



Strathmore University

Law School

**LAW AND WELFARE IN DIGITAL GLOBAL VALUE CHAINS: A CRITICAL
ANALYSIS OF THE IMPLEMENTATION OF ENHANCED DOWNSTREAM
WORKERS' RIGHTS IN KENYA**

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By

[Wangari Kamau Maina]

[146087]

Prepared under the supervision of

[Ms. Janet Macharia]

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Declaration

I, WANGARI KAMAU MAINA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, 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.

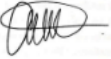
Signed:

Wangari Kamau

Date: 22 April 2025

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

Signed:



Ms. Janet Macharia

Abstract

The rapid rise of technology has transformed the labour market, notably through the creation of digital global value chains. Traditional liability doctrines fail to protect downstream workers due to the absence of a formal employer- employee relationship, as well as limited proximity and control. Consequently, these workers lack the legal protections and reliefs enjoyed by employees in comparable traditional industries. Tort reformists argue that rather than the employment relationship, corporate liability should be attributed based on networks and connections to the harm, which would allow Multinational Companies to bear responsibility for production practices throughout their value chains.

However, in imposing such regulations, it is necessary to account for the complexities introduced by digital markets and the fragmented organisational structure of globalised firms. Given these complexities, this study argues for a sui generis liability framework. State-based interventions in digital markets are often limited due to the dynamic nature of these markets, which creates information asymmetries and regulatory uncertainty, potentially leading to inappropriate regulation, deterring investment and hindering economic growth. Private regulation, driven by industry expertise, can offer more efficient solutions. However, it faces challenges in enforcement and compliance due to firms' profit-driven nature, prioritising self-interest. A public-private regulatory approach thus emerges as the most effective solution by bridging the respective strengths and weaknesses of private and public regulation. This study employs a doctrinal methodology complemented by a comparative analysis of the European Union's Corporate Sustainability Due Diligence Directive to answer the question of how to sufficiently protect downstream digital workers. The discussion proposes the Environment, Social and Governance standards as a potential regulatory model. The voluntary nature of the standards allows for flexible, market-driven solutions whereas the state exercises oversight through monitoring reporting.

List of abbreviations

CoK	Constitution of Kenya
CSDDD	Corporate Sustainability Due Diligence Directive
BPO	Business Process Outsourcing
BPOAK	Business Process Outsourcing Association of Kenya
EU	European Union
ESG	Environment, Social Governance
GRI	Global Reporting Initiative
GVC	Global Value Chain
ILO	International Labour Organisation
ITES	Information and Technology Enabled Services
MNE	Multinational Enterprise
MLSP	Ministry of Labour and Social Protection
MNC	Multinational Corporation
NSE	Nairobi Securities Exchange PLC
OECD	Organization for Economic Cooperation and Development
OSH	Occupational Safety and Health

List of cases

AAA and Others v Unilever PLC and Unilever Tea Kenya (2018) Court of Appeal England and Wales

Caparo Industries Plc v Dickman (1990) United Kingdom House of Lords

Charles Lwanga v Nation Media Group Limited (2023) eKLR

HRH Okpabi v Royal Dutch Shell Plc (2018) Court of Appeal England and Wales

Meta Platforms Inc and Meta Platforms Ireland v Daniel Motaung & 186 others (2024) eKLR

Mugambi and 4 others v Registrar of Trade Unions (2022) eKLR

Palsgraf v Long Island Railroad Company (1928) New York Court of Appeal

Robert Muguro Mungai v Avion Limited (2023) eKLR

Shayona Timber Limited v Donard Obaro Ochieng (2025) KLR

Samasource EPZ Limited t/a Sama v Meta Platforms, Incorporated and 186 others; Kenya Human Rights Commission and 8 others (2024) eKLR

List of legal instruments

Constitution of Kenya, 2010

Companies Act, (Act No.17 of 2015)

Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015

Employment Act, (Act No.11 of 2007)

Employment (General) Rules, 2014

Executive Order No. 2 of 2023

Labour Relations Act, (Act No.14 of 2007)

Labour Institutions Act, (Act No.81 of 2007)

Nairobi Securities Exchange, ESG Disclosures Guidance Manual, 2021

Occupational Safety and Health Act, (Act No.15 of 2007)

Work Injury Benefits Act, (Act No.13 of 2007)

Global reporting initiative standards

GRI 1: Foundation, 2021

GRI 3: Material Topics, 2021

GRI 402: Labor/Management Relations, 2016

GRI 403: Occupational Health and Safety, 2018

GRI 401: Employment, 2016

ILO Instruments

P029 - Protocol of 2014 to the Forced Labour Convention, 1930

ILO Declaration of Fundamental Principles and Right, 1998

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977

C029 - Forced Labour Convention, 1930 (No. 29)

C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

C100 - Equal Remuneration Convention, 1951 (No. 100)

C105 - Abolition of Forced Labour Convention, 1957 (No. 105)

C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

C138 - Minimum Age Convention, 1973 (No. 138)

C155 - Occupational Safety and Health Convention, 1981 (No. 155)

C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)

C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

Legal instruments from other jurisdictions

Corporate Sustainability Due Diligence Directive, 2024

Treaty on the Functioning of the European Union, 1958

CHAPTER 1: INTRODUCTION

1.1 Introduction

Gains in technology and trade liberalization have fundamentally reconfigured modern production. Firms are able to optimize operations by fragmenting processes across multiple jurisdictions, leveraging comparative advantages and resulting in the proliferation of global value chains (GVCs). The future of work vis-à-vis advancements in technology is a perennial concern for workers and regulators. With every new wave of innovation comes the problem of how to manage the impact on labour markets.¹ Digital platforms can be both a driver of sustainable and unsustainable production and consumption.² It is a difficult task to find the right balance between encouraging responsibility while avoiding the destruction of the new opportunities created by the online platforms.³ In their desire to ensure a level playing field, states must avoid cracking down on platforms just because they depart from the traditional model. Gig workers and outsourced workers are positioned at the lower tiers of GVCs-whether in back-end operations or in direct-to-consumer delivery-rendering them structurally peripheral yet economically indispensable. Throughout the discussion, the term downstream worker is used to encompass both gig and outsourced workers as are they are similarly positioned within GVCs, both being at the lower tiers.

1.2 Background

Downstream workers are typically classified as independent contractors, including in Kenya.⁴ This means they are not considered formal employees of the companies they work for and thus lack the protections that are offered to employees under labour law.⁵

¹ David H, 'Why Are There Still So Many Jobs? The History and Future of Workplace Automation', 29 *Journal of Economic Perspectives* 3, 2015, 3-6.

² Bobkov V, Chernykh E, 'Platform Employment: From Unsustainable To Sustainable Development' in Simonova M (eds), *Digital Technologies in the New Socio-Economic Reality*, Springer International Publishing, 2022, 139-147.

³ Buhalis D, Luisa A, and Juergen G, 'The dark side of the sharing economy: Balancing value co-creation and value co-destruction', 37 *Psychology & Marketing* 5, 2020, 689-704.

⁴ Burke A, Zawwar I, and Hussels S, 'Do freelance independent contractors promote entrepreneurship?' 55 *Small Business Economics* 2, 2020, 415-416.

Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 176.

Javits J, Luby M, 'Gig Workers: Walking a Tightrope Without a Safety Net' 1 *Journal of Dispute Resolution* 2, 2022, 27-28.

⁵ Cherry M, Aloisi A, 'Dependent contractors in the gig economy: A comparative approach' 66 *American University of Law Review*, 2016, 635.

The digital economy and platform work pose several threats to human rights that traditional employees are generally protected from under employment law. For example, the right to liveable wages. Traditional employees are protected by minimum wage laws. Downstream workers on the other hand lack minimum wage protections, leading to inconsistent and potentially exploitative wage levels.⁶ Gig workers also frequently face unregulated hours, leading to significant impacts on their physical and mental health.⁷ Additionally, the right to health includes the right to safe working conditions, adequate rest, and protection from burnout.⁸ Traditional employees are protected by regulations that limit working hours and ensure adequate rest periods which is not replicated in platform work.⁹

The right to freedom from discrimination is also impacted by gig work.¹⁰ Gig workers, for example on platforms such as Uber, can be subject to arbitrary bans or deactivation of their accounts without due process. This can be discriminatory, especially if algorithms or rating systems replicate biases, leading to unfair treatment.¹¹ The lack of physical presence of companies in a country can further complicate the resolution of such issues, exacerbating the risk of discrimination.¹² This in turn impacts the right to fair treatment and due process as there often lacks access to effective redress mechanisms such as hearing and appeal processes when they face such issues of unfair treatment, discrimination or arbitrary bans.¹³

Further, traditional employees are also often entitled to social protections such as health insurance, unemployment benefits, and pension plans. Downstream workers typically lack

⁶ Katiyatiya L and Nombulelelo L, 'The Current Social Protection Discourse, Gig Economy within the Advent of COVID-19: Some Emerging Legal Arguments' 66 *Labor History* 1, 2025, 64-76.

⁷ Katiyatiya L and Nombulelelo L, 'The Current Social Protection Discourse, Gig Economy within the Advent of COVID-19: Some Emerging Legal Arguments' 66 *Labor History* 1, 2025, 64-76.

⁸ Ropponen A, Hakanen J, Hasu M and Seppänen L, 'Workers' health, wellbeing, and safety in the digitalizing platform economy' in Poutanen S, Kovalainen A, Rouvinen P (eds), *Digital work and the platform economy*, Routledge, 2019, 56-68.

⁹ Ropponen A, Hakanen J, Hasu M and Seppänen L, 'Workers' health, wellbeing, and safety in the digitalizing platform economy' In *Digital work and the platform economy*, Routledge, 2019, 56-68.

¹⁰ De Stefano V and Aloisi A, 'Fundamental labour rights, platform work and human rights protection of non-standard workers' In *Research handbook on labour, business and human rights law*, Edward Elgar Publishing, 2019, 7-9.

¹¹ Barzilay A, 'The technologies of discrimination: how platforms cultivate gender inequality' 13(2) *The Law & Ethics of Human Rights*, 2019, 185-201.

¹² De Groen W, Kilhoffer Z, Lenaerts K and Mandl I, 'Employment and working conditions of selected types of platform work, Publications Office of the European Union, Luxembourg, 2018, 28.

¹³ De Groen W, Kilhoffer Z, Lenaerts K and Mandl I, 'Employment and working conditions of selected types of platform work, Publications Office of the European Union, Luxembourg, 2018, 28.

Levy K, Barocas S, 'Designing against discrimination in online markets' 32 *Berkeley Technology Law Journal* 3, 2017, 1183-1186.

access to these social protections, leaving them vulnerable to economic shocks and without a safety net.¹⁴ This can significantly impact their economic security and overall well-being.

Liability may apply within an employer-employee relationship, however, in many supply chain scenarios, the Multinational Company (MNC) may not have a direct employment relationship with the workers in question.¹⁵ They may be employed by subcontractors, suppliers, or even in factories owned by other entities which makes it difficult to establish the necessary legal link to hold the MNC directly liable for the actions of these workers.¹⁶

States are often working with limited information vis-à-vis firms, which creates information asymmetry in assessing sector-specific risks and regulatory uncertainty.¹⁷ A co-regulatory approach offers a more efficient means of compelling the internalisation of labour harms by leveraging firms' superior knowledge of their operations while maintaining state oversight to incentivise compliance.¹⁸

1.3 Statement of the problem

The human rights impacts on downstream workers arise because MNCs create a high demand for productive efficiency otherwise unattainable under an ethical operative environment. Imposing labour regulations on GVCs is difficult because there lacks direct employment relationships between downstream workers and MNCs. They do not fit the classical employer-employee relationship, bringing workers beyond the purview of employment protections. The negative production externalities generated are thus not internalized by the companies but instead borne by workers which creates need for regulatory interventions to incentivise internalisation.

¹⁴ Behrendt C, Nguyen Q, Rani U, 'Social protection systems and the future of work: Ensuring social security for digital platform workers' 72(3) *International Social Security Review*, 2019, 17-20.

¹⁵ Allen-ILE C, Olabiyi J, 'A preliminary comparative perspective on the role of multinational enterprises in influencing labour relations of their host nation' 6 *Advances in Social Sciences Research Journal* 12, 2019, 305. Todolí-Signes A, 'The 'gig economy': employee, self-employed or the need for a special employment regulation?' 23 *Transfer: European Review of Labour and Research* 2, 2017, 196.

¹⁶ Allen-ILE C, Olabiyi J, 'A preliminary comparative perspective on the role of multinational enterprises in influencing labour relations of their host nation' 6 *Advances in Social Sciences Research Journal* 12, 2019, 305. Todolí-Signes A, 'The 'gig economy': employee, self-employed or the need for a special employment regulation?' 23 *Transfer: European Review of Labour and Research* 2, 2017, 196.

¹⁷ Chor D, *Handbook on Global Value Chains*, Edward Elgar Publishing, 2019, 105-118.

¹⁸ Gölgeci I, Gligor D, Bayraktar E, Delen D, 'Reimagining global value chains in the face of extreme events and contexts: Recent insights and future research opportunities' 160 *Journal of Business Research*, 2023, 1.

1.4 Hypothesis

A co-regulatory approach is the best way to achieve efficient allocation and avoid overregulation or inappropriate regulation of MNCs as firms are in a better position to determine how much of the externalities they can sustainably absorb and the state creates compliance incentive.

1.5 Research objectives

- 1) To identify the causes of ineffectiveness in attributing liability to MNCs for labour harms
- 2) To explore frameworks for holding MNCs responsible
- 3) To develop a model of regulation that avoids market disruption while addressing the rights of downstream digital workers

1.6 Research questions

- i. What are the specific social responsibilities of MNCs?
- ii. What strategies can be implemented to enhance the rights and protections of downstream workers without disrupting the digital economy?
- iii. How can a corporate governance framework be used to address the challenges faced by downstream workers within the context of MNCs?

1.7 Justification for the study

The classification of workers as employees or independent contractors is a decisive factor of the duties and liability enterprises may face and what rights and protections may be claimed. Classifying workers as independent contractors allows companies to bypass crucial labour standards. Research into a standard for downstream workers' protection is therefore important for the safeguarding and empowerment of workers and to clarify the responsibility of MNCs. It establishes a basis for the advocacy of fair treatment and ensuring the digital economy thrives while upholding basic human rights for all its participants.

1.8 Conceptual frameworks

This study seeks to test the abovementioned hypothesis using the theory of cosmopolitan or global social justice, which argues that moral obligations and principles of justice should apply to all humans, regardless of nationality, ethnicity, or other social divisions.¹⁹ It challenges the idea that justice is solely a matter of national or domestic concern and forms the foundation of universal human rights.²⁰ The duty to ensure fairness in social relations is not confined by national boundaries, rather, justice obligations transcend borders.²¹

1. How do international obligations of justice arise?

In *Perpetual Peace* Kant develops this concept of justice in international relations. He posits that the earth and all its resources are subject to communal ownership with individuals having equal right of enjoyment.²² He then presupposes the Hobbesian condition that peace among men living in proximity is not the natural state. Rather, the natural condition is one of war and open hostilities and peaceful relations may only be established upon lawfulness, which is the *Rechtstaat*.²³ The State emerges as a moral agent with the duty of enforcing mutual tolerance to enable the enjoyment of the common resources of the earth.²⁴ This duty is observed both internally with respect to relations between the citizens of that state and externally with respect to relations with the citizens of other states.²⁵

2. What are the conditions for social justice?

Rawls argues that when the concept of justice is applied to the basic structure of a political and social system, the necessary principles to achieve justice are that: (i) each person participating in it or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all and (ii) inequalities are arbitrary unless it is reasonable to expect that they will work out in the advantage of all.²⁶ For justice in international relations, Rawls states that three

¹⁹ Bailliet C, Franko K, *Cosmopolitan justice and its Discontents*, 1 ed, Routledge, 2011, 1-4.

²⁰ Jones C, 'Human rights and moral cosmopolitanism' in Matravers M and Meyer L (eds), *Democracy, Equality and Justice*, 1ed, Routledge, 2011, 115-136.

