kenya Human Rights Commission, *“Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers’ Rights at Del Monte Kenya”* (KHRC: Nairobi, 2002).

⁸⁶ Article 46, *Constitution of Kenya*, 2010.

⁸⁷ Article 46(3), *Constitution of Kenya*, 2010.

⁸⁸ Act No. 46 of 2012.

economy were scattered in a number of statutes resulting in lack of a “comprehensive and significant policy direction” to effectively ensure the protection of the consumers.⁸⁹ This was one of the challenges facing the implementation of consumer protection laws in Kenya.

Consumer exploitation is witnessed in a wide range of sectors in which private sector corporations are major actors. These include the banking and financial sector, the information and communication technology (ICT) sector, the energy sector, the health services sector, the agricultural sector and the manufacturing sector. This is attributed largely, as observed earlier, to poor compliance and weak enforcement machinery of consumer protection laws. Unfortunately, consumer protection has not taken prominence in Kenya’s foreign policy on bilateral and multilateral relations either. This is exemplified by the fact that Kenya remains a dumping ground for substandard, counterfeit and contraband goods.⁹⁰

In the telecommunication sector, there have been cases of corporations in the sectors misrepresenting their products in their advertisements, for instance, having promotional offers with attractive rates which lure consumers in the pretext that they are permanent rates.⁹¹ In the financial services sector, banks have been accused of having hidden charges in their products and not disclosing them to consumers thereby infringing consumer rights.⁹² There have been reported cases of goods which are not fit for the consumers being distributed even to the vulnerable people in the community. The scandal on unimix feed contaminated with aflatoxin and distributed to consumers in Turkana and Mandera is a clear example of this.⁹³

This conduct by the private sector impedes the flow of information in the market though false advertising, deception or overt coercion affects the right of the consumer’s ability to choose freely thus infringing on consumers’ rights.⁹⁴

⁸⁹ Asher D. and Sengupta R., *State of the Kenyan Consumer 2012*, CUTS, Kenya 2012) iv.

⁹⁰ S. Mutoro, “Reflections on Consumer Rights in Kenya” (Business Today, 15 March 2010) - <http://businesstoday.co.ke/news/2012/03/15/reflections-consumer-rights-kenya>-(03 September 2020).

⁹¹ S. Mutoro, “Reflections on Consumer Rights in Kenya” (Business Today, 15 March 2010) - <http://businesstoday.co.ke/news/2012/03/15/reflections-consumer-rights-kenya>-(03 September 2020).

⁹² FSD Kenya, Consumer Protection Diagnostic Study-Kenya (January 2011).

⁹³ Pembere I., “Understanding Consumer Protection in Kenya” (Think Business, 12 February 2012) - <http://businesstoday.co.ke/news/2012/03/15/reflections-consumer-rights-kenya>- (03 January 2021).

⁹⁴ J. Kieyah, “Kenyan Consumer has become King.” (Business Daily, 27 May 2014) - <http://www.businessdailyafrica.com/Opinion-and-Analysis/Kenyan-consumer-has-become-king/-/539548/2328478/-/item/0/-/acm1wcz/-/index.html>- (03 September 2014).

3.5 Conclusion

The findings and results of the above-mentioned research explicitly indicate that companies not only have the ability to weaken and violate human rights, but are also complicit in human rights abuses. These breaches entail breaches of labor standards and abuses, discrimination policies and environmental destruction. These violations impact not only those who are the perpetrators of violations, but their families and their neighborhoods.

Therefore, reliable structures must be built within the framework of corporate governance of private sector companies to ensure that corporation operations are in accordance with the human rights norms, avoiding human rights abuses and making corporations responsible for any breaches thereof. In exchange, this will mean the private sector in the world continues to develop its economy and it can meet its economic and social development objectives.

CHAPTER FOUR: DISCUSSIONS

4.1 ADEQUACY OF THE REGULATORY FRAMEWORK GOVERNING THE RESPECT FOR HUMAN RIGHTS

4.1.1 Introduction

Business is a major contributor towards the growth of the economy of the society.⁹⁵ Companies contribute towards the development of society through creation of investments and employment opportunities, supplying of goods and services and contribution towards public revenue through tax payments. The success and development of corporations also means the development of the society's economy and ultimately the improvement of the society's standard of living. However, the role of the corporation in society can also be a double edged sword since the activities and actions of corporations also have the potential to negatively affect society. This chapter will examine the regulatory framework for corporate accountability for human rights in Kenya.