²¹ Young I, Responsibility and global justice: A social connection model. 23(1) *Social philosophy and policy*, 2006, 102-130.

²² Immanuel K, *Perpetual Peace*, 3ed, The Macmillan Company, 1795, on 12 January 2024--
<https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>

²³ Immanuel K, *Perpetual Peace*, 3ed, The Macmillan Company, 1795, on 12 January 2024--
<https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>

²⁴ Immanuel K, *Perpetual Peace*, 3ed, The Macmillan Company, 1795, on 12 January 2024--
<https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>

²⁵ Immanuel K, *Perpetual Peace*, 3ed, The Macmillan Company, 1795, on 12 January 2024--
<https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>

²⁶ Rawls J, The Law of Peoples, 20 *Critical inquiry* 1, 1993, 36-68.

main elements must be met: (i) a list of certain basic rights and liberties and opportunities; (ii) a high priority for these fundamental freedoms; and (iii) measures assuring all citizens means to make use of their freedom.²⁷

3. How would such obligations be framed?

Fuller considers that debate upon the morality of law has become confused through a failure to adequately distinguish between moralities of ‘aspiration’ and of ‘duty’.²⁸ Aspiration is a maximum goal whereas duty is a minimum standard. One may aspire to excellence but the standard of duty is the minimum required for viable social order so that failure to achieve it is actually a wrong.²⁹

Roscoe Pound's concept of ‘law as social engineering’ posits that the law should actively work to shape and improve society. In this view, the legal system is not merely a set of rules but a dynamic tool for social progress.³⁰

Richard Posner argues that legal decisions should be pragmatic and based on economic analysis, aiming to promote economic efficiency and societal welfare.³¹

4. Criticisms of global social justice

A core issue for cosmopolitanism is enforcement. Hans Kelsen criticises global organization for a lack of implementation.³² Beitz’ counterargument is that the best way to realize cosmopolitanism justice in a society of states is to allow the respect of state sovereignty to accommodate differentiated state capabilities.³³

1.9 Literature Review

i. The problem of gig work and global value chains

²⁷ Rawls J, The Law of Peoples, 20 *Critical inquiry* 1, 1993, 36-68.

²⁸ Shapira O, *A Theory of Mediators' Ethics Foundations, Rationale, and Application*, 1ed, Cambridge University Press, United Kingdom, 2016, 12-14

²⁹ Shapira O, *A Theory of Mediators' Ethics Foundations, Rationale, and Application*, 1ed, Cambridge University Press, United Kingdom, 2016, 12-14

Nicholson P, ‘The internal morality of law: Fuller and his critics’ 84 *Ethics* 4, 1974, 307-326.

³⁰ Pound R, *Social control through law*, Transaction Publishers, 1997, 2-12.

³¹ Posner R, *The Problematics of Moral and Legal Theory*, Harvard University Press, 2009, 3-17.

Campbell D, ‘Welfare economics for capitalists: The economic consequences of Judge Posner’ 33 *Cardozo Law Review*, 2011, 2233.

³² Kelsen H, ‘Foundations of democracy’ 66 *Ethics*, 1955, 12.

³³ Beitz C, ‘International distributive justice’ in Luper-Foy S (eds) *Problems of international justice*, 1ed, Routledge, 1988, 27.

As Pinosof discusses, the traditional battleground of labour law has been on the classification of workers – who qualifies as an employee with a contract *of* service and who is an independent contractor with a contract *for* service.³⁴ There is a growing recognition that to effectively ensure protection of workers, the legal landscape needs to extend beyond the classic employee-independent contractor binary as such a focus leaves certain workers exposed.

Posner explains that independent contractors can find it tough to break into certain markets, especially when dominated by just a few powerful players.³⁵ This can lead to a situation where the contractor becomes overly reliant on these dominant companies, for better or worse.³⁶ The dependence can also develop over time during a working relationship if the contractor invests heavily in developing specific skills or tools needed solely for that particular client.³⁷

The risks faced by digital workers may be traceable to various factors but can primarily be attributed to the internal mechanisms (or lack thereof) of the platform providers.³⁸ Taylor and Sheppard find that most risks arise at the company level due to systemic issues. Companies often exploit regulatory gaps, which are beyond the control of individual workers, thus leading to a significant power imbalance.³⁹ It is through addressing the systemic issues at the company

³⁴ Pinosof, J, 'A new take on an old problem: employee misclassification in the modern gig-economy', 22 *Technology Law Review* 2, 2016, 341-353.

Pichault, Fand Tui M, 'Autonomy at work in the gig economy: analysing work status, work content and working conditions of independent professionals' 34 *New Technology, Work and Employment* 1, 2019, 59-72.

³⁵ Posner E, 'The economic basis of the independent contractor/employee distinction' University of Chicago Law School, Coase-Sandor Working Paper Series in Law and Economics, Number 909, 2020, 353 --<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1039&context=law_and_economics_wp> on 19 March 2025.

³⁶ Posner E, 'The economic basis of the independent contractor/employee distinction' University of Chicago Law School, Coase-Sandor Working Paper Series in Law and Economics, Number 909, 2020, 353 --<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1039&context=law_and_economics_wp> on 19 March 2025.

³⁷ Posner E, 'The economic basis of the independent contractor/employee distinction' University of Chicago Law School, Coase-Sandor Working Paper Series in Law and Economics, Number 909, 2020, 353 --<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1039&context=law_and_economics_wp> on 19 March 2025.

³⁸ Duggan J, Carbery R, McDonnell A, Sherman U, 'Algorithmic HRM control in the gig economy: The app-worker perspective', *Human Resource Management*, 2023 --<<https://onlinelibrary.wiley.com/doi/10.1002/hrm.22168>> on 19 March 2025.

³⁹ Taylor K, Van Dijk P, Newnam S, Sheppard D, 'Physical and psychological hazards in the gig economy system: A systematic review' 166 *Safety Science*, 2023, --<<https://www.sciencedirect.com/science/article/pii/S0925753523001765>> on 19 March 2025.

level-such as improving wages, stronger welfare policy- that there is potential for more effective risk management and improved outcomes for workers.⁴⁰

ii. *The challenge of regulation- choosing the appropriate regulatory model*

Classical economic theory posits that competitive markets tend toward optimal social welfare, guided by the invisible hand of self-interest. However, this is not true if the market's interests has implications for other parties that are not accounted for.⁴¹ Market failure arises from imperfect competition, imperfect information and externalities. Externalities arise when the costs or benefits of an activity spill over onto third parties, unaccounted for in market transactions.⁴² Downstream workers are not directly involved in the transaction between the platform provider and the consumer. The consumer pays the platform for the service, and the platform provides the service through the workers but they are indirectly affected by the economic activity. Low wages, job insecurity, and unsafe working conditions are negative production externalities because they are not fully reflected in the price paid by the consumer.

This gap stems from the distinction between private and social costs. Firms act on marginal private costs as opposed to social marginal cost.⁴³ The social costs includes both private costs and broader harms incidental to production such as environmental damage or labour exploitation.⁴⁴ When social costs exceed private costs, the market oversupplies the good, leading to a deadweight loss- foregone social welfare caused by transactions that are privately efficient but socially destructive. There is a market failure because the private market is not delivering the welfare-maximizing outcome.⁴⁵

Keech and Munger explain that the challenge of internalizing these costs lies not just in incentive structures, but also in information asymmetries and negotiations.⁴⁶ Negotiations often

⁴⁰ Taylor K, Van Dijk P, Newnam S, Sheppard D, 'Physical and psychological hazards in the gig economy system: A systematic review' 166 *Safety Science*, 2023, --<
<https://www.sciencedirect.com/science/article/pii/S0925753523001765>> on 19 March 2025.

⁴¹ Vilks A, 'The inverse invisible hand and heuristics in managerial decision-making' 17 *Philosophy of Management* 2, 2015, 137-147.

⁴² Islam N, 'Market Failure: Reasons and Its Accomplishments' 5 *International Journal of Economics and Financial Research* 12, 2019, 276-281.

⁴³ Morgan M, Vaishnav P, Dowlatabadi H, 'Rethinking the social cost of carbon dioxide: the standard benefit-cost methodology that is used to calculate marginal costs of environmental regulations should not be used for long-lasting greenhouse gases' 33 *Issues in Science and Technology* 4, 2017, 43-51.

⁴⁴ Sewell E, 'surpluses, transfers, deadweight loss and blueberries' 18 *Journal for Economic Educators* 1, 2018, 1-7.

⁴⁵ Salanie B, *Microeconomics of Market Failures*, 1ed, MIT Press, 2000, 2-9.

Morgan M, Vaishnav P, Dowlatabadi H, 'Rethinking the social cost of carbon dioxide: the standard benefit-cost methodology that is used to calculate marginal costs of environmental regulations should not be used for long-lasting greenhouse gases' 33 *Issues in Science and Technology* 4, 43-51, 2017.

⁴⁶ Keech W, Munger M, 'The anatomy of government failure' 164 *Public choice*, 2015, 25-30.

break down because parties lack perfect knowledge of each other's valuations and stakes.⁴⁷ Thus, government intervention emerges as necessary a corrective mechanism where market solutions fail. Intervention may be through regulation, taxation, or outright prohibition. However, these tools are imperfect, requiring detailed knowledge of supply and demand that governments may lack and inappropriate regulation may worsen outcomes.⁴⁸

The challenge in regulation is that while government regulations can ensure minimum standards and address market failures, they often incur high transaction costs such as to conduct extensive information gathering, complex negotiations with industry, monitoring and enforcement efforts.⁴⁹ Even more pressing is the potential of overregulation or inappropriate regulation, deterring investment.⁵⁰ A collaborative approach, where industry standards are developed by firms can leverage the expertise and knowledge of industry participants, leading to more efficient and tailored solutions.⁵¹ Information cost can be reduced as firms within an industry are better positioned to understand their own operations and the most efficient ways to address issues and this eliminates the need for extensive information gathering by regulatory bodies.⁵²

Ogus discusses the justification for collaborative regulation stating that the appropriateness of self-regulation as a model is based on three conditions: first, that the activity is afflicted by some form of market failure, notably externalities or information asymmetries, secondly, that private law instruments are inadequate or too costly to correct the failure and, thirdly, that self-regulation is a better (cheaper) method of solving the problem than conventional public regulation.⁵³

1.10 Research Methodology

This study will employ qualitative analysis and doctrinal legal research. A desktop study will be conducted, analysing the laws of Kenya as a primary source. Regarding secondary sources,

⁴⁷ Keech W, Munger M, 'The anatomy of government failure' 164 *Public choice*, 2015, 25-30.

⁴⁸ Salanie B, *Microeconomics of Market Failures*, 1ed, MIT Press, 2000, 2-9.

Bartle I, Vass P, 'Self-regulation within the regulatory state: Towards a new regulatory paradigm?' 85 *Public Administration* 4, 2007, 885-905.

⁴⁹ Ogus A, 'Rethinking self-regulation', 15 *Oxford Journal of Legal Studies* 1, 1995, 97-108.

⁵⁰ Cohen M, Sundararajan A, 'Self-regulation and innovation in the peer-to-peer sharing economy.' 82 *University of Chicago Law Review Dialogue*, 2015, 116.

⁵¹ Black J, 'Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory' world' 54 *Current legal problems* 1, 2000, 103-146.

⁵² Ogus A, 'Rethinking self-regulation', 15 *Oxford Journal of Legal Studies* 1, 1995, 97-108.

⁵³ Ogus A, 'Rethinking self-regulation', 15 *Oxford Journal of Legal Studies* 1, 1995, 97-108.

it will conduct a comprehensive review of existing literature on corporate responsibility, labour law and welfare economics to provide a theoretical foundation for the research. To enrich the analysis and offer a grounded model for norm transposition, the study also undertakes a comparative assessment of the European Union's Corporate Sustainability Due Diligence Directive (CSDDD) which is the European Union's (EU) legislative instrument that imposes binding obligations on large companies, including MNCs, to account for adverse human rights and environmental impacts across their value chains.⁵⁴ The EU was chosen for the comparative analysis because it is a progressive and frontier jurisdiction in the integration of sustainability and international human rights concerns into corporate governance frameworks, definitively marking a break from the tradition limiting corporate obligations to shareholder interests.⁵⁵ The CSDDD affirms the universality, indivisibility, and interdependence of human rights, extending corporate responsibility beyond domestic confines to GVCs.⁵⁶ It also adopts an inclusive understanding of employees, covering not only standard employees but also those in non-traditional employment arrangements.⁵⁷

1.11 Limitations

Limited generalizability- Both outsourced workers and gig economy workers fall under the broad banner of downstream workers owing to their position within the supply chain, however some aspects of their experiences may be distinguishable. This could be mitigated by providing detailed descriptions of the context to clearly establish the limitations of generalizations.

1.12 Chapter Breakdown

Chapter one will introduce the study by establishing the challenges presented in establishing MNCs' liability.

Chapter two will develop a framework for the expansion of corporate liability to include downstream labour harms.

⁵⁴ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

⁵⁵ Bartl M, 'Towards the imaginary of collective prosperity in the European Union (EU): reorienting the corporation' 1 *European Law Open* 4, 2022, 957-986.

⁵⁶ Bartl M, 'Towards the imaginary of collective prosperity in the European Union (EU): reorienting the corporation' 1 *European Law Open* 4, 2022, 957-986.

⁵⁷ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

Chapter three will discuss what regulation approaches stand to be implemented ultimately advocating for co-regulation using ESG as a model.

Chapter four will assess the fundamental obligations the state must secure.

Chapter five will present the conclusion and recommendations.

CHAPTER 2: SUPPLY CHAIN LIABILITY IN GLOBAL VALUE CHAINS

Introduction

This chapter examines the legal argument for holding MNCs accountable to workers by exploring the notion of attribution of liability. Corporate accountability for harm within supply chains is typically based on contractual obligation, statutory duty, or civil liability.⁵⁸ In theory, this establishes multiple causes of action through which workers may seek remedies- by invoking breach of contract, violation of statutory protections, or personal injury in tort. However, the availability of these remedies is predicated on how labour relationships are structured and classified. Downstream workers are frequently classified as independent contractors rather than employees, excluding them from the protective scope of labour statutes. In contract, the power asymmetry against MNCs-exacerbated by the absence of collective bargaining rights-hampers workers' ability to negotiate terms and challenge breaches.⁵⁹ To avoid civil liability, MNCs strategically shift liability by using subsidiaries and outsourcing to suppliers who act as independent contractors,⁶⁰ engaging downstream workers under subcontracting rather than direct employment and thus effectively distancing themselves. An example of this is Meta's content moderation model. Meta Platforms Incorporated, the focal firm, is based in California. Meta Platforms Ireland Limited is a subsidiary which manages the firm's EMEA operations.⁶¹ The subsidiary further outsources the process through contracts with local data service companies.⁶² This layering and outsourcing, allows Meta to benefit from the labour performed while shielding itself from direct liability, as the doctrine of corporate separateness-reinforced by contractors' independence-ensures that each entity is legally distinct.⁶³ These outsourcing strategies allow for an accountability gap creating negative externalities as the costs do not disappear but rather are borne by workers and society.

⁵⁸ Ulfbeck V, Ehlers A, 'Tort Law, Corporate Groups and Supply Chain Liability for Workers' Injuries: The Concept of Vicarious Liability' University of Oslo, Faculty of Law Legal Studies Research Paper Series, 31, 2016, 167

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https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2947124_code2440818.pdf?abstractid=2894949&mirid=1&type=2>

⁵⁹ Schömann I, Jagodzinski R, Boni G, 'Transnational collective bargaining: a new component of European industrial relations?' European Trade Union Institute, 2012, 219-221.

⁶⁰ Skinner G, 'Rethinking limited liability of parent corporations for foreign subsidiaries' violations of international human rights law' 72 *Washington and Lee Law Review*, 2015, 1769.

⁶¹ Meta, 'Meta EMEA Headquarters' --< <https://studios.com/meta-emea-hq.html>> on 10 February 2025.

⁶² *Samasource EPZ Limited t/a Sama v Meta Platforms, Incorporated & 186 others; Kenya Human Rights Commission & 8 others* (2024) eKLR.

⁶³ Skinner G, Rethinking limited liability of parent corporations for foreign subsidiaries' violations of international human rights law, 72 *Washington and Lee Law Review*, 2015, 1769.

This chapter examines the evolution of conceptions of responsibility within value chains, arguing that effective demand supplies the necessary connection between actors, providing a basis for the attribution of liability to MNCs.

2.1 Upstreaming liability

Firms' responsibilities are viewed under (i) *downstream liability*- which concerns consumption-related issues regarding the buyer and society at large in how things are used and; (ii) *upstream liability*- which concerns production-related issues.⁶⁴ Upstream operations cover the function of activities from raw material procurement to manufacturing of the final product.⁶⁵ The Nairobi Securities Exchange (NSE) considers the operational boundaries of the firm to encompass the range of entities over which it exercises control and influence thus encompassing entities upstream in its supply chain as well as downstream entities such as distributors and users.⁶⁶

The discussion of upstreaming liability begun with the 'sweatshop' scandals in the 1970s and 1980s.⁶⁷ In this era, corporations increasingly begun establishing worldwide supply chain networks, outsourcing production processed particularly to developing countries where production costs and working standards were low, which drew attention to the issue of exploitation and workers' rights.⁶⁸ What followed was an explosion of news stories depicting gruesome working environments prompting public outcry on concerns such as safety standards, health, overtime hours, low wages and child labour.⁶⁹ At first, the corporations were defensive and reluctant to act. Phillips summarises the ensuing debate into three limbs by which the denial of responsibility was argued: control, connection and knowledge.⁷⁰ MNCs claimed that their suppliers were independent corporations, the connection between the focal firm and its suppliers were arm's length transactions, they could not control the actions of other firms and

⁶⁴ Verstein A, 'Upstream Liability, Entities as Boards, and the Theory of the Firm' 74 *The Business Lawyer* 2, 2019, 313-328.

⁶⁵ Verstein A, 'Upstream Liability, Entities as Boards, and the Theory of the Firm', 74 *The Business Lawyer* 2, 2019, 313-328.

⁶⁶ Nairobi Securities Exchange, *ESG Disclosures Guidance Manual*, 2021, 12.

⁶⁷ Schrempf-Stirling J, Palazzo G, Phillips R, 'Ever expanding responsibilities: Upstream and downstream corporate social responsibility' in Lindgreen A, Maom F, Sen S, Vanhamme J (eds) *Sustainable value chain management*, 1ed, Routledge, 2016, 353-368.

⁶⁸ Merk J, 'Global outsourcing and socialization of labour: the case of Nike' in Van der Pijl K (ed) *Handbook of the International Political Economy of Production*, Edward Elgar Publishing, 2015, 115-125.

⁶⁹ Greenberg J, Knight G, 'Framing sweatshops: Nike, global production, and the American news media' 1 *Communication and Critical Cultural Studies* 2, 2004, 151-175.

⁷⁰ Phillips R, Caldwell C, 'Value Chain Responsibility: A Farewell to Arm's Length', *Business and Societies Review*, 2005, 234-370.

lastly, they claimed that they were unaware of the conditions within the factories.⁷¹ However, as the anti-sweatshop campaign continued and firms faced mounting pressure from civil society and importantly, the public, which exposed them to financial risks, MNCs responded by establishing supply chain management programs, including audit systems, codes of conduct and contractual compliance requirements with suppliers, and thus the notion of upstream responsibility begun taking form.⁷²

The debate on supply chain liability initially revolved around the first-tier suppliers, considering whether MNCs could be obligated to use their business contracts with direct suppliers as a means of enforcing decent working conditions for their workers.⁷³ First tier suppliers are the direct suppliers closest to the end products and thus those closest to the focal firm.⁷⁴ By contrast, more recent debate refers broadly to *stakeholders*, enjoining concern for actors with whom MNCs may not have direct contractual links.⁷⁵ The debate now envelops the whole value chain, even going as far as to argue for a responsibility to contribute to the stability of the geopolitical contexts in which the various steps of value creation occur.⁷⁶

2.1.1 Traditional attribution of liability and the context in Kenya

Traditionally, civil responsibility in tort is assigned to a party if it is proved that there is a direct causal link between the action and harm. Such actions must have been voluntarily and consciously performed, with the exception of strict liability.⁷⁷ This is the liability approach to responsibility.⁷⁸ There are five elements to a claim for negligence: (i) the existence of a legal duty to the plaintiff; (ii) the defendant breached that duty; (iii) the plaintiff was injured; (iv) the

⁷¹ Phillips R, Caldwell C, Value Chain Responsibility: A Farewell to Arm's Length, *Business and societies Review*, 2005, 234-370.

⁷² Schrempf-Stirling J, Palazzo G, Phillips R, 'Ever expanding responsibilities: Upstream and downstream corporate social responsibility' in Lindgreen A, Maom F, Sen S, Vanhamme J (eds) *Sustainable value chain management*, 1ed, Routledge, 2016, 353-368.

⁷³ Schrempf-Stirling J, Palazzo G, Phillips R, 'Ever expanding responsibilities: Upstream and downstream corporate social responsibility' in Lindgreen A, Maom F, Sen S, Vanhamme J (eds) *Sustainable value chain management*, 1ed, Routledge, 2016, 353-368.

⁷⁴ Raj-Reichert G, 'The role of transnational first-tier suppliers in GVC governance' in Ponte S, Gereffi G, Raj-Reichert G (eds) *Handbook on global value chains*, Edward Elgar Publishing, 2016, 354-369.

⁷⁵ Civera C, Freeman R, 'Stakeholder relationships and responsibilities: A new perspective' *Emerging Issues in Management* 1, 2017, 24- 31.

⁷⁶ Civera C, Freeman R, 'Stakeholder relationships and responsibilities: A new perspective' *Emerging Issues in Management* 1, 2017, 24- 31.

⁷⁷ Schrempf-Stirling J, Palazzo G, Phillips R, 'Ever expanding responsibilities: Upstream and downstream corporate social responsibility' in Lindgreen A, Maom F, Sen S, Vanhamme J (eds) *Sustainable value chain management*, 1ed, Routledge, 2016, 353-368.

⁷⁸ Owen D, 'The five elements of negligence' 35 *Hofstra Law Review*, 2006, 1671.

defendant's breach of duty caused the injury and; (v) the injury was foreseeable.⁷⁹ These requirements may thus be summarised as imputing: from (i)-(iii) a condition of *attributability*- a legal obligation and a proximate relationship which creates the basis for the duty of care and; from (iv)-(v) *direct causality*-a connection with the harm. To establish a duty of care, the court applies a three-pronged test: the duty of care must relate to a harm that is reasonably capable of being foreseen; it must concern a "relationship of proximity" or "neighbourhood" between the plaintiff and defendant; and the attachment of liability for harm occurred must be "fair, just and reasonable".⁸⁰

In applying the negligence framework to labour harms, the question of employment status becomes a threshold issue in establishing whether a duty of care arises at all.⁸¹ The question is whether the individual is engaged under a contract of service and thus an employee or under a contract for service and thus an independent contractor.⁸² The law typically presumes a duty of care grounded in the employer–employee relationship, whereas for independent contractors, no such presumption exists meaning the duty must be established separately and is often denied due to lack of proximity or control.⁸³ This question of employment status is both a question of fact and a question of law.⁸⁴ The Employment Act defines an employee tautologically as a person employed for wages or a salary.⁸⁵ Under the Occupational Health and Safety Act, an employee is defined as a person who works under a contract of employment.⁸⁶ Therefore, judicial interpretation plays an essential role in determining what it means to be employed.

The court has employed various tests in determining employment status including: (i) *the control test*- examining whether the firm retains day-to-day control over the workers' activities which would likely result in a negative finding for outsourced workers;⁸⁷ (ii) *the integration test*- examining whether the worker and the activities performed are integrated into the

⁷⁹ *Palsgraf v Long Island Railroad Company* (1928) Court of Appeals New York.

⁸⁰ *Caparo Industries Plc v Dickman* (1990) United Kingdom House of Lords.

⁸¹ Pinsof, J, 'A new take on an old problem: employee misclassification in the modern gig-economy', 22 *Technology Law Review* 2, 2016, 341-353.

⁸² Pinsof, J, 'A new take on an old problem: employee misclassification in the modern gig-economy', 22 *Technology Law Review* 2, 2016, 341-353.

⁸³ Pichault, Fand Tui M, 'Autonomy at work in the gig economy: analysing work status, work content and working conditions of independent professionals' 34 *New Technology, Work and Employment* 1, 2019, 59-72.

⁸⁴ Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 176-180.

⁸⁵ Section 2, *Employment Act* (Act No.11 of 2007).

⁸⁶ Section 2, *Occupational Safety and Health Act* (Act No.15 of 2007).

⁸⁷ *Robert Muguro Mungai v Avion Limited* (2023) eKLR

Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 204-207.

business- when applied to outsourced workers within digital GVCs, outsourced functions are often peripheral to the functions of the firm thus such workers would fail to meet this test,⁸⁸ (iii) *the economic reality test*- examining whether the work is undertaken for their own benefit or on behalf of the other part. A key consideration in this respect is what share the engagement constitutes of the worker's overall economic activities-⁸⁹ for downstream workers, gig platform workers are often engaged on multiple platforms and for outsourced workers they are remunerated by the outsourcing company rather than the MNC firm thus if remuneration is the sole determiner of employment, it may shift the MNC from being the employer.⁹⁰

The case of *Meta Platforms Inc and Meta Platforms Ireland v Daniel Motaung & 186 others* (2024) eKLR is the first of its kind in Kenya as the court was called upon to address labour rights and legal protections particularly for downstream digital workers within the context of digital GVCs and platform-based outsourcing.⁹¹ In the case, former Facebook content moderators are suing Meta and its outsourcing partner Sama for labour rights violations, alleging exploitative working conditions and psychological harm. Proceedings thus far addressed the Kenyan courts' jurisdiction to hear the matter as it concerns a foreign legal person.⁹² Presumably, the case will be instructional in shaping the contours of downstream liability for labour harms.

2.1.2 Modern Tort Law reform

In *AAA and Others v Unilever PLC and Unilever Tea Kenya* the court affirmed that the corporate structure mitigates against the requisite proximity needed to establish liability stating that it would be ludicrous if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries.⁹³

⁸⁸ *Charles Lwanga v Nation Media Group Limited* (2023) eKLR
Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 204-207.

⁸⁹ *Shayona Timber Limited v Donard Obaro Ochieng* (2025) KLR
Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 204-207.

⁹⁰ Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 204-207.

⁹¹ *Meta Platforms Inc and Meta Platforms Ireland v Daniel Motaung & 186 others*.

⁹² *Meta Platforms Inc and Meta Platforms Ireland v Daniel Motaung & 186 others*.

⁹³ *AAA & Others v Unilever PLC and Unilever Tea Kenya* (2018) Court of Appeal England and Wales.
HRH Okpabi v Royal Dutch Shell Plc (2018) Court of Appeal England and Wales.

Tort reformists argue that while a corporation may not have performed a function itself, it remains connected to it through the creation of a system, the firm's network.⁹⁴ Network members may not directly cause harm but may contribute to it and have the potential to mitigate it through their interactions.⁹⁵ Therefore, responsibility ought to stem not from direct actions but from belonging to a network through which members are connected to issues.⁹⁶

The social justice theory of tort argues that tort law fulfils a societal role in addition to securing individual justice.⁹⁷ Modern society is increasingly interwoven and harms are often not caused by isolated individuals. Rather, they are occasioned as a result of systemic structures, how networks are set up.⁹⁸ Therefore, injury may be networked, resulting from the actions of multiple actors, systemic failures, and broader societal forces.⁹⁹ The normative basis of liability is thus shifted from an individual centric approach to a systems approach, focusing on interconnectedness and networks.

Young develops the social connection model of modern corporate responsibility which states that responsibility is based on connection, both direct and indirect, between actors and the harm produced by their activities.¹⁰⁰ Harm is understood to result not from individual action but from the systems created, thus engendering shared responsibility.¹⁰¹ Instead of looking for direct causal relations between actors and harm, social connection assigns responsibility based on connection. Responsibility derives from belonging together in a system of interdependent processes of cooperation through which mutual benefit and the realisation of a common vision is sought.¹⁰²

2.1.3 Revisiting traditional Tort Law

Even employing classic tortious liability, it is possible to arrive at the same conclusion as the reformists through a close reading of factual causation. Factual causation is the *sine qua non* of

⁹⁴ Calnan A, 'Torts as systems' 28 *Southern California Interdisciplinary Law Journal*, 2018, 301.

⁹⁵ Calnan A, 'Torts as systems' 28 *Southern California Interdisciplinary Law Journal*, 2018, 301.

⁹⁶ Schrempf-Stirling J, Palazzo G, Phillips R, 'Ever expanding responsibilities: Upstream and downstream corporate social responsibility' in Lindgreen A, Maom F, Sen S, Vanhamme J (eds) *Sustainable value chain management*, 1ed, Routledge, 2016, 353-368.

⁹⁷ Perry S, 'The moral foundations of tort law' 77 *Iowa Law Review*, 1991, 449.

Rödl F, 'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect' 20 *Indiana Journal of Global Legal Studies* 2, 2013, 1015-1034.

⁹⁸ Calnan A, 'Torts as systems' 28 *Southern California Interdisciplinary Law Journal*, 2018, 301.

⁹⁹ Chamallas M, 'Social Justice Tort Theory' 14 *Journal of Tort Law* 2, 2021, 309-332.

¹⁰⁰ Young I, 'Responsibility and global justice: A social connection model' 23 *Social philosophy and policy* 1, 2006, 102-130.

¹⁰¹ Young I, 'Responsibility and global justice: A social connection model' 23 *Social philosophy and policy* 1, 2006, 102-130.

¹⁰² McKeown M, 'Iris Marion Young's "Social Connection Model" of responsibility: Clarifying the meaning of connection' 49 *Journal of Social Philosophy* 3, 2018, 32.

tortious responsibility as it fulfils the nexus condition. It capsulizes harm through the ‘but-for’ test. The question is posed whether the harm suffered by the claimant would have occurred in any event *but-for* the defendant’s conduct and thus requires that a cause-and-effect relationship to be established between the wrongful act and the asserted harm.¹⁰³ A factual cause is one that is empirically ascertainable and is distinguished from proximate causes which are those that may be eliminated in view of fairness, pragmatism and as a matter of social policy.¹⁰⁴

It is possible that there may be separate causes behind a certain effect and that either cause on its own would have been sufficient to result in the effect, such that neither effect depends upon the other.¹⁰⁵ This means that a weak enforcement of fair labour practices, callous suppliers and a demand by focal firms for high production at the lowest costs possible can all jointly and separately cause the effect of labour violations for low tier workers. The question then becomes which of the causes is the proper subject of legal action.

Attributing causation by mere fact of distance-confined to direct suppliers-is an inadequate conclusion as it does not address the fact that different causes may be equally and separately factually causative. Rather, *strictly* reading into the but-for test the correct inquiry ought to be as to which cause the harm results both when other causes are present and when the other causes are absent, fulfilling the but for condition.¹⁰⁶ Thus, while each cause separately may be a legitimate cause meeting the threshold of the but for test, a dominant cause may be distinguished over other legitimate causes in such a networked situation where multiple causes exist at once. Such distinguishing allows us to both acknowledge that harms may be systemically occasioned within a network and to bridge the nexus argument against remote connections, proving a normative basis in classical tort that facilitates upstream liability.

The condition of effective demand becomes the dominant cause. Without this effective demand, the entire value chain collapses and focus on the bottom line is what motivates the strong compulsion to drive productive efficiency to levels otherwise unattainable under an ethical operative environment. Weak institutional arrangements and the callousness of suppliers emerge as enabling conditions. They may be seen as equally factually causative but the place is carved out for a dominant causative factor, which is the initial demand by the focal firm.