4.1.2 Corporations in the Human Rights Context

Human rights are rights which are inherent in the nature of human beings and thus accrue to individuals by virtue of being human.⁹⁶ They are guaranteed as basic rights for all members of the human race regardless of their nationality, origin, sex, religion, race, color, age, gender, language or any other status.⁹⁷ They are aimed at securing dignity and equality for all.⁹⁸ The impact of business on the enjoyment of human rights by individuals, communities and the society as a whole has increasingly become of concern globally. This is largely as a result of the impact of the activities of multinational corporations in developing nations including African countries.

⁹⁵ N. Pillay, "The Corporate Responsibility to Respect: A Human Rights Milestone (United Nations High Commissioner for Human Rights Contribution during the 2009 Annual Labor and Social Policy Review) - <http://www.ohchr.org>- (9 December 2020).

⁹⁶ Office of the High Commissioner on Human Rights (OHCHR) definition of human rights- <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>- (December 2020).

⁹⁷ United Nations, Universal Declaration of Human Rights (UDHR) (1948) -<http://untreaty.un.org>- (7 December 2020), Article 2.

⁹⁸ United Nations, Human Rights Translated: A Business Reference Guide (OHCHR, 2008) viii -http://human-rights.unglobalcompact.org/doc/human_rights_translated.pdf-(December 2020). 145.

4.1.3 The International Human Rights Regulation of Business Corporations

In order to give substance to the human rights and fundamental freedoms envisaged in the UN Charter, the UDHR was adopted by the UN in 1948.⁹⁹ The UDHR outlines the key human rights and their constituent elements. The UDHR has been described as the “cornerstone of modern human rights law”.¹⁰⁰ As a way of elaborating on the human rights and fundamental freedoms contained in the UDHR, the UN General Assembly in 1966 adopted two binding treaties namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰¹ Although contained in two separate covenants, the rights in the two covenants have been recognized as universal, indivisible, interdependent and equally important.¹⁰² Collectively, the UDHR, ICCPR and ICESCR form what has been described as the ‘International Bill of Human Rights’.

In addition to these general human rights instruments, a number of declarations and conventions dealing with specific human rights issues have been adopted by the UN. These include the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).¹⁰³

Additionally in 2011, Ruggie moved to operationalize the Respect, Protect and Remedy Framework by developing guiding principles as set out in his March 2011 report.¹⁰⁴ The guiding principles were endorsed by the United Nations Human Rights Council and a working group was established whose mandate is to ensure the effective implementation of the guiding principles.¹⁰⁵

⁹⁹ Adopted by the UN General Assembly on 10 December 1948.

¹⁰⁰ UDHR viii.

¹⁰¹ Came into force on 16 December 1976 following the requisite number of member state ratifications.

¹⁰² United Nations, ix.

¹⁰³ Steiner H. J., Alston P. And Goodman R., “*International Human Rights in Context: Law, Politics, Morals*” (3rd Edition, Oxford, New York: Oxford University Press, 2007) 1388.

¹⁰⁴ Ruggie J., “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011).

¹⁰⁵ Endorsed in resolution 17/4 of the Human Rights Council of 16 June 2011.

4.1.4 The Regional Framework on Corporate Accountability for Human Rights

The African system for the promotion and protection of human rights is largely based on the African Charter on Human and Peoples' Rights also referred to as the Banjul Charter.¹⁰⁶ The Charter recognizes that human rights derive from the attributes of human beings and hence should be protected at the international as well as the national levels.¹⁰⁷ It prohibits discrimination on the basis of race, religion, language, sex, ethnic group, national and social origin, birth, political opinion or other status.¹⁰⁸ Article 15 provides for the right to work under equitable and satisfactory conditions and the right to equal pay for equal work. Article 16 provides for the right to the best attainable state of physical and mental health and the right to receive medical care when unwell. Article 24 provides for the right of all peoples to a general satisfactory environment favorable for their development. These are rights which directly affect corporations and should be respected and promoted by corporations in Africa.