¹⁰³ Beale J, ‘The proximate consequences of an act’ 33 *Harvard Law Review* 5, 1920, 633-658.

¹⁰⁴ Weigand T, ‘The wrongful demise of but for causation’ 41 *Western New England Law Review*, 2019, 75.

¹⁰⁵ Robinson G, ‘Multiple causation in tort law: reflections on the Des cases’ 68 *Virginia Law Review*, 1982, 713-769.

¹⁰⁶ Bavli H, ‘Counterfactual causation’ 51 *Arizona State Law Journal*, 2019, 879.

2.2 Environment, Social and Governance investing

The popular understanding of Environment, Social and Governance (ESG) investing is that it is a tool for investors to assess risks and opportunities.¹⁰⁷ ESG standards are used by investors to evaluate prospective investments and growth opportunities.¹⁰⁸ However, it is much broader and complex. ESG captures the voluntary and mandatory commitments made by businesses to observe international norms, human rights, due diligence and to disclose relevant non-financial information.¹⁰⁹

The social pillar refers to an organisation's ability to identify and manage its business impact on society and those within the organization itself.¹¹⁰ One social criteria is supply chain management which encompasses the creation and delivery of commercial goods, from inception to consumer, involving the sourcing of materials, manufacturing, logistics, and sales.¹¹¹ Every step in this journey, from material extraction to final delivery, has the potential to leave a mark. Recognizing this interconnectedness, responsible businesses scrutinize their supply chains, ensuring sustainable practices and ethical labour conditions are upheld throughout.

In recent years, there has been a growing recognition that companies must not only avoid negative social impacts but also actively contribute to positive change.¹¹² Economic models based on the "laissez faire" concept, letting the market operate without government interference, have demonstrated a clear weakness with respect to public goods, public interest

¹⁰⁷ Miklian J, Katsos J, 'The business of sustainability as a governance tool', in Bull B, Aguilar-Staen M (eds) *Handbook on International Development and the Environment* 1, 2023, 250.

¹⁰⁸ Miklian J, Katsos J, 'The business of sustainability as a governance tool', in Bull B, Aguilar-Staen M (eds) *Handbook on International Development and the Environment* 1, 2023, 250.

¹⁰⁹ Pollman E, 'The making and meaning of ESG', *University of Penn law Institute for Law & Economic Research Paper*, 2022, 404-434.

¹¹⁰ Chen L, Zhang L, Huang J, Xiao H, 'Social responsibility portfolio optimization incorporating ESG criteria', *6 Journal of Management Science and Engineering* 1, 2021, 75-85.

¹¹¹ Lund-Thomsen P, and Lindgreen A, 'Corporate social responsibility in global value chains: where are we now and where are we going?' *123 Journal of Business Ethics*, 2014, 11-22.

Gregor D, Halbritter G, Nguyen M, 'Measuring the level and risk of corporate responsibility—an empirical comparison of different esg rating approaches', *16 Journal of Asset Management*, 2015, 450-466.

Knorringer P, 'value chain responsibility in the Global South' in Mansoob S, Goulart P, Serino L *South-South Globalization*, Routledge, 2011, 228.

¹¹² Giese G, Lee L, Melas D, Nishikawa L, 'Foundations of ESG investing: How ESG affects equity valuation, risk, and performance' *45 The Journal of Portfolio Management* 5, 2019, 69-83.

and sustainability.¹¹³ Capitalism often prioritizes short-term profits which can lead to the promotion of practices that are harmful to the environment and society.¹¹⁴

As a consequence of this scrutiny, MNCs are now increasingly disclosing their performance concerning individual and collective labour rights and are more responsive to allegations of violations.¹¹⁵

2.2.1 ESG in Kenya

The legal and regulatory framework around ESG compliance in Kenya is still in its nascent stages. In 2021 the NSE issued its ESG Disclosure Manual (the Manual) which provides guidance on how listed companies in Kenya and other interested organisations can navigate ESG reporting in accordance with international standards.¹¹⁶ The Kenya Companies Act requires company directors to review environmental, social and community issues that may affect the future development, performance, and position of the company.¹¹⁷ Therefore, reporting on corporate sustainability performance is a fiduciary responsibility owed to stakeholders. Further, the 2015 Code of Corporate Governance Practices for Issuers of Securities to the Public, requires companies to put in place ESG frameworks and proposes public disclosure of ESG performance in annual reports.¹¹⁸

2.2.2 ESG in Kenya and upstream liability

The manual recommends the Global Reporting Initiative (GRI) standards as the framework for ESG reporting in Kenya, which are the most widely adopted standards for sustainability impacts.¹¹⁹ Listed companies are required to report publicly on their ESG performance annually.¹²⁰

The NSE manual defines ‘boundary’ as the entities whose performance is ought to be represented by the ESG disclosures report, for example subsidiaries, joint ventures and subcontractors.¹²¹ In setting the boundary, an organisation must consider the range of entities

¹¹³ Alamad S, ‘production and the public goods problem in capitalism’ in *Beyond Profit: The Humanisation of Economics Through the Theory of Equitable Optimality*, Springer Nature Switzerland, 2024, 41-54.

¹¹⁴ Barton D, Wiseman M, ‘Focusing capital on the long term’ 92 *Harvard Business Review* 1/2, 2014, 44-51.

Levi-Faur D, ‘Regulatory capitalism and the reassertion of the public interest’ 27 *Policy and Society* 3, 2009, 181-191.

¹¹⁵ Cherkasova V, Nenuzhenko I, ‘Investment in ESG projects and corporate performance of multinational companies’, 37 *Journal of Economic Integration* 1, 2022, 73-86.

¹¹⁶ Nairobi Stock Exchange, *Disclosures Guidance Manual*, 2021, 8.

¹¹⁷ Section 655, *The Companies Act* (Act No.17 of 2015).

¹¹⁸ The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015.

¹¹⁹ Nairobi Stock Exchange, *Disclosures Guidance Manual*, November 2021, 8.

¹²⁰ Nairobi Stock Exchange, *Disclosures Guidance Manual*, November 2021, 8.

¹²¹ Nairobi Stock Exchange, *Disclosures Guidance Manual*, November 2021, 8.

over which it exercises control, the organisational boundary, and over which it exercises influence, the operational boundary.¹²² In assessing influence, the organisation will need to consider its ability to influence entities upstream such as in its supply chain as well as entities downstream such as distributors and users of its products and services.¹²³ The boundary may also vary based on the specific type of information being reported.¹²⁴ For companies engaged in the commercial and services sector, the GRI mandates reporting on inter alia supply chain performance and human rights which include labour and working conditions and occupational health and safety.¹²⁵ The NSE and the GRI thus envision a duty well beyond direct relationships with the focal firm, by considering that impacts may involve the organisations either through their own activities or as a result of their business relationships with other entities in the supply chain.¹²⁶ Therefore, the NSE appears to recognise the network nature of harms and enjoins firms in the liability for harms suffered elsewhere within the value chain.

The ESG problem primarily stems from: its voluntary nature-it is not currently a mandatory requirement for most companies, and a lack of standardization as ESG metrics can vary widely across industries and regions, making it difficult to compare the performance of different companies. Some companies may also engage in "greenwashing," exaggerating their ESG efforts or making misleading claims to improve their public image.¹²⁷

It has been proposed that one avenue of addressing these concerns is the imposition of a disclosure requirement by a regulator, such as the financial markets regulator, mandating disclosure of information on companies' ESG performance.¹²⁸ An alternative approach is the introduction of specific legislation setting out the minimum standards.¹²⁹ In the next chapter, this work proposes the former as the best mode of implementation, which is a co-regulatory

¹²² Nairobi Stock Exchange, *Disclosures Guidance Manual*, November 2021, 8-10.

¹²³ Nairobi Stock Exchange, *Disclosures Guidance Manual*, November 2021, 8. Global Reporting Initiative, *GRI 1: Foundation*, 2021.

¹²⁴ Nairobi Stock Exchange, *Disclosures Guidance Manual*, November 2021, 8. Global Reporting Initiative, *GRI 3: Material Topics*, 2021.

¹²⁵ Global Reporting Initiative, *GRI 402: Labor/Management Relations*, 2016.

Global Reporting Initiative, *GRI 403: Occupational Health and Safety*, 2018.

¹²⁶ Global Reporting Initiative, *GRI 401: Employment*, 2016.

¹²⁷ Cort T, Esty D 'ESG standards: Looming challenges and pathways forward' 33 *Organization & Environment* 4, 2020, 491-510.

¹²⁸ El-Hage J, 'Fixing ESG: Are Mandatory ESG Disclosures the Solution to Misleading ESG Ratings?' 26 *Fordham Journal of Corporate and Financial Law*, 2021, 359.

Mariani S, 'Environmental, Social, and Governance (ESG) matters: Can the SEC mandate disclosure? Should the SEC mandate disclosure?' 37 *Notre Dame Journal of Law and Ethics*, 2023, 369.

¹²⁹ Bernstein S, Cashore B, 'Can non-state global governance be legitimate? An analytical framework' 1 *Regulation and governance* 4, 2007, 347-371.

approach, entailing oversight by a regulatory agent as opposed to specific rule setting by a legislator or through courts.

2.3 Norm convergence with the Corporate Sustainability Due Diligence Directive framework on upstreaming multinational firms' liability

This chapter argues that the attribution of liability to MNCs for labour harms in GVCs should be based not in direct control or formal employment ties but rather on their economic influence and effective demand, which create the conditions under which connect the firms to such harms. This notion that legal responsibility for adverse labour outcomes in GVCs may arise absent direct causation finds a parallel in the CSDDD. The Directive applies to large EU and non-EU companies with a net turnover exceeding EUR 450 million, including parent companies.¹³⁰ Turnover serves as a proxy for effective demand, reflecting the extent to which a company's activities generate economic impact within the internal market and thus justifying the imposition of public interest obligations.¹³¹ The directive imposes firm responsibility across the full scope of corporate activity, from the firm's own operations, subsidiaries, and supply chains in recognition that adverse impacts often emerge beyond a company's direct legal borders.¹³² This affirms the networked nature of harms. The Directive it imposes a duty of human rights due diligence. The core elements of this duty are identifying and addressing potential and actual adverse human rights and environmental impacts in the company's own operations, their subsidiaries and where related to their value chains, those of their business partners.¹³³

The Directive recognises that adverse impacts may be caused by the firm, jointly caused with business partners, or the firm may be directly linked through its operations, and it obliges firms to act based on their capacity to influence partners, even in the absence of formal control.¹³⁴ Companies are expected to carry out an in-depth assessment of their own operations, their subsidiaries and their business partners in the areas where adverse impacts have been identified to be most likely to occur.¹³⁵ The duty requires companies to identify, prioritise, and mitigate potential and actual harms in their upstream and downstream chains of activities, covering human rights and environmental impacts generated.¹³⁶ This expansive scope of application

¹³⁰ Article 2, *Corporate Sustainability Due Diligence Directive*, 2024.

¹³¹ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

¹³² Article 2-3, *Corporate Sustainability Due Diligence Directive*, 2024.

¹³³ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

¹³⁴ Article 10, *Corporate Sustainability Due Diligence Directive*, 2024.

¹³⁵ Article 10, *Corporate Sustainability Due Diligence Directive*, 2024.

¹³⁶ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

affirms the core argument advanced in the chapter, that liability for labour harms must follow a company's material economic footprint and capacity to influence outcomes across GVCs, rather than being limited to formal legal or operational control.

Conclusion

This chapter has traced the shifting terrain of responsibility in GVCs, exposing how corporate legal architecture enables multinational firms to benefit from labour while distancing themselves from its consequences. By reframing liability through the lens of effective demand and the networked nature of harm, it argues for a more expansive understanding of responsibility that reflects the economic realities of modern production.

CHAPTER 3: REGULATION OF GLOBAL VALUE CHAINS, PRIVATE REGULATION AND ESG COMPLIANCE

Introduction

As the previous chapters discuss, the complexities of GVCs—blurred firm boundaries, corporate shields, outsourcing, information asymmetry and regulatory uncertainty—challenge traditional approaches to liability and this necessitates exploring other avenues of regulation.

In recent decades, a core component of reform in the public sector has been the privatisation of governance,¹³⁷ involving reliance on non-state actors such as firms in the formulation of rules and standards, monitoring and enforcement.¹³⁸ This chapter argues that the complexity and scale of GVCs limits the effectiveness of state interventions and creates a need for private governance. States lack the resources and expertise to comprehensively monitor GVCs.¹³⁹ On the other hand, industry players possess technical expertise, detailed operational data and closer insight into future trends and impacts.¹⁴⁰ Private governance may thus play an important role in filling regulatory gaps and aiding public policy implementation.¹⁴¹

Examples of private regulation mechanisms include fair trade certifications, sustainable sourcing standards and ethical codes of conduct.¹⁴² Establishing safeguards or minimum requirements in material areas spurs the trickle of positive externalities along value chains.¹⁴³

¹³⁷ Ilcan S, 'Privatizing responsibility: Public sector reform under neoliberal government' 46 *Canadian Review of Sociology* 3, 2009, 207-234.

¹³⁸ Guy P, 'The two futures of governing: decentering and recentering processes in governing' Reihe Politikwissenschaft, Wien, Political Science Series, Number 114, 2008, 1 -- <https://www.ssoar.info/ssoar/bitstream/handle/document/24572/ssoar-2008-peters-the-two-futures-of-governing.pdf?sequence=1&isAllowed=y> on 25 March 2025.

¹³⁹ Gereffi G, Lee J, 'Economic and social upgrading in global value chains and industrial clusters: Why governance matters' 133 *Journal of business ethics* 1, 2016, 25-38.

¹⁴⁰ Mayer F, Gereffi G, 'Regulation and economic globalization: Prospects and limits of private governance' 12 *Business and Politics* 3, 2010, 1-25.

Samans R, Nelson J, 'Corporate reporting and accountability' in Samans R and Nelson J (eds) *Sustainable Enterprise Value Creation: Implementing Stakeholder Capitalism through Full ESG Integration*, Springer International Publishing, 2022, 187-218.

¹⁴¹ Guy P, 'The two futures of governing: decentering and recentering processes in governing' Reihe Politikwissenschaft, Wien, Political Science Series, Number 114, 2008, 1 -- <https://www.ssoar.info/ssoar/bitstream/handle/document/24572/ssoar-2008-peters-the-two-futures-of-governing.pdf?sequence=1&isAllowed=y> on 25 March 2025.

¹⁴² Melbye J, 'CSR: Bridging business and development for sustainability: a case study of CSR implementation at coffee houses as enabler for sustainable development and livelihood among small-scale producers' Published Master's thesis, University of Agder, Norway, 2010, 20.

¹⁴³ Bartley T, 'Institutional emergence in an era of globalization: The rise of transnational private regulation of labour and environmental conditions' 113 *American journal of sociology* 2, 2007, -351.

For example, implementing fair wages enables lower-tier players to capture a more equitable share of the profits.¹⁴⁴

However, the attendant limitation is that not all governance functions can or ought to be fulfilled through non-state actors.¹⁴⁵ The challenge for authorities is the governance of governance-providing direction on institutional practices, while still maintaining the benefits of decentred government.¹⁴⁶ This chapter advocates for ESG as a model of private regulation because it offers a flexible, market-driven approach allowing companies to adapt and innovate while still addressing key public policy concerns. The proper role of the state is envisioned in two tiers: (i) as a co-regulator, coordinating private governance activities and promoting progressive adaptation of responsible practices and; (ii) engaging its coercive machinery to safeguard fundamental labour rights.

3.1 The role of private industry in developing legal standards

State agencies may involve private stakeholders typically via public consultations, stakeholder bodies and representation in management boards.¹⁴⁷ Stakeholder participation engages firms, industry associations, NGOs or trade unions.¹⁴⁸

The complexity of GVCs means that outcomes and optimal solutions are not readily apparent which creates significant uncertainty.¹⁴⁹ Problem solving on this front requires joint action between state and nonstate actors to balance the attainment of business objectives vis-a-vis public policy goals.¹⁵⁰ A rule implemented in one part of the chain can have unintended

¹⁴⁴ Bartley T, 'Institutional emergence in an era of globalization: The rise of transnational private regulation of labour and environmental conditions' 113 *American journal of sociology* 2, 2007, -351.

¹⁴⁵ Guy P, 'The two futures of governing: decentering and recentering processes in governing' Reihe Politikwissenschaft, Wien, Political Science Series, Number 114, 2008, 1 -- https://www.ssoar.info/ssoar/bitstream/handle/document/24572/ssoar-2008-peters-the_two_futures_of_governing.pdf?sequence=1&isAllowed=y on 25 March 2025.

¹⁴⁶ Guy P, 'The two futures of governing: decentering and recentering processes in governing' Reihe Politikwissenschaft, Wien, Political Science Series, Number 114, 2008, 1 -- https://www.ssoar.info/ssoar/bitstream/handle/document/24572/ssoar-2008-peters-the_two_futures_of_governing.pdf?sequence=1&isAllowed=y on 25 March 2025.

¹⁴⁷ Arras S, Braun C, 'Stakeholders wanted! Why and how European Union agencies involve non-state stakeholders' 25 *Journal of European Public Policy* 9, 2017, 1257.

¹⁴⁸ Parviainen T, Lehikoinen A, Kuikka S, 'How can stakeholders promote environmental and social responsibility in the shipping industry?' 17 *WMU Journal of Maritime Affairs*, 2018, 49.

¹⁴⁹ Chor D, *Handbook on Global Value Chains*, Edward Elgar Publishing, 2019, 105-118.

¹⁵⁰ Gölgeci I, Gligor D, Bayraktar E, Delen D, 'Reimagining global value chains in the face of extreme events and contexts: Recent insights and future research opportunities' 160 *Journal of Business Research*, 2023, 1.

consequences in other parts as a ripple effect.¹⁵¹ A state-led approach to standard setting runs into significant challenge because the state cannot unilaterally develop specific and binding rules without an accurate view of the externalities that the firm would be able to internalize without detrimental impact to long-term profitability.¹⁵² Such an approach fails because it does not account for the uncertainty of the policy environment.¹⁵³ This is why a collaborative and flexible approach proves to be more efficacious.

The ESG model affords the flexibilities necessary for learning as key modalities include experimentation- corporate innovation,¹⁵⁴ coordinated stocktaking- progress tracking and assessment of performance,¹⁵⁵ and peer review processes- engagement with stakeholders and industry players.¹⁵⁶ This aids in identifying and expanding the reach and impact of the most promising approaches as proven strategies can then be adopted more broadly within firms, supply chains or across the industry.¹⁵⁷

The non-binding nature of ESG allows for experimentation, learning, and adaptation as we grapple with the complex challenges of measuring, managing, and mitigating externalities in digital GVCs.¹⁵⁸ Prematurely imposing rigid, binding regulations could stifle innovation and lead to other unintended negative consequences.¹⁵⁹ The non-binding nature of ESG allows companies to experiment with different approaches which fosters innovation and the

¹⁵¹ Ponte S, Sturgeon T, 'Explaining governance in global value chains: A modular theory-building effort' In Nailson J, Pritchard B, Yeung H (eds) *Global Value Chains and Global Production Networks*, Routledge, 2017, 195-223.

¹⁵² Suder G, Meng B, Yuning G, 'Critical perspectives on GVC theory: uncovering GVC resilience through non-lead power' 20 *Critical Perspectives on International Business*, 2024, 489.

¹⁵³ Gao C, McDonald R, 'Shaping nascent industries: innovation strategy and regulatory uncertainty in personal genomics' 67 *Administrative Science Quarterly* 4, 2022, 915-967.

Raskolnikov A, Baker S, 'Harmful, harmless and beneficial uncertainty in law' 46 *Journal of Legal Studies*, 2017, 281, 284-287.

Chor D, *Handbook on Global Value Chains*, Edward Elgar Publishing, 2019, 105-118.

Kano L, 'Global value chain governance: A relational perspective' 49 *Journal of International Business Studies* 6, 2018, 684-705.

¹⁵⁴ Li C, Ba Shusing, Ma Kejia, 'ESG rating events, financial investment behavior and corporate innovation' 77 *Economic Analysis and Policy*, 2023, 372.

¹⁵⁵ Bose S, 'Evolution of ESG reporting frameworks' in Esty D, Cort T (eds) *Values at Work Sustainable Investing and ESG Reporting*, 1ed, Palgrave Macmillan, Cham, 2020, 13.

¹⁵⁶ Gao J, Hua G, Huo B, 'Green finance policies, financing constraints and corporate ESG performance: insights from supply chain management' *Operations Management Research*, 2024, 1-15.

¹⁵⁷ Kano L, 'Global value chain governance: A relational perspective' 49 *Journal of International Business Studies* 6, 2018, 684-705.

¹⁵⁸ Song Y, 'Sustainability reporting in Singapore: setting the boundaries for what is "material"' 39 *Singapore Law Review*, 2021, 58.

¹⁵⁹ Suder G, Meng B, Yuning G, 'Critical perspectives on GVC theory: uncovering GVC resilience through non-lead power' 20 *Critical Perspectives on International Business*, 2024, 489.

development of best practices as companies can try different supply chain management practices without the fear of legal repercussions for every misstep.¹⁶⁰

Long-term, such an approach may lay the foundation for the development of binding standards through ‘argumentative self-entrapment’ whereby having acknowledge certain actors, stakes, and rules, firms cannot subsequently reject them at will.¹⁶¹ For example, if only 10% of firms currently disclose on a certain topic, expanding this to 100% could be perceived as unjustifiable. However, if 90% of firms have already opted in, mandated disclosure becomes significantly more tenable.¹⁶² This behavioural consistency then contributes to the institutionalization of norms and incremental standard setting.¹⁶³

Further support for a flexible market-led approach is gleaned from considering the diversity of industries, business models, and geographical contexts in which firms operate.¹⁶⁴ Divergent operational realities mean that a "one-size-fits-all" regulatory approach would be ineffective as different circumstances would call for different measures.¹⁶⁵ A more flexible, voluntary approach thus allows for tailored solutions.

3.2 How voluntary standards may be enforced

Having discussed the suitability of private governance for GVCs, the question then becomes how to create an environment that incentivises the internalization of externalities as this creates costs for the firm.¹⁶⁶ A common criticism of the ESG framework is indeed that there lacks sufficiently strong incentives for firms to act.¹⁶⁷

¹⁶⁰ Song Y, ‘Sustainability reporting in Singapore: setting the boundaries for what is" material’ 39 *Singapore Law Review*, 2021, 58.

Suder G, Meng B, Yuning G, ‘Critical perspectives on GVC theory: uncovering GVC resilience through non-lead power’ 20 *Critical Perspectives on International Business*, 2024, 489.

¹⁶¹ Scherer A, Palazzo G, Baumann D, ‘Global rules and private actors: Toward a new role of the transnational corporation in global governance’ 16 *Business Ethics Quarterly* 4, 2006, 505-532.

¹⁶² Lee J, Serafin A, Corbeau C, ‘Corporate disclosure, ESG and green fintech in the energy industry’ 16 *Journal of World Energy Law and Business* 6, 2023, 482.

¹⁶³ Scherer A, Palazzo G, Baumann D, ‘Global rules and private actors: Toward a new role of the transnational corporation in global governance’ 16 *Business Ethics Quarterly* 4, 2006, 505-532.

¹⁶⁴ Raza H, Zada H, ‘Navigating the ESG landscape: Corporate strategies and sectoral trends in the S&P 500’ 15 *The Business and Management Review* 2, 2024, 20-22

¹⁶⁵ Murphy D and McGrath, D, ‘ESG reporting—class actions, deterrence, and avoidance’ 4 *Sustainability Accounting, Management and Policy Journal* 2, 2013, 216-235.

¹⁶⁶ Sheehan N, Vaidyanathan G, Fox K, Klassen M, ‘Making the invisible, visible: Overcoming barriers to ESG performance with an ESG mindset’ 66 *Business Horizons* 2, 2023, 265-276.

¹⁶⁷ Samans R, Nelson J ‘Corporate reporting and accountability’ in Samans R and Nelson J (eds) *Sustainable Enterprise Value Creation: Implementing Stakeholder Capitalism through Full ESG Integration* Springer International Publishing, 2022, 187-218.

A distinction may be drawn between instances where ESG compliance: (i) creates benefits outweighing the costs; (ii) imposes a negative cost on the firm or; (iii) the effects are more complex or beyond the ambit of established approaches. The first instance is easier to navigate. Viewing firms as rational economic agents, a choice is made only if it results in a pay-off or in avoidance of a negative outcome,¹⁶⁸ for example reduced litigation risk, improved brand reputation and increased employee engagement.¹⁶⁹ Where ESG compliance generates a positive externality for the focal firm, such as in markets where the ethical attributes of products matter to consumers, firms may be more inclined to comply owing to the profit incentive created.¹⁷⁰

Where compliance imposes a negative cost on the firm, the conventional approach in ESG literature places reliance on political consumerism. Political consumerism is the harnessing of consumer choice of producers and products with the goal of changing objectionable institutional or market practices, based on attitudes and values such as social justice, fairness, and ethical assessments of unfavourable business practices.¹⁷¹ This approach is constrained in markets lacking such a politically conscious consumer base.¹⁷² The Kenyan market is characterised by this relative absence of activist consumerism and the significant portion of MNC activity is focused on Business-to-Business transactions, which also constrains the ability of consumers to check the market.¹⁷³

In such cases where political consumerism fails, state action may serve as the incentive for compliance through the threat of legal sanctions such as penalties.¹⁷⁴ The Organization for Economic Co-operation and Development (OECD) suggests that regulators may instead prefer

¹⁶⁸ Murphy D, McGrath D, 'ESG reporting—class actions, deterrence, and avoidance. *Sustainability Accounting, Management and Policy Journal* 2, 2013, 216-235.

¹⁶⁹ Zumente I, Bistrova J, 'ESG importance for long-term shareholder value creation: Literature vs. Practice' 7 *Journal of Open Innovation: Technology, Market, and Complexity* 2, 2021, 127.

¹⁷⁰ Mayer F, Gereffi G, 'Regulation and economic globalization: Prospects and limits of private governance' 12 *Business and Politics* 3, 2010, 1-25.

Gereffi G, Lee J, 'Economic and social upgrading in global value chains and industrial clusters: Why governance matters' 133 *Journal of business ethics* 1, 2016, 25-38.

¹⁷¹ Boufounou P, Moustairas L., Toudas K, Malesios C, 'ESGs and customer choice: Some empirical evidence' 3 *Circular Economy and Sustainability* 4, 2023, 1841-1874.

¹⁷² Boufounou P, Moustairas L., Toudas K, Malesios C, 'ESGs and customer choice: Some empirical evidence' 3 *Circular Economy and Sustainability* 4, 2023, 1841-1874.

¹⁷³ Wanjiku A, 'Multinational Corporations in Kenya and application of the bottom of the pyramid proposition' Published Masters Thesis, University of Nairobi, Nairobi, 2012, v.

¹⁷⁴ Sabel C, O'Rourke D, Fung A, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace' Columbia Law and Economic Working Paper, 2000, 185.

Murphy D, McGrath D, 'ESG reporting—class actions, deterrence, and avoidance' 4 *Sustainability Accounting, Management and Policy Journal* 2, 2013, 216-235.

to mandate and enforce specific corporate governance standards.¹⁷⁵ However, an important limitation is the uncertainty of business impacts.¹⁷⁶ The state therefore ought to reserve the exercise of its powers for topics deemed to be of utmost importance. The difficulty that emerges is where the cost of ESG compliance exceeds the potential regulatory penalty costs a rational, but amoral, corporation may choose to breach and risk the penalty.¹⁷⁷

In the third case where the effects of compliance are more complex or beyond the ambit of established approaches, a ‘comply or explain’ model may be adopted. It permits deviation from industry standards where a strong rationale is provided to justify deviations from rules which is then verified by market stakeholders, such as regulators.¹⁷⁸ The effect of this approach is upholding best practices while also promoting flexibility by allowing customization to address the unique needs of individual firms.¹⁷⁹

3.3 What drives regulatory standards- Labor-focused priorities in Kenya’s Business Process Outsourcing and Information Technology Enabled Services sector

The BPO sector and ITES, BPO/ITES, has been identified as a priority area for national development in Kenya as it is a significant source of employment and a key driver of the economy. BPO refers to the outsourcing of functions within a larger production process where workers are engaged as outsourced providers rather than direct employees of the core company. ITES is derived from BPO and refers to the outsourcing of business processes that rely heavily on information technology, speaking to Kenya’s goal of emerging as a hub for digital services on the continent. BPO is identified as a priority within vision 2030’s economic pillar, which envisions Kenya as a BPO Destination creating a contribution of Kshs.10 billion to the national GDP.¹⁸⁰ The BPO/IITES nexus stems from the digital economy goals, seeking to enhance

¹⁷⁵ Organization for Economic Co-operation and Development, Public Consultation on Draft Revisions to the G20/OECD Principles of Corporate Governance, September 2022, 10.

¹⁷⁶ Bilyay-Erdogan S, Danisman G, Demir E, ‘ESG performance and investment efficiency: The impact of information asymmetry’ 91 *Journal of International Financial Markets, Institutions and Money*, 2024, 2.

¹⁷⁷ Murphy D, McGrath, D, ‘ESG reporting—class actions, deterrence, and avoidance’ 4 *Sustainability Accounting, Management and Policy Journal* 2, 2013, 216-235.

¹⁷⁸ Lee J, Serafin A, Corteau C, ‘Corporate disclosure, ESG and green fintech in the energy industry’ 16 *Journal of World Energy Law and Business* 6, 2023, 481-484.

¹⁷⁹ Stocker F, Zanini M, Reis I, ‘The role of multi-stakeholders in market orientation and sustainable performance’ 39 *Marketing Intelligence & Planning* 8, 2021, 1091-1103.

Lee J, Serafin A, Corteau C, ‘Corporate disclosure, ESG and green fintech in the energy industry’ 16 *Journal of World Energy Law and Business* 6, 2023, 481-484.

¹⁸⁰ Vision 2030, ‘Marketing Kenya as BPO destination --<https://vision2030.go.ke/project/marketing-kenya-as-a-bpo-destination/> on 10 February 2025.

Kenya's participation in digital markets.¹⁸¹ Two of the five pillars of the digital economy are Digital Skills- the growth of a skilled workforce; and Digital Innovation and Entrepreneurship- putting in place measures that support and promote innovation, job creation and development of the digital economy.¹⁸²

The BPO sector is managed by various public and private entities. Executive Order No. 2 of 2023 vests in the Ministry of Labour and Social Protection (MSLP) the mandate of formulating policies, strategies, and regulations for labour, employment and skills development. In addition, the Business Process Outsourcing Association of Kenya (BPOAK) is established to represent the domestic and international private sector.¹⁸³

The MSLP identifies several critical issues that need to be addressed regarding BPO/ITES workers, *inter alia*:

- i. Gig workers are not included in the Employment Act;
- ii. Weak adherence to labour laws;
- iii. Decent work deficits¹⁸⁴

The MSLP also identifies issues specifically stemming from the nature of digital platforms:

- i. The use of algorithms may expose workers to unfair practices and job outcomes;
- ii. Risk of agreements between companies to fix wages or other terms relating to platform work that should be subject to competition;
- iii. Failure of companies to disclose financial details of platform work;
- iv. Deprivation of rights that workers are entitled to under other laws;
- v. Low bargaining power and non-negotiable contracts;
- vi. Low earnings and wages below competitive rates;
- vii. Non-contribution to social security¹⁸⁵

The key action points established are to:

- i. Develop minimum standards for labour in the platform economy;

¹⁸¹ Ministry of Information, Communications and the Digital Economy, *Digital skills --* <https://www.ict.go.ke/digital-skills> on 10 February 2025.

¹⁸² Ministry of Information, Communications and the Digital Economy, *Pillar IV digital innovation, Entrepreneurship and digital business* <https://www.ict.go.ke/digital-innovation-entrepreneurship-and-digital-business> on 10 February 2025.