The East African Community (EAC) is established by the EAC Treaty which was adopted in 1999 and came into force in 2000.¹⁰⁹ The EAC originally consisted of Kenya, Uganda and Tanzania but expanded its membership to include Rwanda and Burundi.¹¹⁰ The EAC recognizes that good governance is critical in the achievement of its objectives and accordingly the partner states undertake to abide by the principles of good governance which include adherence to the rule of law, principles of democracy, transparency, social justice, equal opportunities, gender equality and the recognition, promotion and protection of universally accepted standards of human rights.¹¹¹ The importance of respecting human rights within the Community is further enunciated by the fact that in considering membership applications from other states, one of the factors to be considered is observance of human rights and social justice.¹¹²

¹⁰⁶ Adopted on 17 June 1981 and came into force on 21 October 1986.

¹⁰⁷ Preamble, *African Charter on Human and Peoples' Rights*.

¹⁰⁸ Article 2, *African Charter on Human and Peoples' Rights*.

¹⁰⁹ <http://www.eac.int/> (29 November 2020).

¹¹⁰ Paragraph 11 of the Preamble and Articles 27 and 28, *EAC Treaty*.

¹¹¹ Article 6 (d) and 7(2), *EAC Treaty*.

¹¹² Article 3(3) (b), *EAC Treaty*.

4.1.5 The Domestic Human Rights Regulation of Business Corporations

The domestic legal framework often influences the conduct and behavior of corporations with respect to their operations and their corporate governance structure which ultimately has an impact on their respect for human rights. In Kenya, corporations' actions and activities are governed and regulated by the Constitution of Kenya, 2010¹¹³ and a myriad of statutes and regulations including the Companies Act,¹¹⁴ the Penal Code,¹¹⁵ the Capital Markets Authority Act, 2002, the Capital Markets Regulations the Nairobi Stock Exchange (NSE) Regulations for publicly listed companies, labor laws, consumer protection laws and environmental laws. The statutory law governing corporations in Kenya is embodied in the Companies Act. It is both an enabling and regulatory legislation and deals with among other issues the requirements for incorporation, registration and the management of companies.

4.1.6 Regulatory framework with regards to consumer rights in Kenya

Article 46 of the Constitution of Kenya, now expressly provides for consumer rights. This accordingly binds private sector corporations under the Constitution to respect and protect consumer rights. In addition to the constitutional protection of consumer rights, there are a number of legislations which seek to protect the rights of the consumers. Key among these is the newly enacted Consumer Protection Act¹¹⁶ which provides for the protection of the consumer and prevents unfair trade practices in consumer transactions.

Other statutes which deal with different aspects of consumer protection include the Sale of Goods Act,¹¹⁷ which provides for implied conditions and warranties which must exist in a sale of goods contract and the Kenya Anti-Counterfeit Act of 2008 which prohibits counterfeit and substandard goods. There is also the Standards Act¹¹⁸ which establishes the Kenya Bureau of Standards and provides protection against substandard goods and services, the Public Health Act which aims at securing and maintaining public health standards, the Hotels and Restaurants Act¹¹⁹ which seeks to ensure proper sanitary conditions in hotels and restaurants.

¹¹³ Promulgated on 27 August 2010.

¹¹⁴ Chapter 486, *Laws of Kenya*.

¹¹⁵ Chapter 63, *Laws of Kenya*.

¹¹⁶ Act No. 46 of 2012.

¹¹⁷ Cap 31, *Laws of Kenya*.

¹¹⁸ Cap 496, *Laws of Kenya*.

¹¹⁹ Cap 494, *Laws of Kenya*.

Further, the Pharmacy and Poisons Act¹²⁰ which aims at ensuring the safety and quality of pharmaceutical products and services through the Pharmacy and Poisons Board, the Food Drugs and Chemical Substances Act¹²¹ which seeks to prevent adulteration of food, drugs and chemical substances. The Trade Description Act¹²² which prohibits false description of goods, services, accommodations and facilities provided in the course of trade, and the Weights and Measures Act¹²³ which provides for standardization of weights and measures and the Competition Act of 2010 which aims to promote and safeguard competition in the national economy and to protect consumers from unfair and misleading market conduct.

4.1.7 Regulatory framework with regards to environmental rights in Kenya

The right to a safe and clean atmosphere is assured under Article 42 of the Constitution. However, new regulations, including the Environmental Management and Co-ordination Act, secure the interests of the clean and safe environment,¹²⁴ provides a framework for the management and conservation of the environment, including the necessary structural and institutional framework. It established a strong and comprehensive institutional framework for environmental management which includes; The National Environment Management Authority (NEMA),¹²⁵ which is the principal institution responsible for supervising and coordinating the implementation and enforcement of the Act. These are the major key regulatory frameworks that govern the protection of the right to clean and safe environment.

4.1.8 Conclusion

Private sector companies shall uphold the human rights of the countries under which they work in compliance with international law and national legislation. Thus, although the international framework on human rights still does not create binding legal commitments with regard to corporate responsibility, the Constitution provides for a mechanism to keep businesses to account for human rights abuses in Kenya through application of human rights obligations to firms. This further underlined the separate regulatory instruments that already covered corporate human rights commitments. However, since the corporate human rights policy in Kenya has been binding and

¹²⁰ Cap 244, *Laws of Kenya*.

¹²¹ Cap 254, *Laws of Kenya*.

¹²² Cap 505, *Laws of Kenya*.

¹²³ Cap 513, *Laws of Kenya*.

¹²⁴ Chapter 387, *Laws of Kenya*.

¹²⁵ Section 9(1), *The Environmental Management and Coordination Act*, 1999.

enforceable, companies are still expected to follow appropriate criteria in terms of human rights. This is due to the fact that companies fail to report and record abuses of human rights in different parts of the world, which is the topic of the following chapter.

4.2 CORPORATE GOVERNANCE AND HUMAN RIGHTS

4.2.1 Introduction

Strong corporate governance is important not only for the particular business but for the economy in its entirety for sustainable growth. Corporations play an important role in fostering economic and social growth and are increasingly responsible for the supply of jobs, goods and services and development of infrastructure.¹²⁶

Good corporate governance is required to ensure businesses work competitively, economically and efficiently.¹²⁷ This, in essence, would increase the responsibility, openness and efficiency of those responsible for the management of businesses. Good corporate governance requires responsibility, openness, honesty, justice, accountability, productivity and performance.¹²⁸ Corporate management thus seeks to foster efficient, responsible, open and responsive corporate governance for the good of all persons involved, including the societies in which the businesses work.¹²⁹ These universal concepts of corporate governance also form part of the central principles of human rights security.¹³⁰ Thereby good government is encouraged by the respect and defense of human rights.

The long-term value and sustainability of the business is strengthened with the consideration and taking into account the stakeholders' interests.¹³¹ Consequently, businesses should take care of the rights and interests of their clients in their activities and decision-making processes. The topic of regard for human rights then becomes a matter of corporate governance. Human-related issues

¹²⁶ Ramnath M and Nmehielle V. O., “*Interpreting Directors’ Fiduciary Duty to Act in the Company’s Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration*” (2013) 2 *Speculum Juris* 98-115, 99.

¹²⁷ Gakeri J., “*Enhancing Kenya’s Securities Markets through Corporate Governance: Challenges and Opportunities*” (2013)3(9) *International Journal of Human and Social Sciences* 94-117.

¹²⁸ International Finance Corporation, Global Corporate Governance Forum, Frequently Asked Questions http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Global+Corporate+Governance+Forum/Frequently+Asked+Questions/- (31 November 2020).

¹²⁹ International Finance Corporation, Global Corporate Governance Forum, Frequently Asked Questions http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Global+Corporate+Governance+Forum/Frequently+Asked+Questions/- (31 November 2020).

¹³⁰ Robinson M., “*What Rights can Add to Good Development Practice*” in Phillip Alston and Mary Robinson, *Human Rights and Development* (OUP: Oxford, 2005) 38.