¹⁸³ Ministry of Labour and Social Protection, *National policy on business process outsourcing*, 2025, 7. Executive order No.2 of 2023, 38, 69.

¹⁸⁴ Ministry of Labour and Social Protection, *National policy on business process outsourcing*, 2025, 12.

¹⁸⁵ Ministry of Labour and Social Protection, *'National policy on business process outsourcing*, 2025, 11.

- ii. Enhance the protection of workers from unfair and misleading market conduct;
- iii. Develop a labour administration and inspection toolkit;
- iv. Create awareness among workers about their labour rights;
- v. Ensure that a complaint handling mechanism is created for platform workers.¹⁸⁶

3.4 Implementation challenges within market-led regulatory models

3.4.1 Information asymmetries and system gaming

The effectiveness of private governance is heavily dependent on continuous incentivisation. Where compliance creates costs or the effects are complex and uncertain, firms may be tempted to exploit the information asymmetry¹⁸⁷ and the state's limited monitoring capacities to engage in so called 'system gaming' which is strategic exploitation of institutional design flaws.¹⁸⁸ Such practices include greenwashing- making misleading claims about the impacts of a product or service to improve brand image without actually making significant changes,¹⁸⁹ or cherry-picking data-selectively reporting only the positive impacts while downplaying or ignoring negative impacts, or strategically avoiding to collect data on issues that could reveal negative impacts, "if we don't measure it, we don't have to report it".¹⁹⁰

Rational economic self-interest instils wealth maximisation as the driving motivation behind firm action.¹⁹¹ Firms are characterised as profit-driven and amoral, making decisions purely influenced by economic cost-benefit calculations.¹⁹² A potential wrongdoer weighs the potential gain against their perception of the likelihood of discovery and the negative costs

¹⁸⁶ Ministry of Labour and Social Protection, *National policy on business process outsourcing*, 2025, 16.

¹⁸⁷ Bilyay-Erdogan S., Danisman G, Demir E, 'ESG performance and investment efficiency: The impact of information asymmetry' *Journal of International Financial Markets, Institutions and Money* 91, 2024, 2.

¹⁸⁸ Bilyay-Erdogan S, 'Corporate ESG engagement and information asymmetry: the moderating role of country-level institutional differences' *Journal of Sustainable Finance & Investment*, 2022 --<
https://www.tandfonline.com/doi/full/10.1080/20430795.2022.2128710?casa_token=oOq02N7EMBIAAAAA%3AhaJ8gWqc4913ERaET6_CYO7KX_HXmPfpqbEQ5tcFpqD1Gcu2eYtbG0qt1Fys206Q4oh1DXVHNUHkoZ4#abstract> on 19 February 2025.

¹⁸⁹ Ballan B, Czarnezki J, 'Disclosure, Greenwashing, and the Future of ESG Litigation' 18 *Washington and Lee Law Review* 2, 2023, 545.

¹⁹⁰ Shastry V, *The Notorious ESG: Business, Climate, and the Race to Save the Planet*, Emerald Publishing Limited, 2023, 135-151.

¹⁹¹ Velin V, *On the Path Toward Enlightened Value Maximization? A Snapshot on Stakeholder theory, Sustainability, and Environmental, Social and Governance Performance*, Published Masters Thesis, Tilburg University, 2013, 9.

¹⁹² Murphy D, McGrath, D, 'ESG reporting—class actions, deterrence, and avoidance' 4 *Sustainability Accounting, Management and Policy Journal* 2, 2013, 216-235.

Cornell B, 'ESG preferences, risk and return' 27 *European Financial Management* 1, 2021, 12-19.

imposed by punishment.¹⁹³ Consequently, the effectiveness of ESG practices is heavily reliant on monitoring and the level of penalties that may be imposed.

3.4.2 Regulatory capture

This is the potential of agency capture whereby regulation becomes skewed towards serving private rather than public interests through lobbying, monetary incentives and other forms of rapport-building with agency officials.¹⁹⁴ Good governance requires measures to enhance the independence of state agencies such as higher transparency, independent audits and reviews.¹⁹⁵

3.4.3 Further regulatory challenges specific to Kenya's Business Process Outsourcing and Information Technology Enabled Services sector

The MLSP identifies particular challenges in the governance and administration of the BPO/ITES sector which are:

- a. Lack of a national overall coordination mechanism;
- b. Government working in silos has fragmented efforts;
- c. Low capacity of public institutions;
- d. Weak monitoring, evaluation and reporting systems.¹⁹⁶

Regarding the legal and regulatory frameworks, the challenges are:

- a. Lack of a specific BPO framework;
- b. Weak compliance to related business regulatory frameworks;
- c. A regulatory environment that hinders ease of doing business;
- d. Weak dispute resolution mechanisms.¹⁹⁷

3.5 Optimal rule design- considering deterrence, error costs and enforcement capacity

All governance projects, including rulemaking, necessitate a fundamental choice- what societal outcomes are to be prioritized. This choice should be informed by the values held by the society,

¹⁹³ Nagin D, 'Deterrence: A review of the evidence by a criminologist for economists' *5 Annual Review of Economics* 1, 2023, 83-105.

¹⁹⁴ Yeoh P, 'Capture of regulatory agencies: A time for reflection again' *40 Business Law Review* 4, 2019, 134-145.

¹⁹⁵ Yeoh P, 'Capture of regulatory agencies: A time for reflection again' *40 Business Law Review* 4, 2019, 134-145.

¹⁹⁶ Ministry of Labour and Social Protection, 'National policy on business process outsourcing' 2025, 7-8.

¹⁹⁷ Ministry of Labour and Social Protection, 'National policy on business process outsourcing' 2025, 7-8.

reflecting its collective priorities as articulated through policy.¹⁹⁸ Kenya has taken a strong stance on the prioritization of the digital economy, which in turn means that regulatory frameworks must be carefully calibrated to enhance such participation in the digital economy, avoiding overly burdensome interventions that could stifle the sector's growth while still safeguarding fundamental rights.

It is posited that in view of both interests- the significant risks of overregulation, stifling innovation, driving away investors, regulatory intervention in form of state sanctions ought to be reserved for the most serious breaches. It is better to underregulate than to overregulate. The state is envisioned as playing a de minimis role to assure the public interest while ensuring the efficient functioning of markets.

In setting up the mandatory legal standards-optimal rule design, the main factors that should be taken into account can be summarised as: the deterrence effects, the cost of decision errors, whether the standard generates legal uncertainty and; costs-enforcement costs and costs to firms.¹⁹⁹

The optimal level of deterrence should be that it ensures the prevention of illegal action while also avoiding preventing agents from undertaking harmless pro-business actions.²⁰⁰ However, as discussed, regulators face significant epistemic limitations that make decisions vulnerable to error. Two tools are utilised to address this problem: the error type concept and the decision theory.

The error type concept presents Type I errors-false convictions- when neutral business conduct is wrongfully sanctioned; or Type II errors-false acquittals- when there is failure to be held liable for damaging conduct.²⁰¹ Any legal standard will be likely to make one of the two types of errors.²⁰² Decision theory presents that type II errors are preferable to Type I errors.²⁰³ A strict rule should be reserved for when harmful actions are rare and the rules of litigation should

¹⁹⁸ Kerr O, 'Line drawing' 70 *Journal of Legal Education* 1, 2020, 164-166.

¹⁹⁹ Katsoulacos Y, 'On the choice of legal standards: a positive theory for comparative analysis' *European Journal of Law and Economics*, 2019, 6.

Capital Markets Authority, *The deterrent effect of competition authorities' work*, 2017, 3-5.

Broulik J, 'Preventing anticompetitive conduct directly and indirectly: accuracy versus predictability' 64 *Antitrust Bulletin* 1, 2019, 3.

²⁰⁰ Buccirossi P, Ciari L, 'Deterrence in competition law' Social Science Research Centre Berlin, Competition and Innovation, Paper Number 14, 2009, 11.

²⁰¹ Devlin A, Antitrust Error, 52 *William & Mary Law Review* 1, 2011, 103-105.

²⁰² Wright J, Mungan M, The Easterbrook Theorem: An Application to Digital Markets, 130 *The Yale Law Journal*, 2021 --< <https://www.yalelawjournal.org/forum/the-easterbrook-theorem>> 10 2022.

²⁰³ Whinston M, *Lectures in Antitrust Economics* Massachusetts Institute of Technology Press, Massachusetts, 2006, 54.

not be so as to ensnare many practices just to ensure that those of greater consequence are caught.²⁰⁴ This creates a presumption in favour of the defendant. Type I error reflects an over-enforcement or over-regulation whereas Type II error reflects under-enforcement or under-regulation.²⁰⁵

Further consideration should be given to the overarching framework of regulation, which is the enforcement capacities of the regulator, including financial and human resources and the investigative powers.²⁰⁶ The stronger these powers and endowments, the better the information-gathering and monitoring capabilities of the regulator.²⁰⁷ Thus there exists a positive relationship between the extent of powers and the probability of uncovering illegal conduct.

Therefore, while it might sound unethical, it is indeed commercially viable and the most pragmatic option in view of the sheer information asymmetries and capacity limitations that states face for the state's coercive machinery to be treated as a residual mechanism- a backstop role addressing critical failures in fundamental obligations and treating lesser forms of system gaming as inevitable.

3.6 Norm convergence with the Corporate Sustainability Due Diligence Directive framework on public-private regulation

This chapter argues that the regulation of labour practices in GVCs would be most effective through a co-regulatory model that combines the state enforcement capacity with private-sector knowledge and expertise. The CSDDD intersects private autonomy and public responsibility. It is founded on the idea that economic freedoms such as the right to establish and operate a business must be conditioned by obligations to uphold public interest considerations such as labour rights and environmental protection.²⁰⁸ This mirrors Kenya's constitutional model, where Article 40 guarantees economic rights, but Article 10 demands their alignment with public values such as equity, social justice, and inclusiveness.²⁰⁹

²⁰⁴ Easterbrook F, 'Limits of Antitrust', 63 *Texas Law Review* 1, 1984, 15.

²⁰⁵ Katsoulacos Y, 'On optimal legal standards for competition policy: a general welfare-based analysis' 57 *The Journal of Industrial Economics* 3, 2009, 413.

²⁰⁶ Buccirosi P, Ciari L, 'Deterrence in competition law' Social Science Research Centre Berlin, Competition and Innovation, Paper Number 14, 2009, 12-15.

²⁰⁷ Buccirosi P, Ciari L, 'Deterrence in competition law' Social Science Research Centre Berlin, Competition and Innovation, Paper Number 14, 2009, 12-15.

²⁰⁸ Article 50, *Treaty on the Functioning of the European Union*, 1958.

²⁰⁹ *Constitution of Kenya*, 2010.

At the state level, the Directive assigns enforcement power to national supervisory authorities. The authorities are required to set out effective, proportionate and dissuasive penalties by setting the level of pecuniary penalties according to global turnover.²¹⁰ This reinforces that consideration for broader societal harms incidental to doing business is not optional, but legally enforceable. Private firms are enjoined as active regulatory actors as the CSDDD imposes obligations of means whereby companies are expected to integrate due diligence into policies, map risk across their supply chains, engage stakeholders meaningfully and to collaborate with business partners to mitigate harm.²¹¹

The Directive recognises that regulating corporate behaviour in global value chains cannot rely solely on top-down state action, especially in complex, cross-border contexts. Instead, it embeds a hybrid enforcement strategy, whereby the state defines the legal boundaries and creates enforcement tools and ensuring that corporate action is not optional. Private firms and industry associations are invited into the regulatory process not just to comply, but to co-create standards and develop the tools to implement them. This is through:

- (i) Multi-stakeholder initiatives- the directive mandates multi-stakeholder initiatives involving governments, civil society, unions, and businesses to generate sector-specific risk analyses, tools and implementation pathways which allows the creation of practicable standards. The idea is that standard-setting is iterative, shaped through social dialogue and feedback loops;²¹²
- (ii) Model contractual clauses and soft guidance- the European Commission issues model clauses and guidance documents to help firms structure their compliance. These tools are non-mandatory but influential, allowing firms the flexibility to adapt implementation to context, while still operating under a common normative umbrella;
- (iii) Obligations of means rather than guarantees-firms are required to take appropriate and proportionate measures rather than ensuring harm never occurs, which mirrors the comply or explain model;²¹³

Thus, the CSDDD exemplifies a co-regulatory model where regulation is neither entirely top-down nor laissez-faire but a coordinated effort between public institutions and private firms.

²¹⁰ Article 25, *Corporate Sustainability Due Diligence Directive*, 2024.

²¹¹ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

²¹² Article 14, *Corporate Sustainability Due Diligence Directive*, 2024.

²¹³ Article 18, *Corporate Sustainability Due Diligence Directive*, 2024.

Conclusion

In navigating the ESG landscape, particularly in dynamic sectors such as digital markets and GVCs, a pragmatic approach is essential. Public-private partnership leverages the respective strengths and bridges the weaknesses of the state and industry players, allowing markets to thrive while mitigating fundamental violations.

CHAPTER 4: MINIMUM STATE PROTECTIONS- ADAPTING FUNDAMENTAL LABOR RIGHTS TO OUTSOURCING AND DIGITAL PLATFORM LABOUR

Introduction

The preceding chapter advocated for a collaborative public-private regulatory model. It was argued that an ESG framework should guide firm-level action, engendering a broad and ambitious range of issues to be progressively realised and affording the flexibilities necessary to avoid stifling businesses. On the other hand, the state's function in collaborating with private actors was envisioned as establishing the baseline of protection to prevent abuses of fundamental workers' rights.

Kenya has recognized the digital sector as a strategic priority for economic development. However, as highlighted by the MLSP in the Medium-Term Labour Policy Framework, there lacks specific legal and regulatory frameworks to safeguard digital worker rights in downstream production processes.²¹⁴ This chapter examines the state's role in addressing this gap. While the MSLP proposes that comprehensive legal reforms are needed to develop frameworks,²¹⁵ this chapter argues that in the interim or alternatively, existing legal frameworks can be leveraged to extend protections to digital workers.

4.1 The employment issue in outsourced labour processes

Labour in Kenya is regulated under five instruments: (i) *the Labour Relations Act*- which provides for trade unions, (ii) *the Labour Institutions Act*- which establishes the National Labour Board, (iii) *the Work Injury Benefits Act*- which provides for employee compensation for injury, (iv) *the Occupational Safety and Health Act*- which creates a duty to maintain conducive working conditions and; (v) *the Employment Act* which is the primary instrument on employment.²¹⁶ It defines employment relationships and establishes the respective rights and duties.²¹⁷ However, it applies to only traditional formal employment relationships,²¹⁸ creating systemic exclusions for unconventional forms of employment such as gig work and

²¹⁴ Ministry of Labour and Social Protection, 'National policy on business process outsourcing' 2025, 8, 3.

²¹⁵ Ministry of Labour and Social Protection, 'National policy on business process outsourcing' 2025, 14, 16.

²¹⁶ *Labour Relations Act* (Act No.14 of 2007), *Labour Institutions Act* (Act No.81 of 2007), *Work Injury Benefits Act* (Act No.13 of 2007), *Occupational Safety and Health Act* (Act No.15 of 2007), *Employment Act* (Act No.11 of 2007).

²¹⁷ Section 7-10, *Employment Act* (Act No.11 of 2007).

²¹⁸ Section 7-10, *Employment Act* (Act No.11 of 2007).

outsourced work.²¹⁹ This challenge is further compounded by the policy environment surrounding outsourced labour.