¹³¹ Williams C. A. and Conley J. M. , “*Is there an Emerging Fiduciary Duty to Consider Human Rights?*” (2005) 74 *University of Cincinnati Law Review*,76.

specifically applicable to businesses, such as the provision of equal pay and non-discrimination legislation on decent working practices for workers, secure working environments, labour union representation and negotiated trade negotiations, customer protection issues and respect for the environment are essential to effective corporate governance.¹³²

Human rights structures have to be integrated into private company corporate governance frameworks for productive human rights enforcement within businesses. By respect for human rights, businesses foster principles such as openness, integrity and professional responsibility and thus enhance good management, which is important for sustainable socio-economic growth.¹³³

4.2.2 The Integration of Human Rights in Corporate Governance of Private Sector Corporations in Kenya

Companies profit immensely from upholding and supporting civil rights. First, respect for human rights increases the credibility and image of the organization. Companies are also upholding their integrity by honoring human rights. The ideals of human rights are generally enshrined in both national and international law. Consequently, with regard for human rights, businesses essentially cooperate with the domestic and international regulatory system to prevent legal threats against their conduct that could be harmful to their image.

Second, the respect of human rights allows businesses to improve their market competitiveness by hiring and maintaining professional workers. Corporations that uphold human rights and workers' rights are expected to see higher efficiency as workers that are equally treated and valued for their integrity are more profitable.

Third, by ensuring the constructive presence and thus retaining and maintaining the authorization for activities, human rights organizations establish friendly relations with the communities they work in. Respect for human rights improves the bond between companies and customers and investors, thereby providing a secure and profitable climate for businesses.¹³⁴

¹³² Williams C. A. and Conley J. M. , *“Is there an Emerging Fiduciary Duty to Consider Human Rights?”* (2005) 74 University of Cincinnati Law Review, 76.

¹³³ Kenya National Commission on Human Rights, *“The Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi”* (2006).

¹³⁴ International Business Leaders Forum, *“Human Rights: It is Your Business: The Case for Corporate Engagement”* (IBLF, 2005).

Violation of corporate human rights is devastating for firms and their companies. It can cause a drop in share value through negative advertising, which adversely impacts the company's name or logo. This will lead to a reduction in income as a result of costly courts and customer boycotts, which would distract from the group. This too would affect the company's competitiveness as it would also negatively affect training and recruiting of staff. Therefore, the value of organizational respect for human rights cannot be exaggerated. Human rights respect is an essential and inherent aspect of responsible business.¹³⁵

As mentioned above, unlike before, the Constitution binds all natural and artificial entities, such as businesses, to protect basic human rights and freedoms as laid out in the Charter of Rights. It offers a good framework for taking care of human rights concerns related to organizations in corporate governance systems and corporate frameworks. These challenges require considering the needs and rights of the corporation's stakeholders. There are obviously no conditions for incorporation or recognition in the activities of the company in the Company Act, which follows the shareholder primacy paradigm. Therefore, it offers no facilitative mechanism for good corporate governance activities aimed at integrating into the corporation's activity, and uphold human dignity, the rights and interests of stakeholders.

Thus, corporate governance cannot sufficiently include frameworks to ensure that businesses are compliant with human rights in private sector organizations in Kenya. In addition, in the absence of the enforcement of the Guidelines, combined with the absence of a robust corporate governance system for non-publicly listed firms, regard for human rights was not completely implemented into corporate governance and, thus, the focus it needs in most co-managements has not been provided.

¹³⁵ International Business Leaders Forum, “*Human Rights: It is Your Business: The Case for Corporate Engagement*” (IBLF, 2005).

4.2.3 Conclusion

While the system of corporate governance in Kenya has acknowledged to an extent the need to protect human rights by acknowledging stakeholders as essential constituents of the organization, the need to integrate human rights issues into corporate governance still remains to be thoroughly understood. The statutory acceptance that businesses are bound by the provisions of the Bill of Rights is a welcome step in ensuring that firms take care of the impacts of their actions on human rights. Much needs to be done to update this though by changing the legislative system for corporate governance so as to streamline it with the obligation to protect corporate human rights provided for in the Constitution.

CHAPTER FIVE: SUMMARY, RECOMMENDATION AND CONCLUSION

5.1 Summary

This research explored the human rights role of private sector firms in Kenya in improving corporate governance. The aim was to investigate infringements of human rights by private sector firms in Kenya and how these infringements impair good corporate governance in Kenya's private sector companies. While a regulatory structure covering human rights security exists in Kenya, there are several cases of abuses of human rights by private sector firms. The aim of these studies was to analyze the structure for the defense of human rights in the private sector of Kenya, the interrelationship between corporate governance of private sector corporations and their respect for human rights and how the respect for human rights can enhance corporate governance of private sector corporations in Kenya.

This research primarily investigated the abuses of human rights by private sector companies in Kenya; evaluated the adequacy of the legislative system regulating protection for human rights by private sector corps in Kenya. The study examined the connection between Kenya's human rights and good corporate governance and made a recommendation.

The research found that private sector firms were not at the frontline of human rights promotion. Instead, by breaching civil rights by their acts and activities, they engaged in undermining human rights principles. They engaged in actions that led to environmental destruction, slave labor, sexism, sexual harassment at work and unsafe working conditions for their employees. Kenya has not properly integrated human rights safeguards into the corporate governance frameworks or processes of private sector businesses, and thus little regard for human rights has been introduced purposefully by private sector corporations.

5.2 Recommendations

Adoption of a Stakeholder Oriented Corporate Governance

Good corporate management should aim at maximizing the contribution of companies and other stakeholders to the broader economy. Consequently, corporate decision-making should consider the rights and interests of all of the corporate stakeholders. This would respect and promote human rights for the company. But Kenya's corporate governance framework is mainly based on shareholders. In other words, it is simply intended to maximize the shareholder value.

Therefore, private industry enterprises must set corporate governance framework to include the effect of the organization on its stakeholders in decision-making. It will require a method to recognize the organization's stakeholders, and especially those who are threatened with the human rights of the firm.

Reform of Corporate Law

The Capital Markets Act sets down rules for the practice of corporate governance. The rules set the principles of sound corporate governance and are aimed at promoting excellent corporate governance in Kenya. The principles have helped to raise awareness of the need of good corporate governance in Kenya. They have contributed to some extent to excellent corporate governance in public businesses in Kenya, thereby making a beneficial contribution to improving good corporate governance in Kenya. Although they acknowledge the role of a company's stakeholders and the necessity that their interests should be taken into consideration in decision-making in companies, the rules do not specifically allow for corporations to respect human rights.

The Companies Act has to be revised in order to codify and clearly define the obligations of management. This improves their impact on Kenya's business leadership. The Law should also make it compulsory to acknowledge the rights and requirements of the company stakeholders for management in their decision-making process. Companies should be incorporated in the Company Act as an obligation to safeguard human rights.

Development of a clear human rights policy by private sector corporations.

The main problem faced by the international and state frameworks of human rights in general is the implementation gap. This particularly applies to duties to corporate human rights. Kenya is not an exception, since the implementation of human rights responsibilities in Kenya remains a difficulty, even if there is a legal context for human rights protection in the nation.

By its Charter of Rights, the Constitution specifically extended civil rights duties to corporations. Companies should have a particular human rights plan, authorized by their board that would lead them in addressing the challenges of human rights that could arise. Human rights law should assure respect for human rights at all levels and organizational activities.

Establishment of effective human rights monitoring mechanisms within private sector corporations.

The company must have adequate systems of human rights monitoring in place to guarantee that the human rights policy of a business is properly executed. One method to accomplish this is to carry out effect evaluations of human rights. This includes identifying and evaluating the current and prospective effect of the corporation on human rights in its operations, goods, services and connections. This evaluation is crucial in allowing the company to identify the actions to be taken to avoid or react to the consequences of human rights.

Corporations should also report and communicate the actions taken to comply with their human rights commitments. The efforts of the company to address the impact of their acts upon human rights should, in other words, be reported externally to guarantee the stakeholders impacted are transparent and accountable.

5.3 Further Research

Further study is also advised to assess the degree to which private sector businesses in Kenya understand and fulfill the human rights responsibilities of companies. This is particularly important for the assessment of the extent of conformity of private sector firms with constitutional human rights obligations.

5.4 Conclusion

The economic drivers of society are private sector businesses. They build jobs and add to the production of income by taxation. However, private sector companies may also have a negative effect on society. Their practices could lead to infringements of employers' workers' rights, people being forced from their lands and environmental destruction. That is, in particular, in the fields of labor rights and ties, customer rights, property and environmental conservation, private sector businesses have an influence on society.

Corporations have been argued to have responsibility for civil rights. Indeed, regard for human rights is an integral part of a responsible organization. Respect for civil rights can not be seen as a burden on companies. In comparison, by upholding human rights, companies maintain and improve their brand and image, expand their client base while consumers are continually pursuing corporations with positive standards, recruit and retain skilled employees and thus decrease staff morale and increase efficiency by minimizing costs relating to civil rights, labor conflicts and lawsuits incurred by worker or neighborhood strikes.