For outsourced workers, this challenge is further compounded by the BPO/ITES policy environment. In aiming to promote an attractive environment for FDI, a prominent feature of the EPZs and SEZs, the economic sectors under which BPO/ITES initiatives are promoted, is an emphasis on labour market flexibility.²²⁰ This refers to the ability of employers to adjust their workforce in response to changes in market conditions.²²¹ This can involve changes in the number of workers employed, the hours worked, and the duties performed.²²² Flexibility increases efficiency and reduces labour costs contributing to a competitive advantage for firms.²²³ Thus, labour regulations are deliberately suspended or thin regulations imposed as a strategic promotion of investment in outsourcing-oriented industries, enhancing global competitiveness.²²⁴ However, the use of these flexibilities may lead to a downward spiral of labour standards due to competitive pressure, resulting in a race to the bottom.²²⁵ In Kenya, there lacks specific regulatory frameworks surrounding labour in the SEZs and EPZs and this is identified as a high risk issue that may impede the success of BPO/ITES which seeks to promote the outsourcing of digital labour.²²⁶

The MLSP reports on labour market performance indicate the challenges faced by digital platform workers finding: higher hours of unpaid work, wages below minimum wage in some

²¹⁹ Muindi M, 'An analysis of the legal regulation of outsourcing triangular employment relationships in Kenya' Published PhD Thesis, University of Nairobi, Nairobi, 2018, 8.

Njuguna N, 'An overview of labour laws in Kenya: seeking pathways to empowering women in the labour sector in Kenya' African Women Studies Center, Discussion Paper Series Number 4, 2022, 3 -- <https://erepository.uonbi.ac.ke/bitstream/handle/11295/165160/Overview%20of%20Labour%20Laws%20in%20Kenya%20-%20Seeking%20Pathways%20to%20Empowering%20Women%20in%20the%20Labour%20Sector%20in%20Kenya.pdf?sequence=1&isAllowed=y> on 30 March 2025.

²²⁰ Wathuti G, 'An analysis of the legislative framework governing special economic zones in Kenya' Published Masters Thesis, University of Nairobi, Nairobi, 2019, 5.

²²¹ Kenya Institute for Public Policy Research, *Embracing labour market flexibility in Kenya* June 17th 2024 --< <https://kippra.or.ke/embracing-labour-market-flexibility-in-kenya/> on 30 March, 2025.

²²² Kenya Institute for Public Policy Research, *Embracing labour market flexibility in Kenya* June 17th 2024 --< <https://kippra.or.ke/embracing-labour-market-flexibility-in-kenya/> on 30 March, 2025.

²²³ Kenya Institute for Public Policy Research, *Embracing labour market flexibility in Kenya* June 17th 2024 --< <https://kippra.or.ke/embracing-labour-market-flexibility-in-kenya/> on 30 March, 2025.

Makboul M, Sayih O, 'IMF conditionality: what effect on the labor market?' 8 *International Journal of Social Science and Economic Research* 9, 2023, 2689.

²²⁴ European Parliament Directorate-General for External Policies, *Labour rights in Export Processing Zones with a focus on GSP+ beneficiary countries*, 2017, 25-33.

²²⁵ Blanton R, Blanton S, Peksen D, 'The impact of IMF and World Bank programs on labor rights' 68 *Political Research Quarterly* 2, 2015, 324-336.

²²⁶ Vision 2030, *Unlocking the Potential of Special Economic Zones* --<https://vision2030.go.ke/unlocking-the-potential-of-special-economic-zones/> on 30 March 2025.

instances,²²⁷ limited access to social protection, high levels of stress and safety concerns and restricted access to unions.²²⁸

4.2 Core Labour Standards: Universal application of fundamental ILO Conventions

This section identifies immutable fundamental labour rights that should form the basis of the state-enforced "floor" and which ought to be applicable to workers even pending legislation of specific instruments.

Labour conditions are assessed according to five fundamental principles.²²⁹ The ten International Labour Organisation (ILO) conventions covering these fundamental principles engender the fundamental rights at work, the so-called Core Labour Standards.²³⁰ The principles are considered to reflect the international consensus and are thus applicable to all ILO member states irrespective of ratification status of the corresponding ILO conventions.²³¹ ILO Fundamental Conventions are not self-executing by default as they often require positive legislative, administrative or institutional steps by member states, thus the duty is on state members to ensure implementation.²³² The conventions and principles are thus key benchmarks both nationally and internationally, forming the baseline for fair treatment of workers and a minimum starting point for addressing labour in economic development policies.²³³ The standards and corresponding instruments are as follows:

²²⁷ Ministry of Labour and Social Protection, 'National policy on business process outsourcing' 2025, 17.

²²⁸ Ministry of Labour and Social Protection, 'National policy on business process outsourcing' 2025, 17.

²²⁹ Preamble, *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, 1998.

²³⁰ Chowdhury M, 'Compliance with core international labor standards in national jurisdiction: evidence from Bangladesh' 68 *Labor Law Journal* 1, 2017, 78-79.

²³¹ Preamble, *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, 1998.

²³² De Stefano V, 'Not as simple as it seems: The ILO and the personal scope of international labour standards' 160 *International Labour Review* 3, 2021, 387-388.

Koliev F, 'Promoting international labour standards: The ILO and national labour regulations' 24 *The British Journal of Politics and International Relations* 2, 361-364, 2022.

²³³ United Nations Development Programme, *Guidance Note UNDP Social and Environmental Standards Standard 7: Labour and Working Conditions*, 2021, 3.

ILO fundamental Principles	ILO fundamental Labour Standards
freedom of association and the effective recognition of the right to collective bargaining	<ol style="list-style-type: none"> 1. C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) 2. C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
the elimination of all forms of forced or compulsory labour	<ol style="list-style-type: none"> 3. C029 - Forced Labour Convention, 1930 (No. 29), P029 - Protocol of 2014 to the Forced Labour Convention, 1930 4. C105 - Abolition of Forced Labour Convention, 1957 (No. 105)
the effective abolition of child labour	<ol style="list-style-type: none"> 5. C138 - Minimum Age Convention, 1973 (No. 138) 6. C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)
the elimination of discrimination in respect of employment and occupation	<ol style="list-style-type: none"> 7. C100 - Equal Remuneration Convention, 1951 (No. 100)

	<ol style="list-style-type: none"> 8. C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
a safe and healthy working environment	<ol style="list-style-type: none"> 9. C155 - Occupational Safety and Health Convention, 1981 (No. 155) 10. C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) transposes these fundamental principles to MNEs creating an obligation for MNEs to implement effective measures to address these concerns.²³⁴ The aim is to encourage positive contribution by MNEs, complementing state efforts,²³⁵ the realization of decent work for all and to resolve the difficulties that MNE operations create.²³⁶

These fundamental protections are echoed in the Constitution in article 41 which provides for labour relations. It establishes that every person has the right to fair labour practices, every worker has the right to fair remuneration, reasonable working conditions, to form, join or participate in the activities and programmes of a trade union; and to go on strike.²³⁷

In light of these fundamental protections, workers may thus be afforded the following protections:

4.2.1 Freedom of association and the effective recognition of the right to collective bargaining

Article 1 of the Freedom of Association Convention obliges the state to ensure workers protection against acts by employers undermining trade union membership.²³⁸ Article 4 requires states to develop machinery for voluntary negotiation between employers and workers' organisations, to regulate terms and conditions of employment through collective agreements.²³⁹ Article 41 CoK in turn provides for the right to join trade unions.²⁴⁰

Collective agreements stand to have a significant positive impact on outsourced workers' welfare, industrial action to secure better working conditions and dispute resolution.²⁴¹ In theory workers' enjoy a broad freedom of association provided they form an identifiable community of joint interests and subject to meeting the requirements imposed in the Labour Relations Act (LRA). This position is set out in *Mugambi and 4 others v Registrar of Trade Unions (2022)eKLR*.²⁴² The LRA defines a unionisable employee as any employee who is

²³⁴ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2022.

²³⁵ Introduction, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2022.

²³⁶ Introduction, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2022.

²³⁷ Article 41, *Constitution of Kenya* (2010).

²³⁸ Article 1, *Freedom of association and protection of the right to organise convention*, 1948, No. 87.

²³⁹ Article 4, *Freedom of association and protection of the right to organise convention*, 1948, No. 87.

²⁴⁰ Article 41, *Constitution of Kenya* (2010).

²⁴¹ Musembi N, Waswa F, 'Effects of trade union practices on employees welfare at export processing zones industries in Athi River, Kenya' 6 *Journal of Strategic Management* 1, 2022, 39-58.

²⁴² (2022) eKLR.

eligible for membership of a trade union.²⁴³ However, collective bargaining in the EPZs and SEZs has been fragile. From studies undertaken on the sector in Kenya, reports indicate a significant challenge in unionisation, with only 14% of EPZ workers being unionised,²⁴⁴ and firms frequently refuse to recognise trade unions, actively obstructing their efforts to organise workers through the use of temporary employment.²⁴⁵ Temporary employment affects workers' ability to unionise through the perceived costs of such formal collective organisation by creating a perception that workers can easily be replaced, instilling a sense of job insecurity and a weaker bargaining position, thus discouraging unionising activities.²⁴⁶

The difficulty in bargaining is further compounded by the contractual arrangements prevalent in platform work. Platforms require users to accept their terms and conditions before they can create accounts.²⁴⁷ Unlike traditional employment contracts, platform workers are unable to negotiate the terms of the contract and are instead forced to accept the contract as presented.²⁴⁸ Users have no choice but to accept contracts that may be unfair to them in the long run.²⁴⁹ Unions enhance the bargaining position of workers and worker interest representation through political lobbying and by negotiating with the platforms on the terms of engagement.²⁵⁰ Thus, owing to the potential benefits that union membership presents, the state ought to prioritise the realisation of the fundamental right to collective bargaining.

4.2.2 The elimination of all forms of forced labour

Article 2 of the Forced Labour Convention defines forced labour as all work exacted under the menace of any penalty and for which the person has not offered themselves voluntarily.²⁵¹ The

²⁴³ Section 2, *Labour Relations Act* (Act No.14 of 2007).

²⁴⁴ Ulandssekretariatet, 'Labour Market Profile Kenya 2024/2025', 2025, 2.

²⁴⁵ Wood A, Lehdonvirta V, Graham M, 'Workers of the internet unite? online freelancer organisation among remote gig economy workers in six Asian and African countries' 33 *New Technology, Work and Employment*, 2018, 105.

²⁴⁶ Wood A, Lehdonvirta V, Graham M, 'Workers of the internet unite? online freelancer organisation among remote gig economy workers in six Asian and African countries' 33 *New Technology, Work and Employment*, 2018, 105.

²⁴⁷ Kwanya T, Regulation of digital platforms for a socially-just gig economy in Kenya, Alexander von Humboldt Institute for Internet and Society Berlin, 2023, 70.

²⁴⁸ Kwanya T, Regulation of digital platforms for a socially-just gig economy in Kenya, Alexander von Humboldt Institute for Internet and Society Berlin, 2023, 70.

²⁴⁹ Kwanya T, Regulation of digital platforms for a socially-just gig economy in Kenya, Alexander von Humboldt Institute for Internet and Society Berlin, 2023, 70

²⁵⁰ Johnston H, Land-Kazlauskas C, ILO, 'Organizing on-demand: Representation, voice, and collective bargaining in the gig economy' Conditions of Work and Employment Series No. 94, 2019, 5.

²⁵¹ Article 2, *Forced Labour Convention*, 1930, No. 29.

United Nations Human Rights Council recognises that digital technologies can perpetuate contemporary forms of slavery.²⁵²

Forced labour, involves two elements: Involuntary work and penalty threats for non-performance. In the gig economy, this has manifested itself in form of debt bondage whereby gig workers may take on debt to participate in the platform, and the platform's structure may make it difficult to earn enough to repay that debt, effectively trapping them in a cycle of work.²⁵³ Uber offers vehicle financing to its drivers, partnering with Sidian Bank and Stanbic Bank offering upto 100% financing with a 36 month repayment period.²⁵⁴ The platform has also imposes rules on maximum car ages and has progressively reduced the fares charged in a bid to enhance competitiveness with other firms.²⁵⁵ This creates significant pressure and financial strain for drivers who take out loans as they have to balance thinning profit margins and the obligation to pay in time or have their vehicles repossessed.²⁵⁶ The maximum car ages augment this situation by incentivising the up-take of such loans as drivers face the threat of deregistration or demotion into a lower earning ride-category.²⁵⁷

²⁵² United Nations Human Rights Council, 'Contemporary forms of slavery, including its causes and consequences' A/78/161, 12 July 2023, 4-7.

²⁵³ Li A, 'Beyond precarity: forced labor in China's ride-hailing industry' 26 *New Media & Society* 4, 2024, 1835-1838.

²⁵⁴ Uber, 'Vehicle finance in Kenya --< <https://www.uber.com/ke/en/drive/vehicle-solutions/leasing/?city=nairobi>> on 3 March 2025.

Sidian Bank, 'Uber Kenya and Sidian Bank Launch an Innovative Vehicle Solutions Programme' May 25th 2016 --< [Wainainah D, Business Daily, 'Uber Driver Loans from Sidian, Stanbic hit 500', 2nd September 2018 --< <https://www.businessdailyafrica.com/bd/corporate/companies/uber-driver-loans-from-sidian-stanbic-hit-500-2217666>> on 30 March 2025.](https://sidianbank.co.ke/investment/uber-kenya-and-sidian-bank-launch-an-innovative-vehicle-solutions-programme-2/#:~:text=The%20vehicle%20finance%20component%20of,a%20low%2010.5%25%20interest%20rate.> on 30 March 2025.</p></div><div data-bbox=)

²⁵⁵ Njue T, Keroti R, 'Risk factors and performance of app-based taxi operators in Nairobi County, Kenya' 8 *International Journal of Social Sciences Management and Entrepreneurship* 4, 2024, 539.

²⁵⁶ Njue T, Keroti R, 'Risk factors and performance of app-based taxi operators in Nairobi County, Kenya' 8 *International Journal of Social Sciences Management and Entrepreneurship* 4, 2024, 538.

²⁵⁷ Uber *Vehicle eligibility in Nairobi, Kenya* 27th February 2025 --< [Fos V, Hamdi N, Kalda A, Nickerson J, 'Gig labor: trading safety nets for steering wheels' 163 *Journal of Financial Economics*, 2025, 1.](https://www.uber.com/en-KE/blog/vehicle-eligibility-in-nairobi-kenya/#:~:text=Where%20your%20vehicle%20will%20operate%20on%20the,be%20eligible%20to%20join%20the%20Uber%20platform.&text=Where%20your%20vehicle%20will%20operate%20on%20the,be%20eligible%20to%20join%20the%20Uber%20platform.> on 30 March 2025.</p></div><div data-bbox=)

Some platforms also deactivate or suspend workers for not accepting enough work, thus pressuring workers into work that they might not otherwise have chosen and creating a sense of coercion and involuntariness.²⁵⁸

These practices illustrate that forced labour may still be facilitated absent physical coercion through structures embedded in digital labour platforms. Therefore, inquiry into such potential exploitative conditions may be validly instituted.

4.2.3 The effective abolition of child labour

Article 1 of the Minimum Age Convention creates the obligation for states to ensure the abolition of child labour in line with the age of admission to employment.²⁵⁹ Children in Kenya of ages 13-16 are allowed to perform light work.²⁶⁰ However, the ILO notes the challenge in this regard is the lack of guidelines as to the limitations of such work.²⁶¹

The danger with respect to digital labour markets is that digitisation creates a risk of such practices being harder to detect through traditional monitoring mechanisms such as labour inspections.²⁶² While formal evidences of child labour in the gig economy in Kenya are lacking, reports from other jurisdictions highlight the emergence of this challenge thereby establishing an area of potential concern which takes on new urgency in light of the rapid expansion of platform work.²⁶³

4.2.4 A safe and healthy working environment

The Occupational Safety and Health (OSH) Conventions require for employers to ensure workplaces are safe and healthy and create the state's duty to establish and promote a national

²⁵⁸ Kwanya T, Wakunuma J, 'Regulation of digital platforms for a socially-just gig economy in Kenya' Alexander von Humboldt Institute for Internet and Society, 2023, 70.

Vallas S, Schor J, 'Labour platforms as mechanisms of class reproduction: middle-class interests as the basis of worker consent' 4 *Work in the Global Economy* 2, 2024, 238, 253.

²⁵⁹ Article 1, *Minimum Age Convention*, 1973, No. 138.

²⁶⁰ Fifth Schedule, *the Employment (General) Rules*, 2014.