Corporate good governance principles, such as openness, openness, duty, dignity, justice and performance, can also be supported with protection to human rights. This leads to well-managed businesses, which eventually make a meaningful contribution to the general community. Therefore, respect for human rights is imperative to incorporate into private sector business corporate governance structures, which in the end would have a beneficial influence on the nation's economy and growth.

BIBLIOGRAPHY

BOOKS

Addo M, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International: The Hague, 1999).

An-Naim A, *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press 2003).

Bix B, *Jurisprudence: Theory and Context* (4th edn, London: Sweet & Maxwell, 2006).

Cooper J, “Horizontalty: The Application of Human Rights Standards in Private Disputes” in Rosalind English and Phillip Havers (eds), *An Introduction to Human Right and the Common Law* (Oxford – Portland Oregon: Hart Publishing, 2000).

Davies P and Prentice D, *Gower’s Principles of Modern Company Law* (6th edn, Sweet & Maxwell: London 1997).

Freeman M.D.A, *Lloyd’s Introduction to Jurisprudence* (7th edn, London: Sweet & Maxwell, 2001).

Freeman R. E, *Strategic Management: A Stakeholder Approach* (Boston: Pitman Publishing, 1984).

Friedman M, ‘The social responsibility of business is to make profits’ in Steiner and Steiner (eds), *Issues in business and society* (New York: Random House, 1977).

JOURNAL ARTICLES

Aka P, *Corporate Governance in South Africa: Analyzing the Dynamics of Corporate Governance Reforms in the “Rainbow Nation”* (2007) 33 N.C. J. Int’l L. & Com. Reg. 119-292. Berle A, *Corporate Powers as Powers in Trust* (1931) 44 Harvard Law Review.

Blitt R, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance” 48 (1) *Texas International Law Journal*.

Cragg W, “Human Rights and Business Ethics: Fashioning a New Social Contract” (2000) 27 *Journal of Business Ethics*.

Croucher R and Miles L, “Corporate Governance and Employees in South Africa” (2010) 10 (2) *Journal of Corporate Law Studies* 367-389.

Deniz O, “The Importance of Corporate Governance for a Well-Functioning Financial System: Reforming Corporate Governance in Developing Countries.”(2012) 14 *Duq. Bus. L. J.* 219.

Deva S, “Guiding Principles on Business and Human Rights: Implications for Companies” (2012) 9(2) *European Company Law*.

Muswaka L, *Corporate Governance Best Practices Vital for Good Corporate Citizenship: Guidance from King III*” (2013) 3(4) *WJSS* 25-35.

Mwaura K, “Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity In Human Rights Violations” (2011) 7 (No.1) *The Law Society of Kenya Journal*.

REPORTS

Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report 103, 2011).

Report of the Committee on the Financial Aspects of Corporate Governance (Gee, 1992).

Kenya Human Rights Commission, *Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers’ Rights at Del Monte Kenya* (KHRC: Nairobi, 2002).

Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006).

Kenya Human Rights Commission A Comparative Study of the Tea Sector in Kenya: A Case Study of Large Scale Tea Estates (KHRC: Nairobi, 2008).

Kenya Human Rights Commission, “Wilting in Bloom: The Irony of Women Labor Rights in the Cut-flower Sector in Kenya.” (KHRC: Nairobi, 2012).

Private Sector Corporate Governance Trust, Principles for Corporate Governance in Kenya (PSCGT, 1999).

Truth and Reconciliation Commission of South Africa Report, Institutional Hearing: Business and Labour (1998) (Volume Four: Chapter Two) available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>

CONVENTIONS, UN DOCUMENTS AND OTHER INTERNATIONAL INSTRUMENTS

Ruggie J., Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97.

Ruggie J., “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporates Acts,” Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/4/35.

Ruggie J., “Protect, Respect and Remedy: A Framework for Business and Human Rights” Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5.

Ruggie J., “Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework”, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13.

Ruggie J., “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, Report of the Special Representative of the

Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31.

United Nations Global Compact.

United Nations, Universal Declaration of Human Rights (1948).

United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (New York and Geneva, 2011).