²⁶¹ International Labour Organization 'Child Labour and Forced Labour Reports: Kenya -- <https://www.dol.gov/agencies/ilab/resources/reports/child-labour/kenya> on 30 March 2025.

²⁶² Stefano V, The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the gig-economy' International Labour Office, Conditions of Work and Employment Series No. 71, 2016, 110.

²⁶³ Stefano V, The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the gig-economy' International Labour Office, Conditions of Work and Employment Series No. 71, 2016, 110.

²⁶³ See for example BBC, 'Children working as riders for food delivery apps - BBC investigation' 14 November 2023 --< <https://www.bbc.com/news/uk-67371473>> on 15th April 2025.

Thompson Reuters Foundation, 'Children in Brazil found working for food delivery apps' Thursday, 3 December 2020 --< <https://news.trust.org/item/20201203090436-evjw0/>> on 15th April, 2025.

framework for OSH.²⁶⁴ The inclusion of this fundamental principle is a recent development following the 2022 amendment of the ILO Declaration.²⁶⁵

In the Pre-2022 paradigm, OSH responsibility was primarily placed on the occupier of premises.²⁶⁶ This is echoed in section 6 of Kenya's OSH Act.²⁶⁷ Thus, for workers in GVCs, this obligation would fall on the subsidiary or outsourcing partner- whoever provides the premises for such work.²⁶⁸ MNEs played a complementary role, for example through voluntary Corporate Social Responsibility initiatives, Codes of Conduct and auditing.²⁶⁹ Such schemes lacked legal enforceability.²⁷⁰ This diluted accountability as outsourcing allowed MNEs to avoid responsibility for compliance and firms exploited regulatory arbitrage in countries with weak OSH enforcement.²⁷¹ The lack of OSH protections for gig workers was particularly prominent during the Covid-19 pandemic, as many workers had to continue providing services without access to protective gear such as masks or gloves.²⁷² Many also had to work while sick because they could not take time off, endangering both workers and consumers.²⁷³

The elevation of OSH to a fundamental principle reshapes the role of MNEs, transforming OSH from a voluntary, secondary concern into a core legal obligation.²⁷⁴ Further, all ILO member states must respect OSH, even if they have not ratified Conventions 155/187. Thus, the state may utilise this as a basis to require more robust measures by firms to ensure the safety and health of downstream workers.

²⁶⁴ Article 1-2, *Occupational Safety and Health Convention*, 1981, No. 155.

Article 1-2, *Promotional Framework for Occupational Safety and Health Convention*, 2006, No. 187.

²⁶⁵ International Labour Organisation, *Matters arising out of the work of the 110th Session of the International (2022) Labour Conference*, 2022, 3.

²⁶⁶ Walters D, Johnstone R, James P 'The challenge of improving work health and safety in global supply chains: Institutions and evidence of effectiveness' 0 *Economic and Industrial Democracy*, 0, 2-6.

²⁶⁷ Section 6, *The Occupational Health and Safety Act*, 2007.

²⁶⁸ Walters D, Johnstone R, James P 'The challenge of improving work health and safety in global supply chains: Institutions and evidence of effectiveness' 0 *Economic and Industrial Democracy*, 0, 2-6.

²⁶⁹ Walters D, Johnstone R, James P 'The challenge of improving work health and safety in global supply chains: Institutions and evidence of effectiveness' 0 *Economic and Industrial Democracy*, 0, 5.

²⁷⁰ Walters D, Johnstone R, James P 'The challenge of improving work health and safety in global supply chains: Institutions and evidence of effectiveness' 0 *Economic and Industrial Democracy*, 0, 13.

²⁷¹ Walters D, Johnstone R, James P 'The challenge of improving work health and safety in global supply chains: Institutions and evidence of effectiveness' 0 *Economic and Industrial Democracy*, 0, 8.

²⁷² Kwanya T, Wakunuma J, 'Regulation of digital platforms for a socially-just gig economy in Kenya' Alexander von Humboldt Institute for Internet and Society, 2023, 32.

²⁷³ Kwanya T, Wakunuma J, 'Regulation of digital platforms for a socially-just gig economy in Kenya' Alexander von Humboldt Institute for Internet and Society, 2023, 32.

²⁷⁴ Politakis G, 'The recognition of occupational safety and health as a fundamental principle and right at work' 72 *International and Comparative Law Quarterly* 1, 2023, 213–232.

4.3 Norm convergence with the Corporate Sustainability Due Diligence Directive framework on labour standards

This chapter focuses on the role and obligations of the state in ensuring labour protections within GVCs in the context of digital labour markets, arguing that even while legal reforms are pending, there exists a sufficient basis for the state to act drawing on its international legal obligations. In a similar fashion, the CSDDD does not generate a new substantive catalogue of rights but transposes pre-existing international legal instruments into binding corporate obligations, rather than relying on EU-specific or Member State definitions of rights. For example, the Directive draws from *inter alia*, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.²⁷⁵ In relation to labour practices, it draws from the ILO Fundamental Principles and Rights at Work.²⁷⁶ These instruments are treated as the source texts for defining what constitutes an adverse human rights or labour impact, with the Directive functioning as a mechanism for legal internalization.²⁷⁷

Crucially, the CSDDD does not treat these international norms as aspirational or optional but compels companies to embed them within internal governance structures through state enforcement and civil liability mechanisms.²⁷⁸ In doing so, the Directive demonstrates how transnational norms may acquire binding force through legal codification not because they are newly invented, but because they are recognised and domesticated.

Conclusion

this chapter has delineated the capacities in which the state stands to establish a foundational labour protection even in digital value chains. By identifying core labour standards derived from fundamental ILO conventions and adapting them to the realities of non-standard work, this chapter argues that there exists a sufficient basis for the state to address the condition of digital workers.

²⁷⁵ Annex 2, *Corporate Sustainability Due Diligence Directive*, 2024.

²⁷⁶ Annex 2, *Corporate Sustainability Due Diligence Directive*, 2024.

²⁷⁷ Preamble, *Corporate Sustainability Due Diligence Directive*, 2024.

²⁷⁸ Preamble, Article 6 *Corporate Sustainability Due Diligence Directive*, 2024.

CHAPTER 5 FINDINGS AND RECOMMENDATIONS

Introduction

This chapter serves as the concluding part of this study, which has undertaken a critical analysis of the law and economics of GVCs, exploring the viability of various regulatory approaches in enhancing the legal liability of MNCs for digital workers in Kenya. It restates the initial problem that this dissertation intended to solve and provides findings on the research objectives outlined in the study. The chapter then concludes by providing recommendations.

5.1 Summary of findings

The fundamental challenge in establishing the legal liability of MNCs was found to be the characterisation of the relationship between workers and the MNCs. Owing to the globalised and fragmented nature of the production processes, downstream workers do not stand in direct employer-employee relationships with the focal firm as they are often engaged through subsidiaries or subcontracting, working under different entities within the MNC's supply chain.²⁷⁹ Examples include gig economy workers connected to platforms like Uber and Bolt through their subsidiaries and content moderators working for Meta and OpenAI through outsourcing companies.²⁸⁰ This lack of a direct legal relationship is fatal for traditional liability doctrines which require proximity and control as a basis of responsibility, making it difficult to hold the MNC directly accountable for labour harms suffered by these workers.²⁸¹

The study explored different frameworks for regulation, ultimately leaning towards a private-public model as it bridges the weaknesses and leverages the strengths of both private and public governance, with ESG playing a central role.

Purely state-based interventions are limited in digital markets. This limitation stems from the characteristics of government interventions- often slow and limited in resource capacities²⁸² and owing to the characteristic of digital markets- dynamic, creating significant information asymmetries, regulatory uncertainty in predicting future outcomes and requiring extensive

²⁷⁹ Allen-ILE C, Olabiyi J, 'A preliminary comparative perspective on the role of multinational enterprises in influencing labour relations of their host nation' 6 *Advances in Social Sciences Research Journal* 12, 2019, 305.

²⁸⁰ *Samasource EPZ Limited t/a Sama v Meta Platforms, Incorporated & 186 others; Kenya Human Rights Commission & 8 others* (2024) eKLR.

²⁸¹ Jurkovsky P, 'Negligence and vicarious liability' *Applied Paramedic Law, Ethics and Professionalism: Australia and New Zealand*, 2019, 120.

Van Tulder R., Van Wijk J, Kolk A, 'From chain liability to chain responsibility: MNE approaches to implement safety and health codes in international supply chains' 85 *Journal of business ethics*, 2009, 399-412.

²⁸² Bartle I, Vass P, 'Self-regulation within the regulatory state: Towards a new regulatory paradigm?' 85 *Public Administration* 4, 2007, 885-905.

information gathering capabilities to monitor.²⁸³ The consequence of inappropriate regulation or overregulation would be a deterrent of investment and stifling the growth of production and the digital economy.²⁸⁴

On the other hand, private regulation featuring industry-developed standards can leverage the expertise and knowledge of industry participants, leading to more efficient solutions.²⁸⁵ However, there emerges significant challenges in enforcement and compliance. Firms are characterized as profit-driven and potentially amoral, making decisions based on cost-benefit analyses.²⁸⁶ Thus, information asymmetries may be exploited by firms, leading to "system gaming" activities such as greenwashing and unambitious target setting.²⁸⁷

Private-state collaboration offers synergistic benefits by bridging the technical expertise and informational insights of private actors and the state's coercive machinery, ultimately bolstering enforcement and the ratcheting up of standards.²⁸⁸ The study proposed ESG as a model of private-public regulation because it offers a flexible, market-driven approach, allowing companies to adapt and innovate while still creating space for imbuing key public policy concerns into firm operations.²⁸⁹ The non-binding nature of ESG may be leveraged as a strength, through allowing for the experimentation, learning, and adaptation necessary to develop standards progressively while maintaining dynamic markets. Prematurely imposing rigid regulations could stifle innovation.²⁹⁰

The challenge identified with ESG regulation was its reliance on market-based incentives-politically conscious demand from investors and consumers to drive compliance.²⁹¹ To account

²⁸³ Bartle I, Vass P, 'Self-regulation within the regulatory state: Towards a new regulatory paradigm?' 85 *Public Administration* 4, 2007, 885-905

²⁸⁴ Mäkinen, J, Kasanen, E, 'In defense of a regulated market economy' 11 *Journal of Global Ethics* 1, 2015, 106.

²⁸⁵ Mayer F, Gereffi G, 'Regulation and economic globalization: Prospects and limits of private governance, 12 *Business and Politics* 3, 2010, 1-25.

Samans R, Nelson J 'Corporate reporting and accountability' in Samans R and Nelson J (eds) *Sustainable Enterprise Value Creation: Implementing Stakeholder Capitalism through Full ESG Integration* Springer International Publishing, 2022, 187-218.

²⁸⁶ Cornell B, 'ESG preferences, risk and return' 27 *European Financial Management* 1, 2021, 12-19.

²⁸⁷ Bilyay-Erdogan S, 'Corporate ESG engagement and information asymmetry: the moderating role of country-level institutional differences' *Journal of Sustainable Finance & Investment*, 2022 --<https://www.tandfonline.com/doi/full/10.1080/20430795.2022.2128710?casa_token=oOq02N7EMBIAAAAA%3AhaJ8gWqc4913ERaET6_CYO7KX_HXmPfpqEQ5tcFpqD1Gcu2eYtbG0qt1Fys206Q4oh1DXVHNUHkoZ4#abstract> on 19 February 2025.

²⁸⁸ Judge-Lord D, McDermott C, Cashore B, 'Do private regulations ratchet up? How to distinguish types of regulatory stringency and patterns of change' 33 *Organization & Environment* 1, 2020, 96-125.

²⁸⁹ Song Y, 'Sustainability Reporting in Singapore: Setting the Boundaries for What Is" Material' 39 *Singapore Law Review*, 2021, 58.

²⁹⁰ Mäkinen, J, Kasanen, E, 'In defense of a regulated market economy' 11 *Journal of Global Ethics* 1, 2015, 106.

²⁹¹ Boufounou P, Moustairas L., Toudas K, Malesios C, 'ESGs and customer choice: Some empirical evidence' 3 *Circular Economy and Sustainability* 4, 2023, 1841-1874.

for the lack of such market incentives in the Kenyan context, a "comply or explain" model was advocated for, leveraging progressive implementation in which firms may deviate from established approaches only with strong justification.²⁹² This promotes the adaptation of best practices without stifling adaptation and innovation.²⁹³ Therefore, the proper role of the state is envisioned in two tiers: (i) as a co-regulator, coordinating private governance activities and promoting progressive adaptation of responsible practices, and (ii) engaging its coercive machinery to act as a backstop on standards retrogression and to safeguard fundamental labour rights.

Labour law protections are derived from the employment status of workers.²⁹⁴ Thus, the challenge that emerges for digital workers in Kenya, as found by the MLSP, is that the Employment Act does not extend to such unconventional forms of work, hence they fall outside the scope of protections afforded to employees.²⁹⁵ The MLSP recommends that comprehensive legal reforms are needed to adequately remedy this situation.²⁹⁶ In the interim however, fundamental labour guarantees as established in international practice may be relied on as a basis of establishing minimum state protections. The fundamental ILO principles establish core labour standards that are universal applicable in member states even pending formal ratification of the specific instruments as they reflect the international consensus.²⁹⁷ This is bolstered by the MNE Declaration which transposes the duty to implement the fundamental standards to MNEs.²⁹⁸ Therefore, it may be concluded that the state has a definitive capacity to establish a foundational minimum of labour protections to protect downstream digital workers in Kenya.

5.2 Recommendations

Given the finding that the Employment Act does not adequately cover digital workers, the state, in collaboration with stakeholders including digital platform companies, worker representatives, and legal experts, may undertake a comprehensive review and amendment of

²⁹² Inwinkl P, Josefsson S, Wallman M, 'The comply-or-explain principle: Stakeholders' views on how to improve the 'explain' approach' 12 *International Journal of Disclosure and Governance*, 2015, 214.

²⁹³ Inwinkl P, Josefsson S, Wallman M, 'The comply-or-explain principle: Stakeholders' views on how to improve the 'explain' approach' 12 *International Journal of Disclosure and Governance*, 2015, 210-229.

²⁹⁴ Atkinson J, 'Employment status and human rights: an emerging approach' 86 *The Modern Law Review* 5, 2023, 1167.

²⁹⁵ Ministry of Labour and Social Protection, *National policy on business process outsourcing*, 2025, 8.

²⁹⁶ Ministry of Labour and Social Protection, *National policy on business process outsourcing*, 2025, 8.

²⁹⁷ Preamble, *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, 1998.

²⁹⁸ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2022.

existing labour laws. This review should aim to formally recognize digital work as a distinct form of employment and establish a clear legal definition for digital workers, moving beyond the traditional employer-employee dichotomy. Kenya should consider creating a new category of worker or adapting existing definitions to ensure digital workers have access to fundamental labour rights.

To enable public-private collaboration, a measure that can be implemented is the establishment of multi-stakeholder platforms that bring together representatives from the state, MNCs, local subsidiaries, subcontractors, digital worker associations and civil society organizations. Such platforms would serve as forums for dialogue, information sharing and the development of collaborative initiatives. Meaningful engagement with stakeholders should ensure that stakeholders are free from retaliation and retribution through maintaining confidentiality and anonymity.

A further recommendation is the strengthening of the enforcement of the ILO fundamental principles. While comprehensive legal reforms are being developed and implemented, it is recommended that the state ought to pursue the enforcement of the ILO's fundamental principles. The state should also work with digital platform companies to promote the incorporation of these principles into their operational policies and terms of service and awareness campaigns may be conducted to inform digital workers of their rights and to encourage them to form or join representative bodies to advocate for their interests.

An area of future research could be investigating the impact of such regulatory demands on the competitive landscape, narrowing in on smaller, domestically oriented firms and understanding the impact on their costs and competitiveness. Consideration in this light may be given to the fact that ESG disclosures are only mandated for large publicly traded companies which may disadvantage larger firms when deploying ESG as a public-private regulatory scheme.

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